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This comment responds to the Notice in the Federal Register, Jan. 26, 2005, vol. 70, no. 16, p. 3739 <<http://www.copyright.gov/fedreg/2005/70fr3739.html>>.

The problem of orphan works is best solved globally. Such a solution should facilitate making orphan works accessible to members of the public worldwide. The solution should also spare users the trouble of having to start procedures with national copyright or like offices one after another. Indeed, it would be misleading to suggest to users that any purely local solution would fully facilitate their making orphan works accessible to the public in cyberspace. The United States should therefore not lock itself into a local solution before there is a treaty provision pending that would effectuate a global solution. The most that the United States should do now is explore a treaty-ready provision.

Such a treaty-ready provision could limit liability to a reasonable royalty for disseminating an orphan work. That limitation could be subject to either of the following conditions: the owner of rights refused to license them on reasonable terms; the owner was not locatable upon the exercise of due diligence. Due diligence could be found upon a showing that inquiry was addressed to the following: the author or owner of relevant rights identified on the public record in the Berne country of origin of the work; the party or parties identified as author, maker, or publisher on or in connection with the work pursuant to Article 15 of the Berne Convention. Courts could be mandated to tailor relief as follows: reduce the royalty by taking account of the extent that the work had not been hitherto exploited; award costs and attorney's fees against a claimant who demanded a royalty without proving ownership or who demanded an unreasonable royalty.

The United States should take the lead in drafting such a treaty-ready provision. But it should not legislate until the provision has been incorporated into a pending treaty with every chance of becoming a global standard. Legislating a purely local provision could make a global solution more difficult.

Yours truly,
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