Comments on Orphaned Works.
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In response to

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[Notices]
[Page 3739-3743]
LIBRARY OF CONGRESS
Copyright Office
Orphan Works
AGENCY: Copyright Office, Library of Congress
ACTION: Notice of inquiry

The Register of Copyright has asked for comments regarding the issues raised by "orphan works," i.e., copyrighted works whose owners are difficult or even impossible to locate. 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.

The Register has posed six general questions with several parts. In the interests of brevity, these comments will be structured around those questions using a question and answer format. Specific questions will be identified in the body using an italic font and responses in regular font. The Register of Copyright has also asked a series of "pregnant questions" where it is difficult to respond to them collectively. Free form commentary is presented at the end.

Background

Several sections of the background material presented by the Register of Copyright are relevant to the comments presented here and will be included. In particular, the Register wrote

"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. "…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."

For brevity the excellent summary and discussion of the problem in the notice has been deleted from these comments. There are certain other facts regarding the Berne Convention that are not presented and are relevant to the question of Orphaned works. The original Berne Convention was in 1886. There were several significant differences between the goals that came out of that convention and the current state of copyright. First, the Berne Convention advocated a copyright extended from the lifetime of the author plus some fixed term after that. (NOTE: Macauley's'excellent arguments against such a system of nearly 30 years before are still relevant today and make excellent reading). At that time the life expectancy of people was several decades less than today. The copyright term formula created then would be much larger now than the creators of it then might envision. As such the formula of over a century ago needs to be reexamined for the needs of this century rather than accepted as dogma. Second, the fixed term was considerably less than today. Today's fixed term exceeds the lifetimes of the creator's children and probably their grandchildren. Indeed, they extend into the fourth generation of descendants. Third, the scope of what was copyrighted was considerably less then than it is today. Not only were there no sound recordings, motion pictures, computer programs, computer games, executable, but there was also no concept of "derivative works." Fourth, the sheer number of people creating works or even capable of creating them is orders of magnitude larger than at that earlier time. These facts could not have been considered during that original Berne Convention.

Given this, the question of orphaned works really comes down to a question of administering copyright and "how does someone desiring to publish a new edition of some older work determine if a work is under copyright or not?" Obviously, one must determine the date of death of the creator. Presumably, the creator must have some identification with the work (e.g., "copyright by John Smith"). Of course, the non-de plume creates special difficulties because the author desires anonymity and under current copyright law that anonymity extends to their great great grandchildren. Putting that aside, one must begin searching for the death of THE "John Smith" anywhere in the world beginning today and going back 70 years. If "John Smith" dies in less than 70 years ago, one must track down his heirs. Presumably, the probate records are close in proximity to where John Smith's death certificate is. One must then find what heir acquired the copyright. Hopefully the heirs do not share equally and pass their shares down to their descendants. At best one might find a child or grandchild with sole rights. Of course all of this begs the question of how the children or grandchildren are to know what copyrights their ancestor had since there is also no registration required having them. Obviously, to the person desiring to distribute a new edition of an orphaned work, the cost of doing this must not exceed the revenue generated from selling the reissued work. Another alternative is that one cannot find the owner of a copyright after many searches and the funds expended are lost. This hypothetical is not intended an argument. Nevertheless, it does illustrate some aspects of the Berne Convention relevant to

orphaned works. The sheer numbers of people on the Earth at this time creating copyrightable works is billions not millions. The amount of records that must be kept to determine copyright extends for 70 years. These records must be traceable through several generations and many locations.

After over a century of rejection, the ideology of that earlier Berne convention has become the basis for our copyright law. Given these facts and the amount of material that is copyrighted from the moment it is created, the existence of orphaned works is inherent in the Berne Convention. Yet that convention is silent on these matters. It is well that the Register of Copyright has requested comments at this time since it is obvious that under the Berne Convention the problem of orphaned works can never get better over time.

Specific Questions

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.

The question is premature at this time. The current copyright system has only been in place in the United States for a few years. Even in other countries that adopted the Berne Convention earlier than the United States, the duration and expansion of copyright is of recent origin. It is not possible through recent anecdotal evidence to assess the scope of the problem over the long term. Theoretical models and mathematical analysis are the only means to provide some measure of the problems of this approach in the future. These types of theoretical models are not hypothetical since they have been well studied for decades and successfully applied may times before.

Another approach would be to perform an empirical study. Namely, the Register of Copyright should attempt to track down who might own the copyrights for works published decades ago that would be comparable to the duration allowed under current copyright without using any means other than death certificates and probate records. Recording the number of hours spent and costs for a number of works would give a statistical basis for assessing the difficulties. Assuming that most works are not created before one's 16th birthday or after ones 60th and a lifespan of 80 years, the duration of copyright would be 90 to 134years. Consider choosing a set of lesser known articles from well known magazines such as Harper's, Century, or some from Victorian England (A good source is at http://gaslight.mtroyal.ca/) between 1871 and 1905, and then track down who would own the copyright today. Given the international nature of the Berne Conventions this should be done with works in other foreign countries as well. Or

alternatively, decide on an amount of money to be spent and if that money is exhausted, declare the work to be "orphaned." By doing this on a number of articles, one can devise an experiment to test the numbers and difficulties associated with orphaned works.

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

How should an "orphan work" be defined?

Economically, an orphaned work is one where the one who desires to use it but cannot bear the cost of

1. Not finding the owner. Or
2. Finding the owner and being unable to negotiate a profitable license because the costs of finding the owner were onerous.

The true question is "what is the legal definition?"

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?

Since each copyright work is created by a unique copyright owner who dies at some time in a unique place, passing the copyright on to a unique set of heirs and the desired uses of those works is also unique; each case of orphaned works is inherently "case-by-case". Unfortunately, too case-by-case adjudication is for the judicial branch not the executive branches of most governments and so this puts the burden on the judicial branch.

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 an unlocatable work has also been suggested.

As the Register of Copyright pointed out in the background material "the Berne Convention and other treaties dealing with copyright that have followed forbid the imposition of formalities as a condition to copyright." Requiring copyright owners to check weekly, monthly, or annually the "Orphaned Works Registry" imposes a formality as a condition to copyright. Indeed, this formality is worse than the requirement of earlier copyright law for renewal. Renewal is a positive action that must be taken to retain copyright. Forgetting or not knowing to check the "Orphaned Works Registry" imposes the loss of copyright for failure to take an action more egregious than the previous failure of forgetting to look at the copyright date of a work one knows that one owns the copyright.

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?

While this would be the proper function of the Copyright office, as discussed above, this contradicts the Berne Convention.

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?

If the copyright holder is locatable, then the work is not orphaned. The question is if it within the economic constraints of doing so.

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?

As stated in the background, the Berne Convention "forbid the imposition of formalities as a condition to copyright". The registrations in the Copyright office would be incomplete since registration is NOT a requirement for copyright. The question then is "sufficient" for what? Search of the registrations in the Copyright Office would not satisfy the obligations under the Berne Convention. A limitation on the rights of a copyright holder for not registering is also imposing a formality since it might limit rights in the absence of registration.

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?

As stated previously, the duration of copyright extends several generations past the author's death and this was not considered when the foundations for the Berne Convention were created in the 19th century. Since copyright information need not be held in a publicly known location any longer and existence depends upon death notices and probate records, then inheritance records, personal interviews, and examination of family papers from distant ancestors will be required.

Should there be an obligation to place an advertisement seeking the owner?

The question is where? Certainly newspaper readers in Los Angeles do not read the Washington Post with any regularity. As stated above, requiring the diligent reading or even a central published list would be an "imposition of formalities as a condition to copyright".

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?

Previous copyright law has been blind to how obscure a work is. It did not need to since the term had been fixed. The obscurity of a work is subjective and not the basis of good law or practice. Herman Melville's "Moby Dick" was an obscure work until rediscovered years after his death. But, how one could legally judge a work obscure? Does one create a committee of "experts" to pass judgment? Can the creator or heirs present rebuttal evidence at the hearing or in some future time when they might become aware of the Star Chamber verdict? Can they appeal the verdict? Should one take an opinion poll and attempt to argue statistical significance and could the works of literary giants even pass such polls?

As for the "how long since publication" criteria, again, the Berne Convention does not relate copyright term to publication but to the creator's death. Therefore, date of publication is antipodal to the Berne Convention and irrelevant a discussion of copyright even if it is relevant to the pragmatic administration of copyright.

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.\9\ 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?

Again, this is a formality that is counter the Berne Convention. Pragmatically, the administration of such a system is far more expensive and cumbersome than the requirement that a copyrighted work have a copyright notice and the date of publication. The continued filings involve far more than a few dozen characters typeset at the time of publication.

Should such a registry(ies) be privately owned or administered by a government agency like the U.S. Copyright Office?

As stated above, the duration of copyright may be 90 to 134 years beyond publication. Can any privately owned company be assured to be in business for 5 to 7 generations after founding? Can they be assured of keeping accurate records? How would such a company be funded? Would such a company be funded by the government? If so why not just have the government do it? Would copyright owners be required to fund such a

company? How would such funding differ from the copyright fees previously charged previously? Other than enriching a private company using either government funds or fees from copyright owners, it would not.

What would such a registry look like? What kind of information should be required from such a filing?

The minimum formality would be sufficient information to allow an interested party to contact the owner of a copyright be that the creator or his heirs for 70 years after the death of the creator without undue expense. Given the time span and mobility of society this may be impossible without a centralized registry but that would impose a "formality" under the Berne Convention.

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).

As previously stated, such a registry is a formality not in accordance with the Berne Convention and more complicated than the copyright law that has been set aside in preference to the Berne Convention.

Nevertheless, consider the following. If persons are required to register with the Department of Motor Vehicles when they move from residence to residence, then it is difficult to understand why owners of copyright should not be required to register contact information within a reasonable period of some change (say 5 years). Neither would it be unreasonable for the Register of Copyright to send out notices every 5 years requesting an update. If the State Department of Motor Vehicles can do this, then the Federal Government should be able to do so as well. If the update is not received, then a work may be placed on the weekly "Orphaned Works Notice" for the next five years. If no response has been received after that time, the "Orphaned Work" will be designated as abandoned. Abandoned intellectual property shall then have not more rights than the owner can reclaim it at a later date but have no claims until having done so. Why should intellectual property not enjoy the same legal requirements as lost or abandoned personal or real property?

The question then become one of damages when works believed to be "orphaned" are published and the owners then step forth to reclaim their intellectual property rights. If one cannot enjoy full ownership of copyright and the damages the might come from infringement without adhering to these "formalities" then how does one have a copyright

in accordance the Berne Convention. Indeed, this would seem to create almost a "third world" status for some copyrights.

One radical alternative, which it perhaps too unpalatable to some, would be to allow creators of copyright works to be allowed to elect to either follow the vague common law copyright of the Berne Convention or formally register works with the Register of Copyright and placing the traditional copyright notice with date in the work. Because a claim of status of copyright is immediate and infringement could be adjudicated quicker and more sure than the copyright law of the Berne Convention, penalties for registered copyright infringement might be more severe.

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?

Having the registry is more practical than not having it but only assists in tracking down copyright if the owner has registered it. Certainly, it would be the first place to start a search but unfortunately, given the distributed nature of copyright determination inherent in the Berne Convention, not where it probably will end.

As for how helpful would such a registration be, then one should turn to the reasonable man criteria. Is it reasonable to assume that someone possessed valuable jewelry that they left outside at night, lost on the street corner regularly, and took no care safeguarding it for decades? Eliminating "formalities" seems to be equivalent of this. Such a registration would be only valuable for establishing a willful disregard for ownership of copyright after decades of inaction as a defense equivalent to "I saw the jewelry on my sidewalk and I only took it after it was there a year". This does not solve the problem.

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?

The difficulty with this that by providing additional benefits, one is penalizing those who do not. This is the "formalizing" that the Berne Convention has eliminated.

Rather than providing benefits to registering. Perhaps the benefits should be applied to NOT registering. The publication and distribution of a work is also a public announcement. Let creators be able to elect to publish a work with the date of

publication and notification that the copyright will expire in some term[1] set by law with extensive notices on applicable copyright law. The only formality then is a line of type giving the date and copyright owner. During that term the owner is free from any question of orphaned works and any infringements can be determined quickly and damages computed severely.

Would there be sufficient incentive for copyright owners to register in a permissive system?

What incentive does a copyright owner have to register at all under this proposal? One spends time and money to register a work that has little economic value (and as the Register pointed out in the background in 1966 few works were renewed at that time in any case). A better strategy would be to do nothing except keep the records of copyright as secret as possible and pray for an infringement with a large settlement out of court. While the owners and lawyers of such might benefit, it is hard to understand how anyone else or society as a whole can do so.

The Register of Copyright has asked a number of "pregnant questions" regarding registration and while not asked, one question is "how do the heirs of the creator of a copyrighted work promote progress in the science and arts?" In some occasions, the son may continue his fathers work (e.g., Babar- King of the Elephants, a set of children's stories) but this is rare and perhaps might be best considered on a case-by-case basis. In general, the heirs of a creator merely administer the copyright for economic advantage at best. Few would equate the creation of a work with the business of marketing. The issue then is how is government to administer copyright for 3 to 4 generations beyond the death of the creator of that copyright. If the purpose of the Berne Convention were to promote the creation of works by reducing the "formalizing" of copyright, then the conclusions do not apply to those who market copyrighted works or enjoy the profits from marketing. In this case, let those who create copyrighted works not be bound by "formalizing" but those who inherit copyright be required to not only register, provide contact information, but also pay for the administrative costs since they burden that administration the most. If these administrative fees are not paid on a regular basis, then the works become orphaned. The only question is how to objectively identify such works that are published but not registered. Finding a mine planted in a field should be an easier task than this given the distributed record keeping allowed by the Berne Convention.

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? … 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

[1] 42-50 years is recommended. Macauley's arguments on copyright are still more cogent than the gigabytes written today

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?

As stated previously, the Berne Convention does not allow this but pragmatically, certainly after 50 years after creation, there is a high probability that the creator is dead and his children may be in their middle age or most likely dead. While the grand children may not be orphaned, records are likely to be lost, destroyed, or stuffed into a shoebox in the closet. At 50 years after creation or publication, the majority of works are probably orphaned. This argument does not apply to works of ephemeral value that are protected by copyright laws such as computer games, Microsoft DOS Version 1.0, microchip masks, or pornography. In these instances, the original owners have no interest in their intellectual property past a few years or decades at best and there is no reason why the government should not treat these as orphaned works after that time but this would not be allowed under the Berne Convention.

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 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?

An unpublished work is not an orphaned work, it is a created but not yet published work. . The difficulty in applying the status to unpublished works is that the problem of locating a copyright owner is compounded by the problem of locating the unpublished works in many instances! The situation in Harper & Row is irrelevant to the discussion on orphaned works. The reasons there were the desire to protect those works from unscrupulous people who would steal these works and by publishing them damage the financial incentive to create works. Trade secret law would seem to be more applicable to Harper & Row than orphaned works. Perhaps it is time for Congress to reconsider the copyright and trade secret laws for this particulars of that case rather than using that case as a precedent.

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 [agrave] 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.\15\ 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?

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*\15\ 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. Sec. 1498(b) (2003). Complex issues raised by that proposal 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.*

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?

The fundamental problem with all of this is that it reduces the rights of copyright holders under the term of the Berne Convention by imposing some form of formality to copyright but the convention eliminates the formality as a condition of copyright. In most fields that employ logic this is recognized as a contradiction. In mathematics this is called "reductio ad absurdum" or the reduction to absurdity. The question then is if the Berne Convention has not created and will create far more problems than it will solve. Occam's Razor would have one choose the simpler solution. The question then is if the administrative

costs of the Berne Convention exceed the quaint practice of putting a copyright notice and a date in a work.

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.

As stated previously, most of the remedies to the problem of orphaned works do indeed run afoul of the Berne Convention. The problem is inherent in the Berne Convention. The "enjoyment and exercise" of copyright is well enough for the owner but does not account for the administrative burden copyright places on society, the courts, and governments. As Macauley stated over 150 years ago, a monopoly is onerous to society. The scope of copyright has expanded considerable. Current law is unprecedented. The duration of copyright extends onto several generations requiring extensive record keeping for over a century, if such records are kept, preserved, not destroyed, or even can be found in the millions of places they might be.

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?

No. A limitation on remedies is obviously a limitation on the "enjoyment or exercise of copyright" since as the Register of Copyright has noted, "that failure to comply with formalities can serve as a trap for the unwary." Continual vigilance is not preferable to periodic vigilance at well defined times.

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"?

While beyond the scope of these comments, this question reminds the author of the argument by Abe Fortas in Gideon vs. Wainwright. Fortas argued that continual determination of special cases was unhealthy for the courts in general. The same argument applies here. An ad-hoc solution for each case is not preferable to a clearly written law and a workable efficient procedure for administering.

Are there any other international issues raised by a proposed solution?

It is outside the scope of these questions but whether the Berne Convention is Constitutional is an issue. While not a part of Eldred V. Ashcroft, the administrative

aspect of adherence and extension of the Berne Convention were of concern to the United States Supreme Court.

GENERAL COMMENTARY

Least the reader misunderstand the above comments, they are not supportive of the Berne Convention but a condemnation of it. The Berne Convention of copyright is based upon an ideological notion rather than a pragmatic one- copyright exists for the creator or works.. The Berne Convention is silent on the critical fact that society, governments, courts, and citizens must administer copyright. Given the hundred, if not thousand, fold increase in the creation of copyright works in the 21st century, it is not surprising that the Register of Copyright has rightfully sought comments on how copyright might be administered under the Berne Convention. The fundamental problem here is that the elimination of "formalities" in the Berne Convention is antagonistic to the fair and efficient administration of copyright. The solution to this problem cannot be through ad-hoc measures but requires new thinking on copyright in the 21st century rather than the imposition of a 19th century concept that was not even well received in its day.