

of the General Counsel/CARP, U.S. Copyright Office, James Madison Memorial Building, Room LM-401, 101 Independence Avenue, SE, Washington, DC 20559-6000 between 8:30 a.m. and 5 p.m. If delivered by a commercial carrier, an original and five copies of a comment must be delivered to the Congressional Courier Acceptance Site located at 2nd and D Street, NE, between 8:30 a.m. and 4 p.m. The envelope should be addressed as follows: Office of the General Counsel/CARP, Room 403, James Madison Memorial Building, 101 Independence Avenue, SE, Washington, DC. If sent by mail (including overnight delivery using U.S. Postal Service Express Mail), an original and five copies of a comment should be addressed to: Copyright Arbitration Royalty Panel (CARP), P.O. Box 70977, Southwest Station, Washington, DC 20024-0977. Comments may not be delivered by means of overnight delivery services such as Federal Express, United Parcel Service, etc., due to delays in processing receipt of such deliveries.

**FOR FURTHER INFORMATION CONTACT:**

David O. Carson, General Counsel, or Tanya M. Sandros, Associate General Counsel, Copyright Arbitration Royalty Panel (CARP), P.O. Box 70977, Southwest Station, Washington, DC 20024-0977. Telephone: (202) 707-8380. Telefax: (202) 252-3423.

**SUPPLEMENTARY INFORMATION:** Section 111 of title 17 of the United States Code creates a statutory license for cable systems that retransmit to their subscribers over-the-air broadcast signals. Royalty fees for this license are calculated as percentages of a cable system's gross receipts received from subscribers for receipt of broadcast signals. A cable system's individual gross receipts determine the applicable percentages. These percentages, and the gross receipts limitations, are published in 37 CFR part 256 and are subject to adjustment at five-year intervals. 17 U.S.C. 801(b)(2)(A) & (D) (2000). This is a window year for such an adjustment.

On January 10, 2005, the Copyright Office received a joint petition from representatives of copyright owners of sports programming ("Joint Sports Claimants") and motion pictures and syndicated television series ("Program Suppliers") requesting commencement of a cable rate adjustment proceeding. See <http://www.copyright.gov/carp/cable-rate-petition.pdf>. As part of the joint petition, Joint Sports Claimants and Program Suppliers request that their "petition and any resulting proceeding be handled pursuant to existing CARP procedures, rather than under the new

provisions established by the Copyright Royalty and Distribution Reform Act of 2004 ('CRDRA')." Joint petition at 2. They assert that their request is consistent with the CRDRA, Pub. L. 108-419, which does not take effect until May 30, 2005, and note that the CRDRA does not contain a provision for a termination of proceedings that addresses petitions filed between November 30, 2004, and May 30, 2005. Furthermore, Joint Sports Claimants and Program Suppliers submit that a CARP proceeding will resolve the 2005 cable rate adjustment more expeditiously than the CRJs which, in their view, could take more than two years to finalize. *Id.* at 3.

The Copyright Office seeks public comment as to whether it is appropriate and/or required that the 2005 cable rate adjustment be resolved through the CARP process set forward in chapter 8 of the Copyright Act prior to passage of the CRDRA, or whether the joint petition filed by the Joint Sports Claimants and the Program Suppliers should be terminated and transferred to the CRJs.

Dated: January 21, 2005

**Marybeth Peters,**

*Register of Copyrights.*

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**BILLING CODE 1410-33-S**

## LIBRARY OF CONGRESS

### Copyright Office

#### Orphan Works

**AGENCY:** Copyright Office, Library of Congress.

**ACTION:** Notice of inquiry.

**SUMMARY:** The Copyright Office seeks to examine the issues raised by "orphan works," *i.e.*, copyrighted works whose owners are difficult or even impossible to locate. Concerns have been raised that the uncertainty surrounding ownership of such works might needlessly discourage subsequent creators and users from incorporating such works in new creative efforts or making such works available to the public. This notice requests written comments from all interested parties. Specifically, the Office is seeking comments on whether there are compelling concerns raised by orphan works that merit a legislative, regulatory or other solution, and what type of solution could effectively address these concerns without conflicting with the legitimate interests of authors and right holders.

**DATES:** Written comments must be received in the Copyright Office on or before 5 p.m. EST on March 25, 2005. Interested parties may submit written reply comments in direct response to the written comments on or before 5 p.m. on May 9, 2005.

**ADDRESSES:** All submissions should be addressed to Jule L. Sigall, Associate Register for Policy & International Affairs. Comments may be sent by regular mail or delivered by hand, or sent by electronic mail to the e-mail address "[orphanworks@loc.gov](mailto:orphanworks@loc.gov)" (see file formats and information requirements under supplemental information below). Those sent by regular mail should be addressed to the U.S. Copyright Office, Copyright GC/I&R, P.O. Box 70400, Southwest Station, Washington, DC 20024. Submissions delivered by hand should be brought to the Public Information Office, U.S. Copyright Office, James Madison Memorial Building, Room LM-401, 101 Independence Avenue, SE., Washington, DC 20540.

**FOR FURTHER INFORMATION CONTACT:**

Mary Rasenberger, Policy Advisor for Special Programs, Copyright GC/I&R, PO Box 70400, Southwest Station, Washington, DC 20024-0400. Telephone (202) 707-8350; telefax (202) 707-8366.

**SUPPLEMENTARY INFORMATION:**

#### File Formats and Required Information

1. If by electronic mail: Send to "[orphanworks@loc.gov](mailto:orphanworks@loc.gov)" a message containing the name of the person making the submission, his or her title and organization (if the submission is on behalf of an organization), mailing address, telephone number, telefax number (if any) and e-mail address. The message should also identify the document clearly as either a comment or reply comment. The document itself must be sent as a MIME attachment, and must be in a single file in either: (1) Adobe Portable Document File (PDF) format (preferred); (2) Microsoft Word 2000 or earlier; (3) WordPerfect 8.0 or earlier; (4) Rich Text File (RTF) format; or (5) ASCII text file format.

2. If by regular mail or hand delivery: Send, to the appropriate address listed above, two copies of the comment, each on a 3.5-inch write-protected diskette, labeled with the name of the person making the submission and, if applicable, his or her title and organization. Either the document itself or a cover letter must also include the name of the person making the submission, his or her title and organization (if the submission is on behalf of an organization), mailing

address, telephone number, telefax number (if any) and e-mail address (if any). The document itself must be in a single file in either (1) Adobe Portable Document File (PDF) format (preferred); (2) Microsoft Word 2000 or earlier; (3) WordPerfect Version 8.0 or earlier; (4) Rich Text File (RTF) format; or (5) ASCII text file format.

3. If by print only: Anyone who is unable to submit a comment in electronic form should submit an original and two paper copies by hand or by mail to the appropriate address listed above. It may not be feasible for the Copyright Office to place these comments on the Office's Web site.

### Background

The Copyright Act of 1976 made it substantially easier for an author to obtain and maintain copyright in his or her creative works. Today, copyright subsists the moment an original work of authorship is fixed in a tangible form—it need not be registered with the Copyright Office or published with notice to obtain protection. While registration of claims to copyright with the Copyright Office is encouraged and provides important benefits to copyright holders, it is not required as a condition to copyright protection. Under the 1909 Act, renewal registration was required to maintain protection beyond an initial 28-year term. Failure to register the renewal during the last year of the first term resulted in complete loss of protection. The 1976 Act removed the renewal requirement going forward, but kept it for works copyrighted before 1978. It was not until 1992 that the renewal requirement was abolished altogether. These changes, as well as other changes in the 1976 Act and in the Berne Convention Implementation Act of 1988, were important steps toward harmonizing U.S. copyright law with international treaties. Specifically, the Berne Convention and other treaties dealing with copyright that have followed forbid the imposition of formalities as a condition to copyright, principally on the grounds that failure to comply with formalities can serve as a trap for the unwary, resulting in the inadvertent loss of copyright.<sup>1</sup>

<sup>1</sup> The Berne Convention article 5(2) “no formalities” requirement has been incorporated by reference into both the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”), and the WIPO Copyright Treaty (“WCT”). See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, art. 9.1, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round vol. 31, 33 I.L.M. 81, 87 (1994); WIPO Copyright Treaty, Apr. 12, 1997, art. 3, S. Treaty Doc. No. 105–17 (1997), 36 I.L.M. 65, 69 (1997). The WIPO Performances and

Concerns have been raised, however, as to whether current copyright law imposes inappropriate burdens on users, including subsequent creators, of works for which the copyright owner cannot be located (hereinafter referred to as “orphan” works). The issue is whether orphan works are being needlessly removed from public access and their dissemination inhibited. If no one claims the copyright in a work, it appears likely that the public benefit of having access to the work would outweigh whatever copyright interest there might be. Such concerns were raised in connection with the adoption of the life plus 50 copyright term with the 1976 Act and the 20-year term extension enacted with the Sonny Bono Copyright Term Extension Act of 1998.

The Copyright Office has long shared these concerns about orphan works and has considered the issue to be worthy of further study. On January 5, Senators Orrin Hatch and Patrick Leahy of the Senate Judiciary Committee asked the Register of Copyrights to study this issue and to report to the Senate Judiciary Committee by the end of the year. Also in January, Reps. Lamar Smith and Howard Berman, the chairman and ranking member of the House Judiciary Committee's Subcommittee on Courts, the Internet and Intellectual Property, sent letters to the Register supporting this effort. The Office is gratified that Congress has shown an interest in this important issue and is pleased to assist Congress in its efforts to learn more about the problem and to consider appropriate solutions.

Prior to the 1976 Act, the term of protection was limited to 28 years if the copyright was not renewed. Under this system, if the copyright owner was no longer interested in exploiting the work, or a corporate owner no longer existed, or, in the case of individual copyright owners, there were no interested heirs to claim the copyright, then the work entered the public domain. Of course, it also meant that some copyrights were unintentionally allowed to enter the public domain, for instance, where the claimant was unaware that renewal had to occur within the one year window at the end of the first term or that the copyright was up for renewal. The legislative history to the 1976 Act reflects Congress' recognition of the concern raised by some that eliminating renewal requirements would take a large number of works out of the public

Phonograms Treaty (“WPPT”) contains an express “no formalities” provision without reference to the Berne Convention. See WIPO Performances and Phonograms Treaty, Apr. 12, 1997, art. 20, S. Treaty Doc. No. 105–17 (1997), 36 I.L.M. 76, 80 (1997).

domain and that for a number of those older works it might be difficult or impossible to identify the copyright owner in order to obtain permissions. Congress nevertheless determined that the renewal system should be discarded, in part, because of the “inadvertent and unjust loss of copyright” it in some cases caused.<sup>2</sup> More recently, in the mid-1990s, Congress heard concerns that the Copyright Term Extension Act would exacerbate problems in film preservation by maintaining copyright protection for older motion pictures for which the copyright owner is difficult to identify.<sup>3</sup> Also, in our study on Digital Distance Education published in 1999, the Copyright Office identified several “problems with licensing” that educators asserted in attempting to use copyrighted materials in digital formats, including that “it can be time-consuming, difficult or even impossible to locate the copyright owner or owners.”<sup>4</sup>

A situation often described is one where a creator seeks to incorporate an older work into a new work (e.g., old photos, footage or recordings) and is willing to seek permission, but is not able to identify or locate the copyright owner(s) in order to seek permission. While in such circumstances the user might be reasonably confident that the risk of an infringement claim against this use is unlikely, under the current system the copyright in the work is still valid and enforceable, and the risk cannot be completely eliminated. Moreover, even where the user only copies portions of the work in a manner that would not likely be deemed infringing under the doctrine of fair use, it is asserted by some that the fair use defense is often too unpredictable as a general matter to remove the uncertainty in the user's mind.

Some have claimed that many potential users of orphan works, namely individuals and small entities, may not have access to legal advice on these issues and cannot fully assess risk themselves. Moreover, even if they are able to determine with some certainty that there is little or no risk of losing a lawsuit, they may not be able to afford any risk of having to bear the cost of defending themselves in litigation.

<sup>2</sup> H.R. Rep. No. 94–1476, at 134 (1976).

<sup>3</sup> Letter from Larry Urbanski, Chairman, American Film Heritage Association, to Senator Strom Thurmond Opposing S. 505 (Mar. 31, 1997), available at <http://homepages.law.asu.edu/~dkarjala/OpposingCopyrightExtension/letters/AFH.html> (stating that as much as 75% of motion pictures from the 1920s are no longer clearly owned by anyone, and film preservationists as such cannot obtain the necessary permissions to preserve them).

<sup>4</sup> See Register of Copyrights, Report on Copyright and Digital Distance Education 41–43 (1999).

Given the high costs of litigation and the inability of most creators, scholars and small publishers to bear those costs, the result is that orphan works often are not used—even where there is no one who would object to the use.

This uncertainty created by copyright in orphan works has the potential to harm an important public policy behind copyright: To promote the dissemination of works by creating incentives for their creation and dissemination to the public. First, the economic incentive to create may be undermined by the imposition of additional costs on subsequent creators wishing to use material from existing works. Subsequent creators may be dissuaded from creating new works incorporating existing works for which the owner cannot be found because they cannot afford the risk of potential liability or even of litigation. Second, the public interest may be harmed when works cannot be made available to the public due to uncertainty over its copyright ownership and status, even when there is no longer any living person or legal entity claiming ownership of the copyright or the owner no longer has any objection to such use.

Empirical analysis of data on trends in copyright registrations and renewals over the last century suggests that a large number of works may fall into the category of orphan works.<sup>5</sup> Based on data of registrations of claims to copyright and their subsequent renewal under the 1909 Act, it appears that, overall, well less than half of all registered copyrighted works were renewed under the old copyright system. Because renewal was required to maintain protection of a work, this data suggests that, at least in many cases, there was insufficient interest a mere 28 years later to maintain copyright protection. The empirical data does not indicate why any particular works were not renewed, and no doubt, a certain portion of those works were not renewed due to inadvertence, mistake or ignorance on the part of the

owner.<sup>6</sup> With respect to many of these works, however, particularly those owned by legal entities or other sophisticated copyright owners, it can be assumed that the work no longer had sufficient economic value to the copyright claimant to merit renewal. Libraries and scholars have argued that those works that have so little economic value that they fail to merit the small expense and effort of renewal may nevertheless have scholarly or educational value and should not be needlessly barred from such use.

Several alternatives for addressing these issues have been proposed and at least one country, Canada, has adopted legislation that specifically addresses orphan works. For background purposes, the Copyright Office describes some examples in this notice. It is stressed that the Office does not take a position as to the viability or desirability of any specific proposals or systems at this time, but seeks input as to the pros and cons of, and issues raised by, each, as well as proposals for other solutions and analysis thereof.

An example of a system that enables the use, in certain circumstances, of orphan works can be found in Canada's copyright law. The copyright law has a specific provision permitting anyone who seeks permission to make a copyright use of a work and cannot locate the copyright owner to petition the Canadian Copyright Board for a license.<sup>7</sup> The Copyright Board makes a determination as to whether sufficient effort has been made to locate the owner. If so, the Copyright Board may grant a license for the proposed use. It will set terms and fees for the proposed use of the work in its discretion and will hold collected fees in a fund from which the copyright owner, if he or she ever surfaces and makes a claim, may be paid. It should be noted that since the enactment of these provisions in 1990, the Copyright Board has issued only 125 such licenses. More information about the Canadian approach can be found on the Copyright Board Web site at: <http://www.cb-cda.gc.ca/unlocatable/index-e.html>.

The United Kingdom has a provision that affects a small subset of orphan works, namely those for which it is reasonable to assume the copyright has

already expired. The law provides that there is no infringement where the copyright owner cannot be found by a reasonable inquiry and where the date the copyright expired is uncertain but it is reasonable to assume that the copyright has expired.<sup>8</sup>

### Specific Questions

Through review of the submissions, the Copyright Office intends to determine the scope of the problem, evaluate appropriate next steps and create a record from which specific legislative proposals, if appropriate, could be considered and developed. To that end, this notice of inquiry sets forth several sets of questions, organized by issue, in an effort to begin gathering relevant information. Commenters do not need to respond to all questions, but are encouraged to respond to those as to which they have particular knowledge or information. Commenters may also frame additional questions or reframe any of the questions below.

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

What are the difficulties faced by creators or other users in obtaining rights or clearances in pre-existing works? What types of creators or users are encountering these difficulties and for what types of proposed uses? How often is identifying and locating the copyright owner a problem? What steps are usually taken to locate copyright owners? Are difficulties often encountered even after the copyright owner is identified? If so, this is an issue that the Copyright Office also invites you to address.

#### 2. *Nature of "Orphan works": Identification and Designation*

How should an "orphan work" be defined? Should "orphan works" be identified on a case-by-case basis, looking at the circumstances surrounding each work that someone wishes to use and the attempts made to locate the copyright owner? Should a more formal system be established? For instance, it has been suggested that a register or other filing system be adopted whereby copyright owners could indicate continuing claims of ownership to the copyrights in their works.

On the other hand, the establishment of a filing system whereby the potential user is required to file an intent to use

<sup>5</sup> See William M. Landes and Richard A. Posner, *Indefinitely Renewable Copyright* 22–41 (John M. Olin Law & Economics Working Paper No. 154, 2d Series, 2002), available at [http://www.law.uchicago.edu/Lawecon/WkngPprs\\_151-175/154.wml-rap.copyright.new.pdf](http://www.law.uchicago.edu/Lawecon/WkngPprs_151-175/154.wml-rap.copyright.new.pdf); see also H.R. Rep. No. 94–1476, at 136 (1976) ("A statistical study of renewal registrations made by the Copyright Office in 1966 supports the generalization that most material which is considered to be of continuing or potential commercial value is renewed. Of the remainder, a certain proportion is of practically no value to anyone, but there are a large number of unrenewed works that have scholarly value to historians, architects and specialists in a variety of fields").

<sup>6</sup> Indeed, one reason why the renewal system was replaced in recent copyright enactments was because it at times served to impose an excessive penalty on the unwary copyright owner. See H.R. Rep. No. 94–1476, at 134 (1976) ("One of the worst features of the present copyright law [the 1909 Copyright Act] is the provision for renewal of copyright \* \* \* In a number of cases it is the cause of inadvertent and unjust loss of copyright").

<sup>7</sup> Copyright Act, R.S.C., ch. C–42, § 77 (1985) (Can.).

<sup>8</sup> Copyright, Designs and Patents Act, 1988, c. 48, § 57 (Eng.); see also Copyright and Related Rights Act, No. 28, 2000 § 88 (Ir.); Laws of Hong Kong, Chapter 528: Copyright Ordinance, June 27, 1997 § 66, available at <http://www.justice.gov.hk/Home.htm>.

an unlocatable work has also been suggested. Would the Copyright Office or another organization administer and publish such filings? For instance, would the Copyright Office publish lists of these notices on a regular basis, similar to the lists of notices of intent to enforce restored copyrights filed with the Office? Questions arising from these different approaches are set forth in the next sections.

#### A. Case-by-Case Approach

The “ad hoc” or “case-by-case” approach, like that adopted in Canada, would set forth parameters for the level of search that would need to be undertaken in order to establish that a particular work is “orphaned.” Ensuing questions include the nature of those parameters. Should the focus be on whether the copyright holder is locatable? What efforts need be made to locate a copyright holder before it can be determined that the owner is not locatable? Would a search of registrations with the Copyright Office (or any other registries as described below in section B) and an attempt to reach the copyright owner identified on the work if any (plus any follow up) be sufficient? What other resources are commonly consulted to locate a copyright owner, and what resources should be consulted? Do resources like inheritance records, archives, directories of authors or artists need to be searched? Should there be an obligation to place an advertisement seeking the owner? Should factors such as the age of the work (which is discussed below), how obscure the work is or how long it has been since a publication occurred be taken into consideration?

#### B. Formal Approach

Another approach, like that used in the 1909 Act, would require registration or some sort of filing by copyright owners to maintain their copyrights past a certain age and to assist in locating copyright owners.<sup>9</sup> Would such a new registry or registries be created separate from the existing system of copyright registration (akin to the designated agent registry under section 512 of the Copyright Act) where copyright owners could identify themselves so that users could more easily find them? Should such a registry(ies) be privately owned or administered by a government agency like the U.S. Copyright Office? What would such a registry look like? What kind of information should be required from such a filing? Should the identification of a person to whom

permission requests can be sent be required? What other information should be included? Also, how would the registry identify the “works” at issue, especially in light of the current multimedia age where works can take on many forms and spawn multiple derivative works? And, even more importantly, how could fraud and abuse of such a registry be avoided—*i.e.*, what is to prevent someone from fraudulently claiming works as his own?

Such a registration system could be optional as well as mandatory. Where, under a mandatory system, copyright owners could be required to make a filing in order to preserve their rights and/or prevent their works from being deemed “orphan,” under an optional registry, registration might provide additional benefits. Alternatively, under an optional system failure to register could carry certain penalties or limit remedies available to the right holder. If registration were mandatory, on the other hand, would failure to register create a rebuttable presumption that the work is “orphaned,” or would it conclusively be deemed “orphaned”? (Questions as to the effect of a designation as an “orphan work” are set forth below in section 5). If optional, the registry might serve as just one factor in determining whether the copyright owner was locatable. How helpful would such a registration system be in determining whether a work was in fact “orphaned”? Would the registry then qualify as just another place that a potential user should look to find the owner? If so, how practicable would such a system be? What incentives would a copyright owner have to use such a system? Should the owner be permitted to acquire any additional benefits from registering, such as additional damages or a penalty for willful use of a work? Does this tread too closely to the copyright registration system? What would the effect be on the user? For instance, if a user did not check the registry, would it prevent the user from claiming that the work was orphaned? Would there be sufficient incentive for copyright owners to register in a permissive system?

#### 3. Nature of “Orphan Works”: Age

Should a certain amount of time have elapsed since first publication or creation in order for a work to be eligible for “orphaned” status? If so, how much time? It might be helpful, in determining what an appropriate time period would be, to note some of the different benchmarks for term requirements that history and international conventions suggest. For example, under the 1909 Act, a work

was to be renewed in the 28th year after publication. Current copyright law provides a presumption after the shorter of 95 years from publication or 120 years from creation that the work is in the public domain unless the Copyright Office’s records indicate otherwise (and the Copyright Office issues a certified report to that effect).<sup>10</sup> Current copyright law provides another benchmark in the right to terminate grants of transfers or licenses after 35 (and up to 40) years after the grant or publication date.<sup>11</sup> Under existing international treaties, the term of protection for works measured other than by the life plus fifty term is generally fifty years from publication. The Copyright Term Extension Act of 1998 extended terms in the U.S. by 20 years, but at the same time recognized that certain uses should still be allowable in those last twenty years, namely uses by libraries and archives of certain works that are neither available at a reasonable price nor subject to normal commercial exploitation.<sup>12</sup> Would the last twenty years of the copyright term, or any of the other benchmarks or time periods noted above, be an appropriate measure for eligibility as an “orphan work”? Should it be the same for all categories of works, or different depending on the nature of the work? What if the term for a particular work is unknown or uncertain? If the copyright owner is not known or cannot be found, there will certainly be instances where the date of creation or death of the author will be unknown. Can it be presumed at a certain point that a work has entered into the period in which it can be recognized as an orphan work?<sup>13</sup>

#### 4. Nature of “Orphan Works”: Publication Status

Should the status of “orphan works” only apply to published works, or are there reasons for applying it to

<sup>10</sup> 17 U.S.C. § 302(e) (2003).

<sup>11</sup> § 203.

<sup>12</sup> § 108(h). Specifically, this provision provides that in the last twenty years of the term of any published work, a library or archive, including a nonprofit educational institution that functions as such, may make any copyright use of the work (other than create derivative works) for purposes of preservation, scholarship or research, if it has determined on the basis of reasonable investigation, that (i) the work is not subject to normal commercial exploitation, (ii) a copy cannot be obtained at a reasonable price, and (iii) the copyright owner or its agent has not provided notice with the Copyright Office that neither (i) or (ii) applies to the work.

<sup>13</sup> For instance, the U.K. law cited above provides a complete defense against liability if the owner cannot be found after reasonable inquiry and the date of expiration is uncertain but it’s reasonable to presume that the copyright has expired. *See supra* note 8.

<sup>9</sup> See also H.R. 2601, 108th Cong. § 3 (2003).

unpublished works as well? In Canada, for example, the system for unlocatable copyright owners only applies to published works. What are the reasons for applying it to unpublished works? If "orphan work" status would apply to unpublished works, how would such a system preserve the important right of first publication recognized by the Supreme Court in *Harper & Row*?<sup>14</sup> What are the negative consequences of applying such a system to unpublished works?

#### 5. Effect of a Work Being Designated "Orphaned"

However a work is identified and designated as "orphaned," what would be the effects of such designation? Under systems for a mandatory, formal registry of maintained works, like the 1909 Act, the right to assert one's exclusive rights vis à vis others could similarly be lost, in whole or in part, if the work was not contained on the registry. Should this loss of rights apply only to the particular work at the time of use, or only to the particular use or user, or would it affect a permanent loss of rights as against all uses and users?

Other possibilities include imposing a limitation on remedies for owners whose works are "orphaned"—without affecting the copyright itself. For instance, under the Canadian approach, the Copyright Board sets the license fees and other terms for the use and collects the payments on behalf of the copyright owner should one ever be identified. Under that approach, users could be confident that their use of the work would not subject them to the full range of remedies under the Copyright Act, but only an amount akin to a fee for use. At the same time, copyright owners would not be concerned about the inadvertent loss of rights from failure to pay the fee or take other requisite action. Domestically, the Copyright Clearance Initiative of the Glushko-Samuelson Intellectual Property Law Clinic of American University's Washington College of Law is currently developing a proposal that would limit the liability for users of orphan works and not result in any loss of copyright per se on the part of the copyright owner.<sup>15</sup> Under that proposal, only a

recovery of a reasonable royalty would be allowed in infringement actions with respect to orphan works where good faith efforts have been made to locate the copyright owner. Are there other approaches that might be used? If a reasonable royalty approach is used, how should it be determined in any given case? To settle disputes as to the appropriate fee, is traditional Federal court litigation the right dispute resolution mechanism, or should an administrative agency be charged with resolving such disputes or should another alternative dispute resolution mechanism be adopted?

Are there other measures that could be applied in cases of orphan works? How would these, or any of the others described above, affect the incentives for authors of such works, particularly small copyright owners or individuals who might bear a greater burden than copyright owners with more resources?

#### 6. International Implications

How would the proposed solutions comport with existing international obligations regarding copyright? For example, Article 5(2) of the Berne Convention generally prohibits formalities as a condition to the "enjoyment and exercise" of copyright. For any proposed solution, it must be asked whether it runs afoul of this provision. Would a system involving limitations on remedies be consistent with the enforcement provisions of the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) or the prohibition against conditioning the enjoyment or exercise of copyright on compliance with formalities of TRIPS and other international agreements to which the U.S. is party? Would such proposals satisfy the three-step test set forth in TRIPS, Art. 13, requiring that all limitations and exceptions to the exclusive rights be confined to "certain special cases that do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder"? Are there any other international issues raised by a proposed solution?

Dated: January 21, 2005.

**Marybeth Peters,**

*Register of Copyrights.*

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**BILLING CODE 1410-30-P**

include how to determine what constitutes "good faith efforts" to locate the copyright owner and how to determine and/or settle what a reasonable royalty would be.

## NATIONAL SCIENCE FOUNDATION

### Agency Information Collection Activities: Comment Request

**AGENCY:** National Science Foundation.

**ACTION:** Submission for OMB Review; Comment Request.

Under the Paperwork Reduction Act of 1995, Pub. L. 104-13 (44 U.S.C. 3501 *et seq.*), and as part of its continuing effort to reduce paperwork and respondent burden, the National Science Foundation (NSF) is inviting the general public and other Federal agencies to comment on this proposed continuing information collection. This is the second notice for public comment; the first was published in the **Federal Register** at 69 FR 64114 and one comment was received. NSF is forwarding the proposed submission to the Office of Management and Budget (OMB) for clearance simultaneously with the publication of this second notice.

**DATES:** Comments regarding these information collections are best assured of having their full effect if received by OMB within 30 days of publication in the **Federal Register**.

**ADDRESSES:** Written comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of NSF, including whether the information will have practical utility; (b) the accuracy of NSF's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; or (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for National Science Foundation, 725—17th Street, NW, Room 10235, Washington, DC 20503, and to Suzanne H. Plimpton, Reports Clearance Officer, National Science Foundation, 4201 Wilson Boulevard, Suite 295, Arlington, Virginia 22230 or send e-mail to [splimpto@nsf.gov](mailto:splimpto@nsf.gov). Copies of the submission may be obtained by calling (703) 292-7556.

**FOR FURTHER INFORMATION CONTACT:** Suzanne H. Plimpton, NSF Reports Clearance Officer at (703) 292-7556 or send e-mail to [splimpto@nsf.gov](mailto:splimpto@nsf.gov).

An agency may not conduct or sponsor a collection of information

<sup>14</sup> See generally *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 550-555 (1985).

<sup>15</sup> Pursuant to that proposal, copyright law would be amended to limit liability for the use of works where the user has been unable to locate the copyright holder after making good faith efforts. Liability could be limited to a "reasonable royalty" or the like, or could be akin to the limitation of U.S. Federal Government liability to "reasonable and entire compensation as damages \* \* \*, including minimum statutory damages." 28 U.S.C. § 1498(b) (2003). Complex issues raised by that proposal