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COPYRIGHT—DON'T FORGET ABOUT THE ORPHANS: A LOOK AT A (BETTER) LEGISLATIVE SOLUTION TO THE ORPHAN WORKS PROBLEM

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NOTES

COPYRIGHT—DON'T FORGET ABOUT THE ORPHANS: A LOOK AT A (BETTER) LEGISLATIVE SOLUTION TO THE ORPHAN WORKS PROBLEM

INTRODUCTION

Coleman Hawkins, Lester Young, Billie Holiday, and Herschel Evans are just a few of the jazz masters from the 1930s and 1940s to resurface onto today's music scene with previously unheard recordings.¹ These jazz recordings were made by William Savory, an audio engineer who recorded live performances from some of jazz's greatest during that time period and kept the recordings in his private collection.² William Savory's son recently sold nearly 1,000 discs, known as the "Savory Collection,"³ containing recordings of these artists to the National Jazz Museum in Harlem.⁴ At the time of the recordings, only a few people had the opportunity to listen to them.⁵

For the first time, jazz fans are able to listen to excerpts as the museum cleans up and digitizes the recordings.⁶ Unfortunately, because of United States copyright laws, sound snippets are all listeners will be able to hear for a while.⁷ In order for listeners to hear an entire song, the museum needs to obtain a license or some other form of permission from the copyright holder before distributing

1. Larry Rohter, *Museum Acquires Storied Trove of Performances by Jazz Greats*, N.Y. TIMES, Aug. 16, 2010, http://www.nytimes.com/2010/08/17/arts/music/17jazz.html?_r=2&hp; see also Steven Seidenberg, *Orphaned Treasures: A Trove of Historic Recordings Has Found a Home in Harlem, But You Can't Hear Them*, A.B.A. J., May 2011, at 48.

2. Rohter, *supra* note 1; Seidenberg, *supra* note 1, at 48.

3. Rohter, *supra* note 1; Seidenberg, *supra* note 1 at 48.

4. Editorial, *Free That Tenor Sax*, N.Y. TIMES, Aug. 21, 2010, <http://www.nytimes.com/2010/08/22/opinion/22sun3.html>; Seidenberg, *supra* note 1, at 48.

5. Seidenberg, *supra* note 1, at 48.

6. Seidenberg, *supra* note 1, at 49. To hear audio samples, visit *Savory Collection*, THE NAT'L JAZZ MUSEUM IN HARLEM, <http://www.jazzmuseuminharlem.org/savory.php> (last visited May 24, 2012).

7. *Free That Tenor Sax*, *supra* note 4; Seidenberg, *supra* note 1, at 48-49.

the music.⁸ For the museum, tracking down these copyright holders is a daunting, potentially impossible task.⁹ Many of the current copyright holders are very difficult to find.¹⁰ Additionally, the cost of this search may be too expensive for the museum to undertake.¹¹

These recordings and other protectable works under copyright law whose copyright holders cannot be found are considered “orphaned.” An orphan work, as defined by the United States Copyright Office, is “a term used to describe the situation where the owner of a copyrighted work cannot be identified and located by someone who wishes to make use of the work in a manner that requires permission of the copyright owner.”¹²

Orphan works create problems, albeit self-made problems,¹³ in copyright law that are prevalent today.¹⁴ The orphan works problem is threefold: first, it stifles creativity by limiting the public’s access to the piece;¹⁵ second, it defeats the economic incentive to create copyrightable works because no one can receive the potential royalty if the copyright owner cannot be found; and third, it

8. 17 U.S.C. §§ 106, 501(a) (2006). “Anyone who violates any of the exclusive rights of the copyright owners as provided by sections 106 through 122 . . . is an infringer of the copyright . . .” § 501(a). Many of these copyright holders may be the estates of the artists who may be unaware that they hold a copyright. *Free That Tenor Sax*, *supra* note 4.

9. Seidenberg, *supra* note 1, at 49.

10. *Id.*

11. *Free That Tenor Sax*, *supra* note 4, (stating that “the estates of the musicians . . . may be very difficult to track down after all these decades”).

12. U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS 1 (2006) [hereinafter REPORT ON ORPHAN WORKS], available at <http://www.copyright.gov/orphan/orphan-report-full.pdf>.

13. Joel Sage, *Revenue Streams and Safe Harbors: How Water Law Suggests a Solution to Copyright’s Orphan Works Problem*, 16 B.U. J. SCI. & TECH. L. 294, 298 (2010) (noting that “orphan works are a natural outgrowth of copyright law’s robust protections and arise from the lack of formalities under current copyright law”). The changes in copyright law over the years have created “broad, automatic, and lengthy protection[s]” aggravating the orphan works problem. *Id.*

14. The prevalence of orphan works cannot be pinned down exactly. In Europe, there has been an attempt to examine the prevalence of the issue. According to one source, “depending on the sector[,] . . . estimates of the number of orphan works in cultural institutions vary from around 20% for films and slightly less for books, at the low end, to up to 90% for photography at the high end.” Neelie Kroes, Vice-President of the European Comm’n Responsible for the Digital Agenda, Addressing the Orphan Works Challenge at the IFRRO (The International Federation of Reproduction Rights Organisations) launch of ARROW+ (Accessible Registries of Rights Information and Orphan Works towards Europeana) (Mar. 10, 2011), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/163&format=HTML&aged=0&language=EN&guiLanguage=en>.

15. See *infra* Part III.A.

undermines copyright law by forcing some orphan works users to violate infringement laws, despite efforts to comply.

These problems will not be resolved soon, either.¹⁶ In 2008, Congress proposed legislation in both the House of Representatives and the Senate regarding the orphan works issue.¹⁷ Though the bill passed in the Senate, it did not pass in the House.¹⁸ Congress has not attempted a reexamination of the orphan works problem, nor has it proposed legislation that would address the fears of those who opposed its passage originally. It is Congress's job to resolve the orphan works issue.¹⁹

The sole remedy for the orphan works problem is to create uniformly-applied legislation that fairly balances the interests of copyright holders, those who want to use copyrighted materials, and the public's access to and the availability of as many creative works as possible. To solve the orphan works issue, Congress needs to revisit the bill and resolve the issues that prevented its enactment in 2008.

Congress should realize that an important reason the 2008 bill failed to become law was the uncertainty surrounding what constituted a "diligent search" as proscribed by the bill.²⁰ In its *Report on*

16. The United States Copyright Office noted that "there is good evidence that the orphan works problem is real and warrants attention." REPORT ON ORPHAN WORKS, *supra* note 12, at 2.

17. Shawn Bentley Orphan Works Act of 2008, S. 2913, 110th Cong. (2008); Orphan Works Act of 2008, H.R. 5889, 110th Cong. (2008).

18. On the last day of the Congressional term, the bill passed in the Senate and was expected to pass in the House of Representatives. Brent Phelps, *Senate Passes Orphan Works Bill (S2913), House Expected to Follow*, ABOUT THE IMAGE (Sept. 29, 2008), http://www.abouttheimage.com/3900/senate_passes_orphan_works_bill_s2913_house_expected_to_follow/author2. The House, however, did not pass the bill "in part because of objections by artists who feared a corporate takeover of their rights." *Free That Tenor Sax*, *supra* note 4.

19. *See* Authors Guild v. Google, Inc., 770 F. Supp. 2d 666, 673 (S.D.N.Y. 2011) (rejecting the Amended Settlement Agreement as too broad in scope). The court further notes, "the establishment of a mechanism for exploiting unclaimed books is a matter more suited for Congress than this Court." *Id.* at 677.

20. The standard laid out in the Senate's version of the bill was considered improved compared to previous "diligent search" language. Rashmi Rangnath, *Senate Passes the Shawn Bentley Orphan Works Act of 2008. Will the House Do the Same?*, PUBLIC KNOWLEDGE (Sept. 30, 2008, 1:00 PM), <http://www.publicknowledge.org/node/1768>. But it was pointed out that though the two bills are similar, they are not the same. Alex Curtis, *Orphan Works 2008: House and Senate Bills Introduced*, PUBLIC KNOWLEDGE (Apr. 24, 2008, 3:34 PM), <http://www.publicknowledge.org/node/1537>. The Senate's bill was referred to as the "clean version" while the House's version had a lot more provisions and extras. *Id.* Despite having more language, the House's bill still lacked language to provide enough protection for the copyright holder and the copyright user. *Id.*

Orphan Works, the Copyright Office suggested a very general standard for the diligent search which would have been “applied on a case-by-case basis” and noted that “[s]uch a standard [was] needed because of the wide variety of works and uses identified as being potentially subject to the orphan works issues.”²¹ Such a general standard was not ideal, as it was the standard proposed in the 2008 bills.²² Congress can be aided in defining more specifically what it means to conduct a “diligent search” and how to prove that one conducted the search by looking to other areas of the law, such as the Internal Revenue Code, the Federal Rules of Evidence, and case law regarding serving notice by court officers.²³ If the term “diligent search” were more specifically defined, the proposed legislation would be more likely to pass in both chambers of Congress.²⁴ Creating new orphan works legislation that includes a more comprehensive definition of “reasonably diligent search” is the only way to deal with the orphan works problem, because it would create one set of laws that could be applied uniformly throughout the United States to all forms of copyrightable material.²⁵

Part I of this Note is an overview of the copyright system, outlining and detailing the history of copyright law, what is protected, and how one goes about obtaining a copyright. Part II illustrates factors that contribute to a copyrighted work becoming orphaned. Part III discusses the Copyright Office’s *Report on Orphan Works* from 2006 and Congress’s proposed acts in 2008. Part IV examines why the proposed acts in 2008 ultimately did not pass in Congress. Part V discusses alternatives to legislative action. Part VI details what it means to conduct a reasonably diligent search. Finally, Part VII is an application of the proposed definition of the term, “reasonably diligent search,” as applied to real world problems.

I. WHAT IS COPYRIGHT?

Sir Isaac Newton said, “If I have seen farther, it is by standing on the shoulders of giants.”²⁶ This statement epitomizes intellec-

21. REPORT ON ORPHAN WORKS, *supra* note 12, at 9.

22. See *supra* note 20 and accompanying text.

23. See *infra* Part VI.

24. See *infra* Part VI.

25. See *infra* Parts V-VI.

26. ON THE SHOULDERS OF GIANTS: THE GREAT WORKS OF PHYSICS AND ASTRONOMY 725 (Stephen Hawking ed., 2002) [hereinafter ON THE SHOULDERS OF GIANTS] (referring to a famous quote from Isaac Newton which is “[o]ften described as Newton’s nod to the scientific discoveries of Copernicus, Galileo, and Kepler before him”).

tual property, especially copyrightable property, and how it has manifested throughout time. Human creativity can be independent, but, more often than not, something new is built off another's ingenuity; our greatest thinkers build off the works and inventions of those who came before them.²⁷ A "cornucopia of expressive riches" is created²⁸ and United States intellectual property law attempts to balance the important goal of protecting the creators of these works with the goal of allowing society to benefit from their creations.²⁹

In most circumstances, the copyright holder can give a license to his rights and his work can be used and disseminated by others.³⁰ Without this license, any use is an infringement and unauthorized users face heavy penalties.³¹ Potential users may opt to wait until the work passes into the public domain, but they may be waiting a long time.³²

A. Copyright History

The Copyright Clause can be found within the text of the United States Constitution.³³ The Founders recognized the importance of protection for creative works and inventions, so they included the clause in the Constitution.³⁴ In 1970, under the Constitution's grant of power, Congress enacted the first copyright law. This law gave authors a monopoly over their works in order to

27. See Sage, *supra* note 13, at 303.

28. *Id.*

29. Benjamin T. Hickman, *Can You Find a Home for This "Orphan" Copyright Work? A Statutory Solution for Copyright-Protected Works Whose Owners Cannot Be Located*, 57 SYRACUSE L. REV. 123, 129 (2006) (noting that Congress has continued to recognize a need for "balance [between] the interests of those who want to use copyright works . . . and those who own the rights in the works").

30. See 17 U.S.C. § 106 (2006); see also *Broad. Music, Inc., v. Columbia Broad. Sys.*, 441 U.S. 1, 20-22 (1979) (discussing the advantages and necessities of licenses, and how they give access to users while creating a reliable way for owners to protect the use of their copyrights).

31. The statutory consequences for each willful copyright infringement can be as high as \$150,000. 17 U.S.C. § 504(c)(2) (2006).

32. 17 U.S.C. § 302(a) (2006) ("Copyright in a work . . . endures for a term consisting of the life of the author and 70 years after the author's death.").

33. U.S. CONST. art. I, § 8, cl. 8 ("Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").

34. See generally L. Ray Patterson & Craig Joyce, *Copyright in 1791: An Essay Concerning the Founders' View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution*, 52 EMORY L.J. 909 (2003).

promote the expansion of learning and culture.³⁵ The formalities of the Act of 1790, such as registration, deposit, notice, and renewal, were used to limit the monopoly authors held.³⁶ Furthermore, these formalities were

intended to record publicly full and complete information about a work for which copyright is claimed and to make that work continuously available for public inspection in order that the extent and boundaries of the monopoly may be understood by the public at all times during the life of the copyright.³⁷

These early formalities had the *essential* function “of assuring a balance between the interests of the author and the public.”³⁸

The formalities did not last forever, though they stayed intact over the years despite amendments in developing United States copyright law.³⁹ In 1909, Congress made important revisions that provided federal copyright protection at the moment of publication,⁴⁰ and extended the copyright renewal term to twenty-eight years.⁴¹ Congress continued to recognize the need to have a “balance [between] the interests of those who want to use copyright works . . . and those who own the rights in the works.”⁴²

35. Act of May 31, 1790, ch. 15, 1 Stat. 124; ABRAHAM L. KAMINSTEIN, REPORT OF THE REGISTER OF COPYRIGHTS ON GENERAL REVISION OF THE U.S. COPYRIGHT LAW 3-6 (1961); Corey Thompson, Note, *Orphan Works, U.S. Copyright Law, and International Treaties: Reconciling Differences to Create a Brighter Future for Orphans Everywhere*, 23 ARIZ. J. INT'L & COMP. L. 787, 792 (2006). The Copyright Act of 1790 emerged during a time when the majority of people and the courts championed free trade and wanted to limit monopolies. James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33, 53-55 (2003). See generally Thompson, *supra*.

36. *Washingtonian Publ'g Co. v. Pearson*, 306 U.S. 30, 43 (1939) (Black, J., dissenting) (stating the statutory requirements “impose[d] a simple and easily performed duty—not burdensome in any respect—in return for a [limited] monopoly”); Thompson, *supra* note 35, at 793.

37. *Washingtonian Publ'g Co.*, 306 U.S. at 48-49 (Black, J., dissenting).

38. Thompson, *supra* note 35, at 793. See generally Zechariah Chafee, Jr., *Reflections on the Law of Copyright: I*, 45 COLUM. L. REV. 503 (1945).

39. Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 493 (2004); Thompson, *supra* note 35, at 794.

40. Act of Mar. 4, 1909, ch. 320, § 9, 35 Stat. 1075, 1077 (“[A]ny person entitled thereto by this Act may secure copyright for his work by publication thereof with the notice of copyright required by this Act . . .”).

41. §§ 24-25, 35 Stat. at 1080-82.

42. Hickman, *supra* note 29, at 129; PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 1.14 (3d ed. 2005). Copyright holders receive a monopoly over a work for a period of time, but eventually a work will enter the public domain, where the public will have access to use, reproduce, and work off of the original without fear of penalty. MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.03 (2006).

It was not until the Copyright Act of 1976 that copyright law in the United States underwent significant changes.⁴³ One of the most noteworthy changes to the Copyright Act of 1976 was that a single copyright term was established based on the author's life.⁴⁴ In 1998, the Sonny Bono Copyright Term Extension Act (the "Sonny Bono Act") passed in Congress, thereby adding another twenty years to the already established life term of the author plus fifty years.⁴⁵ The extensions of copyright terms mean that an orphan work will remain unavailable for over a century.⁴⁶ Furthermore, this creates a presumption that the majority of works encountered will be under copyright.⁴⁷

The 1976 Act also substantially changed copyright law in that it provided protection the moment a work was fixed in a tangible medium, as opposed to having to be published.⁴⁸ These changes lead to the ease in obtaining copyrights because they "accrue practically automatically under current law."⁴⁹ The formalities needed in the past—registration, renewal, and notice—are no longer necessary today.⁵⁰ Congress did away with these formalities as a way to gain

43. Thompson, *supra* note 35, at 795.

44. 17 U.S.C. § 302(a) (2006); *see also* Thompson, *supra* note 35, at 798.

45. § 302(a). There were other important changes for the extension of the term of a copyrighted work. The copyright term for works made for hire were also extended to the earlier of either ninety-five years after first publication or 120 years from creation of the work. § 302(c). A "work made for hire" as defined by the U.S. Copyright Statute is

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

17 U.S.C. § 101 (2006).

46. § 302; *see also* *Eldred v. Ashcroft*, 537 U.S. 186, 241 (2003) (Stevens, J., dissenting) (noting that "no copyrighted work created in the past 80 years has entered the public domain or will do so until 2019"); *Golan v. Holder*, 609 F.3d 1076, 1095 (10th Cir. 2010) (upholding the constitutionality of § 514 of the Uruguay Round Agreement Act (URAA) which restores copyrights for thousands of foreign works, including those that had entered the public domain because of failure to adhere to formalities that have seen been repealed), *aff'd* No. 10-545, 2012 WL 125436 (U.S. Jan. 18, 2012).

47. Sage, *supra* note 13, at 299.

48. § 302(a); Thompson, *supra* note 35, at 799.

49. Sage, *supra* note 13, at 296; *see* § 102(a).

50. Sage, *supra* note 13, at 297. Authors today "receive copyright protection the moment their works are affixed in any tangible form." *Id.*; *see* § 102(a).

access and become a member of the Berne Convention.⁵¹ Since the Berne Convention Implementation Act's passage, Congress has fully embraced the Berne Convention and has made it even easier for a copyright holder to both acquire a copyright and retain it for a long time.⁵² Congress has modified the United States copyright statutes nearly fifty times since the Act of 1976, mostly in an attempt to conform to international standards.⁵³ Each modification has continued to erode copyright formalities.

The amendments have created protections that obviously benefit copyright holders, yet at the same time have caused problems.⁵⁴ For purposes of this Note, these "broad, automatic, and lengthy protection[s] . . . exacerbate[] the orphan works problem."⁵⁵ Changes in copyright law have made it easy for a work to become legally protected. Problems arise when an individual or institution

51. Sprigman, *supra* note 39, at 489; see Olive Huang, *U.S. Copyright Office Orphan Works Inquiry: Finding Homes for the Orphans*, 21 BERKELEY TECH. L.J. 265, 270 (2006). The Berne treaty is the basis for the majority of international copyright law, and once Congress realized that the global market was the way of the future, they enacted the Berne Convention Implementation Act. See Act of Oct. 31, 1988, Pub. L. No. 100-568, 102 Stat. 2853; see also Huang, *supra*, at 270; Thompson, *supra* note 35, at 787-89. Thompson explains the reasoning behind adopting the Berne Convention:

[T]he Berne Convention . . . boasts at least 150 member countries . . . [I]t is crucial for the United States to participate in these treaties to help shape the future of intellectual property policy. The United States exports a great deal of intellectual property. Technological advancements are increasing the frequency and efficiency of that trade. However, with such advancements comes a need to adapt U.S. laws to protect the rights and interests of copyright holders both locally and globally. [Therefore,] U.S. copyright law has shifted away from its traditional structure to both ensure its copyright law meets the exacting requirements of international treaties and to benefit from the protection offered by those treaties.

Thompson, *supra* note 35, at 788-89 (footnotes omitted). Berne requires its signatories to provide some minimal rights while treating a foreign rights holder the same as a domestic rights holder. Huang, *supra*, at 270. One of the minimal rights required is protection for author's for fifty years, and that "[t]he enjoyment and the exercise of [copyright] shall not be subject to any formality." Berne Convention for the Protection of Literary and Artistic Works art. 5(2), Sept. 9, 1886, revised in Paris July 24, 1971, 1980 U.N.T.S. 31, 35.

52. See § 302(a).

53. Some of the modifications are clarifications or technical corrections and others are extensions of existing laws. See Kenneth D. Crews, *Looking Ahead and Shaping the Future: Provoking Change in Copyright Law*, 49 J. COPYRIGHT SOC'Y U.S.A. 549, 551 (2001); Thompson, *supra* note 35, at 805.

54. Sage, *supra* note 13, at 298.

55. *Id.*; see Joshua O. Mausner, *Copyright Orphan Works: A Multi-Pronged Solution to Solve a Harmful Market Inefficiency*, 55 J. COPYRIGHT SOC'Y U.S.A. 517, 518 (2008).

wants to use the copyrighted work but cannot locate the copyright holder to gain permission to do so.⁵⁶

The Copyright Office acknowledged in its Report that when copyright law was being revised and amended, concerns were raised about the problems of locating copyright holders for older works with low commercial value. Additionally, the difficulty in finding copyright holders could stifle the use of a copyrighted work.⁵⁷ The orphan works problem began when the formalities of the Copyright Act of 1909 were done away with. The issue was exacerbated further as Congress continued to expand copyright terms.

B. *Obtaining a Copyright*

A copyright arises whenever a creator puts an original work into a fixed medium, whether it is published or not, and lasts until seventy years after the author's death.⁵⁸ Since formalities are no longer required, a copyright owner does not necessarily have to disclose who owns the copyright, i.e., the notice requirement is no longer a prerequisite to copyright protection.⁵⁹ Furthermore, registration is no longer required as a condition to copyright protection.⁶⁰ Deposit with the Library of Congress is considered mandatory for published works, but noncompliance does not mean that copyright will be forfeited; instead, the Copyright Office may levy fines against the copyright owner.⁶¹

Copyright will still be granted to an original piece of work regardless of whether a copyright owner gives notice, registers the copyrighted work, or deposits a copy with the Library of Congress. The owner of the copyright then is protected from attempts to infringe on that right.⁶² A copyright holder is given exclusive rights,

56. For example, "copyrights may belong to corporate entities that go out of business, leaving no means of identifying the successor of the copyrights." Huang, *supra* note 51, at 271.

57. REPORT ON ORPHAN WORKS, *supra* note 12, at 15-16.

58. 17 U.S.C. §§ 102, 302 (2006) (which apply to works created on or after January 1, 1978). If a work was created before that date, copyright duration can be more complicated to determine. See generally 17 U.S.C. §§ 303, 304 (2006) (discussing the term of copyrights for works created but not published or copyrighted before January 1, 1978 and to works in their first term on January 1, 1978).

59. 17 U.S.C. §§ 401(a), 402(a) (2006) (emphasis added) (stating that the copyright notice "may" be placed on copies or phonorecords). There are still incentives to the copyright owner if there is notice on published works.

60. 17 U.S.C. § 408(a) (2006) (regarding the "permissive" registration provision).

61. 17 U.S.C. § 407(a) (2006) (stating that deposit "shall" be made by "the owner of copyright or of the exclusive right of publication"); § 407(d).

62. 17 U.S.C. §§ 106, 501(a) (2006).

which are subject to some limitations including exceptions for fair use,⁶³ preservation efforts,⁶⁴ educational use,⁶⁵ compulsory licenses,⁶⁶ and other uses intrinsic to executing licensed activities.⁶⁷

If a potential users of a copyrighted work are able to circumvent some of the limitations on copyright, they do not have to worry about getting permission from the copyright owner to use the work. Conversely, if potential users do not fall within one of the limitations, the negative inference from § 501 of the copyright statute suggests getting permission in some form from the copyright holder is required.⁶⁸ Failure to secure a copyright owner's permission to use a work results in infringement.

II. YOU'RE ON YOUR OWN NOW, LITTLE ORPHAN

The changes to the United States' copyright laws have affected all aspects of copyright users, not just orphan works users. But there are other factors contributing to the orphan problem.

To begin, a potential user needs to find information on the work itself, though there are many situations where information regarding the author or the copyright owner is minimal.⁶⁹ A potential

63. 17 U.S.C. § 107 (2006).

64. 17 U.S.C. § 108(c) (2006).

65. 17 U.S.C. § 110 (2006).

66. 17 U.S.C. § 115 (2006).

67. Thompson, *supra* note 35, at 809 n.162 (citing 17 U.S.C. §§ 111-12 (2006) and stating, "From their inception, the scope of the exceptions has been unclear."). A further limitation is the First Sale Doctrine, which states that the exclusive right to sell or distribute "is confined to the first sale of any one copy and exerts no restriction on the future sale of that copy." *Fawcett Publ'ns v. Elliot Pub. Co.*, 46 F. Supp. 717, 718 (S.D.N.Y. 1942). Essentially, if individuals buy a copyrighted books, they can then sell that book and not have to worry about violating any exclusive right of the copyright owner.

68. 17 U.S.C. § 501 (2006).

69. In its comments to the Register of Copyright when the Register was still writing the Report on Orphan Works, the College Art Association described different types of works and users and the difficulties it encountered in identifying clearing rights. Some examples were that a College Art Association member, Leslie Humm Cormier, "needed *specific photos of architectural works* by an internationally known architectural firm. The living partner of the firm could not authorize use of photographs of the firm's own work (the buildings) because the *photographer was unlocatable*." Letter from Jeffrey P. Cunard, Counsel, Coll. Art Ass'n, to Jule Sigall, Assoc. Register for Policy & Int'l Affairs, U.S. Copyright Office, at 9 (Mar. 25, 2005) (emphasis in original), available at <http://www.copyright.gov/orphan/comments/OW0647-CAA.pdf>. In another example, Wendy Katz, an Associate Professor in the Department of Art and Art History at the University of Nebraska-Lincoln told the College Art Association, who then related the information to the Copyright Office, that she "wanted to publish an artwork by a 19th century artist. The [museum] has a *photograph but would not give . . . permission to publish it* since they did not own the painting. Nor did they (or would they) . . . help on

user who cannot find a name must then try to “rely on circumstantial or contextual information—to the extent that any is available—to ascertain the relevant factors in deciding whether to exploit the work.”⁷⁰ Copyright notice can be an effective tool in providing information about the owner of a copyright, but when there is no notice, as in most cases involving orphan works, a potential user is faced with an obstacle that will likely result in the work not being used.⁷¹ Non-use of the orphan work stifles creativity in many ways. New forms of mash-up music (e.g., *Girl Talk*⁷²), pieced-together films (e.g., *Tarnation*⁷³), or republication of out-of-print books may never come to fruition. If the pieces that the artist wanted to put together to create something new did not rise to the level of protection under the fair use doctrine,⁷⁴ then these artists would be pre-

who the owner was.” *Id.* at 11-12 (emphasis in original). With regard to trying to find the copyright holder of a motion picture, the College Art Association related the experience of Greta de Groat, an Electronic Media Cataloger at the Stanford University Libraries, that while attending “a public screening of a film [from 1924] When the director called [a major distributor] to obtain permission, they claimed they didn’t own it so therefore could not give permission. She was unwilling to show the film without the proper permissions, so was forced to pull the film.” *Id.* at 16 & n.34 (emphasis and alterations in original). These are just a few examples, but the Register of Copyright noted there were many more, as there were also many more in the letter from the College Art Association. REPORT ON ORPHAN WORKS *supra* note 12, at 23.

70. REPORT ON ORPHAN WORKS, *supra* note 12, at 23. For a plethora of examples of the difficulties and inabilities of people and institutions trying to find copyright owners, one can look to the comments submitted to the Register of Copyright and the transcripts of the Round Table discussions held while the Register was drafting its Report. See *Orphan Works Initial Comments*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/orphan/comments/index.html>; *Orphan Works Reply Comments*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/orphan/comments/reply/>; *Roundtable Transcripts: (7/26/05) Washington, D.C.*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/orphan/transcript/0726LOC.PDF>; *Roundtable Transcripts (7/27/05), Washington, D.C.*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/orphan/transcript/0726LOC.PDF>; *Roundtable Transcripts: (8/2/05) Berkeley, Calif.*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/orphan/transcript/0802LOC.PDF>.

71. REPORT ON ORPHAN WORKS, *supra* note 12, at 24. The Report notes that the obstacle of finding information on a copyright is most pervasive with visual art, specifically photographs. *Id.*

72. See *infra* note 110 and accompanying text.

73. *Tarnation* is a documentary film, put together with photographs, answering-machine messages, home videos, footage of individual interviews, and more, by Jonathan Caouette on his life with his schizophrenic mother. *Tarnation (2003)*, INTERNET MOVIE DATABASE, <http://www.imdb.com/title/tt0390538/> (last visited May 24, 2012); Huang, *supra* note 51, at 275.

74. 17 U.S.C. § 107 (2006) sets out four factors to be considered in determining whether or not a particular use is fair:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;

vented from giving something new to the public. Artists' creativity would suffer and the public would not have the benefit of access to more creative works. As noted by the United States Copyright Office's Report on Orphan Works, "when confronted by the absence of clear information about the work's owner, most users simply do not use the work."⁷⁵

Even if an author or copyright holder is identifiable from a copy of a work, it does not necessarily mean that the person identified is the *current* copyright holder.⁷⁶ Due to events which have occurred since the creation of the copyrighted work, the copyright holder is not always identified on the work.⁷⁷ The Copyright Office

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

§ 107.

75. REPORT ON ORPHAN WORKS, *supra* note 12, at 26.

76. The Copyright Office's REPORT ON ORPHAN WORKS noted that "even if an author or copyright owner can be identified . . . events since the creation of that copy can affect the ability of a subsequent user to identify or locate the current copyright owner. *Id.* The Report noted that "[c]opyright is, after all, a form of property" and like "other forms of property, ownership may pass through many hands, and by various legal mechanisms." *Id.* at 26-27. To further illustrate this point, in a comment to the Register of Copyright, Paul Spehr, who worked at the Library of Congress from 1958 to 1993 in the Motion Picture Section, stated that "[t]he continual changes in ownership and management of the major Hollywood companies" caused several problems. Letter from Paul Spehr to Jule Sigall, Assoc. Register for Policy & Int'l Affairs, U.S. Copyright Office (2005), [hereinafter "Letter from Paul Spehr"], available at <http://www.copyright.gov/orphan/comments/OW0516-Spehr.pdf>. The names of movie companies have changed since the 1910s, causing confusion, and furthermore, when copyright ownership is transferred, blocks of films are sold from one company to another. Letter from Paul Spehr. This process often resulted in some films being destroyed or diminished in quality. Letter from Paul Spehr. To remedy this, he "believe[s] that the ownership of a copyrighted work should bear with it the responsibility to maintain and protect it," which would lead not only to the proper preservation of creative works, but fewer orphan works. Letter from Paul Spehr. Another commentator to the Register of Copyright, Dennis Buck, was "in the process of writing a book on local history" and stated he had spent many "hours calling, writing and e-mailing publishers." Letter from Dennis Buck, Senior Curator, Aurora Historical Soc'y, to Jule L. Sigall, Assoc. Register for Policy & Int'l Affairs, U.S. Copyright Office (Mar. 23, 2005), [hereinafter "Letter from Dennis Buck"], available at <http://www.copyright.gov/orphan/comments/OW0555-Buck.pdf>. He stated "[t]he original publisher consolidated with another house, then was bought out, then that group was bought out, then pieces of the top group were sold away, etc." Letter from Dennis Buck. Buck recounted that no one he talked to owned the rights, nor could they tell him who might own the rights. Letter from Dennis Buck. This changing hands and consolidation of copyright owners caused him, and others like him, the inability to use a specific work. REPORT ON ORPHAN WORKS, *supra* note 12, at 26-27.

77. See *infra* note 79 and accompanying text.

reminds us that “[c]opyright is, after all, a form of property” and, like other forms of property, it can change hands, therefore making an owner difficult to identify.⁷⁸ Tracking down the rightful owner can be extremely challenging in certain complex scenarios. For example, a copyright holder may die without heirs, or if the owner is a corporate entity, there may be a dissolution or (multiple) buyouts of the company, thereby leaving no clear indication of who now owns the copyright.⁷⁹ These scenarios are not uncommon and contribute to the complexity of the orphan works problem.

In addition to copyright holders being difficult to find, copyright holders may also not leave any trace of her existence because of the non-commercialability of the copyrighted work.⁸⁰ Essentially, the work is not worth enough to go through the efforts of making oneself known. If an author believes she is likely to get royalties from her work due to its commercial value, she is more likely to make her authorship and copyright information available to the public.⁸¹ The ease or difficulty of finding copyright holders may also depend on the category of copyrighted work. For musical works, copyright renewal rates are the highest at thirty-two percent, but much lower for books, which are at only eight percent, and graphic-arts, coming in at three percent.⁸²

Copyright renewal rates depend mainly on “the commercial value of the work” at issue.⁸³ A study done by Judge Richard Posner and William Landes found that between 1910 and 1991, “copyright renewal rates never topped twenty-two percent,”⁸⁴ and it appeared that the majority of copyright owners did not think it was worthwhile to renew a copyright.⁸⁵ Since few copyright holders

78. REPORT ON ORPHAN WORKS, *supra* note 12, at 26-27.

79. *Id.* at 28.

80. See *Eldred v Ashcroft*, 537 U.S. 186, 268 (2003) (Breyer, J., dissenting) (noting that “only about 2% of copyrights can be expected to retain commercial value at the end of 55 to 75 years”); William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 477-80, 496-513 (2003); Huang, *supra* note 51, at 269; Sage, *supra* note 13, at 312 (observing “the revenue stream mostly dries up when there is no longer any appreciable prospect of profits available for the owner of the work” as contributing to the orphan work problem).

81. Huang, *supra* note 51, at 269.

82. *Id.* (referencing Landes & Posner, *supra* note 80, at 506).

83. *Id.*

84. Hickman, *supra* note 29, at 135 (citing Landes & Posner, *supra* note 80, at 500) (stating that on average “copyrights have very little economic value after twenty-eight years”).

85. *Id.* (citing Landes & Posner, *supra* note 80, at 500). The lack of commercial incentive to renew a work begs the question of why copyrights last so long in the first

seek renewal of their copyrights after about thirty years, it becomes harder for potential users to find the information on the owner of a work created years before.⁸⁶ Though these works have owners, they have become orphaned.

Various organizations for specific types of copyrighted works have made it a point to make the author's information known and available.⁸⁷ In the world of music, for instance, the American Society of Composers, Authors and Publishers (ASCAP)⁸⁸ and Broadcast Music, Inc. (BMI)⁸⁹ have stated that orphan "works are relatively rare [due to] performance rights organizations (PROs) . . . maintain[ing] extensive [catalogs and records] of copyright holder information."⁹⁰ But despite these organizations' efforts, not all information is known or made available.⁹¹ For printed works, like books, paintings, photographs, film, or old computer codes, there may be no such databases, and thus finding a copyright holder is even harder.

III. THE UNITED STATES COPYRIGHT OFFICE: REPORT ON ORPHAN WORKS AND CONGRESS'S RESPONSE IN 2008

In 2005, the United States Copyright Office initiated an investigation of the orphan works problem to determine if Congress

place. That question, though, is beyond the scope of this Note. For a more in-depth look on the option of indefinite renewals, see Landes & Posner, *supra* note 80, at 500.

86. Huang, *supra* note 51, at 268-69.

87. Thompson, *supra* note 35, at 816.

88. ASCAP

is a membership association of more than 420,000 U.S. composers, songwriters, lyricists, and music publishers of every kind of music ASCAP protects the rights of its members by licensing and distributing royalties for the non-dramatic public performances of their copyrighted works ASCAP makes giving and obtaining permission to perform music simple for both creators and users of music.

About ASCAP, AMERICAN SOC'Y OF COMPOSERS, AUTHORS AND PUBLISHERS, <http://www.ascap.com/about/> (last visited May 24, 2012).

89. Broadcast Music, Inc. was created in 1939 as a non-profit performing rights organization that "collects license fees on behalf of songwriters, composers and music publishers and distributes them as royalties to those members whose works have been performed." *About BMI, BROADCAST MUSIC, INC.*, <http://www.bmi.com/about/?link=navbar> (last visited May 24, 2012).

90. Thompson, *supra* note 35, at 816.

91. *Id.* (relaying the account of a commentator who could not locate information on music artists). "Thus, even in the music industry, which is by far the most advanced in terms of collecting and maintaining up-to-date copyright information, orphan works are impeding the development of new works." *Id.* at 817 (footnote omitted).

should take legislative action.⁹² The Copyright Office's objective was fivefold: first, to explain the way the Copyright Office researched the orphan issue; second, to detail the extensive variety of circumstances where orphan works could arise; third, to explain the legal background of the orphan works problem; fourth, to summarize the commentators' varying proposed solutions; and finally, to illustrate the results gathered regarding the orphan problem while also providing recommendations for Congress.⁹³

The Register of Copyright⁹⁴ determined that if a solution was attainable, legislation would be necessary.⁹⁵ Congress took action in 2008. A bill was proposed to both the Senate and the House. In the Senate, the Act was to "be cited as the 'Shawn Bentley Orphan Works Act of 2008'"⁹⁶ and in the House of Representatives, the "Orphan Works Act of 2008."⁹⁷ Each bill sought legislation that would "provide a limitation on judicial remedies in copyright infringement cases involving orphan works."⁹⁸

A. *Collecting Data on Orphans*

While researching the orphan works problem, the United States Copyright Office asked creative industries for their opinions on the matter.⁹⁹ The Copyright Office received over 850 comments from the public, held roundtable discussions in Washington, D.C. and Berkeley, California, and also met with various institutions and organizations.¹⁰⁰ The Register was astounded by the wide range of organizations and individuals who sent comments: apparently, "the orphan works issue [was] one that affects many types of people in

92. REPORT ON ORPHAN WORKS, *supra* note 12, at 17 (noting that in January 2005, Senators Orrin Hatch and Patrick Leahy and Representatives Lamar Smith and Howard Berman asked the Register of Copyrights to look into and research this issue so the Register could give Congress recommendations).

93. *Id.* at 20.

94. Congress, through the Constitution, has the power to enact laws establishing a system of copyright in the United States. *Information Circular*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/circs/circ1a.html> (last visited May 24, 2012). In the early years of the United States, district court clerks recorded claims. *Id.* In 1870, copyright functions were centralized in the Library of Congress, and, in 1897, the Copyright Office became a separate department in the Library of Congress. *Id.* The Register of Copyright is the head of the department. *Id.*

95. REPORT ON ORPHAN WORKS, *supra* note 12, at 93.

96. Shawn Bentley Orphan Works Act of 2008, S. 2913, 110th Cong., § 1.

97. Orphan Works Act of 2008, H.R. 5889, 110th Cong., § 1.

98. S. 2913; H.R. 5889.

99. REPORT ON ORPHAN WORKS *supra* note 12, at 1-2; *see also* Hickman, *supra* note 29, at 126.

100. REPORT ON ORPHAN WORKS, *supra* note 12, at 1-2.

different contexts.”¹⁰¹ Due to the breadth of examples from all of these individuals and industries, the Copyright Office still had to realize that “the magnitude and precise contours of these problems . . . remain[] largely unknown.”¹⁰² Yet through the real life examples and hypothetical situations, the Copyright Office determined that the orphan problem existed.

The Copyright Office determined that, despite the wide range of industries, each industry faces similar problems when trying to locate copyright holders of orphan works.¹⁰³ It also determined there are four obstacles obstructing and deterring one’s ability to successfully identify and locate a copyright owner: “(1) inadequate identifying information on a copy of the work itself; (2) inadequate information about copyright ownership because of a change of ownership or a change in the circumstances of the owner; (3) limitations of existing copyright ownership information sources; and (4) difficulties researching copyright information.”¹⁰⁴

These difficulties are real.¹⁰⁵ They prevent other users from republishing, exhibiting, or disseminating an orphan work to the public at-large.¹⁰⁶ Consequently, potential users cannot use the

101. Hickman, *supra* note 29, at 127; *see also* REPORT ON ORPHAN WORKS, *supra* note 12, at 17 (stating that “[v]irtually every interest group typically involved in copyright policy debates was represented in the comments”).

102. REPORT ON ORPHAN WORKS, *supra* note 12, at 21. For a look at what the United Kingdom did to determine the prevalence of orphan works in Europe, see generally Naomi Korn, *In From the Cold: An Assessment of the Scope of ‘Orphan Works’ and Its Impact on the Delivery of Services to the Public*, JISC (Apr. 2009), available at http://sca.jiscinvolve.org/wp/files/2009/06/sca_colltrust_orphan_works_v1-final.pdf (last visited May 24, 2012); *see also supra* note 14.

103. For a look at the breadth of the industries covered and the anecdotal information from those industries and the problems they faced, one can read through the initial and reply comments sent to the Copyright Office and the transcripts from the three round tables held in 2005. These are available at *Initial Comments*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/orphan/comments/index.html>; *Reply Comments*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/orphan/comments/reply/>; *Roundtable Transcripts: (7/26/05) Washington, D.C.*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/orphan/transcript/0726LOC.PDF>; *Roundtable Transcripts (7/27/05), Washington, D.C.*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/orphan/transcript/0726LOC.PDF>; *Roundtable Transcripts: (8/2/05) Berkeley, Calif.*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/orphan/transcript/0802LOC.PDF>.

104. REPORT ON ORPHAN WORKS, *supra* note 12, at 2.

105. *Id.* at 21-22 (noting “[s]everal of the comments discussing genuine orphan works situations were submitted by trade associations, academic societies, or other organizations, which surveyed their members, collected response, and aggregated numerous genuine orphan works situations into a single comment”).

106. Ryan Andrews, *Contracting Out of the Orphan Works Problem: How the Google Book Search Settlement Serves as a Private Solution to the Orphan Works Prob-*

works, and the public is deprived of enjoying these works, which effectively disappear.¹⁰⁷

The United States Copyright Office has also identified other types of potential users who are suffering the most due to this problem:

- (1) uses by subsequent creators who add some degree of their own expression to existing works to create a derivative work; (2) large-scale “access” uses where users primarily wish to bring large quantities of works to the public, usually via the Internet; (3) “enthusiast” or hobbyist uses, which usually involve specialized or niche works, and also appear frequently to involve posting works on the Internet; and (4) private uses among a limited number of people.¹⁰⁸

The orphan works problem stifles the creativity of these potential users. Collage, found-object art, and sampling have become prominent forms of art among modern artists.¹⁰⁹ If an artist cannot find the copyright holder, she may not be willing to risk the fines and penalties of copyright infringement and no new work will be created. The artist Girl Talk¹¹⁰ is an example of a sampling artist. Though he believes he is safe from suits of infringement because of the fair use doctrine,¹¹¹ others like Girl Talk may not have the protection of fair use, or are not brave (or reckless) enough to chance being sued for infringement by creating some mash-up or collage work.¹¹²

lem and Why It Should Matter to Policy Makers, 19 S. CAL. INTERDISC. L.J. 97, 110 (2009).

107. See generally *id.*

108. REPORT ON ORPHAN WORKS, *supra* note 12, at 3.

109. Thompson, *supra* note 35, at 816 (noting that “[t]hese forms of artistic expression necessarily involve taking a preexisting work and incorporating it into a new work”).

110. Girl Talk is the stage name for Gregg Gillis, “the biomedical engineer turned pop mash-up mad scientist” who creates new musical works by combining snippets of already recorded music. Dan DeLuca, *Girl Talk a Master of Musical Mixes*, PHILA. INQUIRER, Feb. 4, 2011, available at http://articles.philly.com/2011-02-04/entertainment/27100696_1_experimental-music-gillis-pop-samples; see also Michiko Kakutani, *A Mash-Up Culture: Ten to Watch*, N.Y. TIMES, Mar. 17, 2010, available at <http://artsbeat.blogs.nytimes.com/2010/03/17/a-mash-up-culture-ten-to-watch/>; Joe Windish, *Girl Talk’s Gregg Gillis on Getting Sued*, THE MODERATE VOICE, Dec. 23, 2010, available at <http://themoderatevoice.com/96038/girl-talks-gregg-gillis-on-getting-sued/>.

111. DeLuca, *supra* note 110 (stating that the artist Girl Talk “stands behind the copyright-law doctrine of Fair Use, which allows artists to reuse source material if the work they create is ‘transformative’”).

112. Also, some artists, like movie directors, have noted “insurance companies have taken the position of refusing to issue policies for new works where the author has

Individuals and small companies are not the only ones whose creativity is stunted: “even large companies or well-funded institutions with the financial means to engage in an intensive search” for a copyright holder are not creating new works by using old works for fear of copyright infringement penalties.¹¹³ From educational facilities like the National Jazz Museum in Harlem, to creative artists and large institutions, the orphan works problem stifles expression.¹¹⁴ Additionally, the public at-large suffers from the general lack of access to orphan works, another major reason why the orphan works problem needs to be resolved.¹¹⁵

“[T]he orphan works problem [also] represents a major impediment to economic growth as vast stores of copyrighted works exist in legal limbo with no clear owner to contact for licensing permission [And the orphan works problem] represent[s] a real threat to the U.S. economy.”¹¹⁶ This threat comes in the form of potential users “abandoning or altering” their works altogether.¹¹⁷ American culture and economics suffer from stifled creativity due to the absence of a copyright owner,¹¹⁸ the realistic ability to find a

no documented permission to use excerpts of previous works.” Thompson, *supra* note 35, at 818. This pressures film producers “to alter the content of their films, dramatically in some cases, because they cannot locate a copyright holder and the risk of liability from proceeding without permission.” *Id.*

113. *Id.*

114. *See generally id.*

115. *See generally id.* at 815-17. The injury to the public and the need for a solution is supported by the Copyright Office’s roundtable hearings in 2005. The Copyright Office heard anecdotes like the following from a representative from Wal-Mart:

In our stores . . . we have . . . machines in there where you can bring in an old family photo, put it on there and copy it. What we run into mainly is . . . where you’ve got a . . . customer who brings in an old photograph . . . taken back in the ‘20s, ‘30s, ‘40s, and they just want a copy of it for their family album And we can’t copy it because [we can’t find the photographer and] our policy . . . supports the copyright law

Hickman, *supra* note 29, at 128.

116. Sage, *supra* note 13, at 300. *See generally* MICHAEL HELLER, *THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES* (2008) (discussing the effect of too much private ownership and how it creates a gridlock. In the copyright sense, too many people cannot find the copyright owners of the orphan works because the works are not yet in the public domain, thereby creating the gridlock, which is the orphan works problem. If there was a way around this gridlock, people could use the works, thereby creating more opportunity for wealth in the market and thereby boosting the economy).

117. Thompson, *supra* note 35, at 810.

118. An example of how our culture and economy suffers can be gleaned from an initial comment to the Copyright Office by Tom Poe, Director of Open Studios. Mr. Poe stated that an individual named Olu from Ghana, West Africa, requested the studio’s help in furthering his music career. Letter from Tom Poe, Director of Open Stu-

copyright owner, and the fear of liability if a copyrighted work is used and the copyright owner surfaces later.¹¹⁹

Moreover, with the existence of new technologies, the access to and use of copyright works are hindered by the orphan works problem.¹²⁰ Professor Van Houweling makes the argument that “the cultural importance and ubiquity of copyrighted texts, images, and sounds may make multimedia collage and other forms of creativity that incorporate existing copyrighted works even more vital forms of cultural commentary than they have been in the past.”¹²¹ Technology brings us in contact more frequently with copyrighted works, while also “break[ing] down [limitations to needing physical copies] by enabling the wide-ranging dissemination of nonphysical digital copies.”¹²² Additionally, “[t]he prevalence of orphan works undermines the benefits that these digital technologies provide.”¹²³ The digital age is supposed to be liberating creativity and new forms of expression, but with potential users trying to work off the “shoulders of giants,”¹²⁴ the benefits of the times we live in are wasted.¹²⁵

dios, to Jule L. Sigall, Assoc. Register for Policy & Int’l Affairs, U.S. COPYRIGHT OFFICE (Mar. 3, 2005), available at <http://www.copyright.gov/orphan/comments/OW0175-Poe.pdf>. Poe stated “[e]ach song would need to be ‘vetted’ for originality, then set to music, and . . . the music would [also] need to be ‘vetted’ for originality.” *Id.* But this cost money that Olu did not have. Olu may not have been able to create the music he wanted because the cost of identifying potentially copyrighted conflicts is not simple or cheap—in part due to orphan works. Furthermore, Poe noted that this scenario takes place in a lot of inner-city neighborhoods where “[t]he cost of identifying and arranging to pay unknown copyright holders is overwhelming.” *Id.* Artists’ creativity is being stifled—they cannot afford to legally create. Our economy is being similarly stifled by the lack of more creative works in the market.

119. See Sage, *supra* note 13, at 300; Thompson, *supra* note 35, at 810.

120. Huang, *supra* note 51, at 274 (stating that “orphan works hamper the creative potential that new technologies could unleash”).

121. *Id.* (quoting Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535, 1539 (2005)).

122. *Id.*

123. *Id.*

124. ON THE SHOULDERS OF GIANTS, *supra* note 26, at 725.

125. See generally Huang, *supra* note 51, at 274-76. It should be noted that technology has made it even easier to disseminate some types of creative works, specifically in the visual arts, which include photographs, paintings, graphics, sculptures, etc. Hickman, *supra* note 29, at 144-47. Visual artists may produce the easiest works to become orphaned due to “the very nature of their medium.” *Id.* They often “do not contain text or other information that a user can rely on to help determine the identity of the copyright owner.” REPORT ON ORPHAN WORKS, *supra* note 10, at 99. But with technology, especially Internet search engines, it is much easier for someone to find any visual image and copy it for their own use. Hickman, *supra* note 29, at 145. Though technology can help in creating new works, it also has some drawbacks for some artists in protecting their works. *Id.* Visual artists have a disadvantage that other artists, like authors of books, movies, or music, do not. *Id.* at 145-46. Parallel to the visual artist is

The orphan works problem, especially with respect to photographs and other forms of visual art, is quite prevalent for archives, libraries, and museums.¹²⁶ The majority of these institutions maintain massive collections of photographs where there is no indication of who the author is or was.¹²⁷ Libraries and archives want the ability to provide these works for the public, to expand and enrich our culture and learning—which are the underlying goals of the copyright—but are unable to because of the orphan status of these works and the risk of liability.¹²⁸ Visual art, then, is more likely to become orphaned more quickly, even if an author is still alive and the work’s commercial value is relatively high.¹²⁹

Visual art, however, is only one example of a type of work that becomes orphaned. Any type of creative work can become orphaned if the authors and/or copyright holders do not make themselves known. For these reasons, the Register of the Copyright Office completed its study and gave suggestions to Congress.

B. *Register of Copyright Office’s Recommendations*

The Copyright Office detailed its findings and made recommendations to Congress for a legislative solution.¹³⁰ The Office had two goals in mind when making recommendations: (1) there should be a system that puts owners and potential users together so they can come to an agreement about using a work; and (2) there should be a system in place so a user who, after trying to reasonably and diligently find a copyright owner, can still make use of the work.¹³¹

the music artist, who could turn to ASCAP, an organization that keeps the majority of information about a copyright holder of a piece of music. *Id.* Visual artists do not have an equivalent “umbrella organization” that represents their many interests, so even if a potential user wants to find the copyright information, he has no easy starting point as a user of a musical piece does. *Id.*

126. REPORT ON ORPHAN WORKS, *supra* note 12, at 25.

127. *Id.* (noting that “[t]ypically these institutions acquire these works by donation, such as where individuals give personal effects to a museum upon the death of a family member. . . . [And] the donors rarely have information about the copyright provenance of the materials they donate. These institutions then face a dilemma in striving to meet the expectations of donors and in fulfilling their institutional purpose of preserving and making works available, while also complying with the law of copyright and minimizing . . . liability for infringement.”).

128. *Id.*

129. Hickman, *supra* note 29, at 145.

130. REPORT ON ORPHAN WORKS, *supra* note 12, at 93. It should also be noted that the purpose of this Note is not to flesh out and analyze these recommendations in detail, but merely to mention them; such an in-depth discussion is beyond the scope of this Note.

131. *Id.* at 93-94.

Additionally, two other aspects were important to the Copyright office: first, that any legislation “should be independent of and work in conjunction with existing exemptions and limitations to copyright,”¹³² and second, that a solution to the orphan works problem should be efficient and not too burdensome on all parties involved.¹³³

The favored solution from all the commentators and the Copyright Office itself was that if a potential user has done a reasonably diligent search for a copyright owner’s information, yet is still unable to locate that owner, the potential user should be able to use the orphan work and become an actual user without fear of full-out statutory liability.¹³⁴ In addition, the recommendation had two main parts: first, two threshold requirements of a reasonably diligent search; and second, a limited list of remedies available to copyright holders if users are able to prove they conducted a reasonably diligent search.¹³⁵

The Copyright Office suggested that the reasonably diligent search needed to be completed before the orphan work was used, and it was the potential user’s burden to prove that the search she did was reasonable.¹³⁶ The Copyright Office further discussed what it meant to “locate” a copyright holder and perform a “reasonably diligent search.”¹³⁷ The Report also recommended a requirement that before an orphan work user would be within the safe harbor of any legislation, the user would have to provide any information on the copyright holder that the orphan work user was able to identify.¹³⁸ The reasoning behind this is to let the public know that the work is the product of another, at least to some extent.¹³⁹

The Copyright Office also suggested that if an orphan work user did all that was necessary within a statute, copyright owners, should they surface later, would have a limitation on remedies. The remedy would be limited to reasonable compensation for the use

132. *Id.* at 94.

133. *Id.* at 95.

134. *Id.*

135. *Id.* at 96.

136. *Id.*

137. *Id.* at 96-107.

138. *Id.* at 110.

139. *Id.* The Report goes on to explain the reasoning supporting this requirement: it provides more notice to authors and copyright holders; giving credit is important to copyright in the first place; since a diligent search was necessary, there should be at least some information that can be attributed; and, it diminishes the potential for abuse. *Id.* at 110-12.

and a limitation on the ability for full injunctive relief.¹⁴⁰ The Copyright Office recommended “a savings clause that makes clear that nothing in the new section on orphan works affects rights and limitations to copyright elsewhere in the Copyright Act,” and that, after ten years, Congress re-examine the issue after it has been in practice to see if any alterations are needed.¹⁴¹ Congress took the Copyright Office’s study seriously and decided to act.

C. *The 2008 Orphan Works Acts*

Based on the Copyright Office’s recommendations from the Report on Orphan Works, Congress created legislation in an attempt to solve the orphan work problem. The central theme of the proposed legislation in both chambers of Congress was “to limit the remedies a copyright holder may obtain against an infringer where the infringer performed a reasonably diligent search for the author of the work prior to use.”¹⁴² If a case for infringement was brought against orphan works users and they could show the fulfillment of the diligent search requirement, then the orphan work users would only be responsible for “reasonable compensation” to the copyright owner.¹⁴³ The policy behind this limitation was to promote greater use of creative works by reducing the fear of the full penalties afforded by copyright law.¹⁴⁴ Besides the diligent search language in each proposed Act, there was a second requirement compelling the orphan work user to give credit to the copyright holder when it was possible (e.g., when the user had some information on the copyright holder).¹⁴⁵

Continuing to follow the Copyright Office’s suggestions, the Act defined “reasonable compensation” as “the amount on which a willing buyer and willing seller in the positions of the infringer and the owner of the infringed copyright would have agreed with respect to the infringing use of the work immediately before the infringement began.”¹⁴⁶ A copyright holder, who was ultimately not found after the diligent search, would not be able to get injunctive

140. *Id.* at 115.

141. *Id.* at 121.

142. Andrews, *supra* note 106, at 111.

143. Shawn Bentley Orphan Works Act of 2008, S. 2913, 110th Cong. § 2 (2008); Orphan Works Act of 2008, H.R. 5889, 110th Cong. § 2 (2008).

144. Andrews, *supra* note 106, at 111; *see also* 17 U.S.C. § 504(c)(2) (2006) (stating that an award of statutory damages can be in an amount up to \$150,000 if the infringement is found to be willful).

145. S. 2913 § 2; H.R. 5889 § 2.

146. S. 2913 § 2; H.R. 5889 § 2.

relief so long as the orphan work user “recast, transform[ed], adapt[ed], or integrate[d] the infringed work with a significant amount of [the infringer’s] original expression.”¹⁴⁷ Limiting such relief is Congress’s “attempt to counteract [the] inefficiency” of a would-be user’s fear of liability, which would result in her not “making productive use” of the orphan work.¹⁴⁸

IV. ORPHANS LEFT OUT IN THE COLD

Despite the extensive study and data collected by the Copyright Office and Congress’s attempt at legislation, there is still no orphan works act today. The Senate passed the bill, but the House refused to. It seems that, at least to the House, the Orphan Works Act of 2008, had “significant drawbacks.”¹⁴⁹ The drawback that this Note focuses on is the provision requiring judicial determination of whether an orphan work user performed a reasonably diligent search. This uncertainty in the litigation would create a chilling effect on potential users, who would have to fear the cost of litigation just as much as the cost of having to pay the copyright holder if she ever surfaced.¹⁵⁰

The objections did not come solely from the legislature, as copyright holders also had a problem with the proposed Orphan Works Act—particularly visual artists, who may have been the most adversely affected. Visual artists often do not publish their work with credit lines or, if there was notice of the copyright owner, new technology made it so others could remove such notice.¹⁵¹ Thus, even if a visual artist has her work registered with the Copyright Office, someone could easily remove the notice and re-upload the work to the Internet for display. A user finding the vandalized work may then find it impossible to find the copyright holder.¹⁵² Furthermore, the majority of visual artists are more prolific than “creators

147. S. 2913 § 2; H.R. 5889 § 2. This is similar to creating a derivative work, which is defined as “a work based upon one or more preexisting works . . . in which a work may be recast, transformed, or adapted.” 17 U.S.C. § 101 (2006).

148. Andrews, *supra* note 106, at 112.

149. *Id.* at 113. The “reasonable compensation” aspect of the 2008 proposed bill was one such drawback, as was whether a search was “reasonably diligent.” *Id.* Discussing the impact of an unfavorable meaning and determination of “reasonable compensation” is outside the scope of this Note.

150. *Id.*

151. *Orphan Works 2008*, S. CAROLINA NEWS PHOTOGRAPHERS ASS’N, (Oct. 6, 2008), available at <http://www.scnpa.org/2008/10/06/orphan-works-2008/>.

152. *Id.* The author of the article dramatically points out that the Act “would force artists to risk their lives’ work” because of the parameters built into it. *Id.*

of literary, musical and cinematographic works,” and so “[t]he cost and time-consumption to individual artists of registering tens of thousands of visual works, at even a low fee, would be prohibitive.”¹⁵³

Copyright holders also feared the proposed bills’ lack of definition for “reasonably diligent search” could lead to a “case-by-case” definition among the federal courts, potentially leading to different results in different cases.¹⁵⁴ Essentially, determining what exactly was “reasonable” when conducting a search created inherent uncertainty for both potential users and copyright holders.

V. OPTIONS FOR ORPHANS: ALTERNATIVES TO LEGISLATIVE ACTION

Congress, through the introduction of legislation, attempted to strike a compromise for copyright holders and orphan work users. Unfortunately, the legislation was not passed, and the orphan works problem remains. The orphans were dropped from the legislative stage and have yet to return. As noted, the problem is not dwindling; it makes sense to address the problem now rather than deal with it at a time when it is likely to have become an even more pressing issue.

The 2008 proposals were a step in the right direction, but because of their ultimate failure, the orphan works problem continues. This Note advocates a legislative solution to this problem; however, there are alternatives to this approach that may be potentially viable and are worth exploring here.¹⁵⁵

A. *Water Law*

The argument has been made that water law in the American West might provide the basis for a solution to the orphan works problem, making up for what the bills lacked.¹⁵⁶ The argument

153. *Id.* The cost of filing for registration with the Copyright Office is \$35 if done online, and \$65 if done in hard copy. *Electronic Copyright Office*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/eco/> (last visited May 24, 2012).

154. David Rhodes, *The Orphan Work You Save Could Be Your Own*, AIGA, THE PROF. ASS’N FOR DESIGN, (Jun. 3, 2008) available at <http://www.aiga.org/the-orphan-work-you-save-could-be-your-own/>.

155. *Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666, 677 (S.D.N.Y. 2011) (similarly noting that “[t]he questions of who should be entrusted with guardianship over orphan books, under what terms, and with what safeguards are matters more appropriately decided by Congress . . .”). *Id.*

156. Sage, *supra* note 13, at 295-96; see also TERRY L. ANDERSON & PETER J. HILL, *THE NOT SO WILD, WILD WEST: PROPERTY RIGHTS ON THE FRONTIER* 203

analogizes copyrights to water, contending that both are unable to be “captured from the commons in the same way that chattels and land are captured” yet both are valuable resources.¹⁵⁷ When Americans moved west, they began to change their thinking about water because water was not as readily available as it was in the East.¹⁵⁸ The water-law-copyright argument posits that there needs to be a similar national shift in how Americans think about intellectual property generally; it should be seen more like “[a] [s]carce [r]esource” than an infinite one and should be treated as such.¹⁵⁹ Like water law in the West, if one did not use his water, he thus lost the right to it; similarly, if a copyright holder does not use his or her copyright (mainly because there is no economic incentive), he or she would lose his or her right to it.¹⁶⁰ Furthermore, “[i]t seems reasonable to allow the copyright owner to move back in and reassert her rights to the copyright’s revenue stream.”¹⁶¹

This sort of “use it or lose it” scheme could potentially come through grassroots efforts,¹⁶² but “U.S. policy will still need to *officially* legitimize the nominally unauthorized use of orphan works.”¹⁶³ The official legitimization would come through legislation, and if there is going to be legislation in the end, the most efficient way is to persuade Congress to tackle the issue head on.

The “use it or lose it” policy, though sound, is not realistic in today’s copyright environment. Today in the United States, much of copyright law reform and legislative amendments have a recurring theme that “[t]he advantages of [adopting European guidelines] . . . outweigh[s] any possible disadvantages.”¹⁶⁴ The European countries did not have issues with water law like the Americas did, decreasing the likelihood that European countries will solve their orphan works problem, which is similar to the

(2004) (noting that “[t]he lessons from the American West not only are usefully applied to history but also provide insights into how property rights are evolving and will evolve on new frontiers”).

157. Sage, *supra* note 13, at 309; *see also* STEPHEN E. SIWEK, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2003-2007 REPORT 3 (2009), available at <http://www.iipa.com/pdf/IIPASiwerekReport2003-07.pdf> (estimating that copyright’s economic value to the United States economy was \$1.52 trillion in 2007).

158. Sage, *supra* note 13, at 307.

159. *Id.* at 310.

160. *Id.* at 315.

161. *Id.* at 314.

162. *Id.* at 314-15.

163. *Id.* at 315-16 (emphasis added).

164. H.R. Rep. No. 94-1476, at 136; *see also* Thompson, *supra* note 35, at 804.

United States',¹⁶⁵ by analogizing to water law, or promulgating a "use it or lose it" policy.

B. *Collective Rights Organizations and Privatization*

Arguably, the government is not the solution to the orphan works problem; rather private organizations provide the answer through privatization of intellectual property rights and using collective rights organizations (CROs).¹⁶⁶ CROs function as a middleman by accumulating individual works and then selling licenses to customers who are permitted to use the work for a fee.¹⁶⁷ CROs make the licensing process easier while still allowing authors to have control of their works.¹⁶⁸

Today there are many CROs that help both people who want to use copyrighted works and copyright owners who want to receive royalties and exercise control over their works.¹⁶⁹ As an example of how this privatization may work for orphan works, imagine that a magazine wants to include an article one of its editors found. Instead of the magazine finding and negotiating terms with the individual copyright owner of the article, the magazine could pay an

165. See generally Korn, *supra* note 102.

166. Andrews, *supra* note 106, at 99 (noting that "[w]hile it is most common for a government to initially grant property rights, private organizations can, and have, created and enforced [Intellectual Property Rights] without any initial government grant"); Mark B. Radefeld, Note, *The Medium is the Message: Copyright Law Confronts the Information Age in New York Times v. Tasini*, 36 AKRON. L. REV. 545, 575-76 (2003).

167. Michael A. Forhan, *Tasini v. New York Times: The Write Stuff for Copyright Law?*, 27 CAP. U. L. REV. 863, 882 (1999).

168. *Id.*

169. The National Writers Union created the Publication Rights Clearinghouse (PRC) to administer collective licensing of freelance work, and digitally process permission payments. See Yuri Hur, Note, *Tasini v. New York Times: Ownership of Electronic Copyrights Rightfully Returned to Authors*, 21 LOY. L.A. ENT. L. REV. 65, 91 n.267 (2000). In the music industry, performance rights organizations—ASCAP, BMI, and SESAC—monitor public performances and broadcasts of copyrighted music. The function of these organizations is to negotiate licensing fees and then collect those fees to distribute to copyright holders as royalties. See Andrews, *supra* note 106, at 114. In the book world, there was an attempt to have the Amended Settlement Agreement by Google for the Google Book Project, which had an aspect called the Book Rights Registry which was supposed to act as a CRO for books, to be accepted by the court. See generally *Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666, 670 (S.D.N.Y. 2011); Andrews, *supra* note 106, at 118; *FAQs, Google Book Settlement*, GOOGLE, <http://www.googlebooksettlement.com/help/bin/answer.py?answer=118704&hl=en#q1> (last visited May 24, 2012). "The Registry will have the authority to act as a non-exclusive licensor representing the interests of rightsholders. . . . The Registry will work as a middleman between Google and rightsholders, collecting licensing revenues from Google and distributing them to authors and publishers." Andrews, *supra* note 106, at 118.

already determined fee to a CRO for published articles. The duty would then be placed on the CRO to find the owner of the copyright if the copyright holder is a member of the CRO.¹⁷⁰ If the work happened to be orphaned, there could be a potential “pool” of revenue for when those copyright owners come forward. This process is arguably beneficial and helps works get used whether the work is an orphan or not.

Despite the benefits of CROs, there are drawbacks. First, private, self-interested parties may not always try to follow copyright laws, and therefore, in a situation where there is no law, it would be better for Congress to contemplate and create such a law.¹⁷¹ Also, not every form of art is represented by a CRO, nor is every artist or copyright holder necessarily represented by a CRO.¹⁷² Legislation, in contrast, would act as a blanket and cover all types of creative works with safeguards for all.¹⁷³ Privatization also gives rise to “[p]otential antitrust violations” because setting up collective rights organizations can “have the potential to function as [a] monopol[y]

170. It is important to note that not all types of creative works have a CRO looking out for their interests. See *supra* note 125 and accompanying text explaining visual artists’ difficulties in this area compared to musical artists. It is also important to note that just because a CRO represents the majority of a specific type of creative works’ artists, that does not mean all of the artists *are* represented. See *infra* note 172 and accompanying text.

171. See *Authors Guild*, 770 F. Supp. 2d at 677-78 (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003)) (noting how safeguards for copyright protection many not fully be in place in private, self-interested agreements, and that “it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause’s objectives”).

172. For example, just because one is a music artist or a publisher of music does not necessarily mean he or she is represented by ASCAP or BMI. One must become a member of one of these organizations first. See *About ASCAP*, *supra* note 88 (representing “more than 420,000 U.S. composers, songwriters, lyricists, and music publishers”). The Amended Settlement Agreement was only to apply to books that Google decided to copy onto its website, and there were limitations on what is considered a *book* and an *insert*. See *FAQs*, *supra* note 169. It is important to note that the organization Picture Licensing Universal System (PLUS) is on a “mission[] to simplify and facilitate the communication and management of image rights,” while also trying to help those who “creat[e], distribut[e], us[e] and preserv[e] images.” *Picture Licensing Universal System*, PLUS, <http://www.useplus.com/> (last visited May 24, 2012).

173. Andrews, *supra* note 106, at 125.

and extract a surplus from users.”¹⁷⁴ This monopoly concern is not applicable if there is a legislative solution.¹⁷⁵

VI. LEGISLATIVE ACTION

A. *Legislative Benefit*

Legislation is the most advantageous way to resolve the orphan works issue because it creates uniformity and consistency in copyright law.¹⁷⁶ As our elected representatives, Congressmen should represent what the nation, as a whole, would want.¹⁷⁷ In addition, a legislature “can commission studies, take testimony, and conduct continuing oversight investigations.”¹⁷⁸ This is further illustrated by the Register of the Office of Copyright through research that was conducted in 2006. Each bill had a provision regarding a re-evalua-

174. *Id.* at 106-07. In the 1930s, fashion guilds created a CRO called the Fashion Originator’s Guild of America (FOGA) and tried to protect against ‘style piracy’ despite the fact fashion design was not and is still not protected by copyright or patent law. But the Supreme Court held FOGA to be illegal on antitrust grounds. *See Fashion Originators’ Guild of Am. v. Fed. Trade Comm’n*, 312 U.S. 457, 461-68 (1941); Andrews, *supra* note 106, at 99-100. ASCAP grew to be a huge player in the music industry and there were concerns among the courts of its monopolistic power and had antitrust concerns. *See e.g.*, *Broad. Music, Inc. v. Columbia Broad. Sys.*, 441 U.S. 1, 6 (1979); *Buffalo Broad. Co. v. Am. Soc’y of Composers, Authors and Publishers*, 744 F.2d 917, 920-22 (1984). To avoid future antitrust litigation, ASCAP had to change its licensing system. *See Bernard Korman & I. Fred Koenigsberg, Performing Rights in Music and Performing Rights Societies*, 33 J. COPYRIGHT SOC’Y U.S.A. 332, 355-56 (1985-86); Michael B. Rutner, Note, *The Ascapi Licensing Model and the Internet: A Potential Solution to High-Tech Copyright Infringement*, 39 B.C. L. REV. 1061, 1076 (1998).

175. *See Authors Guild*, 770 F. Supp. 2d at 677; Andrews, *supra* note 106, at 125.

176. The United States Supreme Court has recognized the “necessity of having a clearer rule” even at the expense of creating “anomalies.” *Hertz Corp. v. Friend*, 130 S.Ct. 1181, 1194, (2010) (determining that a corporation’s principal place of business, for diversity jurisdiction purposes, is its nerve center). The Court noted that there are benefits in having “a more uniform legal system.” *Id.* at 18; *see also Cynthia Lee, The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 550 (2008) (pointing out that a simple way to solve the issue of “gay panic” evidence issue in the courtroom may be to have legislative action which has the benefits of “[a]ll judges in the relevant jurisdiction [being] required to follow the legislative rule, leading to uniform results in similarly situated cases”).

177. *See generally* BRUCE MIROFF, RAYMOND SEIDELMAN & TODD SWANSTROM, *THE DEMOCRATIC DEBATE: AN INTRODUCTION TO AMERICAN POLITICS* 322 (4th ed. 2007) (stating that Congress is considered “the ‘people’s branch’—a branch filled with citizen-lawmakers, accessible to citizens who wished to be heard, open to citizens who wished to hear its deliberations, resistant to arbitrary action and secrecy from the executive,” and stating “[a]s the most representative branch of American national government, Congress [would] be expected to speak for the concerns, grievances, and interests of popular democracy”).

178. Lee, *supra* note 176, at 550.

tion of the state of the orphan works issue after the law had been in effect for two years.¹⁷⁹ Such a provision would help Congress understand the effects of legislation on the orphan works problem and whether further legislation could be created.

The predominant reason the Orphan Work Act of 2008 did not pass in the House, and therefore in Congress overall, was that the phrase “reasonably diligent search” was too vague and would have caused too much of a problem for artists in general.¹⁸⁰ A clearer, well-defined articulation would more likely overcome the impasse the bill could not overcome in 2008 and would then become law. As a result, the fear of liability would be ameliorated if a copyright holder later surfaces, thereby resolving the orphan works issue.

B. *Defining Diligence*

The proposed Act required the user of an orphan work to conduct a “reasonably diligent search,” but what those words meant was vague.¹⁸¹ If the drafters of a newly drafted bill were clearer in their definition of this key phrase, then such a bill would have more support from the artistic community at-large and the legislature would be more willing to make this part of the law.

Black’s Law Dictionary defines “diligent” as “[c]areful; attentive; persistent in doing something,”¹⁸² and “diligent inquiry” as “[a] careful and good-faith probing to ascertain the truth of something.”¹⁸³ Looking at other areas of the law can create a guidable definition of a “reasonably diligent search.”

179. Shawn Bentley Orphan Works Act of 2008, S. 2913, 110th Cong. § 5(c) (2008); Orphan Works Act of 2008, H.R. 5889; 110th Cong. § 7(b) (2008). Both proposed bills stated the following language, with some slight variation:

Not later than 2 years after the date of the enactment of this Act, the Comptroller General shall submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate a report on the study conducted under this section, including such administrative, regulatory, or legislative recommendations that the Register considers appropriate.

H.R. 5589 § 7(b).

180. Andrews, *supra* note 106, at 125. See generally Brad Holland, *Trojan Horse: Orphan Works and the War on Authors*, 36 J. BIOCOMMUNICATION E31, E31 (2010) (noting the orphan works legislation was stopped in 2006 and 2008 “by an aggressive opposition campaign led by artists and photographers”).

181. S. 2913 § 2; H.R. 5889 § 2.

182. BLACK’S LAW DICTIONARY 523 (9th ed. 2009).

183. *Id.*

1. Internal Revenue Code

The Internal Revenue Code (the Code) can assist the legislature in drafting a better definition of a “reasonably diligent search” for orphan works users. The courts discussed below have dealt with the issue of adequate evidence to prove a deduction for income tax and these courts’ reasoning should act as guidance for Congress in drafting a new bill regarding orphan works.

Section 274 of the Code is concerned with entertainment expense deductions of business expenditures.¹⁸⁴ Section 274(a)(1) generally states that one cannot claim an entertainment expense as a deduction “unless the taxpayer establishes that the item was directly related to, or, in the case of an item directly preceding or following a substantial and bona fide business discussion . . . that such item was associated with, the active conduct of the taxpayer’s trade or business.”¹⁸⁵

To illustrate how this section of the Code works, consider *Hughes v. Commissioner*,¹⁸⁶ in which the taxpayer was a television stage manager at New York’s CBS studio between 1963 and 1964.¹⁸⁷ Part of his job included keeping up the morale and keeping the crew fed. The manager would buy coffee, doughnuts, sandwiches, and drinks for their consumption.¹⁸⁸ Pursuant to section 274(d) of the Code, the taxpayer wanted to deduct half of the cost of the expenses. The Tax Court held that the expenses claimed could not be deducted because the taxpayer had failed to substantiate the records properly.¹⁸⁹ Essentially, the taxpayer only had a few receipts from one bar, and no other documentation.¹⁹⁰ Section 162(a) of the Internal Revenue Code allows an individual taxpayer to deduct from his gross income “all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business.”¹⁹¹ But section 274(d) of the code states that:

No deduction or credit shall be allowed . . . unless the taxpayer substantiates by adequate records or by sufficient evidence corroborating the taxpayer’s own statement (A) the amount of such

184. I.R.C. § 274 (2006).

185. I.R.C. § 274(a)(1)(A).

186. *Hughes v. Comm’r*, 451 F.2d 975 (2d Cir. 1971).

187. *Id.* at 976.

188. *Id.*

189. *Id.*

190. *Id.*

191. I.R.C. § 162(a) (2006).

expense or other item, (B) the time and place of the . . . entertainment, amusement, recreation . . . (C) the business purpose of the expense . . . , and (D) the business relationship to the taxpayer of persons entertained¹⁹²

The Treasury regulations pursuant to section 274(d) state that “adequate records” include “account book, diary, log, statement of expense . . . or similar record . . . and documentary evidence . . . which, in combination, are sufficient to establish each element of an expenditure.”¹⁹³ If the taxpayer cannot meet the adequate record requirement, there is an alternative, according to the Regulations; the taxpayer must establish each element of the expenditure “(A) By his own statement, whether written or oral, containing specific information in detail as to such element; and (B) By other corroborative evidence sufficient to establish such element.”¹⁹⁴ Furthermore, “[i]f such element is . . . the cost or amount, time, place, or date of an expenditure . . . , the corroborative [sic] evidence shall be direct evidence, such as a statement in writing or the oral testimony of persons entertained or other witnesses setting forth detailed information about such element.”¹⁹⁵

This section of the Code can be referred to as the “5-Ws” because it requires the taxpayer to provide information on “Who? What? Where? When? and Why?” in order to get an entertainment expense allowed as a deduction. The Internal Revenue Service expects taxpayers to keep adequate records as reflected in Treasury Regulation § 1.274-5. The taxpayer in *Hughes* could not sufficiently establish the record, because there were no written records or other evidence substantiating the business purpose of the expenses, nor were the taxpayer’s oral statements corroborated to meet the requirements under section 274(d).¹⁹⁶

Another illustration on how section 274(d) works is in the case of *Townsend Industries, Inc. v. United States*, where the taxpayer wanted to deduct a fishing trip that he and his employees went on as a directly related business expense.¹⁹⁷ In *Townsend*, “the real crux of the matter” was determining whether the taxpayer could sufficiently prove that the trips were reasonable and necessary to

192. I.R.C. § 274(d).

193. Temp. Treas. Reg. § 1.274-5T(c)(2) (2011); *see also* *Hughes v. Comm’r*, 451 F.2d 975, 976-77 (2d Cir. 1971).

194. Temp. Treas. Reg. § 1.274-5T(c)(3); *see also* *Hughes*, 451 F.2d at 977.

195. Temp. Treas. Reg. § 1.274-5T(c)(3); *see also* *Hughes*, 451 F.2d at 977.

196. *Hughes*, 451 F.2d at 977-78.

197. *Townsend Industries, Inc. v. United States*, 342 F.3d 890, 891 (8th Cir. 2003).

the business therefore deductible under section 274.¹⁹⁸ The district court decided that the evidence was not sufficient because it was made up of “witnesses’ recollections” and therefore “lacked the necessary specificity,” but the Eighth Circuit reversed.¹⁹⁹ For the Circuit Court, the witness testimony was extensive enough on the whole to satisfy the requirements set forth in 274(d).²⁰⁰ Although it held in favor of the taxpayer, the Eighth Circuit admonished district courts to “be suspicious of oral, non-contemporaneous evidence provided in such cases.”²⁰¹

Courts have emphasized that a taxpayer’s own statement, standing alone, is not sufficient.²⁰² In *Charron v. United States*,²⁰³ the taxpayers were Canadian citizens seeking refunds on income they earned from playing professional hockey in the United States.²⁰⁴ The court determined that none of the documentation submitted by the taxpayers was valid, and that relying only on vague testimony that was seen as “unpersuasive, unsubstantiated[,]” and unsupportive as well as relying on their tax returns was not enough to satisfy 274(d).²⁰⁵

The Internal Revenue Service has required taxpayers to keep detailed records in the event of an audit. The fear of being audited is similar to the fear of an orphan work’s copyright owner coming forward, except if an orphan work copyright owner surfaces, and one has appropriated the work without permission the consequences could be more dire.²⁰⁶ Similarly, a diligent search done by an orphan work user needs to be as detailed as the record keeping of a responsible taxpayer. If Congress worded the statute as to demand the “Who? What? Where? When? and Why?” of a search, it would be easier for courts to determine if the search truly was diligent and reasonable.

Congress can learn from the teachings of these courts, and others like them. For example, oral testimony may be acceptable evidence for orphan works users, so long as it can pass muster and

198. *Id.* at 895.

199. *Id.* at 894.

200. *Id.* at 895.

201. *Id.* at 898.

202. *Berkley Mach. Works & Foundry Co. v. Comm’r*, 623 F.2d 898, 906-07 (4th Cir. 1980).

203. *Charron v. United States*, 200 F.3d 785, 786 (Fed. Cir. 1999).

204. *Id.* at 786.

205. *Id.* at 793.

206. 17 U.S.C. § 504(c)(2) (2006) (imposing a maximum fine of \$150,000 for each willful infringement).

be considered extensive enough. Provisions and interpretations such as these should be kept in mind, and Congress will be able to guide users to conduct, and prove they conducted, a reasonably diligent search.

2. Federal Rules of Evidence Rule 803(10)

The Internal Revenue Code is not the only guidance in attempting to define diligence in searching. Rule 803(10) of the Federal Rules of Evidence states that “[t]o prove the absence of a record, report, statement or data compilation . . . evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry” must be shown.²⁰⁷ This has been interpreted to mean the “essential requirement of [the rule] is that evidence of the absence of a record be the result of a ‘diligent search.’”²⁰⁸ In *United States v. Yakobov*, the Federal Bureau of Alcohol, Tobacco and Firearms (ATF) had a certificate indicating a diligent search was conducted, but the court looked at the document and stated:

The ATF Certificate states that [the custodian of ATF licensing records] searched for a license or application for “Jakubov, Simantov.” There is no indication that any search was made under the name “Yakobov” or “Yakubov.” The use instead of misspelled versions of both Yakobov’s first and last names hardly suggests diligence “It hardly requires extended discussion to demonstrate that a casual or partial search cannot justify the conclusion that there was no record,” and we conclude that the ATF Certificate was not admissible under Rule 803(10).²⁰⁹

To the court, a diligent search had clearly not been conducted. The *Yakobov* court further noted that in such a situation the document

207. FED. R. EVID. 803(10) (2006).

208. *United States v. Yakobov*, 712 F.2d 20, 24 (2d Cir. 1983). The defendant was charged with unlawfully engaging in firearms dealing. *Id.* at 22. The government tried to prove this by a signed certificate by the custodian of firearms licensing records—records that stated a diligent search had been conducted across several states’ records and no license was found to be held by the defendant. *Id.* at 22-23. The defendant appealed his conviction stating the admission of the certificate was erroneous. *Id.* at 22. The appellate court agreed stating the certificate could not come into evidence because Federal Rules of Evidence 803(10) required a diligent search, which was not done here. *Id.* at 24.

209. *Id.* (citations omitted) (quoting *United States v. Robinson*, 544 F.2d 110, 115 (2d Cir. 1976)).

itself can be instructive on whether a diligent search was done or not.²¹⁰

Potential orphan works users can keep in mind the lesson of *Yakovov*: in situations involving the spelling of the name of a potential copyright owner, diligence implies testing different spelling variations. A broader, more applicable lesson can be learned in helping define “reasonably diligent search.” If a single form of search fails, other avenues should be undertaken, and a user should be responsible for recording each search attempt. Furthermore, the records an orphan work user keeps should be adequate enough to indicate on their face that a diligent search was conducted. Evidence that is facially lacking, in that it is too short or it does not show multiple avenues taken in a search, can be considered insufficient evidence of a diligent search.

3. Serving Notices

Another place Congress can look for guidance in drafting and explaining the requirement of a “reasonably diligent search” is in the realm of the service of process. The following cases provide examples of courts defining “reasonably diligent search” in the context of serving notices. Congress can apply similar techniques for defining “reasonably diligent search” in the orphan work context and provide guidance for users of orphan works.

a. Bankruptcy

An old, but still applicable, case that may shed light on what it means to conduct a reasonably diligent search is *In re Bayley*.²¹¹ The court officer was required to serve notice on the debtor regarding an execution issued for the sale of property. The officer’s goal was delivery of the notice in hand to the debtor. The officer was expected to “use reasonable diligence to make the service.”²¹² Merely stating that the person to be served, here the debtor, was not where the court officer thought he should be was not good enough for the court.²¹³ A diligent search requires more.²¹⁴ The

210. *Id.*

211. *In re Bayley*, 132 Mass. 457, 457 (1882) (regarding the sale of a debtor’s property after an execution was issued by the court; the officer who delivered the execution stated he complied with the statute’s standard regarding serving the debtor notice on the sale of the property, but the court held that the officer did not conform to the diligent search standard).

212. *Id.* at 461.

213. *Id.*

record indicated that the officer had heard that the petitioner “was probably not” at home, and “made no further inquiry or search, and no attempt to make any legal service of the notice.”²¹⁵ The court found that the officer had not conducted a diligent search of the debtor and that the debtor did not have notice, as he had never been served.²¹⁶ It is clear that to have conducted a proper diligent search, the officer should have actually gone to the petitioner’s home, confirmed firsthand, and had actual, personal knowledge that the debtor was or was not at home, and if not, the officer should have made further inquiries as to the debtor’s whereabouts.

Again, there is a lesson to be learned here for orphan works users. Simply being told that a copyright holder’s identity is impossible or unlikely to be ascertained is insufficient for conducting a reasonably diligent search. The orphan work user must conduct the search, regardless of how unlikely it is that information may eventually be found, and additionally, will need to document and record the details of the search. Through this, the orphan work user can gain protection under the statute.

b. Forfeiture of Real Estate

Another example of a court defining diligent search is in *Qualley v. State Federal Savings & Loan*.²¹⁷ In this case, the defendants sold real estate to a third party, David Rosenberger, who later assigned his rights to the plaintiff.²¹⁸ There was no address on the assignment for the plaintiff.²¹⁹ The defendants wanted to forfeit the rights of Rosenberger and had to give forfeiture notice to the assignees.²²⁰ The defendants said they conducted a diligent search, but the court found differently.²²¹

The court stated “[a] diligent search is measured not by the *quantity* of the search but the *quality* of the search,”²²² and, furthermore:

214. *Id.*

215. *Id.*

216. *Id.*

217. *Qualley v. State Fed. Sav. & Loan*, 487 N.W. 2d 353, 355-57 (Iowa Ct. App. 1992).

218. *Id.* at 354.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* at 355 (emphasis added).

In determining whether a search is diligent, we look at the attempts made to locate the missing person or entity to see if attempts are made through channels expected to render the missing identity. While a reasonable search does not require the use of all possible or conceivable means of discovery, it is an inquiry that a reasonable person would make, and it must extend to places where information is likely to be obtained and to persons who, in the ordinary course of events, would be likely to have information of the person or entity sought.²²³

In a broader context, this language can be applied to orphan works. Orphan work users cannot solely look in superficial places when conducting a copyright holder. Simply stating that one looked in a single database, without explaining more about the quality of the database or why other databases were not used, will not be deemed a diligent search. Orphan work users must make an honest effort to look for copyright holders through reasonable channels. This may mean contacting the BMI or ASCAP (in the case of a music work), publishing companies, or the copyright office, etc. If orphan work users are serious about using the work for their own purpose and the furtherance of culture and society, the bargain being struck is that Congress will remove the usual statutory penalty for infringement only if the orphan work users prove they have made an acceptable effort to find the copyright holder.

VII. APPLYING WHAT IT MEANS TO BE DILIGENT

Part VI illustrated that defining a reasonably diligent search is not difficult if Congress looks at other areas of law as models for an orphan works bill. Based on the foregoing examples, a reasonably diligent search requires the keeping of detailed records of the search process, qualitative searching as opposed to solely quantitative searching, searching avenues and channels that are likely to produce results, and not relying on the unlikelihood of something being found.²²⁴ If orphan work users can prove that they satisfied these requirements, in accordance with new legislation outlining

223. *Id.*

224. *See supra* Part VI (discussing the importance of keeping an adequate written record, like that required under section 274(d) of the Internal Revenue Code; attempting different spellings of names unlike the ATF officer in *United States v. Yakobov*, 712 F.2d 20, 24 (2d Cir. 1983); and doing a quality search, not just quantitative, unlike those in *In re Bayley*, 132 Mass. 457, 460 (1882) and *Qualley*, 487 N.W.2d at 353)).

theses factors, then orphan work users would not be liable for the full infringement under section 504 of Title 17.²²⁵

By applying the standards established by the other areas of law, it is clear that the orphan works problem can be resolved through clearly defined language.²²⁶

A. Books—*The Google Library Project*

Google attempted to create a CRO regarding books, to be called the Book Rights Registry.²²⁷ For purposes of this section, assume that Congress had passed the Orphan Works Bill, with more exact language defining the term “reasonably diligent search” according to the aforementioned case law,²²⁸ before Google embarked on its Library Project. It is clear that, under the current copyright statutes, Google would have to acquire permission and likely pay licensing fees to the rightsholders who could be and are readily found. It is the not-so readily found copyright holders that are at issue—the orphans’ vanished parents.

The examples above, describing how courts and statutes have defined diligent searches, illustrate what Google would have to do in order to satisfy a newly proposed Orphan Works Bill, if Congress were to create one. Taking aspects from the Internal Revenue Code, Google would have to keep a detailed record of everything it searched—who it tried to look up; what it did or did not find; where it did or did not find information; when it conducted its search (the

225. 17 U.S.C. § 504 (2006) (discussing what an infringer of copyright may be liable for, including the copyright owner’s actual damages and any additional profits of the infringer, or statutory damages as high as \$150,000).

226. The following examples will not only look at different types of copyright works (books, music, and visual art) but also illustrate the various sizes and resources of orphan work users. Google represents the “large” orphan work user; the Museum is the “medium” user; the professor is the “small” or individual user. One might wonder if the standard for a “reasonably diligent search” should be different depending on the size and resources available to a particular an orphan work user. The author of this Note thinks that a clearly drafted definition of “reasonably diligent search” should be able to be applied equally for every type of orphan work user, regardless of resources.

227. See *supra* note 169 and accompanying text.

228. *Yakovov*, 712 F.2d at 23-24 (discussing what it means to diligently search for a name regarding a requirement under Federal Rule of Evidence 803(10)); *Charron v. United States*, 200 F.3d 785, 792 (Fed. Cir. 1999) (discussing the Internal Revenue Department’s requirement of adequate record keeping under section 274(d) of the Code); *Berkley Mach. Works & Foundry Co. v. Comm’r*, 623 F.2d 898, 901 (4th Cir. 1980) (same); *Hughes v. Comm’r*, 451 F.2d 975, 979 (2d Cir. 1971) (same); *Qualley*, 487 N.W. 2d at 355-57 (discussing diligence in the forfeiture of real estate setting); *In re Bayley*, 132 Mass. at 460 (discussing diligent search of debtor after the execution of property for sale).

time frame and time spent searching); and why it looked in the places it did (explaining why it looked in some places depending on information gathered or dead ends encountered).²²⁹ A record of all these things would be a *start* for establishing a diligent search.

Having the record is not enough—the quality of the record and the information contained within the record also needs to be of a quality that is considered diligent.²³⁰ If testimony is to be relied on, it must be extensive and corroborated. Searching multiple places and databases is important.²³¹ Finding nothing will be frustrating, but it cannot be the end right away, because diligence requires more. Google will have to inquire with publishers, with the libraries it gets the books from, with the copyright office, and with the authors of the books. If the author is dead, a diligent search may include attempting to learn when he or she died and who inherited the rights.

It is important that Google make “an inquiry that a reasonable person [or entity] would make, and it must extend to places where information is likely to be obtained and to persons who, in the ordinary course of events, would be likely to have information of the person or entity sought.”²³² On the face of its evidence, it must be apparent that Google’s search was thorough, extensive, and diligent. If Google went through the detail-oriented search process for each orphan work it wanted to use, it would be safe from litigation as an outright infringer.

B. *Music—The Savory Collection*

The advantage of the proposed legislation is that it can apply to all forms of creative works. Another inquiry is what would someone who wants to use a musical recording have to do in order to prove it conducted a diligent search? The National Jazz Museum of Harlem and the Savory Collection will provide this section’s example.²³³

229. See I.R.C. § 274(d); Temp. Treas. Reg. § 1.274-5T(c)(2); *Charron*, 200 F.3d at 792 (discussing the Internal Revenue Department’s requirement of adequate record keeping under section 274(d) of the Code); *Berkley*, 623 F.2d at 901 (same); *Hughes*, 451 F.2d at 979 (same).

230. *Qualley*, 487 N.W. 2d at 355.

231. *In re Bayley*, 132 Mass. at 461 (had the court officer looked for the debtor other than at the debtor’s home, a sufficient search, one to be considered diligent, would have taken place and therefore the notice might have been effective).

232. *Qualley*, 487 N.W. 2d at 355.

233. See *supra* Introduction.

Currently, the Museum is digitizing the discs, but all agree the current copyright status is “complicated”;²³⁴ a “minefield . . . [that is] unclear.”²³⁵ The Museum can feature the recordings to visitors in Harlem and present snippets online,²³⁶ but that does not mean the entire song can be released to the public. The Museum owns the physical discs, but not the music on them.²³⁷

But what if copyright laws were not so unclear and confusing? What if there was an Orphan Works Act that provided clear “reasonably diligent search” language? Like Google, the Museum would have to keep a record and a trail of the “Who? What? Where? When? and Why?” of the search.²³⁸

Although the Museum knows the name of the artists, one cannot assume that the artists own the copyrights today.²³⁹ The artists would be a good starting point, but many may have assigned their rights elsewhere, or have since died and passed their rights on in a testamentary fashion. There are organizations that the Museum would want to also consult as a database, like ASCAP or BMI, for the original copyright holders if the artists were not the holders. From there, it might be possible for the Museum to identify those individuals to whom the rights may have passed and could potentially check the probate courts, though it would be a daunting task to see if any of the copyrights were passed through probate.²⁴⁰ Additionally, checking the Copyright Office might be helpful, as any published recordings can be found there.²⁴¹ The Museum has over 1,000 recordings whose copyright holders it must identify before allowing access to the public.²⁴² It could not merely perform a cur-

234. Rohter, *supra* note 1.

235. Sean Michaels, *Jazz Treasure Trove to be Made Public*, THE GUARDIAN, Aug. 18, 2010, <http://www.guardian.co.uk/music/2010/aug/18/jazz-treasure-trove>.

236. *Savory Collection*, *supra* note 6; *see also* Seidenberg, *supra* note 1, at 48-49.

237. *See* Rohter, *supra* note 1.

238. *See supra* Part VII.A.

239. REPORT ON ORPHAN WORKS, *supra* note 12, at 26-27 (noting copyright is a type of property and therefore “ownership may pass through many hands, and by various legal mechanisms” just as a piece of real estate or a car may have multiple owners over time).

240. It is important to know that not all property passes through probate, and it could be possible that some of the artists set up trusts, which included the royalties of the creative works. Or some of the rights of the music may have been owned by the record companies, which would be something else the Museum would want to look into, as it is likely the artists, wanting to make money, would have sold their songs.

241. *See supra* note 94.

242. Rohter, *supra* note 1.

sory or incomplete search,²⁴³ but would be required to go through all the different possibilities that would be reasonable. Contacting the ASCAP and BMI are good starting points, but those CROs may not provide the answer. Despite the music having been recorded in the 1930s and 1940s, the Museum has the names of the artists, and it is not inconceivable that the heirs and assignees might still be locatable. Searching the records of deaths and family lines might be helpful for the Museum because if any of the rights passed through probate, probate is a public record, and such a search could help with the Museum's efforts.

If the Museum found the copyright holders, then it would be able to get a license (so long as the copyright owner agreed to it), and the public could hear the full recordings. If no copyright holder could be found after conducting the diligent search, then the Museum could still distribute the music and the public would be able to hear the entire song. The Museum would be protected because it conducted its diligent search to the degree required.

This outcome would be beneficial for all parties—the Museum would profit from distributing the music and the public would benefit from the music's accessibility. The copyright holder, after such a search, might never be found or come forward. If a copyright owner does surface, he could get reasonable compensation under the statute, but would not be able to hold the Museum liable and profit off of his own previous inaccessibility. The Museum, by doing its diligent search, will have fulfilled its part of the bargain and would be safe from major liability.

C. *Visual Art*

Finally, this Note will consider the potential orphan visual art user. Visual artists may have the strongest case for their work being abused by any orphan works legislation due mainly to the nature of the medium of visual art and technology. Yet, even visual artists

243. Copyright owners can come after anyone they find misappropriating their work. Small businesses can and will be fined for using copyrighted materials without permission from the copyright holder. The Forum of Private Business had to issue a warning to small business whose websites may or may not have copyrighted images: "Check you have the right to use images on your website, small businesses warned." *Check You Have the Right to Use the Images on Your Website, Small Businesses Warned*, FORUM OF PRIVATE BUSINESS June 2, 2011, <http://www.fpb.org/news/2432>. The Forum Chief Executive noted that several members of the organization, all small businesses, had received calls from Getty saying they owed the larger company money for unlicensed use of images. *Id.*

will fare better under legislation regarding orphan work than they would without it.

For this example, one of the examples from the College Art Association's initial comment to the Copyright Office is illustrative.²⁴⁴ A professor wanted to publish a photograph of an architectural rendering that appeared in *Life* magazine in 1957.²⁴⁵ The magazine gave credit to an individual in that issue, "but it was not clear if that person was the maker of the rendering, the photographer of the rendering or someone who had otherwise supplied the image for publication."²⁴⁶ After inquiring at *Life* magazine, it was clear it did not have any information on the individual, either.²⁴⁷

At the time the professor had this problem, there was nothing he could do to protect himself from liability had he wanted to use the image from *Life* magazine without a license. But if Congress had passed an Orphan Works Act that contemplated what it meant to conduct a "reasonably diligent search," and *then* the professor conducted his search, he could have been safe—so long as he followed the parameters set out by Congress in the Act (again, assuming Congress passed such a law). A detailed record, covering all possible angles, with extensive, corroborative evidence would be necessary and not unreasonable.²⁴⁸ In this example, the professor already knew that *Life* magazine might be able to point him in the right direction.²⁴⁹ The magazine may have had the photograph taken as a "work for hire" or because someone was named on the photograph, he could have tracked that individual down and asked that individual about the copyright owner.²⁵⁰ It is important to remember that a *quality* search is necessary.²⁵¹

The professor should be able to understand from the face of his record of his search whether it will be considered a diligent search or not. If there are records adequate enough to satisfy the teachings of the Internal Revenue Code,²⁵² the Federal Rules of Evi-

244. See Cunard, *supra* note 69, at 10-11.

245. *Id.* (recounting, among others, the experience of Professor Joseph M. Siry, Professor of Art History, in the Department of Art and Art History at Wesleyan University).

246. *Id.*

247. *Id.*

248. See *supra* note 229 and accompanying text.

249. See Cunard, *supra* note 69.

250. *Id.*

251. See *Qualley v. State Fed. Sav. & Loan*, 487 N.W.2d 353, 355 (Iowa Ct. App. 1992) (noting the quality of a search is important for diligence, not just quantity).

252. See *supra* Part VI.B.1.

dence,²⁵³ and service of process,²⁵⁴ he could use the photograph and be free of fear of liability should the copyright holder ever surface.

These same steps are appropriate for all visual art, whether the work is found on the internet, in the archives of a museum, or in someone's garage.

CONCLUSION

This Note illustrates the ways in which the orphan works problem came to be and why it will not be going away on its own. Legislation created through the combined powers of Congress is the best solution to the orphan works problem. As this Note discusses, creating a better definition for what constitutes a "reasonably diligent search" and how an orphan work user can satisfy the search requirements, is what Congress should focus on in any proposed legislation. Other areas of law prove instructive for Congress in defining what constitutes a "reasonably diligent search" such as the Internal Revenue Code, the Federal Rules of Evidence, and the standards of diligence required in proof of service cases.

The orphan works problem does not have to persist, and Congress can provide a solution. If the United States wants to become a world leader in copyright law, Congress should enact legislation regarding the orphan works problem—a global, not just domestic, problem. The benefits of a legislative solution are better than the benefits of other potential solutions and, more importantly, are not unrealistic, but are completely plausible. There is a way to please the copyright holder, the copyright user, and the public at-large.

Demanding accountability of both the copyright holder and the orphaned copyrighted work user is the first step in the right direction. There can be a home for orphans despite the lack of formalities in today's copyright law. Through orphan works legislation, the United States can continue to develop its culture and society by fearlessly standing on the shoulders of giants.

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253. See *supra* Part VI.B.2.

254. See *supra* Part VI.B.3.

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