

OBSERVATIONS ON THE INITIAL RESULTS OF THE U.S. COPYRIGHT OFFICE INQUIRY ON ORPHAN WORKS

1. Basic background on the Inquiry: <<http://www.copyright.gov/fedreg/2005/70fr3739.html>>
2. Initial results:
 - a. Over 700 responses: <<http://www.copyright.gov/orphan/comments/index.html>>
 - b. Two journalistic summaries:
 - i. Peter Hirtle, "Adopting 'Orphan Works,'" *RLG DigiNews* 9 (2), 4/15/05, <http://www.rlg.org/en/page.php?Page_ID=20571&Printable=1&Article_ID=1719>
 - ii. Katie Dean, "Copyright Reform to Free Orphans?" *Wired News* 4/12/05, <<http://www.wired.com/news/culture/0,1284,67139,00.html>>
3. Systemwide Library Planning analysis
 - a. Systematic sample of responses
 - i. Five percent systematic sample (every 20th response). Because comments are presented on the Copyright Office website in the order in which they were filed, this sampling method is not biased.
 - ii. Results: of 34 responses sampled, 30 (88 percent) claimed that orphan works were a problem warranting a statutory solution; 4 (12 percent) believed that the orphan works problem did not warrant any diminution of the existing exclusive rights of authors/copyright holders.
 - b. Twenty-seven responses from major organizations
 - i. Appendix A lists these organizations, provides the URL of the complete response and a short summary.
 - ii. Four UC responses (listed first)
 - iii. Includes AAU, a coalition of major art museums, the American Historical Association, the Association of American Publishers, the Association of American University Presses, and the Software and Information Industry Association
 - iv. All 27 acknowledge and present evidence that orphan works are a problem; many (including AAP/AAUP/SIIA) propose solutions
 - c. The "Glushko-Samuelson" proposal
 - i. Submitted by the Glushko-Samuelson Intellectual Property Law Clinic of the Washington College of Law at American University (<<http://www.copyright.gov/orphan/comments/OW0595-Glushko-Samuelson.pdf>>)
 - ii. Key characteristics of the proposal:
 - Any work for which the copyright owner cannot reasonably be located.
 - "Reasonable effort" to locate the copyright owner is expressed in general terms
 - o Determined by the prospective user of the work, requiring
 - Good faith effort
 - Location tools and resources appropriately related to the work in question
 - Reasonable under the totality of the circumstances
 - o Guidelines may be provided by professional/industry organizations and or the USCO
 - o The user will document and retain documentation of the search
 - After reasonable effort

- o Use without limitation until an owner challenges the use
 - o After challenge
 - Previous use continues without limitation
 - New uses require authorization by the owner
 - o User is obliged to indicate their status as a subsequent user under the “orphan works” provisions, provide known attribution information, and make reasonable effort to update attribution information after an owner comes forward
 - In any subsequent litigation,
 - o Owner must register their copyright
 - o User must demonstrate their effort to locate the owner
 - o Owner must demonstrate that the effort was not “reasonable”
 - If not reasonable, fully range of remedies is available to the owner
 - If reasonable, remedies limited to lesser of:
 - Actual damages, or
 - \$100 per work used, to maximum of \$500 for any group of works claimed by a single owner and subject to a single use.
- iii. Support: nine of the 27 major organizations analyzed endorse Glushko-Samuelson.
- iv. Variations on a theme:
- (1) Eleven of the 27 organizations analyzed proposed a legislative solution that differed in some way from Glushko-Samuelson
- (2) See Appendix B for a summary comparison of these
4. Next steps
- a. Reply comments (these are limited to commenting on the initial comments) are due **May 9**
- b. The Copyright Office is obliged to report to Congress on the results of this inquiry by the end of the calendar year.

APPENDIX A

SELECTED COMMENTS ON ORPHAN WORKS FROM UNIVERSITIES, LIBRARIES, AND RELATED ORGANIZATIONS

UCLA Libraries

<http://www.copyright.gov/orphan/comments/OW0473-Strong.pdf>

Discusses the scope and significance of the problem for research libraries, with some examples from UCLA experience. Recommends a blanket exemption from liability for educational and research use and reinstatement of a registration system.

UCSD Libraries

<http://www.copyright.gov/orphan/comments/OW0576-UCSD.pdf>

Offers evidence and examples. Recommends a registry to track orphan works, so that information can be shared with others. Supports ARL solution (Glushko-Samuelson).

UCLA Film and Television Archive

<http://www.copyright.gov/orphan/comments/OW0638-UCLAfilmmandtelevision.pdf>

Does not support additional registration requirements or government-based compulsory licensing schemes. Supports the “Family Entertainment and Copyright Act of 2005” that will allow public libraries and archives to make available works that are no longer commercially available and that are in their last 20 years of copyright protection.

Axel Leijonhufvud, Professor of Economics, UCLA

<http://www.copyright.gov/orphan/comments/OW0708-Leijonhufvod.pdf>

Provides a personal example resulting from publisher merger/acquisition.

Stanford University Libraries

<http://www.copyright.gov/orphan/comments/OW0457-StanfordUniversity.pdf>

Proposes an amendment to Section 108(h) to allow non-profit institutions, libraries, and archives to make certain uses of orphaned works if the work was first published more than 28 years ago and is out of print.

Differs from G-S plan:

1. Only applicable to libraries, archives, non-profit educational institutions, and only for current Sec 108(h) activities: preservation, scholarship, research. Definition of Orphan Works limited to “archive and library orphan works”
2. Proposes an amendment to Copyright Act
3. Characteristics of specific orphan works include age of work (1st published 28 or more years ago), non-in-print, non being commercially exploited
4. Copyright holder could exclude work from orphan work status by registering it

Carnegie Mellon University Libraries

<http://www.copyright.gov/orphan/comments/OW0537-CarnegieMellon.pdf>

Elaborates problems with orphan works. Basically shares Stanford's proposal, with some modifications (shortening the time frame and expanding the scope of potential orphan works users beyond archives and libraries). Notes that identifying orphan works on a case-by-case basis is prohibitively expensive and time-consuming, and would delay educational works. Also, the problem is not always *locating* the copyright holder, but rather getting a *response* from a copyright holder.

Michigan State University

<http://www.copyright.gov/orphan/comments/OW0545-MSU.pdf>

Recommends standard fee for users, mechanism for quickly and efficiently determining orphaned status. Orphan status not determined by age of work.

University of Michigan, University Library

<http://www.copyright.gov/orphan/comments/OW0565-UofMI.pdf>

Provides evidence concerning orphaned works. Wants ability to use them. No specific proposal.

Cornell University Library

<http://www.copyright.gov/orphan/comments/OW0569-Thomas.pdf>

Provides evidence. Supports a solution similar to Glushko-Samuelson (after reasonable search a work would be declared an orphan, then all criminal and civil penalties would be waived until a legitimate owner steps forward; mechanism on the copyright website to assert ownership).

National Humanities Alliance

<http://www.copyright.gov/orphan/comments/OW0584-NHA.pdf>

Endorses Glushko-Samuelson.

Prelinger Library

<http://www.copyright.gov/orphan/comments/OW0593-PrelingerLibrary.pdf>

Provides examples and explains why it is important that the US Copyright Office develop a system to expedite the process of finding copyright information.

Visual Resources Association

<http://www.copyright.gov/orphan/comments/OW0594-Albrecht.pdf>

Endorses Glushko-Samuelson (and provides examples from members).

Duke Law School (Center for the Study of the Public Domain, Co-director: James Boyle),

1. Access to Orphan Films

<http://www.copyright.gov/orphan/comments/OW0596-CPD.pdf>

Focus on films. Provides a solution specifically for films that includes a central database.

2. Orphan Works Analysis and Proposal

<http://www.copyright.gov/orphan/comments/OW0597-CPD2.pdf>

Proposes solution that includes use of a free, online site to post intent to use an orphan work (after a reasonable search has been performed). If no objections after specified amount of time, user may go ahead and use the work.

Duke University Libraries

<http://www.copyright.gov/orphan/comments/OW0599-Duke.pdf>

Emphasizes the need for change. Notes the expense for libraries in dealing with orphaned works, particularly since the passage of the Sony Bono Copyright Extension Act. Supports any effort for change and encourages the copyright office to explore more streamlined and cost-effective clearance mechanisms.

AAP, AAUP, and the Software & Information Industry Association

<http://www.copyright.gov/orphan/comments/OW0605-AAP-AAUP-SIIA.pdf>

Proposed solution includes limiting legal remedies, a broad description of “reasonably diligent” search, and tracking database for copyright owners. The proposal would not affect duration of copyright, scope of liability, or applicability of fair use.

North Carolina State University Libraries

<http://www.copyright.gov/orphan/comments/OW0606-NCSULibraries.pdf>

Provides examples of the impediments faced by libraries in dealing with orphan works. Would like to see a solution that frees potential users, after a reasonable search for a copyright holder, from liability.

Art Museums (J. Paul Getty, Metropolitan, Guggenheim)

<http://www.copyright.gov/orphan/comments/OW0610-ArtMuseums.pdf>

(Note: this URL does not appear correctly in the link from the main page.)

Proposes a change the Exemptions of the Copyright Act and, like others: a reasonable standard of due diligence for locating copyright holders, temporary safe harbor from liability and damages, and a system for identifying and publicizing orphaned works once they are used.

Society of American Archivists

<http://www.copyright.gov/orphan/comments/OW0620-SAA.pdf>

Focus on unpublished material. Proposes a “blended” orphan works identification and designation system, combining “case-by-case” with a more formal approach. This would mean a reasonable effort to locate the copyright holder in addition to publishing intent to use a work (via the Copyright Office).

Johns Hopkins University, The Sheridan Libraries

<http://www.copyright.gov/orphan/comments/OW0625-JHU.pdf>

Emphasizes current regime’s adverse affect on research and scholarship. Focuses on allowable uses for non-profit and educational institutions.

College Art Association

<http://www.copyright.gov/orphan/comments/OW0647-CAA.pdf>

Supports Glushko-Samuelson.

MIT OpenCourseWare

<http://www.copyright.gov/orphan/comments/OW0651-MITOpenCourseWare.pdf>

Favors broad definition of orphan works and rights for non-commercial educational, charitable, or personal purposes.

Association of American Universities

<http://www.copyright.gov/orphan/comments/OW0653-AAU.pdf>

Supports Glushko-Samuelson.

National Institutes of Health, National Library of Medicine

<http://www.copyright.gov/orphan/comments/OW0654-NIH-NLM.pdf>

Provides examples of difficulties in dealing with orphan works. Supports (in general) library proposals for addressing problems.

“Library Copyright Alliance” (ALA, ARL, American Assoc. of Law Libraries, SLA, and MLA)

<http://www.copyright.gov/orphan/comments/OW0658-LCA.pdf>

Provides numerous examples from multiple universities. Supports the Glushko-Samuelson proposal.

ARLIS (Art Libraries Society of North America)

<http://www.copyright.gov/orphan/comments/OW0665-ARLIS-NA.pdf>

Supports Glushko-Samuelson.

American Historical Association

<http://www.copyright.gov/orphan/comments/OW0676-AHA.pdf>

Supports Glushko-Samuelson.

JSTOR, ARTstor and Ithaka Harbors

<http://www.copyright.gov/orphan/comments/OW0680-JSTOR.pdf>

Supports an exemption that reduces the burdens of due diligence (though not prescriptive) and suggests that orphan works should *not* be limited to older works. Does not support a compulsory license or centralized agency.

APPENDIX B

Comparison of Legislative Proposals

	Glushko-Samuelson	AAP, AAUP, SHIA	Stanford University Libraries	Carnegie Mellon University Libraries	Michigan State	Cornell University Library	Duke Law School Center for the ... Public Domain
Definition of Orphan Work	Any work for which the owner cannot be located	No minimum age	Works published more than 28 years ago that are not being commercially exploited (eg. Works in print). Copyright holder has to register work to keep it from being orphan work (“opt-out”).	Not in print and published at least 25 years ago. Not excluded from orphan work status by copyright owner in a list created, maintained and made freely available on the Web by the Copyright Office	Inability to find or get a timely response from the rights holder, regardless of age, type, or publisher.	Works for which the copyright owner cannot be identified or found	Suggests clear guidelines be developed, broadly-defined works including identifiable but unlocatable copyright owners and unidentifiable owners.
Type of use			Educational – only applies to libraries, archives & non-profit inst.	Educational and research – not just through libraries and archives.			
Reasonable effort	Resources appropriate for work in question, look at totality of circumstances	Prescribe minimal standards for reasonably diligent search that includes publicly available databases & records,	?? Checking date, publication status, and list of non-orphan works??	?? Checking date, publication status, and list of non-orphan works??		Established by relevant professional organizations	Low level of requirement, varying with type and extent of use
Database		Database for tracking ownership changes created by Copyright Office or private entity		List of non-orphan works maintained by Copyright Office	System to allow potential users to register interest in using a work.	Easy means on the Copyright Office web site for owners to assert ownership of a presumed orphan work	Users post intended use on a free, online searchable database for reasonable period of time (eg. 30 days)
After reasonable effort search	Use without limitation			N/a	Standard fee (a pool to offset legitimate claims	All civil and criminal penalties waived until legitimate © owner steps forward.	
After challenge	Prior use continues without limitation	Limit legal remedies, reasonable licensing fee or royalties, but not statutory damages or lawyers’ fees. No limitation of remedies for certain findings.		Existing uses okay, new uses only with permission of copyright owner	Not addressed		Immunity from suit or royalty claim after ceasing use of the work, an additional allowance for continued use on payment of a specified, low royalty.
Subsequent use	Indicate status as subsequent user under “orphan works” provisions, provide known attribution information. New uses require authorization by owner. After litigation, owner must register copyright, if search was reasonable, limit remedies to lesser of actual damages or \$100 per work (max \$500)	Not addressed			Not addressed		

	Glushko-Samuelson	Art Museums	Society of American Archivists	UCLA Film and Television Archive	MIT OpenCourseware	JSTOR, ARTstor and Ithaka Harbors
Definition of Orphan Work	Any work for which the owner cannot be located	Recommends safe harbor period for periods of five years for non-exclusive use if no owner appears	Depends on age of work. 25 years after death of author or, if unknown, 50 years after publication of work.		Owner unknown, unlocatable, or does not respond in three attempts.	
Type of use		Non-exclusive				
Reasonable effort	Resources appropriate for work in question, look at totality of circumstances	Based on efforts recognized and practiced by respective industries taking into account the circumstances of the use.	Age-dependent, search online files of Copyright Office and genre-specific publications	Establishment of best practices for users of orphan works, established by © owners, public libraries, archives and other appropriate parties.		Context-dependent, not overly prescriptive.
Database		Listing of orphaned works used (not prior to use), maintained by private entity or Copyright Office (a suggestion)	Database of intent to use. 90 days waiting period after notice. Another notice for copyright owners to declare that their work is not orphaned (“notice to enforce a non-registered copyright”)	Placement in the Copyright Office database registrations and recordings before 1978.		
After reasonable effort search	Use without limitation	Identification of orphaned status on reproductions (a suggestion). No compulsory license.		Establishment of best practices for users of orphan works, established by © owners, public libraries, archives and other appropriate parties.	Right to use might be limited to non-commercial educational, charitable, or personal purposes. Perhaps a two-tier system.	
After challenge	Prior use continues without limitation	Moratorium on new uses unless permission is obtained. No need to halt existing use until safe-harbor period is over.	User may continue to use work after payment of reasonable license fee.	Protection for public libraries and archives from liability and other financial loss.		In a scholarly or educational context, use should be allowed to continue & made available on a non-exclusive basis should a work lose its orphan status.
Subsequent use	Indicate status as subsequent user under “orphan works” provisions, provide known attribution information. New uses require authorization by owner. After litigation, owner must register copyright, if search was reasonable, limit remedies to lesser of actual damages or \$100 per work (max \$500)					