GLUSHKO SAMUELSON INTELLECTUAL PROPERTY LAW CLINIC RESPONSE TO NOTICE OF INQUIRY ON THE ISSUE OF "ORPHAN WORKS"

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GLUSHKO-SAMUELSON INTELLECTUAL PROPERTY LAW CLINIC RESPONSE TO COPYRIGHT OFFICE NOTICY OF INQUIRY REGARDING "ORPHAN WORKS"

I. Background to the Proposal

Since 2001, the Glushko-Samuelson Intellectual Property Law Clinic of the Washington College of Law at American University has provided student attorneys with the opportunity to represent clients from various backgrounds in need of legal counseling within several intellectual property specialties (copyright, patent, trademark, etc.), and to work on important public policy projects related to important issues in the field. Clearly, the problem of "orphan works" is one such issue.

In 2002, the Clinic recognized that limited access to "orphan works" was a serious problem that significantly affected the public interest, and commenced its "Copyright Clearance Initiative" (CCI). CCI was formed to bring attention to the inadequacies in current copyright law's treatment of "orphan works" and to develop a solution that would provide greater public access to such works. On April 11, 2003, the Clinic held a symposium with scholars, academics and other interested parties to discuss this issue. Since then, the work of CCI has focused its efforts on devising the blueprint for a legislative solution to the "orphan works" problem (hereafter the CCI proposal) and has been in close contact with various non-profit organizations, intellectual property practitioners, and academics.[1] The Clinic welcomes the Copyright Office's Notice of Inquiry, and this opportunity to be heard on the subject.

II. Scope of the Problem and Basic Definitions

The broad coverage of contemporary U.S. copyright law is a function of many causes: its substantial abandonment of copyright formalities, the shift to protection upon "fixation" (with the resultant incorporation of unpublished works), the 1994 amendments extending protection to previously public domain works of foreign origin,[2] and the 1998 Copyright Term Extension Act among them.[3] One result has been the coming into existence of a large category of works that are presumptively protected by copyright although their owners cannot be located with reasonable effort to secure licensing permission for use. The problem arising from the existence of such "orphan works" arises with respect to all types of works and all types of uses. Some "orphan works" date back eighty or a hundred years, but others may be of far more recent vintage. And although chain of title is particularly difficult to trace where unpublished works are concerned, published ones may present insoluble puzzles for would-be users. Copyright registration often provides a starting point for tracing the ownership of works, but even where

[1] Clinic students who have contribution to the work of CCI include Gregory Hawn, Andrea Harrington, David Yee, Natalie Koss, Newton Mendys, Jessica Mickelsen, Nayoung Kim and Scott Brairton. In addition, representatives of organizations including the College Art Association, Public Knowledge and the Library Copyright Alliance made significant contributions to the proposal described in this submission..

[2] 17 U.S.C. § 104A .

[3] 17 U.S.C. § 302 (extending the general copyright protection term from 50 years after the author's death to 70 years) The Copyright Term Extension Act also extended the protection for anonymous works from 75 years to 95 years from the date of publication or 125 years from date of creation instead of 100 years, whichever expires first. *Id.*

registered works (especially older ones) are concerned, the trail may be difficult to follow. Moreover, the impact of the problem is not felt only by not-for-profit institutions, scholars, artists, or by for-profit entertainment companies. All of these – and the audiences to whom their own works are addressed – suffer from the inaccessibility of this category of material.

When a potential user chooses or is forced to abandon the use of an "orphan work" and produce a new work of lesser value out of fear of copyright infringement liability, the ultimate costs will be borne by members of the public who read books, attend school, watch television, or listen to music. Potential users themselves suffer because they must engage in self-censorship to escape otherwise irreducible risks of liability. And as is true of censorship of any kind, this self-censorship burdens cultural innovation, which is what the copyright laws have been enacted to protect. Thus, the premise of the proposal described below is that use of an "orphan work" should be permitted so long as a user can show that he or she has made a reasonable but unsuccessful efforts search to find the copyright owner. If, subsequently, the copyright owner should appear and object to the use, the user who has made a qualifying search should be subject only to a limited damage remedy. This memorandum summarizes a proposal to amend Title 17 of the United States Code to bring about this result. By design, it represents a minimalist approach, involving the fewest possible interventions in existing law and the creation of the least possible amount of additional bureaucracy.

For purposes of the CCI proposal outlined here, an "orphan work" is defined as a work for which the copyright owner cannot be reasonably located. Because the problem of "orphan works" is a broad one, the types of works to which the solution applies is correspondingly wide in scope. All kinds of works may fall into this category; so may works of both relatively recent vintage and greater antiquity, as well as both published and unpublished ones. The proposed approach to facilitating the use of the "orphan works" should apply to all types of uses, both not-for-profit and for profit. A "reasonable efforts search" is the burden that potential users must meet when searching for the copyright owner, if they are to take advantage of the safe harbor provided under the proposal. A "qualified user" is any institution or individual who uses an "orphan work" after performing a reasonable efforts search.

III. Details of the CCI Proposal

At this stage in the process of addressing the "orphan work" problem, this comment does not suggest specific statutory language to bring the solution proposed into effect. Key elements of the proposal are described below; some describe proposed modifications in the copyright statute, and others detail practices that those changes would enable.

- *General statutory language relating to the "reasonable efforts search"*
    - The provision to be inserted in the Copyright Act should address the issue of what constitutes a "reasonable effort" only in general terms, since specific instances will depend on the type of work involved, the nature and resources of the user, and other surrounding circumstances. A flexible definition that applies to a variety of situations is most appropriate.

  - A reasonable efforts search therefore should be defined as an effort to identify and locate the copyright owner (1) in good faith, (2) using location tools and other appropriate resources related to the work at issue, and (3) that is reasonable under the totality of the circumstances.

- *Requirements for qualified users' actions under the statute*

  - The prospective user will be required to determine what constitutes a reasonable effort in each instance.
    - Guidance in making this determination might be available from a variety of sources, including statements of "best practices" developed by professional organizations in various relevant disciplines.
    - The Copyright Office could provide general information for potential users on its website, including links to the sites of relevant professional organizations.

  - The user will retain detailed documentation of his or her search.

- *Qualified users' actions after conducting a reasonable efforts search*

  - The user who completes a reasonable efforts search is permitted to use the "orphan work" without limitation until the owner comes forward and challenges the use.

  - Thereafter, new uses of the work would require affirmative authorization, but ongoing uses previously commenced could continue without interference.

  - Ongoing uses would include new editions of published books, reissues of previously recorded music, updates of posted websites, and others that do not involve a substantial modification in the context of use.

  - In order to maintain the status of a qualified user, a person implementing this procedure would be required to so indicate, and to provide summary attribution information, to the extent known, consistent with applicable professional standards for crediting sources. In the event that the copyright owner comes forward after the use has been commenced, a qualified user must make reasonable efforts to update the attribution information accordingly.

- *Burden of proof in litigation*

  - Should one asserting rights in a work wish to pursue an infringement action against a user claiming qualification under legislation, they would be required to register their copyright as required by Sec. 411(a).[4]

[4] 17 U.S.C. § 411(a).

- In such litigation, the user would have the initial burden of proving the efforts that he or she made to locate the owner prior to commencing use.

- Thereafter, the burden would shift to the copyright owner to prove that, under all the facts and circumstances, those efforts were not "reasonable."

- If the user's efforts were proven to be pretextual rather than "reasonable," a full range of copyright remedies would be available to the copyright owner.

- Otherwise, relief to the copyright owner would be limited as indicated below.

- *Remedies and liability*

  - Under no circumstances will Sec. 504(c) statutory damages,[5] attorney's fees, damages based on the user's profits or injunctive relief relating to the challenged use be available against a qualified user.

  - If infringement by a qualified user is proved, damages would be limited to the lesser of
    - Actual damages or
    - An award of $100 per work used, up to a maximum of $500 for any group of works claimed by a single owner and subject to a single use.

IV. Rationale of the Proposal

In developing the legislative proposal for "orphan works" outlined above, several strategic decisions were made in an attempt to balance the interests of all the parties affected by the issue. Some of the primary issues that were dealt with, and the reasoning followed with respect to them, are outlined below.

- *Level of administrative involvement in the "orphan works" procedure*

At varying stages of the development of the CCI proposal, different levels and kinds of administrative involvement were contemplated. Ultimately, we concluded that a simple, self-executing system would be preferable to one that was subject to more intense bureaucratic oversight. Under the final proposal, the decision about what constitutes a reasonable effort to locate a copyright owner rests initially with the qualified user. Although records are to be maintained, no report on the search is to be filed with any government agency. The Copyright Office is not responsible for conducting an examination of the contents of a reasonable efforts search to determine if some minimum level of compliance has been accomplished. This approach was designed for several reasons.

As already noted, there were concerns that building a substantial administrative role into a system for resolving the "orphan works" problem would generate significant, unfunded costs in

[5] 17 U.S.C. § 504(c).

terms of demands on agency resources. In addition, the CCI proposal allows would-be users of "orphan works" to proceed carefully but efficiently, without the delays that would be likely to flow from any requirements for agency action prior to use. Finally, given the wide variation in what would constitute a "reasonable efforts" search in different contexts and situations, it would be difficult or impossible for any agency to regulate the search process effectively. The proposal makes it clear that it is in the best interests of the user to conduct a complete and thorough search, and provides substantial incentives for doing so. In the rare instances where there is disagreement about whether a search was adequate, the courts are open to make the required determination. But requiring an agency to oversee the process and create rules and guidelines for all such searches only would complicate the "orphan works" issue.

- *Allocation of the requirement to engage in due diligence*

In order to encourage the dissemination "orphan works," a legislative solution must necessarily put an affirmative responsibility either on copyright owners (to come forward and declare their continued interest in enforcing rights) or users (to attempt to locate difficult-to-trace owners). The proposal presented above places the burden squarely on the user, by requiring him or her to take affirmative steps of conducting a reasonable efforts search before using the "orphan work." As an initial matter, this decision was made in order to maintain harmony with international intellectual property treaties that forbid requiring a copyright holder to take affirmative steps in the nature of compliance with formalities in order to obtain or maintain copyrights.

In addition, it is important to note that actions that the proposal would require from a qualified user do not differ in kind (although it may in degree) from those he or she ordinarily would undertake. In the typical "orphan work" scenario today, a user comes across a work that he or she would like to make available to the public or incorporate into a creative production of his or her own; the user attempts to find the owner to obtain clearance, but fails in this endeavor. The user then is faced with a difficult choice – to use the work and risk liability or to forgo use. The CCI proposal builds on this reality, providing the user with a safe harbor if the search has been sufficiently rigorous. This solution would be both effective and efficient. Because only a relatively small number of "orphan works" would be of actual interest to potential users, the social cost of compliance with the CCI proposal would be relatively low. This is to be contrasted with an alternative scheme that would require owners to periodically reassert claims to literally millions of works in order to safeguard their rights in an unknown but small subset that ultimately might prove appealing to users. Such an allocation of responsibility to prevent orphaning would require far more overall effort than the one suggested in the CCI proposal. Moreover, much of that effort ultimately might be useless.

A final and compelling reason for requiring affirmative action by the user is that logic necessitates this allocation of duties. Requiring an owner of an "orphan work" to police the use of that work is almost oxymoronic. By definition, an "orphan work" will frequently be one of which the current owner is unaware. Placing the burden with the user of the work makes sense in both pragmatic and logical terms. Moreover, as a matter of simple fairness it would be problematic to make a forfeiture of rights turn on simple inaction. It is the user's preference that

triggers the existence of any concrete instance of the general "orphan works" problem, and it should be the user's actions that provide the basis for its resolution.

- *Limitations on remedies*

An effective "orphan works" proposal must be one that, once implemented, is actually used. Of course, such a proposal also must strike a balance between users and owners. The scheme outlined above strikes this balance and presents a procedure that will be used by placing certain limitations on remedies.

By limiting the remedies an owner can collect from a user who does in fact conduct a reasonable efforts search, the proposal becomes one that users will use. If the damages are not capped, the resulting uncertainty and potential risk exposure would drive users away from the system. Of course, even the approach contemplated by this proposal is not without risk to the user: remedies are not limited where the owner can show that a reasonable efforts search was not conducted by the user. But this is a risk against which users can insure by making careful, well-documented efforts to identify the rights holder. This again strikes a balance that encourages users to conduct thorough and meaningful searches and allows an owner access to the full panoply of remedies where the user does not act dutifully.

V. Contrasting and Comparing the Proposal with the Canadian Approach

The Copyright Board of Canada itself has the power to issue non-exclusive licenses allowing people to use a work after they proved that reasonable although unsuccessful efforts had been made to locate the copyright owner.[6] Canada uses the term "unlocatable works" rather than "orphan works."[7]

There are several elements in the Canadian system that would be problematic in connection with any solution coextensive with the real scope of the "orphan works" problem in the U.S. For example, in Canada, the Copyright Board must determine, on case-by-case basis, whether a would-be user has made a reasonable efforts search before issuing a license.[8] The Copyright Board also maintains a list of all the licenses issued over the years for unlocatable works.[9] Such practices place an administrative burden on the Copyright Board, have the potential to generate considerable expense, and would be likely to slow the operation of the system were there any significant demand for its application. In Canada, however, such demand has not materialized, largely because of another structural limitation. In Canada, the license applies only to published works; such a system could not effectively resolve the "orphan works" problem as it has been defined in these comments.[10]

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[6] *SeeUnlocatable Copyright Owners Brochure* ,Copyright Board of Canada, *at* http://www.cb-cda.gc.ca/unlocatable/brochure-e.html.
[7] *See id*.
[8] *See id.* (indicating that there is no "set form" for the license application of an unlocatable work and that the Copyright Board will determine whether the search was reasonable).
[9] *See Unlocatable Copyright Owners: Licenses Issued to the Following Applicants*, Copyright Board of Canada, *at* http://www.cb-cda.gc.ca/unlocatable/licences-e.html.
[10] *See* Copyright Act, R.S.C., c. C-42, s. 77 (1985) (Can.), *available at* http://www.cb-cda.gc.ca/info/act-e.html#77.

Although, the Canadian system for unlocatable works is premised upon a noble idea, its limitations are far too restrictive for the purposes of U.S. copyright law. It is appropriate to build upon the merits of the Canadian system, while recognizing its flaws and making sure to avoid those shortcomings in a solution for "orphan works" in U.S. law.

VI. Frequently-Asked Questions

Over the three years during which the Glushko-Samuelson Intellectual Property Clinic has been at work on this issue, there has been an opportunity to speak with many individuals and organizations for whom the legal inaccessibility of "orphan work" is a common, current problem. The CCI proposal, summarized above, has been designed to meet the needs of these potential users, with the ultimate goal of promoting the progress of the arts and learning by making more works from the culture of the past available to contemporary audiences. In refining the CCI proposal, the Clinic has circulated versions of it to many concerned individuals and organizations. It is expected that a number of them will endorse the approach taken in the CCI proposal as part of their independent responses to this Notice of Inquiry. Some questions have recurred in conversations with potential endorsers of the CCI proposal. Those questions, and the answers to them, are summarized below:

- *Are the proposed limitations on actual damages (to $100 per work or $500 per transaction) and other remedies (such as statutory damages and injunctive relief) compatible with law?*

To begin, there are no clear legal limits on what the Congress can do to adjust statutory remedies for wrongs defined by statute, at least insofar as domestic copyright law is concerned. As already noted, the proposal carefully avoids depriving copyright owners of their rights as such, or of the ability to exercise them prospectively. Thus,no even arguable "taking" of property is involved.

Where international law is concerned, the potential conflicts, if any, are with Art. 5(2) of the Berne Convention, as incorporated by reference into the TRIPS language of the World Trade Organization, and with Article 13 of TRIPS itself. Technically, the Berne provision is inapplicable, since this proposal (unlike some others) does not involve the creation of a new copyright formality. Even were the article to be broadly interpreted, however, limitations on available remedies do not impinge on the "exercise or enjoyment" of copyright within the meaning of that provision. This conclusion flows from the 1988 Berne Convention Implementation Act, and its legislative history, specifically denying a significant remedial option (that of statutory damages) to copyright owners who fail to comply with the registration requirements of Sec. 412 of Title 17.[11] Turning to TRIPS Art.13, it is important to note that the CCI proposal should not be governed by that provision, correctly understood. The proposal suggests a legislative determination as to the appropriate remedy for certain infringements, rather than a "limitation" or "exception" to the exclusive rights of copyright owners or a

[11] *See* Ad Hoc Working Group on U.S. Adherence to the Berne Convention, *Preliminary Report,* 33 J. of the Copyright Soc'y of the U..S.A. 183, 227 ("Sec. 412 is compatible with Berne since it deals with certain specific remedies rather than the ability to obtain redress at all."), *and* S. Rep. No. 101-681 at 15 (1988).

constraint on the exercise of those rights as such. However, even were Art. 13 to be found applicable to it, the approach suggested in the CCI proposal would easily satisfy the so-called "three-part test": "Orphan works" are a prototypical "special case;"[12] by definition, such works are not subject to "normal exploitation;" and (for the same reason) the owner of an "orphan work" has no legitimate interest in securing an immediate economic return from property that has been (effectively, if not legally) abandoned.[13]

In this connection, it is important to reemphasize that the copyright owner's future ability to exploit his or her work is not compromised by the operation of this proposal to solve the "orphan work" problem. If and when a previously unknown or untraceable owner comes forward and asserts a claim, he or she has the complete authority to license or prohibit future uses. Remedies are limited only with respect to a use commenced after a "reasonable efforts search" as defined in the proposal.

- *How can a proposal that does not provide users with absolute certainty achieve the goal of making "orphan work" more widely available?*

One of the main findings that emerged from conversations with prospective users of "orphan work" is that the main bottleneck to making these available lies not with individual artists or scholars, but with so-called gatekeepers – e.g., publishers, broadcasters, university lawyers and (in some cases) insurers. These risk-averse institutional actors have more to lose, in economic and reputational terms, than do individuals from a choice to use a work without explicit authorization. As a result, gatekeepers tend to embrace the cautious rule of "just say no"!

It is the conclusion of the Clinic that in order to make the use of more "orphan works" practically possible, these gatekeepers do not require absolute certainty that a use will not be challenged; in any event, such absolute certainty would be impossible to provide in any system that continued to respect the property rights of copyright owners. Rather, gatekeepers require assurance that their exposure to risk in case of challenge would be limited and predictable in all but the most unusual cases. It is that assurance that the CCI proposal is designed to provide. By capping damage liability in cases where qualified users have performed a "reasonable efforts" search without succeeding in identifying the copyright owner, and by assuring that in such cases injunctive relief will not cut off the user (and, as a result, waste the underlying investment), gatekeepers should be influenced to relax their control over the redissemination of "orphan works."

As has been explained, the criteria for what constitutes a "reasonable efforts" search have been left relatively open in the CCI proposal, in the expectation that they would be further elaborated through experience. It is likely that, at least initially, some gatekeepers would prescribe their own more specific requirements in this regard (correspondence to the last known

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[12] This is true whether "special" is defined as having a "(special) public policy purpose," or as "apply[ing] to a fairly well delineated area." *See* Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis* 150 (2d. ed. 2003).

[13] A recent panel decision from the World Trade Organization Dispute Settlement Body concluded that "prejudice to the legitimate interests of rights holders reaches an unreasonable level if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owner." *Report of the Panel on United States – Section 110(5) of the US Copyright Act*, document WT/DS160/R (June 15, 2000), at para. 6.229.

address of an identified copyright owner, for example, or a review of relevant residential or business directories in the area, or even voluntary posting of an statement announcing the would-be user's intent). Such attempts to constrain the uncertainty created by the open statutory standard would be understandable and (to an extent) appropriate. It is hoped that gatekeepers would not adopt an excessively restrictive understanding of "reasonable efforts" in their own business practices, and the legislative history of any "orphan work" amendment should reflect this aspiration.

- *Is it fair to deny the owners of "orphan works" any possible share in the profits from their exploitation?*

Here it is important to note that the vast bulk of proposed uses of "orphan works" will not yield significant net profits to the user; indeed, many of those uses will be educational or academic ones undertaken by not-for-profit institutions (such as schools, libraries, archives, and museums). But the fact remains that in a few cases, the user may derive a benefit in which (under the CCI proposal) the owner would have no right to share even if the use continued after he or she had come forward. The problem is a familiar one – how best to allocate the benefit of a possible windfall (however unlikely its occurrence).

Here, it is important to note, once again, that having made himself or herself known, the owner of a previously "orphaned" work would be in a position to license (or refuse to license) future uses, either by the qualified user who commenced the initial use, or by others. Thus, there is every likelihood that once the qualified user had taken the initiative to reintroduce (or, as the case may be, introduce) a work to the public, its owner would have other, and perhaps even more lucrative, opportunities to benefit from its exploitation. This is particularly so because, according to the CCI proposal, the qualified user would always be responsible for providing as complete an attribution of the work as was practically possible at the time.

The relative certainty about risk exposure that the CCI proposal provides would give potential users (and gatekeepers) an incentive to make more "orphan works" available. Other approaches to the compensation of owners would not promote certainty – or use -- to the same extent. Unfortunately, there is no reliable standard by which one can predict what a court might conclude as a "reasonable license fee" for the unauthorized use of an "orphan work". Any such calculation would be fraught with difficulties, including (among others) what market would be the standard of reference, how the value of an new work incorporating an "orphan work" would be apportioned, how the users' overhead and assumption of economic risk would be factored in, and so forth. As a result, any provision to this effect would introduce an unpredictable element into the mix, subjecting even the most conscientious qualified users (and their gatekeepers) to uncertain future liability, and thus would discourage use. Given the underlying objective of the proposal – to encourage the dissemination of material to which the public now does not have access – this outcome is clearly unacceptable.

- *When the proposal refers to a "use," what does it mean?*

When the CCI proposal refers to a "use," it means an act (or series of acts) through which a work or works comes to be made available to the public, regardless of how many of the

exclusive rights set forth in Sec. 106 are implicated.[14] If the user wrote and then published a book, for example, that course of conduct would constitute a single use, regardless of how many copies were sold. The question comes up in several different contexts in the proposal, including that of the $500 cap on damage "for any group of works claimed by a single owner and subject to a single use." Thus, to give another example, if a local historical society were to post on its website a number of unpublished pictures taken by a small-town professional photographer in the 1940's, this would be considered a single use of this group of images, regardless of how often they were viewed or downloaded.

- *How would uses that occur subsequent to the first use of an "orphan work" be handled?*

Every potential user of an "orphan work" would have an independent duty to satisfy himself or herself that "reasonable efforts" to locate its owner have been made. Where a subsequent user was aware of a previous use of the same "orphan work," contacting the prior user would be an inevitable aspect of such a search. Upon inquiry, the prior user could describe his or her own efforts to trace the owner and verify that the copyright owner had not come forward in response. The subsequent user would then have to make a judgment about whether any further search was needed to satisfy the "reasonableness" standard – depending on such factors as the passage of time, the similarities or dissimilarities between the uses, the relative resources of the users, and so forth. Where the copyright owner ultimately had come forward, the prior user would be encouraged to disclose this information, so that the subsequent user could make a determination as to whether his or her proposed use would be infringing, and if so could negotiate directly with the owner. In addition, the CCI proposal would require the prior user to take reasonable steps to update the attribution information associated with its use of the work. So, to return to the example given above, the historical society's initial posting of the "orphan work" images might be accompanied by an attribution such as "photographs believed to be the work of Jane Jones;" if Ms. Jones' grandchild were to come forward and assert ownership, the historical society would be required to add information reflecting this claim to its website. In addition, various other facilities (including conventional copyright registration) would be available to owners of former "orphan works" who wished to publicize their claims.

- *Isn't the proposal unfair to "small" individual creators?*

The answer to this important question is emphatically in the negative. Of course, there are many prolific writers, illustrators, photographers and others who create large numbers of works during their careers, only a fraction of which are "published" or otherwise commercialized in the first instance. These authors, however, already have ready access to reliable, inexpensive systems for assuring that their unseen works are not "orphaned." Of these, the most obvious is copyright registration itself, which already provides facilities for recording claims to groups and collections of unpublished works.[15] To the extent that the existing registration system does not fully serve the interests of small creators in this regard, the solution is to improve that system rather than to continue to deny the public access to large quantities of material with significant educational, scholarly or artistic interest.

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[14] 17 U.S.C. § 106.

[15] *See, e.g.,* 37 CFR § 202.3(b)(9) (group registration of published photographs), and §§ 202.3(b)(3)(B) and 202.20(c)(2)(xx) (unpublished photographs).

Moreover, associations representing creators have a role to play. To the extent that they are concerned that their members works may be accidentally "orphaned," they could devise and make available Internet-based tools by which their members could publicize their identities, their current contact information, and the bodies of work over which they claim copyright. Consulting such voluntary registries as might be established would then be an obvious component of any "reasonable efforts" search by the would-be user of an "orphan work." Given the existing and potential opportunities for effective self-help by small creators, a consideration of their interests does not give rise to significant fairness concerns.

- *What is the relationship of the proposed "use pursuant to a reasonable efforts search" to "fair use"?*

This is a question of great importance. Nothing in the CCI proposal is intended to derogate from the time-honored "fair use" doctrine codified in Sec. 107,[16] and the legislative history of any "orphan work" amendment to the Copyright Act must so reflect. As a general matter, many potential unauthorized uses of "orphan works" already would be permissible under this doctrine because they add value to, and do not detract from the market for, the original. However, the legal advice that a user would need to justify this conclusion in a particular case may be expensive or difficult to obtain. Moreover, as already noted, decisions about whether or not to use an "orphan work" without authorization often lie not with individual users but with publishers, funders, insurers and the like. These "gatekeepers," in turn, have a low tolerance for the kind of uncertainty entailed by the highly situational "fair use" doctrine and the multi-factor analysis associated with it. By providing a less complicated test based upon objective "reasonableness," the CCI proposal seeks to reduce uncertainty and promote use. Its adoption into law would make it possible for many users and gatekeepers to proceed with confidence if they have performed due diligence in at attempt to ascertain copyright ownership. It would not limit the ability of users to proceed, in reliance on fair use – and at their own risk -- even in the absence of a "reasonable efforts search."

[16] 17 U.S.C. § 107.