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Proceedings before the U.S. Copyright Office;
Notice of Inquiry on "Orphan Works"

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Reply Comments of:

CREATIVE COMMONS AND SAVE THE MUSIC

SAVE THE MUSIC and CREATIVE COMMONS are pleased to submit these Reply Comments in response to the Copyright Office Notice of Inquiry on the problem of Orphan Works – i.e., out-of-print works whose owners are difficult or impossible to find. Having reviewed the hundreds of initial comments submitted in this matter, SAVE THE MUSIC and CREATIVE COMMONS believe that it is now beyond serious dispute that current copyright law creates an Orphan Works problem that is substantial both in terms of the number of creative works affected and the number of desirable, socially productive

uses of these works that are impeded. For reasons set out in these Reply Comments, SAVE THE MUSIC and CREATIVE COMMONS believe that the proposal set out in their Initial Comments[1] offers the best prospect of efficiently and fairly addressing the Orphan Works problem for all interests involved – rightsholders, users of Orphan Works and, perhaps most importantly, the public interest in promoting the dissemination of creative works.

SAVE THE MUSIC, a group that wants to archive and facilitate public access to the mostly orphaned genre of Jewish cultural music, and CREATIVE COMMONS, an organization that provides private law tools for copyright owners to clearly signal what rights they reserve and what uses they approve, demonstrated in their Initial Comments that the existence of a large number of Orphan Works is a serious problem for our copyright system. Under current U.S. law, those who wish to use an Orphan Work—to copy it, distribute it, perform or display it, or use it as the building block for a new work—must ask the rightsholder for permission. But the current U.S. copyright system does not keep records of copyright ownership that are complete, current, or accessible. So would-be users can't find the owners of Orphan Works, even when they'd be willing to pay for permission to use the works. In some cases, the owner, being a corporate entity, has ceased to exist. In the vast majority of cases the works were abandoned because they failed to produce (or no longer produced) any income. In most cases, rightsholders, once found, are willing to have their work used, often without compensation or for a nominal royalty. But the cost of trying to identify the rightsholders means that many desired uses are never made.

[1] OW0643-STM-Creative Commons.

SAVE THE MUSIC and CREATIVE COMMONS believe that this serious problem merits a legislative response. The organizations therefore offered in their Initial Comments a proposal that would increase access to both published and unpublished Orphan Works.

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I. The Initial Comments Submitted in Response to the Notice of Inquiry Demonstrate that the Orphan Works Problem is Real and Substantial

The Copyright Office Notice of Inquiry on the problem of Orphan Works produced over 700 initial comments—in itself a testament to how widely the problem of Orphan Works affects authors, artists, filmmakers, librarians, archivists, educators, academics, and a host of others who work with copyrighted materials. Many of the comments provide direct insight into the breadth and seriousness of the Orphan Works problem. The comments illustrate the diversity of people and interests affected by the problem of Orphan Works, as well as the costs that our current copyright system imposes on a huge range of socially valuable uses of creative works. To wit:

- Academic researchers have been forced to restrict the scope and alter the direction of research projects because of an inability to clear rights to Orphan Works;[2]

- Documentary filmmakers must spend significant time and money clearing rights to important historical film footage, and are often unable to do so despite significant effort;[3]

[2] *See, e.g.,* OW0012-Reeve.

[3] *See, e.g.,* OW0030-FMS; OW0046-Goodman; OW0574-Woods.

- Radio producers who wish to re-broadcast programs from the "golden age of radio" are often unable to locate owners and ask permission;[4]

- Photo shops refuse to reproduce or repair wedding photographs,[5] school photographs,[6] and other valuable family mementos which may be subject to a copyright held by a long-forgotten professional photographer;

- Libraries and archives – even such huge, well-funded institutions as the Library of Congress[7] and Harvard University Libraries[8] -- are unable to expand access to important historical, artistic and scholarly works by digitizing them and offering them for download to students, teachers, and others across the U.S. and around the world.[9] As an example, UCLA Libraries has been unable to locate owners and obtain the rights necessary to make available to the public a large and culturally significant collection of Mexican and Mexican-American vernacular recordings;[10]

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[4] *See* OW0032-WSCA-FM.

[5] *See* OW0061-Haynes.

[6] *See* OW0441-Wagner.

[7] *See* OW0630-LOC.

[8] *See* OW0639-Verba.

[9] *See, e.g.,* OW0593-Prelinger; OW0625-JHU.

[10] *See* OW0473-Strong.

- Authors and publishers have been prevented from pursuing many worthwhile projects, including the release of out-of-print historic African-American sound recordings[11] and the publication of a book containing historic photographs of important American dancers;[12]

- Record producers are unable to use music that they wish to sample—even when they are willing to pay a substantial fee for the use—because owners are often impossible to locate;[13]

- Hobbyists and collectors are deterred from preserving physically fragile works of significant cultural value, such as important American films shot on unstable "reversal" film stock,[14] and pulp science fiction magazines.[15] Although current copyright law affords libraries and archives a limited ability to make preservation copies,[16] fragile historical works held by private individuals often are left to crumble;

- Scientists and engineers are burdened by the difficulties of locating owners of old and no longer supported software programs

[11] *See* OW0579-Brooks.

[12] *See* OW0649-DHC.

[13] *See* OW0374-Rivera.

[14] *See* OW0632-Glynn.

[15] *See* OW0607-SFFWA.

[16] *See* 17 U.S.C. § 108.

(often referred to as "abandonware") in order to obtain permission to modify the software as needed to repair or update older computers and scientific instruments;[17]

- Museums such as the National Portrait Gallery are unable to locate owners and clear the rights necessary to reproduce on the Internet photographs of works in their collections – thereby preventing the affected institutions from educating the public about the content of their collections, and from allowing distant patrons and scholars access to reproductions of many works in their collections.[18]

These examples illustrate the problem of Orphan Works as it affects artists, writers, universities, media outlets, historians, filmmakers, journalists, librarians, museums, musicians, archivists, publishers, teachers, students, and others in every community in the United States. These examples necessarily represent only a tiny fraction of those impacted by the Orphan Works problem because they are provided by those who have sufficient motivation, organization and resources to prepare comments for submission to the Copyright Office. Nevertheless, the initial comments amply demonstrate the character and seriousness of the problem. And, importantly, these examples are consistent with what SAVE THE MUSIC and CREATIVE COMMONS have each experienced directly:

[17] *See, e.g.*, OW0071-Ruske; OW0397-Cluskey; OW0433-Nathanson.

[18] *See* OW0514-Holland.

1. Under the rules imposed by our current copyright system, ***most works are orphans*.** Relatively few works, as a percentage of total works created, produce any significant income for a rightsholder. Relatively few works, as a percentage of total works created, are commercially published. Even fewer works, as a percentage of total works, have any enduring commercial value. Most works that are published at all go out of publication quickly.[19]

2. Because the current copyright system does not require copyright holders to record ownership of their works in a publicly accessible system, owners are often hard to find (or no longer exist) and **obtaining permission is therefore often prohibitively expensive or impossible.**

[19] The American Society of Composers, Authors and Publishers (ASCAP) claims in its initial comments that any solution to the Orphan Works problem should not apply to music because ASCAP and similar "Performance Rights Organizations" license the rights "in virtually every copyrighted musical work." *See also* OW0640-BMI (same). This claim is incorrect. ASCAP's initial comments describe their repertory as covering the "most familiar standards to the latest top hits", as if there was no copyrighted music of interest other than that relatively narrow range. Indeed, virtually all of the culturally significant Jewish music that SAVE THE MUSIC wishes to archive is neither "familiar" nor a "top hit".

To check ASCAP's claim to license rights "in virtually every copyrighted musical work," SAVE THE MUSIC co-CEO Roman Ajzen accessed the ASCAP website and ran a search in ASCAP's database for works with "Yiddish" in the title. That search yielded only 18 results – and none of those 18 works were among the Orphan Works discussed in SAVE THE MUSIC's Initial Comment. Clearly, ASCAP does not have in its repertory any of the works that SAVE THE MUSIC is interested in licensing. Accordingly, ASCAP's claim that the there is no Orphan Works problem that affects music is not credible. It may well be that ASCAP holds an extensive collection of licenses for works that were commercially exploited, but they miss the fact that a large amount of recorded music – music subject to copyright – has never been published by a major label.

3. The current copyright law therefore imposes substantial and even insuperable barriers to the use of uncounted millions of works – including works of significant historical and cultural import – **without creating any connected and remotely proportionate benefit for authors and others rightsholders.**

4. **The problems described in the initial comments are caused, in part, by the current copyright rules.** As the result of a series of changes to U.S. copyright laws that began in 1976, U.S. copyright no longer requires registration, notice, or renewal—we are now living under an "unconditional" copyright system that attaches the full term of copyright to all works, whether copyright is relevant to an author's ability to exploit a particular work throughout the entire term or not. All of the works that would otherwise have fallen out of copyright under the former "conditional" system—either because of failure to register or give notice, or because of failure to renew—remain in copyright for the (increasingly long) full term granted under the law. Many of these works end up as orphans.

5. **Advances in technology that would otherwise allow wide use of, and access to, otherwise unknown creative works make the problem of Orphan Works more pressing.** With the development and wide deployment of digital technologies, including but not limited to the Internet, the cost of using creative

> works – of reproducing them, of distributing them, of transforming or recontextualizing them as the building blocks for the creation of new works – has fallen sharply, and will continue to fall. Simply put, the happy economics of creativity in today's digital environment encourages a multitude of uses and allows our culture to grow and spread at a rate that the dismal economics of yesterday's analog world made impossible. Given these developments, and given copyright's intended function as an "engine of free expression," copyright rules that burden and often prevent access to Orphan Works undermine copyright's mission and harm our culture.

II. The SAVE THE MUSIC/CREATIVE COMMONS "Categorical" Proposal is The Most Efficient, Fair Proposal Offered to Address the Problem of Orphan Works

Taken as a whole, the initial comments submitted in response to the Notice of Inquiry support the proposed changes to the copyright laws outlined in the Initial Comments submitted by SAVE THE MUSIC and CREATIVE COMMONS. The SAVE THE MUSIC/CREATIVE COMMONS "categorical" proposal would ease access to published Orphan Works by requiring rightsholders who wish to maintain the full spectrum of copyright remedies to *register* their works – thereby providing easily-accessible ownership information that can be used to facilitate licensing.

One of our proposal's chief advantages is its use of a registry to separate the category of Orphan Works from all other works – hence the reference to the proposal as

"categorical". All works that do not appear on the registry are treated as Orphan Works and will be accessible via payment of a statutorily-determined fee under a "default license," without the need to contact a hard-to-locate owner and ask permission. In contrast, works that appear in the registry are in the category of actively exploited works, and rightsholders in these works are not affected.

SAVE THE MUSIC and CREATIVE COMMONS believe that their registry-based "categorical" proposal largely eliminates the problem of Orphan Works while respecting the choices of rightsholders who wish to retain the full set of rights and remedies current copyright law provides, as well as those who do not. Additionally, SAVE THE MUSIC and CREATIVE COMMONS have set out a "notice proposal" that will provide many of the same benefits for *unpublished* Orphan Works. Other commenters, including Harvard University Libraries[20] and Google,[21] have offered categorical proposals that share many of the important features of the SAVE THE MUSIC/CREATIVE COMMONS proposal.

A full description of the SAVE THE MUSIC/CREATIVE COMMONS proposal is set out in the Initial Comments.[22] The proposal may be summarized as follows:

1. The SAVE THE MUSIC/CREATIVE COMMONS Proposal

A. Proposal for Published Works

SAVE THE MUSIC and CREATIVE COMMONS propose a *registry system* for published works.

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[20] OW0639-Verba.

[21] OW0681-Google.

[22] OW0643-STM-Creative Commons.

1. Holders of copyrights in *published works* who wish to retain the full scope of remedies that current copyright law provides **must *register* their works within a 25-year period following publication**.

    - All works—except for computer software—will enjoy a 25-year period of full copyright protection without the need to register. Rightsholders in software will be required to register their works within five years.

    - For published works that are registered within the prescribed period, **rightsholders will retain for the full term of copyright the ability to obtain any relief the current law allows, including injunctions and actual and statutory damages against infringers**.[23]

- Failure to register within a 25-year period following publication (or five years for computer software) does not vitiate copyright, but **moves the work into "orphan" status**.

    - Once a work is deemed an "orphan", it may be used without the need to ask permission, and for a nominal fee payable under a *default license* applicable to all Orphan Works. No injunctions are available against use under a default license.

[23] SAVE THE MUSIC and CREATIVE COMMONS also suggest that the copyright law be amended to allow rightsholders who register their work to include in their registration a URL referencing a webpage containing the terms and conditions upon which the particular rightsholder is willing to license. Such an arrangement would further facilitate licensing for works that appear in the registry – this would help authors to wish to retain the full scope of copyright remedies and employ standard licensing.

- **Failure to register a work in the Orphan Works Registry would not remove the work's copyright protection**; it would, rather, serve as a signal that the unregistered work was an orphan.
- The default license fee will be payable to an "Orphan Fund", where owners who did not register, and who discover uses of their work after the fact may identify themselves and claim any monies paid to the fund for use of their works.
- A search of the registry would be enough to constitute the "reasonable" inquiry required to determine that a work is orphan.
- Registrants will be required to keep contact information current.

- The law should also **re-install a *renewal* requirement** at 50 years into the copyright term.
  - Again, failure to renew would not vitiate copyright, but would signal that a work is orphaned.
  - Works that are not renewed will be usable under the same type of default license that applies to unregistered works.

B. Proposal for Unpublished Works

SAVE THE MUSIC and CREATIVE COMMONS propose a *"notice" system* for use of unpublished Orphan Works.

- For the unpublished works of natural authors, **the notice system will only apply upon the death of the author.**
    - If a death date cannot readily be determined, the law should presume an author's death 75 years after creation of the work in question.
    - For the unpublished works of corporations, the notice system will apply 10 years after a work's creation.
- Authors and their heirs may retain their full rights in unpublished works (outside the notice system) by **registering them any time before three years following the author's death**, or during the 10-year period applicable to corporate works.
- **For unpublished and unregistered works, a would-be user shall be entitled to make a use** if he
    - (1) confirms the death of the author (or that the date of the work's creation is within the statutory presumption) for the works of natural authors, or the date of the work's creation for the works of corporate authors;
    - (2) confirms the expiration of the three-year period for registration for the works of natural authors or the 10-year period for the works of corporate authors; and

- (3) posts a notice of intent to use for a period of six months in a centrally-administered "Claim Your Orphan" website.

2. The SAVE THE MUSIC/CREATIVE COMMONS "Categorical" Proposal Offers Significant Advantages Compared with Other Proposals

The SAVE THE MUSIC/CREATIVE COMMONS proposal, as outlined in our Initial Comment and summarized above, offers significant advantages over other types of proposals made in initial comments submitted by other parties in terms of enabling the use and dissemination of Orphan Works without interfering with the enjoyment and exercise of copyright by rightsholders. The proposals offered in the initial comments can be divided into three types:

- **"Categorical" proposals** – including the SAVE THE MUSIC/CREATIVE COMMONS proposal – that employ a registry, and that deem non-registration to be a signal of orphan status;[24]

- **"Reasonable efforts" proposals** that provide a defense in litigation or otherwise limit liability for those users who have made reasonable but unsuccessful efforts to find the owner of a Orphan Work;[25] and

[24] *See, e.g.,* OW0639-Verba; OW0681-Google; OW0024-Beckett.

[25] *See, e.g.,* OW-0595-Glushko-Samuelson; OW0597-CPD2; OW0605-AAP-AAUP-SIIA.

- **"Case-by-case" proposals** that create a governmental review body to review individual applications for use of Orphan Works and issue licenses under certain conditions.[26]

A. The SAVE THE MUSIC/CREATIVE COMMONS "Categorical" Proposal Offers Greater Certainty than "Reasonable Efforts" Proposals

Categorical proposals like the one offered by SAVE THE MUSIC and CREATIVE COMMONS offer significant advantages over "reasonable efforts" proposals in terms of providing certainty for both rightsholders and users. A system, such as that proposed by "reasonable efforts" proponents, that offers only a defense to infringement or limited liability, will create risk and uncertainty both for copyright owners and would-be users of Orphan Works. Such a system requires actual litigation or a threat of litigation to be effective in order to provide the relief of a defense to infringement or a limitation on liability. Litigation is costly and time consuming for rightsholders. Litigation or the threat of litigation has a chilling effect on users, as is evident from several initial comments in which individuals and organizations have asserted their lack of use of a work because of the uncertainty of litigation.[27] As a consequence, under a "reasonable efforts" proposal, the public interest in the wide dissemination of copyrighted works would continue to be chilled and, thus, stifled.

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[26] *See, e.g.*, OW0642-PPA; OW0669-FMC-AFTRA-AFM; OW0693-ICCP.

[27] *See, e.g.*, OW0030-FMS ("Ultimately, whether the issue is orphan films or Fair Use, an independent filmmaker rarely has the resources to fight a potential legal battle, and thus, even if they are sure they have a good Fair Use case for a critical piece of footage, or would like to use a piece of film for which they have not been able to find a copyright holder, they have to decide whether or not to take the risk of being sued, even if they expect to win, and their errors and omissions insurance provider has to let them include the footage or it must be removed.").

In addition, what constitutes "reasonable efforts" is not knowable in advance without some precedent-setting caselaw; i.e. the proper functioning of a "reasonable efforts" system will require rightsholders and would-be users to engage, at least for a time, in costly, time-consuming, and uncertain litigation. If the contours of "reasonable efforts" prove as difficult to limn completely as have the contours of "fair use", this period of uncertainty may persist indefinitely.

Even with the benefit of precedent, "reasonable efforts" systems require that each would-be user make a determination of what, in his or her individualized circumstances, constitutes a minimum effort that must be expended to locate an absent rightsholder. The concept of "reasonable efforts" is difficult to define in a manner that applies well to a wide range of individual circumstances, and that provides predictability to would-be users. And the individual user's determination is subject to later challenge in an infringement lawsuit. As a result, premising the ability to use an Orphan Work on a user's assessment of "reasonable efforts" unavoidably exposes that user to a degree of uncertainty and some non-trivial risk of litigation. For many users who desire certainty and cannot afford the cost of defending their use before a court or administrative body, an individualized "reasonable efforts" standard is, therefore, of little assistance.

"Reasonable efforts" proposals also do nothing to help signal or determine when a work has been orphaned, and therefore do not solve the problem of determining if a work has *actually* been abandoned. In this way, a "reasonable efforts" proposal disadvantages rightsholders because they are not able to clearly signal that their work is not an Orphan Work and must resort to litigation to obtain redress against a user's erroneous self-determination that the work in question has been orphaned.

Under the SAVE THE MUSIC/CREATIVE COMMONS proposal, the registry serves as a signaling tool that copyright owners can use to indicate that they have not abandoned their works. A potential user can search the registry and receive confirmation that a work has or has not been orphaned. All a "reasonable efforts" test does is limit the user's responsibility in terms of the extent of a search they are obliged to conduct. It gives copyright owners no power to signal that they have not abandoned their work.

In contrast to the "reasonable efforts" approach, which imposes significant search costs and uncertainty on each individual who wishes to make use of a particular Orphan Work, the SAVE THE MUSIC/CREATIVE COMMONS "categorical" proposal places an initial burden on the party best able to bear it – the rightsholder. Our proposal obliges the rightsholder to make a decision, at a point in time during the life of the work where the rightsholder will have a sense regarding whether the work has substantial and continuing commercial value, whether he or she wishes to exploit a work through the high-cost route of infringement damages, injunctions, and customized licenses that the copyright law currently provides, or whether the work is better exploited through a much lower-cost system of one-size-fits-all default licenses.[28]

It should be noted that several commenters have submitted "reasonable efforts" proposals that also include significant limitations on liability and elimination of injunctions for the use of works that do not appear on a voluntary registry and for which a

[28] The "reasonable efforts" model has the benefit of placing no additional burdens on copyright owners, in contrast to "categorical" proposals wherein owners are obliged to add their work to the registry to signal that it is not an Orphan Work. However, categorical proposals offer a significant countervailing advantage: once a work is added to the registry, a copyright owner can be certain that it will not be used without permission (that is, potential users are put on notice that uses beyond the scope of fair use are not permitted), and that he will retain the full scope of remedies if it is.

reasonable ownership search has been made.[29] While a straightforward registry proposal is superior, we agree that proposals that combine a "reasonable efforts" standard for use of Orphan Works with significant liability limitations and removal of injunctions would be a significant improvement compared with current law, and are therefore also worthy of consideration by Congress.

B. The SAVE THE MUSIC/CREATIVE COMMONS Categorical Proposal Is Superior to a Case-by-Case Approach Because Canadian Experience Demonstrates that the Latter is Ineffective

The "case-by-case" proposals that several commenters have advanced create administrative burdens without corresponding benefits to would-be users of Orphan Works. Case-by-case systems are similar to the arrangement currently operating in Canada, where an administrative body undertakes a lengthy inquiry into both reasonable efforts to locate a rightsholder – a concept that is both difficult to define and case-specific – and the "proper" license fee for a particular work (a fee that is usually set in the absence of market transactions by which the value of the subject work may be measured). Such a "case-by-case" system is slow, bureaucratic, and provides little assurance for the vast majority of desired uses of Orphan Works. Further, Canada's system does not provide much greater access to Orphan Works than our current system does -- the Canadian system has issued only 143 licenses since 1990.[30] Basic logic suggests that this system is, therefore, ineffective. As the Copyright Office itself acknowledged in its Notice of Inquiry "[e]mpirical analysis of data on trends in copyright registrations and renewals

[29] *See, e.g.*, OW0663-IndependentFilm (damages caps, no injunctions or recovery of attorneys fees); OW0629-PublicKnowledge (damages caps); OW0595-Glushko-Samuelson (limitations on actual damages, no statutory damages, attorneys fees, damages based on user's profits, or injunctions).

[30] *See* http://www.cb-cda.gc.ca/unlocatable/licences-e.html.

over the last century suggests that a large number of works may fall into the category of orphan works."[31] Given that the nature of human creativity likely does not change much just north of the U.S. border, the Copyright Office's own analysis suggests that the number of works that fall into the category of being orphaned in Canada must exceed 143 works ***over the course of 15 years***.

In addition, the money and time required for users to access the case-by-case system often are significantly out of proportion to the scope of the problem. Many desired uses of Orphan Works—as described in the stories told by commenters—are non-commercial and are not expected to produce any monetary return. Requiring users to spend time and money to navigate a bureaucratic case-by-case adjudicatory system will simply guarantee that these uses will not be made.

A case-by-case approach, therefore, is not an efficient, fair or effective means of dealing with the Orphan Works problem.

C. Expanding the Libraries and Archives Exception Will Fail to Address Most of the Orphan Works Problem

A number of organizations have proposed changes to the copyright law that would address the Orphan Works problem, but would narrowly limit the solution to organizations classified as "libraries, archives, and non-profit educational institutions."[32] Several commenters suggested, for example, amending the narrow exception under 17 U.S.C. § 108(h), whereby libraries and archives are able to digitize and distribute a

[31] Notice of Inquiry, 70 Fed. Reg. 3741 (Jan. 26, 2005) (citing 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; *see also* H.R. Rep. No. 94–1476, at 136 (1976).

[32] *See* OW0457-Stanford Libraries; OW0657-Internet Archive; OW0687-RIAA.

limited range of works in the final 20 years of their term if the work is not commonly available, to encompass orphan works.

SAVE THE MUSIC and CREATIVE COMMONS believe that these proposals are useful at addressing the difficulties that libraries and archives currently experience in fulfilling their objectives of making important educational and literary material available to the public but, as our experience and the experience of many other commenters demonstrates, such a narrow amendment will not address the entire Orphan Works problem. The problem is bigger than just that experienced by libraries and archives. For example, a narrow approach would not help Google, which provides a vital information locator tool through its search engine and other technologies such as its GooglePrint functionality that allows users to search the text of all books – including Orphan Works.[33] A narrow approach would also not help the Wagner family, who were unable to print a photo of a deceased relative because it was copyrighted by the out-of-business school photographer that had taken the picture 30 years earlier.[34] And, most importantly, a narrow, library-only, approach does nothing to facilitate the creation of derivative works. Libraries and archives serve the vital role of preserving culture and making works available to students and the general public. However, there are many individuals and companies outside the library community that use works from the past to create new works. A library makes Shakespeare available to the public—but an individual author rewrites Romeo and Juliet for the 21st century. A solution to the Orphan Works problem should facilitate all creative reuses that rightsholders would ordinarily permit if they could be found, not just preservation and access.

[33] *See* OW0681-Google.

[34] *See* OW0441-Wagner.

D. The SAVE THE MUSIC/CREATIVE COMMONS Categorical Proposal Complies With U.S. Treaty Obligations

Finally, as was explained in the SAVE THE MUSIC/CREATIVE COMMONS Initial Comments, none of the changes to copyright law we have proposed would create a prohibited copyright "formality" under either the Berne Convention or the TRIPs Accord, and therefore nothing suggested in the SAVE THE MUSIC/CREATIVE COMMONS Proposal would affect the compliance of the United States with these international agreements.

Both the Berne Convention and the TRIPs Accord prohibit the imposition of formalities on the works of foreign authors if those formalities interfere with the "enjoyment and exercise" of copyright. Nothing contained in this proposal would interfere with copyright's "enjoyment and exercise". Failure to register a work in the Orphan Works Registry would not remove the work's copyright protection; it would, rather, serve as a signal that the unregistered work was an orphan, and, therefore, that the rightsholder was no longer exploiting the work through any of the channels – customized licensing, infringement damages, injunctions – that the copyright laws currently offer. Rightsholders who fail to register their works would be choosing to exploit their works through a lower-cost system of one-size-fits-all default licenses with no need to identify a rightsholder and ask permission. In this lower transaction cost environment, many uses of Orphan Works that are impossible now will become possible.

Importantly, whether the default license applies to any particular work is within the control of the rightsholder. Accordingly, a particular rightsholder's decision to rely on the lower-cost default license, rather than the very high-cost rules that current copyright law imposes on all rightsholders, is not a forfeiture of rights. And it does not

detract from the United States' promise under the Berne Convention and the TRIPs Accord to protect the enjoyment and exercise of the copyrights of foreign authors. If anything, the creation of an Orphan Works Registry would *promote* the enjoyment and exercise of copyright by allowing rightsholders whose works were unable find a market under current high transaction cost copyright rules to find a market in a lower transaction cost environment that better suits the economics of most creative works.

In testimony before Congress supporting U.S. accession to the Berne Convention, Professor Paul Goldstein emphasized Berne's ability to embrace a variety of arrangements aimed at balancing the interests of rightsholder with broader public concerns:

> "The fact that Berne consists of standards, and that these standards are sufficiently flexible to accommodate the often disparate laws and practices of its member states, means that the Convention leaves ample room for preserving the American copyright tradition of balancing the incentives needed for authors and publishers against the interests of consumers in access to copyrighted works."[35]

In short, the SAVE THE MUSIC/CREATIVE COMMONS proposal offers an efficient means for balancing the interests of authors and other rightsholders with the public interest in facilitating access to otherwise unavailable works.

For a fuller explanation of why the Orphan Works Registry, and the default licenses associated with it, do not detract from U.S. adherence to the Berne Convention or the TRIPs Accord, *see* Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 Stanford

[35] *Berne Implementation Act of 1997: Hearing on H.R. 1623 Before the House Subcomm. on the Courts, Civil Liberties, and the Administration of Justice of the Comm. on the Judiciary*, 100th Cong. 667 (1987) (statement of Professor Paul Goldstein, Stanford University).

Law Review 485, 539-545, 551-568 (2004) (attached to SAVE THE MUSIC/CREATIVE COMMONS Initial Comments).

III. Conclusion

The initial comments submitted in response to the Copyright Office Notice of Inquiry demonstrate that the Orphan Works problem is serious, and that it has a significant impact on access to information for purposes of research, teaching, learning, and artistic creativity. In their Initial Comments, SAVE THE MUSIC and CREATIVE COMMONS offered a proposal that will solve the problem in a fair and efficient manner, and without affecting U.S. treaty obligations. Again, we commend the Copyright Office for conducting this important inquiry into the problem of Orphan Works, and we look forward to the opportunity to discuss our proposal with you further.