Caring for Orphans
Copyright and the Orphan Works Problem in the United States

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Abstract
This master’s thesis focuses on the orphan works problem in the United States. The research paper analyses three proposed solutions to the orphan works problem: the Orphan Works Act of 2006, the Public Domain Enhancement Act, and Pamela Brannon’s Compulsory Licensing System. After examining these three proposals from a theoretical perspective called the incentives-access paradigm and looking at how they would affect copyright owners and users of orphan works, the paper concludes that the proposals are inadequate. To achieve a better balance between the benefits of copyright protection and its costs, the study presents a new solution to the orphan works problem.

Key words
Copyright, Copyright infringement, Intellectual property, Authors and publishers
Contents

Introduction .................................................................................................................. 3
  Defining Orphan Works.......................................................................................... 4
  Theoretical Basis.................................................................................................... 5
  Purpose ................................................................................................................... 7
  Previous Research ................................................................................................. 8
  Method .................................................................................................................... 11
  Sources ................................................................................................................... 13

Copyright Basics ....................................................................................................... 14
  General Information ............................................................................................... 14
  Limitations on Exclusive Rights and Orphan Works .............................................. 17
  Obtaining Permission to Use Copyrighted Material .............................................. 19

The Orphan Works Problem ..................................................................................... 22
  Causes of the Orphan Works Problem .................................................................. 22
  Orphan Works Situations ....................................................................................... 23
  Uses and Users Affected by the Orphan Works Problem ...................................... 24

Evaluation of Three Proposals to Solve the Orphan Works Problem ................. 27
  Analysis of the Orphan Works Act of 2006 ............................................................ 27
  Analysis of the Public Domain Enhancement Act ............................................... 34
  Analysis of Pamela Brannon’s Compulsory Licensing System .......................... 38
  Evaluation of the Proposals Based on the Incentives-Access Paradigm ............. 43

A New Orphan Works Proposal ............................................................................... 45
  The New Orphan Works Proposal in Relation to the Incentives-Access Paradigm ... 48
Conclusion ........................................................................................................50
Summary ...........................................................................................................52
Works Cited ......................................................................................................53
Glossary ............................................................................................................62
Appendix: 12 Licences Issued by the Canadian Copyright Board
1997-1998 .....................................................................................................65
Introduction

If you want to use material that is protected by copyright, you normally have to obtain permission from the party that holds the granting rights for the copyrighted material. The permission grantor is generally either the copyright owner or the publisher/producer of the work. The granting rights are determined by the contractual agreement the copyright holder has with the publisher or producer of the work.¹ Thus, to obtain permission for copyrighted material, you have to identify and contact the permission grantor.

Sometimes, however, it is impossible to identify or locate the permission grantor. Such instances are called orphan works situations. Orphan works can most easily be understood as copyrighted material for which no permission grantor can be identified and/or located. In a situation where the permission grantor cannot be found, the user risks being sued for copyright infringement if he or she uses the work without permission, as there is always a possibility that the copyright owner could appear and sue the user. Consequently, this is a problem for people that for example wish to publish orphan works or incorporate them in films, music or books. It is also a problem for libraries and archives that want to make orphan works accessible online.

According to the Center for the Study of the Public Domain at Duke Law School, the orphan works problem has worsened in the last few years due to a number of factors. For instance, the urgency to save orphan films that are disintegrating has become urgent, as they simply do not last as long as the copyright term. New legislations in US copyright law have also made it more difficult to locate copyright holders (this is discussed more later on in the paper).²

As a result of the growing orphan works problem, some steps have recently been taken to bring attention to the problem and to find a solution to it. For instance, the U.S. Copyright Office released a report on orphan works in 2006. There have also been some legislative and non-legislative proposed solutions to the problem, such as the Orphan Works Act of 2006, the Public Domain Enhancement Act, and Pamela Brannon’s Compulsory Licensing System. The purpose of this study is to show that none of these three proposals provides a good

¹ Cheryl Besenjak, Copyright Plain & Simple (2001) 133-134.
solution to the orphan works problem in the United States and to offer a new solution to the problem.

The research paper first defines the term “orphan works” and describes the theoretical basis and purpose of the study. The paper then discusses some previous research on orphan works and outlines the method and sources that are used in the study. This is followed by an explanation of some basic facts about US copyright law and a description of the orphan works problem.

After the orphan works problem has been discussed, the study provides a critical analysis of the Orphan Works Act of 2006, the Public Domain Enhancement Act (from now on abbreviated PDEA) and Pamela Brannon’s Compulsory Licensing System. The analysis of the three proposals is followed by a presentation of a new solution to the orphan works problem. The study ends with a conclusive discussion on why the new proposal is a more appropriate solution to the orphan works problem in the US than the other three proposals.

The paper also consists of a short summary of the paper, a glossary of some legal words that are used in the text, and an appendix. The appendix constitutes a list of twelve orphan works licences that were issued by the Canadian Copyright Board in 1997-1998. The information conveyed in the appendix is discussed in connection with Brannon’s Compulsory Licensing System.

Defining Orphan Works

I have not found a definition of “orphan works” in any reference book. However, in the Copyright Office’s Report on Orphan Works the term is used to “describe the situation where the owner of a copyrighted work cannot be identified and located by someone who wishes to make use of the work in a manner that requires permission of the copyright owner.” I think this use of the term is misleading for two reasons. Firstly, if you are unable to locate the copyright owner, the work is still orphaned even though you may be able to identify the copyright owner. Secondly, although some copyright owners grant permission to use their works, many do not. Consequently, in this research paper, an orphan works situation is used to describe a situation where the permission grantor of a copyrighted work cannot be identified and/or located by someone who wishes to make use of the work in a manner that requires permission of the permission grantor.

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3 There was no definition of the term in Encyclopaedia Britannica Online, Encyclopaedia of Library and Information Science, Merriam-Webster’s Collegiate Dictionary, Merriam-Webster’s Dictionary of Law, Black’s Law Dictionary and Oxford English Dictionary on the following access date: 15 Jan. 2008.
Theoretical Basis

The assessment of the Orphan Works Act, the PDEA, and Pamela Brannon’s Compulsory Licensing System, and the presentation of a new solution to the orphan works problem are based on a copyright theory called the incentives-access paradigm. The basic principle of the theory is that the objective of copyright is the maximisation of societal welfare through output. According to the incentives-access paradigm, a good level of copyright is achieved by balancing the benefits to society from protection of copyright against its costs.\(^5\)

To understand the incentives-access paradigm more fully, one needs to consider the benefits and cost of copyright. To create a work, authors need to spend time and often money on equipment, among other things. Using creative expression that has already been created can, of course, diminish the investment needed for creating a work. As William M. Landes and Richard A. Posner state:

> The less extensive copyright protection is, the more an author, composer, painter, or other creator can borrow from previous works without a license yet without infringing copyright, and the lower, therefore, the costs of creating a new work.\(^6\)

At the extreme, copying someone else’s work in its entirety decreases the author’s creative investment to zero.\(^7\) In other words, if there were no copyright protection, creators would be able to copy other people’s work freely. However, if authors did not have some exclusive rights to their material, they would be less likely to make a profit, and thus probably less bothered to create works. As Sami J. Valkonen writes:

> Protecting copyrights leads to societal good because granting authors exclusive rights will induce the creation of more creative works. In the absence of any protection there would be little financial incentive (or sometimes economic ability) for the creative community to invest time and/or money in copyrighted works […].\(^8\)

Likewise, if distributors could not earn money from the works, many distributors would probably not bother to disseminate them.\(^9\) Thus, without copyright protection, there would be a substantial decline in output, and the promotion of creativity would not be served.\(^10\) For example, an author would be less willing to create a new book if other authors who had not invested the time and money of

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\(^7\) Valkonen 371.

\(^8\) Valkonen 371.


\(^10\) Valkonen 371.
producing it could duplicate the work and sell it. In such circumstances, according to Mark A. Lemley, the competitive market would drive the price of the book down towards the marginal cost of producing and distributing the book. As a result, the author would probably not be able to recover the cost of creating it.\textsuperscript{11} Publishers would also suffer in the absence of copyright protection. As Landes and Posner point out:

\begin{quote}
Academic publishers often derive much of their income from their “backlist,” that is, from continuing sales of books published in previous, sometimes long-previous, publishing seasons. The income used to finance current publication of academic books, most of which fail to generate income sufficient to cover their cost. Without copyright, a backlist would not be worth much, and the number of books published by universities would decline.\textsuperscript{12}
\end{quote}

However, although copyright is necessary, it comes at a cost. What makes the issue of copyright problematic is that in the broadest conceptual sense all new creation is based on previous work. As countless scholars have demonstrated, efficient creation of new works requires access to and uses of old works.\textsuperscript{13} Writers, composers, and artists all incorporate into their works ideas, language, and expressive details they first encountered elsewhere. In one of his essays, T. S. Eliot writes, “Immature poets imitate; mature poets steal […]”\textsuperscript{14} Although one may not agree with Eliot, it is nevertheless a fact that “Creation does not occur in a vacuum. Rather, knowledge is cumulative – authors and inventors must necessarily build on what came before them.”\textsuperscript{15} For example, Shakespeare regularly used to borrow the plot and most of the characters from an existing work of history, biography or drama and to incorporate these elements into his plays.\textsuperscript{16}

Shakespeare is not an exception. Many other eminent authors – such as Kafka, Yeats, Shelley, Coleridge, T. S. Eliot, and James Joyce – also borrowed from other writers.\textsuperscript{17} Borrowing can also be found in painting, movies and music.\textsuperscript{18} For instance, Dvorak, Bartok, Grieg and many other European composers frequently used folk melodies in their own works.\textsuperscript{19}

If creators were given control over every element and use of the works they created, there would be little raw material left for later authors. For example, if

\begin{itemize}
\item[12] Landes 56.
\item[15] Lemley 997.
\item[16] Landes 58.
\item[17] Landes 59.
\item[18] Landes 67-68.
\item[19] Arewa 606; Landes 67.
\end{itemize}
copyright protection would be increased so that typical plotlines would constitute copyrighted expression, output would be impacted negatively because writers would be limited in their ability to use these customary formats.20 In other words, “Granting authors and inventors the right to exclude others from using their ideas limits the diffusion of those ideas, and so prevents people from benefiting from them.”21 Thus, a fundamental task of copyright law is to strike a good balance between the benefit of copyright in encouraging the creation of new works and the limiting effect on output that copyright protection has by raising the cost of creating them.22

Sometimes, however, it is difficult to decide what the proper level of copyright should be. This is for instance evident when it comes to the question of how much similarity the law should allow. Allow too much imitation and you will stifle the incentives for creating new works. Discourage imitation too strongly and you will suppress the output of new works.23 Nevertheless, copyright law should try to achieve a good balance between the copyright owners control over their works and the general public’s access to them.

Purpose

The purpose of this research paper is to reject the Orphan Works Act of 2006, the PDEA and Pamela Brannon’s Compulsory Licensing System and to offer a new solution to the orphan works problem in the United States. To show that these three proposals are inadequate, the paper first analyses the proposals and looks at how they would affect copyright owners and users of orphan works. Based on the incentives-access paradigm, the paper then demonstrates that none of the proposals would achieve a good balance between the benefits of copyright protection and its costs. Instead, the paper presents a new solution which would achieve a better copyright balance and thus stimulate output of works more. As the study concerns the orphan works problem in the United States, the paper focuses on US copyright law and those that are subject to it.

There are three reasons why I have chosen the Orphan Works Act, the PDEA and Brannon’s Compulsory Licensing System. Firstly, they represent three distinctively different methods. Secondly, scholars seem to have written more about the Orphan Works Act and the PDEA than most other proposals. Thirdly, the proposals could perhaps be regarded as more “serious” than some other proposals, as

20 Valkonen 372.
21 Lemley 996.
22 Landes 69.
23 Lemley 990.
the Orphan Works Act and the PDEA have been presented as legal bills and Brannon’s proposal is based on an orphan works law in Canada.

Although some scholars have analysed the Orphan Works Act and the PDEA, no one appears to have done an extensive examination of them from a theoretical point of view before. In addition, those scholars that have written about the proposals hardly ever discuss them in relation to other people’s comments on the methods. Thus, my research paper differs from former research as it evaluates these two proposals from a theoretical perspective in relation to a number of critical comments on them. In addition, my research paper differs from former research as it analyses Brannon’s proposal for the first time and offers a new solution to the orphan works problem.

Previous Research

In this section, I will present some studies on orphan works that I think are worth mentioning in relation to this paper. One of these studies is “An Orphan Works Affirmative Defense to Copyright Infringement Actions” (2005) by Jerry Brito and Bridget Dooling. The text starts by discussing the orphan works problem and gives examples of how it affects those who wish to use orphan works. It then goes on to describe the causes and costs of the orphan works problem.24 The article also analyses four proposed solutions to the problem: the PDEA, New-Style Formalities, The Creative Commons Halfway Approach, and the Canadian orphan works system. Brito and Dooling do not think that these proposals address the orphan works problem adequately in regard to US politics and international copyright law.25 Instead, they propose a new solution to the orphan works problem that they call the Orphan Works Affirmative Defense. To remove the unfortunate choice between using an orphan work and bearing the risk of infringement litigation, the proposal suggests that people who conduct a reasonable search in good faith for a work’s copyright holder before using the work should not be liable for copyright infringement.26

About a year after Brito and Dooling’s article, the U.S. Copyright Office published its Report on Orphan Works (2006). The report is based on hundreds of written comments on the orphan works problem from an inquiry issued by the Copyright Office. The report also derives from a number of roundtable discussions and meetings with different interest groups.27 The study gives a

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25 Brito 86-106.
26 Brito 107-112.
comprehensive understanding of the orphan works problem by describing the causes and effects of it. Based on the findings of the study, the Copyright Office comes to the following conclusions: 1) the orphan works problem is real; 2) the orphan works problem is elusive to quantify and describe comprehensively; 3) Many orphan works situations cannot be solved by existing copyright laws; and 4) legislation is necessary to provide a meaningful solution to the orphan works problem as we know it today. Finally, the Copyright Office proposes a solution to the problem. Like Brito and Dooling, the Copyright Office recommends that the user should not be liable for copyright infringement after he or she has performed a reasonably diligent search for the copyright owner.

In Coree Thompson’s study “Orphan Works, U.S. Copyright Law, and International Treaties: Reconciling Differences to Create a Brighter Future for Orphans Everywhere” (2006) the author examines whether the Copyright Office’s proposal could solve the problem of orphan works without conflicting with international treaties. Although Thompson is unsure of how effective the Copyright Office’s solution would be, she believes that the proposal is practical and balances the rights of copyright owners and users. Thompson also discusses how the orphan works problem evolved and the domestic and international history behind it.

Another text that addresses the orphan works problem is “Can You Find a Home for This ‘Orphan’ Copyright Work? A Statutory Solution for Copyright-Protected Works Whose Owner Cannot Be Located” (2006) by Benjamin T Hickman. The text proposes a modification to the Copyright Office’s recommendation to ensure that the diligent search standard provides sufficient certainty to orphan works users. As Hickman does not think that the diligent search standard alone is enough, he suggests that there should also be guidelines for a reasonable search.

In the research paper “Orphan Works, Abandonware, and the Missing Market for Copyrighted Goods” (2007), Dennis W. K. Khong examines a number of solutions to the problems of orphan works and abandonware, such as a statutory licence from a copyright tribunal, collective licensing schemes, copyright levy, expansion of the fair use doctrine, renewable copyright, and the PDEA. After analysing these legal solutions, Khong suggests that a hybrid approach of a

32 Hickman 155-156.
copyright renewal system and a compulsory licensing scheme would be an effective way of solving these problems.33

Pamela Brannon and Darrin Keith Henning also offer solutions to the orphan works issue in their respective studies “Reforming Copyright to Foster Innovation: Providing Access to Orphaned Works” (2006) and “Copyright Deus Ex Machina: Reverse Registration as Economic Fostering of Orphan Works” (2008). Both papers investigate how and why works become orphaned. The studies also provide a critical analysis of various proposed solutions to orphan works. Although the Orphan Works Act and the PDEA are two of the examined proposals, they only discuss them briefly. Henning concludes by rejecting all proposed solutions and suggests a new solution based on a system of reverse registration. This system would require people to register their use of orphan works and pay a standardized fee into a centrally managed fund.34 In contrast to Henning’s recommendation, Brannon proposal is based on a compulsory licensing system for orphan works in Canada.35

Another text that discusses the Orphan Works Act is ”Reason or Madness: A Defense of Copyright’s Growing Pain” (2007) by Marc H. Greenberg. The main purpose of the study, however, is to analyse and critique seven leading arguments against the existing copyright law in the US. Contrary to these arguments – which derive from the writings of Yochai Benkler, Jed Rubenfield, C. Edwin Baker and Neil Weinstock Netanel – Greenberg believes that the copyright law on the whole provides an adequate balance between the rights of creators and users. Nevertheless, he thinks that there are areas of concern, notably the fate of orphan works and fair use. After analysing the Orphan Works Act, Greenberg concludes that the act may provide a framework for improving copyright law without taking some of the more drastic reformative steps proposed by Benkler, Rubenfield, Baker and Weinstock.36

In the article ”An Economic Model for the Incentive/Access Paradigm of Copyright Propertization: An Argument in Support of the Orphan Works Act,” Sami J. Valkonen and Lawrence J. White briefly assess the Orphan Works Act based on an economic model. The article begins by describing the constitutional mandate for the United States copyright regime and some economic models of intellectual property, among other things. It then continues to present a new economic model for copyright based on the view that “the maximisation of societal

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welfare through output […] is the constitutionally mandated objective of the copyright regime.”37 After applying the model to the Orphan Works Act, the text concludes that the act is “consistent with the constitutional objectives of copyright,” and that it provides a good solution to the orphan works problem from an economic perspective, as it would “increase the output of copyrighted works thereby increasing societal welfare.”38

Method
Two different methods are used in the research paper: description and argumentation analysis. A descriptive method is used to explain my proposal, the three former proposals and the nature of the orphan works problem. This method implies an interpretation of a text or a speech. In other words, the goal is to try and understand what the author or speaker wishes to express in the text or speech. To interpret a text or speech, it is sometimes necessary to take into consideration where it is taken from, when it was written or presented, for what audience it was intended, what the purpose of it is (e.g. to inform, persuade, or entertain), and what knowledge and values the author or speaker possesses, among other things.39 In addition, a descriptive method often involves choosing what information to use from the information that has been collected. The chosen information should be relevant and of importance to the purpose of the study.40 However, it is up to the writer to decide what information he or she regards as relevant and important. Moreover, the writer’s knowledge, experiences, opinions and values influence his or her interpretation. Consequently, description is a method that contains a subjective element, as people can interpret and describe the same text or speech in different ways depending on their choice of information and who they are.41

For the evaluation of the three proposals, argumentation analysis is employed. This method constitutes evaluating a work in order to increase the understanding of it. Like description, argumentation analysis contains a subjective element, as it expresses a writer's opinion or evaluation of a work. This evaluation is in turn based on the writer’s knowledge, experiences, opinions, and values.42 In this paper, argumentation analysis is used both as a tool to evaluate the proposals, by creating arguments for or against them, and to assess other people’s opinion of them.

37 Valkonen 361.
38 Valkonen 363, 399.
41 Björnsson 11.
42 Björnsson 51.
To create a sound argument, the argument must be credible to be accepted. A credible argument implies that the argument is either true or probable. Sometimes, you do not need to support a statement with argumentation or proof to make the statement acceptable (e.g. “earth is round” or “porcelain is fragile”). However, in many instances, statements need to be supported by argumentation to be accepted, especially if “it involves a complex matter or is strongly tied to particular values or norms” (e.g. statements such as “breast-feeding is preferable to bottle-feeding” or “it’s not good for the child if the mother works”).

To create a sound argument, the reasoning underlying the argument must also be valid and relevant. For instance, the following reasoning is valid: *If you break your leg, you will feel pain. Pain is unpleasant. Therefore, to break a leg is unpleasant.* However, this next reasoning is invalid: *The crime rate decreased after the death penalty was installed. Thus, the death penalty has caused the decrease.* This so called *post hoc* fallacy is incorrect because we would be wrong to conclude that because the crime rate has decreased after the death penalty came into effect, the death penalty has caused the decrease. The new rate might be the result of hidden causes, such as a decrease in the proportion of the population in the crime-prone ages of sixteen to twenty-eight. Moreover, it would be incorrect to argue that a person claiming that China has the largest rice production is wrong just because he is a communist. In other words, the statement can still be true even if the person is a communist, murderer or notorious liar. Such a logical fallacy is called *ad hominem*.

It is also important for a sound argument to be comprehensible. For instance, sometimes it is necessary to define a term or explain something if the term or statement can be interpreted in different ways. In addition, one should strive to be objective when one argues for or against something. In other words, if a writer arguing for monarchy is aware of facts that could be used to argue against monarchy, but he or she does not mention them, then the argumentation would be imbalanced to some degree. Thus, to assess the soundness of people’s arguments or to express ones own opinion, one should consider aspects such as credibility, validity, comprehensibility and objectivity.

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Sources

A variety of written sources are employed in the study. For instance, for the discussion on the orphan works problem, the Copyright Office’s *Report on Orphan Works* is used as well as a number of documents by the Center for the Study of the Public Domain at Duke Law School, Library Copyright Alliance, Creative Commons, Library of Congress, and Cornell University Library, among others. For the discussion on copyright law, I use works such as *The Economic Structure of Intellectual Property Law* by William L. Landes and Richard A. Posner, *Digital Copyright* by Jessica Litman, *Free Culture: The Nature and Future of Creativity* by Lawrence Lessig, *Copyright Plain & Simple* by Cheryl Besenjak, and the article “’Fairest of Them All’ and Other Fairy Tales of Fair Use” by David Nimmer. I also employ a number of legal sources, such as law case reports, acts, and treaties. One legal source that is used a great deal is the United States Code. The United States Code (often abbreviated U.S.C.) is “the codification by subject matter of the general and permanent laws of the United States […].”48 It is divided into 50 subject titles. Title 17 refers to copyright law.

In the analysis of the three proposals, I also make use of some legal sources, such as the legal texts of the Orphan Works Act and the PDEA. In addition, a number of studies and articles commenting on the proposals are employed, such as Pamela Brannon’s article “Reforming Copyright to Foster Innovation: Providing Access to Orphaned Works,” "Reason or Madness: A Defense of Copyright’s Growing Pain” by Marc H. Greenberg, “An Orphan Works Affirmative Defense to Copyright Infringement Actions” by Jerry Brito and Bridget Dooling, Darin Keith Henning’s study "Copyright Deus Ex Machina: Reverse Registration as Economic Fostering of Orphan Works,” and “Orphan Works, Abandonware, and the Missing Market for Copyrighted Goods” by Dennis W. K. Khong. I also use some documents about the Canadian orphan works system, as Pamela Brannon’s Compulsory Licensing System is based on the Canadian approach.

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Copyright Basics

General Information

To evaluate a legislative proposal and to understand the orphan works issue better, it is essential to know some basic facts about copyright law in the US. Copyright is a form of protection provided by US laws to the creators of “original works of authorship,” including literary works, dramatic works, musical works, artistic works, and certain other intellectual works.\(^{49}\) This protection is available to both published and unpublished works.\(^{50}\) The copyright can belong either to the individual(s) who created it or to an employer if the work is created within the course of employment. The ownership of a copyright can also be transferred from the original author to another owner.\(^{51}\)

US copyright law protects works that are published in the US or created by an American citizen. The law also protects works that are published in a country that like the US is under obligation to follow a specific international treaty. In addition, all unpublished works are under copyright protection, regardless of the nationality of the creator.\(^{52}\)

The length of copyright differs depending on a number of factors. To determine how long the copyright term of a work is, one must know how the old copyright system worked, as some elements of the old system still exist under the current one. Under the old copyright law, the Copyright Act of 1909, copyright protection was secured on the date a work was published. The copyright lasted for a first term of 28 years from the date it was secured. The copyright could be renewed during the last year of the first term. If renewed, the copyright was extended for a second term of 28 years. Unpublished works were entitled to copyright protection under common law without the need for registration.\(^{53}\)

\(^{50}\) 17 U.S.C. § 104.
\(^{52}\) 17 U.S.C. § 104.
\(^{53}\) Besenjak 32, 34.
When the current law, the Copyright Act of 1976, came into effect in 1978, the renewal term of works copyrighted before 1978 was extended an additional nineteen years, giving them a total protection of 73 years. In October 1998, when the Sonny Bono Copyright Term Extension Act was enacted, the renewal term of copyrights was extended by another twenty years. Thus, the total term of copyright protection for works in their renewal became 95 years.54

The Copyright Act of 1976 also extended the copyright term for works created after 1977 from 56 years to life of the author plus fifty years.55 In 1998 the Sonny Bono Act extended the total term by twenty more years.56 Consequently, under the current copyright law, works created in 1978 or later are automatically protected from the moment of their creation and are given a term lasting for the creator’s life plus seventy years. In the case of a "joint work prepared by two or more authors who did not work for hire," the term lasts for seventy years after the last surviving author’s death. For works made for hire, and for anonymous and pseudonymous works, the duration is 95 years from first publication or 120 years from creation, whichever is shorter.57 Works in existence but not published or copyrighted before 1978 also endures for the author’s life plus seventy years. In addition, if the work was published after 1977 but before 2003, the term of copyright will not expire before 31 December 2047.58

Works copyrighted 1964-1977 last for 95 years from the date they were secured. The same duration applies to a work in its first term that was copyrighted before 1964 if its copyright was renewed. If the copyright was not renewed it expired at the end of its 28th year and the work has entered the public domain. Works that were still in their renewal term when the Sonny Bono Copyright Term Extension Act became effective in 1998 last for 95 years from the date they were originally secured.59 However, if the copyright expired before the Sonny Bono Act became effective, the work is in the public domain. Consequently, works created before 1923 are in the public domain.60 For example, the total term for works copyrighted in 1922 that were in their renewal term was 75 years (due to the renewal term extension of the Copyright Act of 1976). Thus, they entered the public domain on 1 January 1998 as their copyright term expired before the Sonny Bono Act came into effect in 1998.

54 Besenjak 21, 32.
55 Pub. L. No. 94-553, § 302(a).
56 Sonny Bono Copyright Term Extension Act. § 102(b).
60 Besenjak 35.
Copyright protects the expression in the work from being copied without permission, but gives no protection whatsoever to the underlying ideas, facts, systems, procedures, methods of operation, principles, or discoveries. As William M. Landes and Richard A. Posner explains:

[If] an author of spy novels copies a portion of an Ian Fleming novel about James Bond, he is an infringer. If, inspired by Fleming, he decides to write a novel about a British secret agent who is a bon vivant, he is not an infringer.

Similarly, if a textile artist uses Picasso’s cubist painting Guernica as a decorative image on a carpet, he is an infringer. But if he in a cubist style creates a completely different illustration of how the Basque village of Guernica was destroyed by Nazi bombers, he is not an infringer. Einstein’s formula E=mc² is not protected by copyright, nor is the design used for the onramps to the Triborough Bridge. In other words, copyright does not protect ideas, no matter how brilliant or unique they may be. This distinction between expression and idea “is critical to allowing subsequent creators and users build on an existing work by taking its ideas and facts to create new works of their own […]”

Under the current copyright statute, copyright subsists automatically in original works of authorship as soon as they are “fixed in tangible form.” No notice or registration is required. For example, the copyright of a book comes into being as soon as it is written. Similarly, the copyright of a song exists from the moment the song is first written down or recorded.

That neither registration nor publication with notice is required for copyright to subsist in a work is an obligation of some international formal agreements, such as the Berne Convention for the Protection of Literary and Artistic Works, the World Trade Organization Agreement on the Trade-related Aspects of Intellectual Property Rights, and the WIPO Copyright Treaty. For instance, the Berne Convention, which according to the U.S. Copyright Office is “the oldest and most widely accepted international agreement on the protection of literary and artistic works,” forbids a country to impose any “formality” on foreign copyright owners.

Even if copyright registration is optional, it is a prerequisite for filing an infringement suit in the US. In other words, if the registration is made within three months after publication of the work or prior to an infringement of the work,
statutory damages and attorney's fees will be available to the copyright owner in court actions. Otherwise only an award of actual damages and profits is available to the copyright owner.  

Limitations on Exclusive Rights and Orphan Works

US copyright law gives copyright owners the right to control who may reproduce the work, create adaptations, distribute copies to the public, and publicly perform and display their works. However, these “exclusive rights” are not unlimited in scope, but are made subject to a variety of limitations. Some of these limitations can be used to address the orphan works problem in certain circumstances. One such limitation is the fair use doctrine, which allows unauthorized use of a copyrighted work “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research […].” However, that does not mean that all educational, news reporting, or research uses are fair. To decide whether a particular use is fair the law states that the following four factors should be considered:

1. The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes.
2. The nature of the copyrighted work.
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole.
4. The effect of the use upon the potential market for or value of the copyrighted work.

In other words, there is no hard and fast rule determining exactly how much of a work may be used. Instead, courts evaluate claims of fair use on a case-by-case basis.

Since it is open to interpretation what constitutes fair use, there have been a number of legal disputes involving fair use. For instance, in one case, Acuff-Rose Music filed an infringement suit against Luther Campbell and his group 2 Live Crew, claiming that the group had created an unauthorised derivative work

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73 Litman 205.
of Roy Orbison and William Dees’s song *Pretty Woman*. After four years in various courts, the Supreme Court ruled in favour of 2 Live Crew. The Supreme Court asserted that the group’s song was a parody of Orbison and Dee’s song, as it criticised or commented on the original song by mimicking it in a satirical way, and that a parody therefore was fair use of a copyrighted work.\textsuperscript{75}

In another fair use case the publisher Harper & Row sued *The Nation* magazine for using about 300 words from a story taken from ex-president Gerald Ford’s memoirs. The story concerned Ford’s decision to pardon former president Richard Nixon. Through a deal between Harper & Row and Gerald Ford, the publisher had received the exclusive right to license prepublication excerpts of the memoirs. As the memoirs were to be published, *Time* magazine contracted with Harper & Row to publish an excerpt of 7,500 words from the “Nixon pardon” material for a fee of $25,000. However, shortly before the *Time* article’s scheduled release, an unauthorised source provided *The Nation* magazine with the unpublished Ford manuscript. Paraphrasing and quoting from the memoirs, *The Nation* rushed into print with what it believed to be a “hot” article. As a result, *Time* cancelled its contract and refused to pay the balance of $12,500. Subsequently, Harper & Row sued *The Nation* for copyright infringement. *The Nation* argued that it was merely reporting the news.\textsuperscript{76} The District Court ruled in favour of Harper & Row. The Court of Appeals then reversed the charge claiming that it was fair use. Finally, in May 1985, the Supreme Court held that *The Nation* had violated the copyright of Harper & Row and that a fair use defence did not apply, as the unpublished nature of the work and *The Nation* magazine’s use of the material in the article had affected the marketability of the work negatively.\textsuperscript{77}

The fact that the Court of Appeal ruled opposite to the District Court and the Supreme Court shows that it sometimes is difficult to determine what constitutes fair use. In fact, in the *Harper & Row v. Nation Enterprises* case, not even the Supreme Court was united in its decision, since three out of nine justices favoured fair use. Nor is this a solitary case, as there have been other cases where courts and justices have reach opposite conclusions.\textsuperscript{78} Nevertheless, a potential user of an orphan work should consider whether his or her use might fall within fair use.

Another provision of limitation that could be used to address the orphan works problem in certain circumstances is a copyright law concerning reproduction by libraries and archives. According to this law, libraries and archives that are open to the public are allowed to make copies of works and distribute them, so long as they comply with a long list of conditions. For instance, libraries

\textsuperscript{75} Campbell v. Acuff-Rose Music, Inc.
\textsuperscript{76} Harper & Row v. Nation Enterprise.
\textsuperscript{77} Harper & Row v. Nation Enterprise.
and archives can make one copy and distribute it to a user if the reproduction is not for a commercial purpose and the work cannot be obtained at a reasonable price. If the duplication is made for purposes of preservation, libraries and archives are allowed to make three copies of a copyrighted work and distribute it, as long as a copy of the work cannot be obtained at a reasonable price and digital copies of it are not “made available to the public outside the premises of the library or archives.” 79 For works in the last twenty years of their copyright term, libraries and archives are allowed to reproduce, distribute, display or perform works “for purposes of preservation, scholarship, or research,” on the condition that the works “are not subject to normal commercial exploitation” and not obtainable at a reasonable price. 80

There are several other limitations. For instance, broadcasting organisations licensed to broadcast a musical recording are allowed to make a copy of a work to facilitate the broadcast; 81 a church may play religious music during services freely; and if a small restaurant wants to play radio or television broadcasts for its customers, it is allowed to do so. 82 Moreover, cable television operators can re-transmit broadcasts of works without the permission of the copyright owners, as long as they pay a statutory license fee. 83

Although existing provisions of limitation can permit certain users to make certain uses of certain forms of orphan works, US copyright law does not, as the Copyright Office states, “contain an omnibus provision addressing all orphan works as such.” 84

Obtaining Permission to Use Copyrighted Material

If the use of copyrighted material does not fall within the fair use provision or any other provision of limitation, you need to contact the permission grantor to obtain permission to use the work. There are a number of ways to locate the permission grantor. The easiest way to search for the permission grantor is to examine a copy of the work for such elements such as a copyright notice and the name of the author or publisher. There are also some resources available for finding information about permission grantors. Some of these information resources are maintained by the U.S. Copyright Office in Washington, DC. For example, the Copyright Office provides an online catalogue of all works registered in the US since 1978. The catalogue includes approximately 20 million records of registered

books, music, films, sound recordings, maps, software, photographs, art, multimedia, periodicals, magazines, journals, and newspapers, among other things.  

Although the Copyright Office’s online catalogue includes information about copyright ownership, it does not specify who the permission grantor is (the copyright owner may of course be the permission grantor). Nor does it provide contact information for the copyright owner or permission grantor. However, address information for the copyright owner is stated on the registration forms which are kept in the Copyright Office. These records are available to the public. If you are unable to visit the Copyright Office, the Office can conduct a search of the records and provide a search report for a fee of $150 per hour.

The Copyright Office also supplies a card catalogue for works registered between 1870 and 1977. The public can get access to the card catalogue either by visiting the Copyright Office or by asking the Copyright Office to search the catalogue for a fee of $150 an hour. From 1891 to 1978, the Copyright Office also published the Catalog of Copyright Entries (abbreviated CCE). According to the Copyright Office, a number of libraries throughout the United States maintain copies of the catalogue. Each CCE segment covers all registrations made during a particular period of time. However, like the online catalogue and the card catalogue, the CCE does not specify who the permission grantor is. Nor does it contain contact information for the copyright owner or permission grantor.

In contrast to the Copyright Office’s records, the Copyright Clearance Center (CCC) provides contact information for permission grantors online. The CCC also offers licenses to many publications. However, a quick search in the CCC’s database shows that it does not contain all works published or registered in the US. The CCC’s homepage does not state how many works can be found in the database. Nor does it say what types of publications (e.g. books, journals, sheet music, brochures) the database includes.

Another source for researching copyright information and obtain permission to use copyrighted works is the performing-rights organisation ASCAP (The American Society of Composers, Authors and Publishers). ASCAP protects the rights of more than 313,000 US composers, songwriters, lyricists and music publishers. ASCAP also represents hundreds of thousands of music creators worldwide. The purpose of the organisation is to provide licenses and distribute royalties for public performances of copyrighted works. The ASCAP database

85 “About the Catalog,” U.S. Copyright Office.
86 U.S. Copyright Office, “Contact Information,” E-mail to the author (8 Feb. 2008).
87 “The Copyright Card Catalog and the Online Files of the Copyright Office,” U.S. Copyright Office.
89 “The Copyright Card Catalog and the Online Files of the Copyright Office.”
90 “About US: Copyright Clearance Center,” Copyright Clearance Center.
91 “About ASCAP,” ASCAP.
contains information on all written and published works that have been registered with the ASCAP, including names of creators, titles of works and publishers.92

A similar information source to ASCAP is The Harry Fox Agency. The agency supplies licenses for songs.93 These licenses are intended for US manufacturers and distributors.94 The Harry Fox Agency’s database, which includes works that are registered with the agency, provides information on titles, songwriters, and publishers of songs.95

92 “ACE Title Search Database,” ASCAP.
93 “About HFA,” The Harry Fox Agency.
94 “Publisher Services,” The Harry Fox Agency.
95 “HFA’s Songfile,” The Harry Fox Agency.
The Orphan Works Problem

Causes of the Orphan Works Problem

Few works, as a percentage of total works, have any enduring commercial value. For example, fewer than eleven percent of the copyrights registered between 1883 and 1964 were renewed at the end of their twenty-eight-year term under the Copyright Act of 1909. In addition, only 1.7 percent of books published in the US in the year 1930 were still in print in 2001. The orphan works problem appears to be the result of loss of commercial value, as some copyright owners do not seem to find it worthwhile to make themselves available to users if their works have little or no commercial value.

The orphan works situation in the US could also be said to be the result of some relatively new legislations, such as the Copyright Act of 1976 and the Sonny Bono Copyright Term Extension Act of 1998. Under the Copyright Act of 1909 a work had to be published to be awarded copyright protection. In addition, the work was required to have a notice of copyright and be registered. The Copyright Act of 1976 did away with the registration requirement, and in 1989 the copyright notice requirement was also abolished. According to the U.S. Copyright Office, these formalities were eradicated because they sometimes caused problems for copyright owners:

[There] was substantial evidence presented during consideration of the 1976 Act that the formalities such as renewal and notice, when combined with drastic penalties like forfeiture of copyright, served as a “trap for the unwary” and caused the loss of many valuable copyrights.

96 Lawrence Lessig et al., Reply Comments to the U.S. Copyright Office (9 May 2005) 7.
97 Landes 212.
98 Brito 82-84.
99 Besenjak 32.
100 Pub. L. No. 94-553. § 401.
101 Besenjak 33.
102 U.S. Copyright Office, Report on Orphan Works 43.
The abolishment of formalities was also an important step towards harmonizing US copyright law with the Berne Convention.¹⁰³ Although the lack of formal requirement is beneficial for copyright owners, it comes at a cost, as it means that it sometimes is very difficult or even impossible to identify and locate permission grantors.¹⁰⁴ The extension of the copyright term of the 1976 Act and the Sonny Bono Act have also probably contributed to the orphan works problem, as old works that should have entered the public domain are still under copyright. Consequently, the number of works for which permission must be obtained before anyone can use them has increased.¹⁰⁵

Orphan Works Situations

According to a number of scholars at the Center for Internet and Society at Stanford Law School, most works are orphans under the current copyright system.¹⁰⁶ For example, film archives in the US contain hundreds of thousands of orphan works. The Museum of Modern Art contains 13,000 films, more than half of which are orphan works.¹⁰⁷ Consequently, as the U.S. Copyright Office states, orphan works situations are “not in the public interest,” as “a productive and beneficial use of the work is forestalled.”¹⁰⁸

Although it is difficult to assess the precise scope of the orphan works problem,¹⁰⁹ there are numerous examples of orphan works situations.¹¹⁰ As the Copyright Office’s Report on Orphan Works illustrates, orphan work situations can happen for a number of reasons.¹¹¹ Firstly, orphan work situations can occur because of inadequate identifying information on a particular copy of the work.¹¹² For instance, there are several cases where individuals and institutions such as libraries and museums have not been able to use photographs or illustrations due to lack of information about the copyright holder or creator on the works themselves.¹¹³

¹⁰³ U.S. Copyright Office, Report on Orphan Works 42.
¹⁰⁴ Brito 82-83; U.S. Copyright Office, Report on Orphan Works 16.
¹⁰⁵ Brito 83-84.
¹⁰⁶ Lessig et al. 7.
¹¹¹ U.S. Copyright Office, Report on Orphan Works 23-34.
¹¹² U.S. Copyright Office, Report on Orphan Works 22.
Secondly, problems can occur as a result of inadequate information about copyright ownership, because of a change of ownership or a change in the circumstances of the owner. 114 For example, sometimes companies that originally owned the rights of a work go out of business, split up or the rights of the work is transferred to some other company, making it very difficult, time-consuming and expensive to find out who owns the copyrights. 115

Thirdly, orphan work situations can happen due to limitations of existing sources on copyright ownership information. 116 In other words, although there are a number of good resources, such as the records of the Copyright Office and the performing-rights organisations, 117 it can still be difficult to find information about a particular work. For example, sometimes the sources do not provide any information about the work or the information is inaccurate or contradictory. 118 Another limitation is that some existing information resources are not available online. For instance, the only way to get access to many of the Copyright Office’s records is to visit the Office in Washington, DC, or pay the Office $150 per hour to conduct the search. According to the Copyright Office’s report, many users cannot afford such searches. 119 Thus, the fact that conducting searches can be costly and time-consuming makes many users forego using some works. 120

Uses and Users Affected by the Orphan Works Problem

According to the Copyright Office, most of the uses affected by the orphan works problem fall into four categories: 1) uses by creators wishing to incorporate orphaned material into their own works, 2) uses by institutions wanting to make a large quantity of works available to the public, 3) uses by hobbyists and experts of a particular work or particular field, and 4) private uses. 121 For instance, in the first category of uses there are examples of authors or publishers wishing to include an orphaned photograph in a new book. There are also examples of companies

114 U.S. Copyright Office, Report on Orphan Works 22.
115 Dennis Buck, Comment to the U.S. Copyright Office (23 Mar. 2005); Timothy W. Kittleson, Comment to the U.S. Copyright Office (25 Mar. 2005); Alister Troup, Comment to the U.S. Copyright Office (14 Mar. 2005).
117 e.g. Alliance of Artists and Recording Companies (AARC); American Society of Composers, Authors, and Publishers (ASCAP); Copyright Clearance Center (CCC); and Motion Picture Licensing Corporation (MPLC).
118 Lessig et al. 7; Carrie Klein, Comment to the U.S. Copyright Office (1 Mar. 2005).
119 Denise Troll Covey, Comment to the U.S. Copyright Office (22 Mar. 2005) 1-2.
120 Center for the Study of the Public Domain, "Orphan Works Analysis and Proposal" 4-5.
121 U.S. Copyright Office, Report on Orphan Works 23.
wishing to use orphaned images in a film. In the second category of uses, there are examples of libraries, archives and museums that would like to digitise and make collections of orphan works available online. The third category consists of cases where people wish to post texts and illustrations from orphaned literary works on the Internet, so that others with shared interests can enjoy the works as well. In the fourth category of uses, there are examples of users wanting to make a reproduction of a family photograph.

The problem of orphan works also affects various users, such as authors, record producers, filmmakers, libraries, archives, museums, and academics, among others. For example, one academic researcher was forced to alter the direction of a research project on media because he was unable to locate the permission grantors of the works. In another case, a film company wished to include images of a number of postcards in a documentary about the history of the American picture postcard. However, the company was unable to identify and locate the copyright owners of many of these images. Despite the possibility of being sued for copyright infringement, the company, nevertheless, decided to use these orphaned images in the film. The orphan works problem also affects people in the music industry. For instance, one record producer recalls three instances where artists were unable to use music that they wished to use, as they could not locate the permission grantors.

Many libraries are also affected by the problem. For example, Library of Congress frequently encounters problems with orphan works in its effort to digitise material in its collections and post it on the library’s website, despite substantial expenditures of time and money on researching copyright ownership. For one project library staff spent two years conducting extensive research on ownership of materials. Of the approximately 7,000 works selected for the project, about 2,000 items were not posted on the library’s public website due to orphan works problems. Cornell University Library experienced similar

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122 Michael Briggs, Comment to the U.S. Copyright Office (14 Mar. 2005); Cunard 10-12; Robert M. Goodman, Comment to the U.S. Copyright Office (19 Feb. 2005) 1-2; David Nelson, Comment to the U.S. Copyright Office.
123 Covey 1-2; J. Paul Getty Trust 3, 14; Library Copyright Alliance, Comment to the U.S. Copyright Office (25 Mar. 2005) 2-7.
124 Bil Corry, Comment to the U.S. Copyright Office; Anthony Meadow, Comment to the U.S. Copyright Office (15 Mar. 2005).
125 Candida L. Grudecki, Comment to the U.S. Copyright Office (27 Feb. 2005); Heather Grimsley, Comment to the U.S. Copyright Office (27 Feb. 2005); Erin Stevenson, Comment to the U.S. Copyright Office (28 Feb. 2005).
126 Lessig et al. 3-6.
127 John Reeve, Comment to the U.S. Copyright Office.
128 Goodman 1-2.
129 Ivan Rivera, Comment to the U.S. Copyright Office (14 Mar. 2005).
131 Hughes 6.
problems when they wanted to digitalise 343 books and make them available online. In the end, after spending an estimated $50,000 on staff working on copyright issues, they were unable to locate permission grantors for 58 percent of the titles.¹³²

¹³² Thomas 1-2.
Evaluation of Three Proposals to Solve the Orphan Works Problem

Analysis of the Orphan Works Act of 2006

The examination of the Orphan Works Act is divided into four sections. The first three sections examine different elements of the proposal. The fourth section consists of some conclusive reflections on the effects of the act.

Conditions for Limitations on Remedies

The Orphan Works Act proposes to amend US copyright law by providing for "limitations on remedies" in cases where “before the infringing use of the work began,” the user has “performed and documented a reasonably diligent search in good faith to locate the owner of the infringed copyright” but failed to do so. If possible, the user must also provide attribution to the author and owner of the orphaned work. In other words, if the user can prove that he was unable to locate the copyright owner after performing a reasonably diligent search for the owner, he should enjoy a benefit of limitations on the remedies that a copyright owner could obtain against him if the owner showed up at a later date and sued him for copyright infringement.

According to the act, a reasonably diligent search implies that the user has taken “steps that are reasonable under the circumstances” to locate the owner of the copyrighted material “in order to obtain permission for the use of the work.” These steps should comprise “the use of reasonably available expert assistance and reasonably available technology, which may include, if reasonable under the circumstances, resources for which a charge or subscription fee is imposed.” In addition, a reasonably diligent search should “ordinarily include, at a minimum, [a] review of the information maintained by the Register of Copyrights.”

133 Orphan Works Act of 2006. § 2.
The requirement of attribution is a reasonable obligation, as the user only has to provide attribution to the creator and owner of the copyrighted work if possible. However, the “reasonably diligent search” requirement could affect copyright owners negatively, as users may take advantage of it to avoid paying permission fees in situations where they are able to locate the permission grantor but not the copyright owner. Thus, in such situations users could claim that they have conducted a reasonably diligent search, as they only have to search for the copyright owner and not the permission grantor.

The definition of a “reasonably diligent search” is also vague, as the act does not state what circumstances the use of “reasonably available expert assistance and reasonably available technology” may include “resources for which a charge or subscription fee is imposed.” Moreover, the act does not say in what situations a user would not have to examine the information maintained by the Copyright Office. Consequently, the vagueness of the search requirement guarantees “permanent uncertainty to users, because they cannot know, without spending a significant amount of money, what work they can use or not.” It may also lead to that many users decide not to use orphan works for fear of being sued for copyright infringement. As Pamela Brannon points out:

[The search requirement] presents the potential for uneven application, as courts’ determinations of what constitutes a “reasonable diligent search” may differ. With this level of uncertainty, it would not be surprising if many users, fearful of the potential for liability and the costs associated with defending against infringement, simply abandon any attempt to make use of an orphaned work.

Some critics have also criticised the search requirement for being a burden for institutions that want to make a large quantity of copyrighted works available online. For instance, Aprille McKay, Elizabeth Yakel and Lawrence Lessig think the requirements for a reasonably diligent search would be too expensive for many libraries and archives. Although libraries and archives that wish to make a large number of copyrighted works available online have to pay a high price (e.g. Wayne State University library paid a total cost of $50,500 or $505 per article to acquire copyright permission for 1000 works), I do not think libraries and archives would be unfairly burdened by the search requirement. In the past, the Copyright Office has been able to conduct title searches of seven works for the

137 Brannon 167.
139 Covey 4-5.
price of $150. Thus, in my opinion, $150 for a search report on seven works is a reasonable price.

A positive aspect of the search requirement is that it could make it easier to locate copyright owners and thus reduce search costs, as it encourages copyright owners to register their works with the Copyright Office in order to protect their intellectual property. As McKay says:

[The Orphan Works Act] encourages voluntary registration, and by requiring the attribution to the author and the copyright owner, so far as it is known, it makes it easier for the owner to locate users. The idea is that everyone will be happier if it becomes trivially easy for owners and users to come together to negotiate licenses.

Although McKay is right, the search requirement is unfair to many copyright owners, as it essentially creates a duty of availability on copyright holders of all kinds of works: foreign, domestic, published and unpublished material. Firstly, it is unfair to copyright owners of foreign works, as their works are not registered with the Copyright Office. Secondly, the search requirement would be unfair to copyright owners who have produced works from 1989 to today, as the notice requirement was abolished in 1989. Many copyright owners have therefore not bothered to register their works or publish them in a way that makes it easy to identify the copyright owner after a reasonably diligent search. As Darin Keith Henning states:

Many works no longer carry notice or information about the copyright owners, as a direct result of past changes to copyright law. This attempt to rectify that previous error would subject many authors, who have relied on copyright protection without attaching notice to their works, to seeing their exclusive rights drastically weakened, or in some instances, effectively taken away [by the Orphan Works Act].

The Orphan Works Act would probably have a particularly negative effect on copyright owners of photographs, as photographs present a special problem when it comes to identifying and locating copyright owners. As McKay writes:

[What] does [the Orphan Works Act] mean in the context of a photograph held in an archive with no information associated with the work about who took the photograph, whether it was created as work for hire or by an independent contractor, when it was taken, or whether copyright was registered or not? Photographers have been allowed to receive mass

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140 Covey 1-2.
141 McKay 242.
142 Lessig, “Against the Current ‘Orphan Works Proposals.’”
143 Besenjak 33.
144 Lessig, “Against the Current ‘Orphan Works Proposals.’”
145 Henning 17.
registration for their photographs and there is no way to search the text-based copyright registration databases to find the owner of a particular photograph. 146

As it is very difficult to search for a particular photograph in the records maintained by the Copyright Office, these sources are not particularly helpful when it comes to searching for copyright information on such images. Thus, the “reasonably diligent search” requirement is unfair to photographers, as it excludes those copyright owners whose work cannot be searched for in a normal way in the Copyright Office’s records.

The Orphan Works Act could also have a negative effect on copyright owners of unpublished works. Paul Aiken and the Authors Guild rightly criticise the Orphan Works Act for not limiting the usage of orphan works to works created to exploit the commercial value. 147 In other words, to protect the privacy rights of copyright owners, users should not have the right to use orphan works without the copyright owner’s permission, unless they were created for commercial purposes. As it sometimes is difficult to tell by looking at a diary or a photograph whether someone intended to commercially exploit it or not, the restriction of works should be limited to material that one can determine were created for commercial purposes. Consequently, although one may argue that unpublished works, such as letters and diaries, are “invaluable resources of information” for “new forms of expression,” 148 the privacy rights of copyright owners should not be neglected.

Marc H. Greenberg is also concerned that the requirements of a reasonably diligent search “would be viewed by the international copyright community as the kind of ‘formalities’ proscribed by the Berne Convention.” 149 However, although the Orphan Works Act affects both domestic and foreign copyright owners, the reasonably diligent search obligation is a requirement forced upon users and not copyright owner. Thus, as the Berne Convention only prohibits formalities imposed upon copyright owners, 150 the search requirement does not violate the rules of the Berne Convention.

Limitations on Remedies

The Orphan Works Act states that the limitations on remedies imply limitations on monetary relief and injunctive relief for the copyright owner. Regarding the limitation on monetary relief, the act states the following:

146 McKay 242-243.
149 Greenberg 49.
150 Berne Convention. Art. 5(2).
[An] award for monetary relief (including actual damages, statutory damages, costs, and attorney’s fees) may not be made, other than an order requiring the infringer [i.e. the user] to pay reasonable compensation for the use of the infringed work.151

However, if the user fails to negotiate in good faith with the owner regarding the amount of reasonable compensation for the use of the infringed work, “the court may award full costs, including a reasonable attorney’s fee, against the infringer […].” The act defines “reasonable compensation” as the amount that a “reasonable willing buyer and a reasonable willing seller in the positions of the owner and the infringer would have agreed [on] with respect to the infringing use of the work immediately before the infringement began.”152 The act also states one exception to the general rule concerning monetary relief:

An order requiring the infringer to pay reasonable compensation for the use of the infringed work may not be made […] if the infringement is performed without any purpose of direct or indirect commercial advantage and primarily for charitable, religious, scholarly, or educational purpose, and […] the infringer ceases the infringement [quickly] after receiving notice of the claim of infringement, unless the copyright owner proves, and the court finds, that the infringer has earned proceeds directly attributable to the infringement.153

As no sum is specified, it is difficult to know how much the user would have to pay, since the cost of using material varies. For instance, in the years 2000 and 2001, Carnegie Mellon University paid royalty fees that ranged from less than $10 to more than $1,000.154 The cost of using a very short excerpt of a work also varies. Some copyright owners charge little or nothing for short quotations or film clips. However, in one case, the user was asked to pay the copyright owner of Martin Luther King, Jr.’s speech “I Have a Dream” $200 to reprint four sentences from the speech.155 Similarly, KQED Public Broadcasting had to pay about $8,500 for approximately fifteen seconds of the film Dead Man Walking (1995) in a television program.156 As these facts show, it is difficult for a user to estimate what the amount might be, as license fees can be anything from a few dollars to thousands of dollars. Thus, if the Orphan Works Act became law, many users would probably not risk using orphan works, as the amount of the “reasonable compensation” could end up being higher than expected.

The limitation on monetary damages also creates an incentive to infringe on low-value works. As Darrin Keith Henning states:

154 Covey 5.
155 McLeod 33.
[Without] the possibility of obtaining attorney’s fees to collect the “reasonable compensation for the use of the infringed work,” entire classes of works of low value could be used with the infringing user safe in the belief that the owner will never step forward, or that denying a copyright owner’s initial request for payment would end the matter. For the owner of the copyright in low-value works, the cost of pursuing collection from infringers would outweigh any fee eventually collected, creating a disincentive to pursue collection. This insufficient economic incentive to pursue infringement claims […] effectively leaves the copyright owner without remedy.157

Thus, unscrupulous businesses could simply target these classes of low-value works for infringement knowing that they will never have to pay for their use.158 In addition to denying the copyright owner compensation for the use of his or her work, the limitation on monetary relief could depress demand, and consequently prices, for material that is available for license by placing a large amount of essentially free material in the marketplace.159

The exception to the general rule of the limitation on monetary relief could help some users to get access to orphan works. For example, libraries, archives, schools or universities would be able to use orphan works for a non-commercial purpose without having to pay reasonable compensation to the copyright owner. However, the exception to the general rule of the limitation on monetary relief is unfair to copyright owners, as they would neither obtain money for attorney’s fees nor reasonable compensation. Thus, copyright owners would lose practically all their rights.

Regarding the limitation on injunctive relief, the act states that when “the infringer recasts, transforms, adapts, or integrates the infringed work with the infringer’s original expression in a new work of authorship,” the copyright owner will not be granted injunctive relief to prevent the user from moving forward with his use, provided the user “pays reasonable compensation to the owner of the infringed copyright for the use of the infringed work.”160 In all other cases, the court “may impose injunctive relief to prevent or restrain the infringing use […].” However, the court must, to the extent practicable, account and accommodate “for any harm that the relief would cause the infringer due to its reliance on having performed a reasonably diligent search.”161

The limitation on injunctive relief would have a positive effect on users. For example, let us assume that a film company has commissioned a screenplay from a writer and the screenplay is an adaptation of an orphan work. As the film is about to be released, the copyright owner of the orphan work appears and sues the company for copyright infringement and demands that the film is stopped. Without a limitation on injunctive relief, the film would be hindered from being

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157 Henning 13-14.
158 Henning 14.
159 Henning 15.
shown. However, although the limitation on injunctive relief would be positive for users, it would be detrimental for copyright owners, as it would strip “author’s of their exclusive right to control their works, including restricting unwelcome uses.”

Information to Guide Searches

The act also requires that the U.S. Copyright Office should “receive, maintain, and make available” information from a wide array of sources that may guide or assist prospective users to conduct their reasonably diligent search. The section includes examples of five types of “information” that the Office may provide:

(i) the records of the Copyright Office that are relevant to identifying and locating copyright owners;

(ii) other sources of copyright ownership information reasonably available to users;

(iii) methods to identify copyright ownership information associated with a work;

(iv) sources of reasonably available technology tools and reasonably available expert assistance; and

(v) best practices for documenting a reasonably diligent search.

The Copyright Office already provides the first, third and fourth suggested types of information resources, as it receives, maintains and provides information on copyright ownership through its services, online catalogue and other sources. The Office also provides a link list to other online resources that are useful for obtaining permission to use copyrighted works, such as licensing organisations and clearinghouses. Whether a link list to other online sources of copyright ownership information would fulfil the second form of “information” suggested by the Orphan Works Act is uncertain, as the definition of “other sources of copyright ownership information” is vague. The only thing the Copyright Office does not provide for certain is a “best practises for documenting a reasonably diligent search.” However, to produce a one or two page document of this kind should not be too difficult or time-consuming. Thus, as the information resources

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162 Henning 16.
165 “Copyright Internet Resources,” U.S. Copyright Office.
166 Greenberg 48.
stated in the act are only suggestions of what the Copyright Office may provide, and as most of them already exist or are not too difficult to provide, the requirement seems reasonable.

Conclusive Reflections on the Effects of the Orphan Works Act

There are three positive things about the Orphan Works Act. Firstly, the act conforms to the rules of the Berne Convention. Secondly, it is good that the Copyright Office is required to provide information to assist prospective users to conduct a reasonably diligent search. Thirdly, users who transform or adapt the creator’s original expression in a new work are positively affected by the limitation on injunctive relief.

Apart from these positive aspects, the effects of the act would be negative. Firstly, copyright owners would lose their exclusive right to control who may use their works by the limitation on injunctive relief. Secondly, due to the vagueness of the “reasonably diligent search” requirement and the unclear meaning of “reasonable compensation,” many users would probably not take the risk of using orphan works, as it may lead to infringement liability and financial harm. Thirdly, the search requirement could affect copyright owners negatively, as users may take advantage of the search requirement to avoid paying permission fees in situations where users are able to locate the permission grantor but not the copyright owner. Moreover, copyright owners of works such as photographs, letters and diaries would lose their privacy rights. Copyright owners of photographs, foreign works and material produced after 1988 would also be unfairly treated by the search requirement. In addition, copyright owners of low-value works would be harmed by the limitation on monetary relief. In other words, the Orphan Works Act could open the doors for substantial copyright infringement of certain copyrighted works.

Analysis of the Public Domain Enhancement Act

In contrast to the Orphan Works Act, the PDEA aims “to establish a method by which abandoned American copyrights can enter the public domain.”\textsuperscript{167} Abandoned works are defined as works that no longer are commercially available.\textsuperscript{168} Although this definition may not always describe orphan works, I think it is safe to say that most orphan works are no longer commercially available.

\textsuperscript{167} Public Domain Enhancement Act. § 2.
\textsuperscript{168} Public Domain Enhancement Act. § 2.
Consequently, the PDEA addresses the orphan works problem indirectly by intending to move abandoned works into the public domain.

The PDEA suggests that works published in the US should be registered after fifty years and every ten years thereafter “until the end of the copyright term” for “maintaining in force the copyright.” The registration would consist of a maintenance fee of $1, a registration form prescribed by the Copyright Office, and “any additional identifying material that the Register may, by regulation, require.” Copyright owners would have to pay the fee to the Copyright Office “before the date the fee is due or within a grace period of 6 months thereafter,” otherwise they would lose their copyright.

The registration form should conform to the rules stated in section 409 of the US Code concerning application for copyright registration. According to section 409 of the US Code, a registration form must consist of the name and address of the copyright owner, the title of the work, and the year in which the work was completed, among other things. To minimise the burden of registration, the PDEA states that the Copyright Office should establish an online registration system. The act also requires the Copyright Office to develop procedures to make the information submitted easily accessible to the public. Since the PDEA was introduced as a bill in 2003, the Copyright Office has established a beta version of an online registration system.

Unlike the Orphan Works Act, the PDEA preserves the privacy rights of copyright owners by excluding unpublished works. Another positive aspect of the PDEA is that the registration system probably would move many orphan works into the public domain, as most orphan works are abandoned works and most works, as a total, are no longer commercially available. Thus, it is likely that many works would not be registered or renewed under the PDEA.

Although there probably would be some positive effects of the PDEA, there are a number of problems with the act. Firstly, the PDEA does not comply with the international laws of the Berne Convention. For instance, the compulsory registration system violates the Berne Convention, as the Convention forbids formalities such as copyright registration imposed upon foreign copyright owners. The PDEA seems to avoid violating the Berne Convention by limiting it to works published in the US. However, as foreign copyright owners may own works published in the US (e.g. a British author and copyright owner who publishes his work in the US), the PDEA violates the Berne Convention all the same. Thus, as
Jerry Brito and Bridget Dooling state, the PDEA would add confusion to the copyright system, as there is no simple method for users to determine if a work is by a foreign or US author.\(^{176}\) The PDEA also violates the Berne Convention by shortening the copyright term of works that are not registered to less than the author’s life plus 50 years.\(^{177}\) According to the Berne Convention the copyright term for all works protected under the Convention shall not be less than “life of the author and fifty years after his death.”\(^{178}\)

There is also a risk that the formality of the PDEA could serve as a “trap for the unwary” and cause the loss of many valuable copyrights, just like the formalities of the Copyright Act of 1909 did.\(^{179}\) Moreover, the proposal would create a burden on copyright owners that own a large amount of published works, as these owners would have to submit a registration form for each of their works after fifty years and then every ten years until the copyright expired. For example, it would be a burden for the Universal Music Group that administers over one million copyrights.\(^{180}\)

Jerry Brito and Bridget Dooling also think the proposed registration fee of $1 per work would be a burden for individuals or corporations that have published many works.\(^{181}\) However, there is no evidence to support their argument. It is doubtful though whether it would be realistically possible to charge only $1. The Copyright Office currently charges $45 for paper applications and $35 for online registration.\(^{182}\) The PDEA does not offer any explanation for how it would be possible to charge only $1. Under the PDEA, the Copyright Office would still have to register all the copies (i.e. identifying material) sent to the Office and issue certificates of copyright registration. Thus, the administration cost would undoubtedly be more than $1. As Dennis W. K. Khong states, the problem with charging only $1 is that it would not ensure a net social gain, as the administration cost would be more than $1.\(^{183}\) In other words, if the maintenance fee was only $1, the Copyright Office would in effect pay copyright owners a subsidy to register. Consequently, to ensure a net social gain, the maintenance fee should be equivalent to the Copyright Office’s administration cost.\(^{184}\)

Another problem with the PDEA is that it would not necessarily make it easier to locate permission grantors to receive permission to use works. For instance, the PDEA does not state that information of the permission grantor

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\(^{176}\) Brito 87-88.
\(^{177}\) Brito 87.
\(^{178}\) Berne Convention. Art. 7(1).
\(^{179}\) U.S. Copyright Office, Report on Orphan Works 43.
\(^{180}\) “Overview,” Universal Music Group.
\(^{181}\) Brito 89-90.
\(^{182}\) “Current Fees,” U.S. Copyright Office.
\(^{183}\) Khong 86-87.
\(^{184}\) Khong 87.
would be easily accessible to the public. Furthermore, a mandatory registry of copyrights is not of much help to users searching for copyright information about photographs and images, as these forms of material are not possible to search for in a text-based database. Adding thumbnail images of the works would probably not help much either (even if it were legal and logistically feasible) because "the database of images might quickly swell to millions of images: owners and users could still miss each other in the mix."[185] In addition, a mandatory registry makes little sense without a notice formality, as it is impossible to use a register to find the copyright owner of a work if the identity of the rights holder is unknown.[186] It is also impossible to ascertain if a work has been published in the US and whether it is free to use if the work lacks publication details.

Pamela Brannon is also critical of the PDEA as it does not provide a solution to orphan works within the initial fifty years of copyright protection.[187] She points to evidence that shows that few copyrights were renewed at the end of their twenty-eight-year term under the 1909 Act due to a rapid depreciation of value.[188] As there is no evidence that this has changed, it is likely that many works will continue to lose their value well within the initial fifty years of copyright protection.[189] Consequently, as many works are orphaned because of a loss of commercial value, there probably are many orphan works that are less than fifty years old.

Conclusive Reflections on the Effects of the PDEA

As the analysis of the PDEA shows, many orphan works would probably enter the public domain as a result of it, which would benefit users. The PDEA also preserves the privacy rights of copyright owners by excluding unpublished works. However, apart from these positive aspects, the effects of the PDEA would mostly be negative. Firstly, there is a risk that the formality of the PDEA would serve as a trap for unwary copyright owners and cause the loss of some valuable copyrights. Secondly, the proposal would create a burden on copyright owners that own a large amount of published works. Thirdly, the PDEA would not make it easier for users to get access to orphaned images and works without a copyright notice. In addition, the proposal does not provide a solution to orphan works within the initial fifty years of copyright protection.

[186] Brito 89.
[188] Landes 212.
Perhaps the most serious problem with the PDEA is that a compulsory registration system would violate the Berne Convention, as it would burden foreign copyright owners and create confusion in the copyright system. Moreover, the registration fee of $1 does not seem like a realistic idea. Consequently, the PDEA appears neither practical nor plausible to implement.

Analysis of Pamela Brannon’s Compulsory Licensing System

Pamela Brannon has proposed a solution to the orphan works problem based on a compulsory licensing system currently in place in Canada. Under Brannon’s compulsory licensing system, a user wanting to use a work would be required to conduct a “reasonable efforts search” to locate the copyright owner of the work. If the user were unable to find the owner, he would be able to apply to the Copyright Office or an independent agency for a licence. The Copyright Office or the independent agency would then determine whether sufficient efforts had been made to locate the owner. If the Copyright Office or the independent agency were satisfied that the user had made a reasonable effort to locate the owner, a license to use the work would be granted the user upon payment of a predetermined royalty fee. Brannon suggests that this royalty fee could “be set aside in an escrow fund in case the copyright owner reasserts his rights to the work.”

The advantage with Brannon’s compulsory licensing system is that it assures the user that there is no risk of being sued for infringement by the copyright owner later, since the use of the work is licensed and approved prior to the actual use. In contrast to the Orphan Works Act, the user also knows what the cost of using the work is before the use. In addition, the proposal complies with the Berne Convention.

Despite these positive elements, there are a number of problems with Brannon’s proposal. Firstly, Brannon does not provide any information of what constitutes a “reasonable efforts search.” Thus, it would be difficult for the user to know if he or she has conducted a “reasonable efforts search” before applying for a license. It would also be difficult for the Copyright Office or some independent agency to judge whether a “reasonable efforts search” has been carried out without any guidelines.

In her proposal, Brannon also states that the Copyright Office should use the compulsory licensing system to build a registry of orphan works for which licences have been granted. Thus, if a future user wishes to use one of these

190 Brannon 167.
191 Brannon 167, 169.
192 Brannon 169.
193 Brannon 170.
orphan works, he or she would be able to apply to use the work “without duplicating the reasonable efforts search of the initial owner.” However, if the copyright owner reappears and asserts his or her rights, full copyright protection would be re-established for any future uses of the work, except for those that have already been licensed.  Although the idea of a registry of orphan works would be practical for future users, there is always a possibility that a subsequent user may be able to locate the copyright owner due to changed circumstances. Consequently, the idea of a registry of orphan works is unfair to the copyright owner, as future users would not even have to try to obtain permission to use a work. It is also worth pointing out that it would be more logical to conduct a reasonable efforts search for the permission grantor rather than the copyright owner, as the copyright owner may not necessarily be the person one should address to receive permission to use the work.

Another problem with Brannon’s proposal is that it does not explain how the system would be financed. For instance, if the Copyright Office were to be the body that reviewed the orphan works applications and issued the licences, it would have to be funded to do the work. Otherwise the system would impose an undue administrative burden on the Copyright Office. As Jerry Brito and Bridget Dooling write: “if the system becomes popular and a large number of applications are filed, pre-clearing every orphan work use will likely be costly and inefficient.”

Dennis W. K. Khong also thinks that a compulsory licensing system would be a costly process for the user involving a certain amount of delay. However, I have found proof that seems to indicate that Khong is incorrect. Firstly, neither the Canadian system nor Brannon’s proposal state how much potential users have to spend to locate copyright owners. Secondly, the Canadian Copyright Board have charged relatively low licence fees for orphan works. For instance, one applicant was asked to pay $0.30 per page of two articles by Robert Severns. Another applicant was asked to pay $25 to reproduce 1,500 copies of a cartoon in a book. Since licence fees can be as high as $8,500 for the reproduction of approximately fifteen seconds of material, these fees are relatively low. Consequently, there is no reason to believe that licence fees for orphan works would be higher in the US if a compulsory licence system was introduced.

I have also found proof which shows that users that file a licence application to use orphan works in Canada do not have to wait very long to receive a licence.

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194 Brannon 169.
195 Brito 106.
196 Khong 75.
197 Copyright Board of Canada, "File: 2004-UO/TI-33."
198 Copyright Board of Canada, "File: 2007-UO/TI-34."
199 Aufderheide 15.
This can be seen in the appendix of this research paper. The appendix shows a list of twelve applications out of a total of 33 that were issued a licence by the Canadian Copyright Board in 1997 and 1998. As the list illustrates, the time to issue an application varies from 37 to 152 days. Thus, the average length of time is approximately 87 days, which I regard as an acceptable time to wait for a licence. Consequently, if the Canadian Copyright Board manages to process applications in approximately 87 days, I see no reason why a similar body in the US should not manage it.

Unlike Brannon’s proposal, the Canadian orphan works provision is limited to published works. Salvador M. Bezos thinks that the Canadian orphan works provision is right in excluding unpublished works, as an unpublished work “arguably is a work the author wouldn’t have wanted released.” Although Bezos is incorrect, as I think it is safe to say that there probably exist numerous un-published works that authors may have wanted to publish, I think the privacy rights of authors that may not have wanted to have their works published should be protected. Thus, I think Brannon’s proposal should have been limited to published works like the Canadian orphan works provision.

Another difference between Brannon’s proposal and the Canadian orphan works system is that an orphan works licence from the Canadian Copyright Board is only valid in Canada. Outside Canada, users are bound by the laws of the country in which they wish to use the orphaned work. Brannon’s proposal, on the other hand, appears to affect both US works and foreign works, which is unfair to foreign copyright owners, as they usually are not as easy to locate in the US as domestic ones. Firstly, they are not registered with the U.S. Copyright Office. Secondly, many are not registered with or represented by performing-rights organisations, publishers or copyright collective societies in the US. Thirdly, if the copyright owner is dead, it is more difficult to investigate who inherited the copy-right or who administered the state if you do not have access to archives and other sources of information abroad. It would also be difficult for the Copyright Office or the independent agency to review applications for licences to use foreign works, as the staff would have to assess whether a reasonable diligent search had been done in a foreign country.

One may also question the idea of an escrow fund. As Brannon explains, the purpose of the escrow fund would be to set aside the royalty fee in case the copy-

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200 According to the Canadian Copyright Board there were 18 applications in 1997 and 15 applications in 1998. See “Unlocatable Copyright Owners: Decisions/Licences Issued to the Following Applicants,” Copyright Board of Canada.

201 Canadian Copyright Act. §77(1).


203 Copyright Board of Canada. "Unlocatable Copyright Owners Brochure,” Copyright Board of Canada.
right owner ever appeared and made a claim. However, what if the copyright owner never reasserted his rights to the work? As Brannon does not address this question, it appears as if the money would not be used for anything. In Canada, the Canadian Copyright Board usually orders that the licence fee should “be made directly to a copyright collective society that would normally represent the unlocatable copyright owner.” Thus, the copyright owner generally has to approach the copyright collective society to recover the royalties. However, according to the Canadian Copyright Act, the owner of a copyright “may, not later than five years after the expiration of [an issued] licence […] collect the royalties fixed in the licence […].” If the copyright owner does not collect the royalties, the copyright collective society is free to do what it wants with the money. As Howard Knopf points out, it seems somewhat odd that a collective society that has done nothing to entitle it to receive the proceeds should get it. Instead, Knopf suggests that the money should be refunded to the user after an appropriate period, which I think is a better solution than both the Canadian approach and Brannon’s proposal.

It is also worth mentioning some critique against the Canadian orphan works system in connection with Brannon’s proposal. Olive Huang is critical of the Canadian system, as he believes that the “complexity and burden” of summoning “all the paperwork collected during the reasonable search” is likely to daunt potential users. He supports his argument by pointing to the low number of licences that have been issued since its inception in 1985. However, although it is true that only 217 licences have been issued so far, it is difficult to assess whether the process of collecting all the paperwork during the reasonable search deters potential users. I also fail to see what is so complex and burdensome about documenting a reasonable efforts search. Furthermore, if users wish to use copyrighted works without the copyright owners’ permission, I do not think that it is unreasonable to ask users to conduct and document a reasonable diligent search as such.

There could also be other reasons for why so few orphan works licences have been issued. For instance, it could simply be because not many people wish to use orphan works in Canada or that the orphan works problem is not a substantial problem there. As Salvador M. Bezos points out, the low number of issued

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204 Brannon 167.
205 Copyright Board of Canada, "Unlocatable Copyright Owners Brochure."
206 Canadian Copyright Act, §77(3).
207 Copyright Board of Canada, "Unlocatable Copyright Owners Brochure."
210 “Unlocatable Copyright Owners: Decisions/Licences Issued to the Following Applicants.”
licences could also be because use of Canadian orphan works remains limited to Canada. One thing for certain is that the low number of licences is not because many users have been denied a licence, since only seven applications have been turned down since 1985. It is also worth noting that these seven applications were turned down for good reasons. For instance, two of the applications were dismissed because the applicants did not need a licence to use the works, as the works were in the public domain. In two other cases, the applications were turned down because the Canadian Copyright Board only issues licences for published works, and the applications lacked proof of that the works had been published. Consequently, there is no real evidence that a requirement of documenting a reasonable efforts search deters potential users.

Conclusive Reflections on the Effects of Brannon’s Proposal

The analysis shows that there are both advantages and disadvantages with Brannon’s proposal. Brannon’s idea of a registry of orphan works would on the one hand affect future users positively, as they would not need to conduct a reasonable efforts search for copyright owners. On the other hand, it would be unfair to copyright owners that may have become easier to locate due to changed circumstances.

The proposal may also have a negative affect on copyright owners of foreign and unpublished works. In addition, it would be difficult for an authorised body to assess applications for licenses to use foreign works. The vague definition of a “reasonable efforts search” could also create problems for potential users and the authorised body that would review the licence applications. Furthermore, it is unclear how Brannon’s system would be financed, and the idea of an escrow fund that keeps the royalties for an unlimited period is irrational, as copyright owners may never collect their royalties.

On the positive side, Brannon’s proposal complies with the Berne Convention. A compulsory licensing system also assures the user that there is no risk of being sued for infringement by the copyright owner later, since the use of the work is licensed and approved prior to the actual use. Moreover, the user knows what the cost of using the work is before the use. There is also no proof

211 Bezos 12.
212 “Unlocatable Copyright Owners: Applications Denied (Reasons),” Copyright Board of Canada.
that a compulsory licensing system would be a costly, long or burdensome process for the user.

Evaluation of the Proposals Based on the Incentives-Access Paradigm

The orphan works problem in the US means that the present level of copyright protection is too high, as US copyright law prevents many works from being used in a productive and beneficial way. Having looked at how the Orphan Works Act, the PDEA and Brannon’s compulsory Licensing System may affect copyright owners and users of orphan works, the question is whether any of the proposals could achieve a good balance between the benefits of copyright protection and its costs and thus stimulate output of works.

As far as the Orphan Works Act is concerned, the vagueness of the “reasonably diligent search” requirement and the “reasonable compensation” criterion could prevent users to get more access to orphan works, as these requirements involve an unnecessary financial and legal risk. Thus, the copyright would still be too high as a result of the Orphan Works Act. On the other hand, copyright owners of photographs, foreign works, low-value works and material produced after 1977 would lose much of their copyright protection, due to the “limitation on monetary relief” and the “reasonably diligent search” requirement. As a result, the level of copyright protection could end up being too low as a result of the Orphan Works Act, leading to creators being less motivated to make the necessary investment.

Contrary to Sami J. Valkonen and Lawrence J. White, who think the Orphan Works Act would have a positive impact on output, 215 I believe that the act might have a negative impact on the output of works because of two reasons. Firstly, it would prevent people from using orphan works without taking a considerable risk. Secondly, the incentive to create works would be diminished due to a loss of copyright protection. Consequently, the Orphan Works Act would most likely not benefit society.

Like the Orphan Works Act, the PDEA does not create a good balance between the benefits of copyright protection and its costs. Firstly, the proposal does not provide a solution to orphan works within the initial fifty years of copyright protection. Thus, even though the PDEA would lower the level of copyright protection considerably and benefit users of orphan works, as more works probably would enter the public domain, the level of copyright protection would

215 Valkonen 399.
still be too high. Secondly, there is a risk that the compulsory registration system of the PDEA could have a negative impact on some copyright owners. For instance, the system may cause the loss of some valuable copyrights and impose an unfair burden on copyright owners that own a large amount of published works. Consequently, the level of copyright protection may end up being too low in some instances.

Even if the negative impact of the PDEA might prove to be limited, the proposal is impractical, as the compulsory registration system violates the Berne Convention by creating an unfair burden on foreign copyright owners and injecting confusion into the copyright system. In addition, it is likely that the Copyright Office would be required to subsidise copyright owners every time they registered, since the maintenance fee of $1 probably would be lower than the administration cost. Thus, even though the PDEA is likely to benefit users and stimulate output of works, it is simply not a plausible solution to the orphan works problem, as it not only violates international laws but also creates an unreasonable social cost.

Pamela Brannon’s proposal would not achieve a good balance between the benefits of copyright protection and its costs either, as owners of foreign and unpublished works would be negatively affected. Brannon’s idea of a registry of orphan works may also harm copyright owners. Consequently, although the proposal would make it possible for users to get access to orphan works more easily, the incentive to create works would be diminished as a result of a loss of copyright protection and privacy rights.

Another problem with Brannon’s proposal is the reasonable efforts search. For instance, as the proposal does not define what constitutes a reasonable efforts search, it is uncertain how much effort potential users would have to invest to carry out a search. It is also unclear how the Copyright Office, or some other authorised body, would be able to assess searches for foreign works. Furthermore, Brannon does not explain how the system would be financed and what would happen to royalties that copyright owners never collect. Thus, on the whole, Brannon’s proposal is not a good solution to the orphan works problem, partly because it could have a negative impact on the output of works and partly because there are a number of practical problems.
A New Orphan Works Proposal

Like Pamela Brannon, I propose a solution based on a compulsory licensing system. Under my proposed system, a prospective user that cannot find the permission grantor would be allowed to use the work provided certain requirements were met. The user would first be required to conduct a reasonably diligent search for the permission grantor and document the search. If the user failed to locate the permission grantor after a reasonably diligent search, he would be able to apply to the Copyright Office (or possibly some other body) for a licence to use the work. If the Office were satisfied that the applicant had made a reasonably diligent search, the user would then be obliged to pay a set licence fee to the Copyright Office. This fee would be kept in an escrow fund. However, if the copyright owner did not collect the royalty within five years, the money would be returned to the applicant.

The advantage with this system is that it assures the user that there is no risk of being sued for infringement by the copyright owner, since the use of the work is licensed and approved prior to the actual use. The orphan works system would also encourage copyright owners/permission grantors to make themselves known and accessible to potential users, so that users would be able to seek permission directly from them and not have to apply for an orphan works licence. In addition, the licensing system would comply with the international laws of the Berne Convention. The Berne Convention protects the exclusive rights of copyright owners, but makes room for countries to enact compulsory licences “in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”216 Thus, since the compulsory licensing system in Canada is in accordance with the Berne Convention, I see no reason why my proposal would not meet the terms of the Convention.

Apart from the requirement of a reasonably diligent search, the user would also be obliged to provide attribution to the author and owner of the orphaned work if possible. The idea is that the user should acknowledge the creator and owner of the work, and make clear that the material is the product of another person.

216 Berne Convention. Art. 9(2).
Under my proposed system, there would be clear instructions of what constitutes a reasonably diligent search. Prospective users would be required to do the following:

1. Try and contact the publisher or producer of the work if the name of the publisher or producer can be identified on the work.

2. Try and contact the copyright owner of the work if the name of the rights holder can be identified on the work.

3. Contact copyright clearinghouses and performing-rights organizations that deal with the type of works the application concerns.

4. Search the Copyright Office’s records for information on copyright ownership and contact information for the copyright owner. If any such information is found, then the user should try and contact the rights holder.

These instructions would not only help prospective users to know that they have fulfilled the search requirement, but they would also help the Copyright Office to assess whether users have conducted a reasonably diligent search or not.

Since the most obvious starting point for trying to identify the permission grantor of a work is the work itself, the first two requirements have been chosen. As the Copyright Office states, “most published works, even older ones, contain at least the name of the author and publisher, and often the address for the publisher […]” 217 The third requirement has been chosen because, as I have previously explained, copyright clearinghouses and performing-rights organizations are common places to turn to in order to receive permission to use copyrighted material, as they have the granting rights for many works. For example, a user attempting to use a song should contact ASCAP (American Society of Composers, Authors and Publishers), BMI (Broadcast Music Incorporated), and SESAC (performing-rights organisation). The Copyright Office provides a list if copyright clearinghouses and performing-rights organizations. 218 If the user still is unable to locate the permission grantor for the work after the first three requirements, he or she would have to search the Copyright Office’s records in order to get more information on copyright ownership. Thus, the fourth requirement has been chosen.

To protect the privacy rights of authors/copyright owners, the orphan works licence would not include unpublished works, as the author/copyright owner may

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218 “Copyright Internet Resources.”
not have wished to have his private letters, diaries or photographs made public. Nor would it apply to works owned by foreign copyright owners, as the requirements of a reasonably diligent search would be inappropriate for trying to locate foreign copyright owners. For example, it would be useless to search for foreign copyright owners in the Copyright Office’s registration catalogues, as they mostly include American rights holders. Moreover, it would be very difficult for the Copyright Office to assess if the user has made a reasonably diligent search abroad due to language barriers, among other things.

As many photographs lack information about its creator and copyright owner, and because photographs cannot easily be searched for in a text-based register such as the Copyright Office’s catalogues, they are also excluded from the orphan works licence. Although this implies that users would be hindered from using many orphaned photographs, I cannot see how photographs could be included without more or less taking away the exclusive rights of photographers.

Works created after 1988 would, however, not be excluded, even though a few works may lack information about the creator, publisher or copyright owner (as the requirement for a copyright notice was abolished in 1989). I have chosen not to exclude these works as most published works, with the exception of photographs, “contain at least the name of the author and publisher, and often the address for the publisher […]” Consequently, as my proposal excludes unpublished works and photographers, I see no need to exclude works published after 1988.

In order to avoid any social costs, I propose that users should pay a small application fee to cover the cost of reviewing the application. I leave it to the Copyright Office to decide what the fee should be. The Copyright Office would also have to determine the licence fees. Moreover, the Copyright Office would be required to continue providing information to assist prospective users to search for permission grantors. It would also be good if they could produce a best practices guide for conducting and documenting a reasonably diligent search.

In Canada, the Copyright Board of Canada only provides instructions on how to submit applications for an orphan works licence. In contrast to the Canadian system, applicants would be required to submit an application form when they apply for an orphan works licence under my system. The purpose of having a set application form would be to avoid incomplete applications and uncertainty among applicants. This application form should include the following: description of the work (type, title, year of production, etc.); information of the intended use of the work; a detailed description of all the efforts made to try and locate the permission grantor plus copies of any relevant material (e.g.

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220 Copyright Board of Canada, "Unlocatable Copyright Owners Brochure."
correspondences); name and contact information of the applicant; and, if possible, the name of the creator, copyright owner, and permission grantor.

It is important to mention that the orphan works system should work in conjunction with existing provisions of limitations rather than substitute them. In other words, if a user is able to show that his use falls within the fair use provision or is otherwise free of copyright liability, there would be no need to apply for an orphan works licence.

In addition to the orphan works licensing system, I think it would be good if the copyright term in the US were decreased from life of the author plus seventy years to life of the author plus fifty years. This is the current copyright term in Canada and the minimum term allowed by the Berne Convention.\textsuperscript{221} Thus, US Copyright law would still comply with the Berne Convention if the copyright term were decreased to life of the author and fifty years. Lowering the copyright term would mean that many orphan works would enter the public domain, which would benefit users and probably eliminate some orphan works situations.

The New Orphan Works Proposal in Relation to the Incentives-Access Paradigm

As users today are unable to use orphan works without risking a costly lawsuit, the current level of copyright protection is too high. My licensing system would make it possible for people to use orphan works without risking infringement liability. The clearly stated requirements of a reasonably diligent search would also eliminate any uncertainty among users. Moreover, the cost of using orphan works is likely to be low in many cases, as the licence fee would be returned to the user if the copyright owner never collects it. Consequently, the system would encourage rather than discourage users to use orphan works and therefore possibly increase output of works.

My licensing system would also respect the rights of copyright owners. For instance, the system would protect the rights of copyright owners by excluding photographs and limiting it to published works owned by American copyright owners. The risk of the system encouraging copyright infringement would also be minimal, as the Copyright Office would scrutinise all applications. Having said that, if the copyright term were decreased by twenty years in conjunction with the licensing system, some copyright owners would lose their rights. However, as only 1.7 percent of books published in the US in the year 1930 were still in print in 2001,\textsuperscript{222} a diminished copyright term would probably affect very few copyright owners.

\textsuperscript{221} Canadian Copyright Act. §6; Berne Convention. Art. 7(1).
\textsuperscript{222} Landes 212.
owners. Thus, I believe that the incentive for prospective creators to create new works would not be substantially diminished by a decreased copyright term. In other words, the positive effects of a diminished copyright term would outdo the negative ones, as users would get access to many orphan works, which in turn could lead to an increase in output.

Although a decreased copyright term and the licensing system most certainly would have a positive impact on the output of works, it would not solve the orphan works problem completely. Users would not have access to photographs, unpublished material, and works by foreign copyright owners, as these types of orphan works would be excluded from the licensing system. Consequently, my solution addresses some but not all orphan works situations. Nevertheless, I believe the proposal would create a better balance between the benefits of copyright protection and its costs than today.
Conclusion

The orphan works problem affects various users and uses. For instance, it creates problems for creators wishing to incorporate orphaned material into their own works. It also affects authors, filmmakers, libraries, and archives, among others. As most works are orphan works under the current copyright system, orphan works situations forestall a productive and beneficial use of many works. Consequently, the orphan works problem undermines the purpose of copyright, which, according to the incentives-access paradigm, is the maximisation of societal welfare through output.

Although some orphan works situations can be addressed by existing provisions of limitations, such as fair use, many cannot. Thus, to solve the orphan works problem, new legislation is necessary. The Orphan Works Act, the PDEA and Brannon’s Compulsory Licensing System tries to solve the orphan works problem in three different ways. However, as this study shows, these legislative proposals do not adequately address the orphan works problem. For instance, the limitation on monetary relief of the Orphan Works Act would harm copyright owners of low-value works. The Orphan Works Act is also likely to prevent potential users from using orphan works due to the vague definition of a “reasonably diligent search.” Thus, many users would probably not take the risk of using orphan works, as it could lead to infringement liability. My proposal solves this problem by providing clear instructions of what a reasonably diligent search would constitute and assuring the user that there is no risk of being sued for infringement by the copyright owner later, since the use of the work would be licensed and approved prior to the actual use.

In contrast to the Orphan Works Act and Brannon’s proposal, my system also respects the privacy rights of copyright owners and the rights of foreign copyright owners, by limiting the provision to published works by US copyright owners. Furthermore, the new proposal complies with the international laws of the Berne Convention, unlike the PDEA. My proposal also provides a solution to orphan works within the initial fifty years of copyright protection, which the PDEA does not do. Moreover, the registration system of the PDEA is likely to create a burden on copyright owners and cause the loss of valuable copyrights.

Under my proposal, potential users applying for an orphan works licence would also be required to pay a low application fee to cover all administration
costs. Thus, contrary to the PDEA and Brannon’s proposal, my system would not create any unnecessary social cost. In conjunction with the licensing system, I also propose that the copyright term should be decreased by twenty years to the author’s life plus fifty years. Many users of orphan works would benefit from a diminished copyright term, as many orphan works would enter the public domain twenty years earlier than under the current copyright term.

Like Pamela Brannon, my proposal is a form of compulsory licensing system. Since there are no indications of that a compulsory licensing system would be a costly, long or burdensome process for the user, I think this is the most efficient and effective way to provide access to orphan works. To come up with a solution that completely solves the orphan works problem without taking away the incentive among future authors to create new works is probably impossible. As the study illustrates, the Orphan Works Act, the PDEA, and Brannon’s proposal fail to do so, as they address the orphan works problem at the expense of many copyright owners’ rights. In contrast, my proposal tries to respect the rights of copyright owners more sufficiently, while at the same time eliminating many orphan works situations. As a result, the new proposal is more likely to stimulate output of works than the other three proposals, as a better balance between the benefits of copyright protection and its costs would be achieved.
Summary

This research paper focuses on the orphan works problem in the United States. Orphan works can most easily be understood as copyrighted material for which no permission grantor can be identified and/or located. As the paper explains, this is a serious problem that affects different types of users and uses of works. There have been a number of solutions proposed on how to solve the orphan works problem. This paper analyses three proposals: the Orphan Works Act of 2006, the Public Domain Enhancement Act, and Pamela Brannon’s Compulsory Licensing System. The purpose of this study is to show that none of these three proposals provides a good solution to the orphan works problem in the US and to offer a new solution to the problem.

After examining the three proposals from a theoretical perspective called the incentives-access paradigm and looking at how they may affect copyright owners and users of orphan works, the paper concludes that the proposals are inadequate, as they address the orphan works problem at the expense of many copyright owners’ rights. To respect the rights of copyright owners more sufficiently and achieve a better balance between the benefits of copyright protection and its costs, the study presents a new solution to the orphan works problem. Although the new proposal does not eliminate the orphan works problem completely, the paper shows that it is more likely to stimulate output of works than the other three proposals.
Works Cited


---. "Contact Information." E-mail to the author. 8 Feb. 2008.


Glossary

Abandonware
I have not found any definition of “abandonware” in any reference book.\(^{223}\) However, on the website *The Official Abandonware Ring*, the term is defined as “any PC or console game that is at least four years old and not being sold or supported by the company that produced it or by any other company”.\(^{224}\) In a study on abandonware, the term is also defined as a situation where “the identity of the copyright owners may be known or even locatable, but the owners are not willing or interested in supplying the software”.\(^{225}\) Thus, abandonware should not be confused with works that are orphaned, as in contrast to orphan works the copyright owner of abandonware may be identifiable and locatable.

Actual Damages and Profits
According to US copyright law, the copyright owner is entitled to compensation for the actual damages the infringement cost in lost sales. The copyright owner is also entitled to “any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages.”\(^{226}\) As a legal term, “damages” means “Money claimed by, or ordered to be paid to a person for compensation for loss or injury.”\(^{227}\)

Copyright Notice
A "copyright notice" is a notice that a work is copyright protected. It is usually placed in each published copy of the work. A copyright notice consists of the symbol ©, the year of publication, and the name of the copyright owner. Since March 1989, a notice is not required for copyright protection in the US.\(^{228}\)

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\(^{223}\) There was no definition of the term in *Encyclopaedia Britannica Online, Encyclopaedia of Library and Information Science, Merriam-Webster’s Collegiate Dictionary, Merriam-Webster’s Dictionary of Law, Black’s Law Dictionary* and *Oxford English Dictionary* on the following access date: 20 Jan. 2008.
\(^{224}\) “Frequently Asked Questions,” *The Official Abandonware Ring*.
\(^{225}\) Khong 56.
Formality
As a copyright term, a “formality” is a procedural requirement to receive copyright protection. The United States used to have formalities. These formalities included a copyright notice appearing on the work, registration of the work with the Copyright Office, and deposit of a copy of the work with the Library of Congress, among other things. Today formalities are not required in the US, although registration remains a prerequisite to US copyright owners for filing an infringement suit against someone.229

Injunction & Relief
An “injunction” is “A court order commanding or preventing an action.”230 For example, an injunction might be a court order ”requiring an infringer to stop publishing or distributing the work and to destroy all remaining copies.”231 As a legal term, a “relief” is the redress or benefit (e.g. an injunction) that a party asks of a court.232

Public Domain
The ”public domain” is the ”universe of inventions and creative works that are not protected by intellectual-property rights and are therefore available for anyone to use without charge.”233 For instance, the public domain constitutes material that is not protected by copyright (e.g. ideas, facts, systems) and works with expired copyrights.234

Register of Copyrights & the U.S. Copyright Office
The “Register of Copyrights” is the head of the “U.S. Copyright Office,” which is a department of the Library of Congress. The Copyright Office is responsible for registering claims to copyright and maintaining records of copyright registration. The Office also advises Congress on copyright law, and administers various licensing provisions, including collecting and distributing royalties, among other things.235

231 Besenjak 145.
234 Besenjak 41-42.
Statutory Damages

“Statutory damages” are damages (i.e. money) established by copyright law. The copyright owner “does not have to prove any loss, but the work must have been registered with the Copyright Office. Amounts vary depending on whether the infringement is determined innocent or wilful.”236 Damages can be as low as $200 or as high as $150,000. However, if the infringer is an employee of a public broadcasting entity or a non-profit educational institution, library, or archive, and “believed or had any reasonable grounds for believing that that his or her use of the copyrighted work was fair use,” then damages will be remitted. It should be noted that an infringer of copyright is liable for either actual damages and profits or statutory damages.237

Work Made for Hire

A “work made for hire” is either 1) a work created by an employee for his or her employer “within the scope of his or her employment,” or 2) a work “specially ordered or commissioned for use as a contribution to a collective work,” such as a part of a motion picture or other audiovisual work, translation, compilation, or a supplementary work prepared as adjunct to a work prepared by another person (e.g. a foreword, illustration, map).238

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236 Besenjak 146.
Appendix: 12 Licences Issued by the Canadian Copyright Board 1997-1998

<table>
<thead>
<tr>
<th>Applicant</th>
<th>Application filed</th>
<th>Licence issued</th>
<th>Time</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Glebe Centre(^{239})</td>
<td>10 January 1997</td>
<td>11 June 1997</td>
<td>152 days</td>
</tr>
<tr>
<td>Monique Dufresne of Val-Mauricie School Board(^{240})</td>
<td>15 January 1997</td>
<td>11 June 1997</td>
<td>147 days</td>
</tr>
<tr>
<td>Fifth House Publishers(^{241})</td>
<td>16 April 1997</td>
<td>23 July 1997</td>
<td>98 days</td>
</tr>
<tr>
<td>Éditions CEC(^{242})</td>
<td>10 July 1997</td>
<td>26 August 1997</td>
<td>47 days</td>
</tr>
<tr>
<td>Épitome Pictures Inc.(^{243})</td>
<td>4 April 1997</td>
<td>27 August 1997</td>
<td>145 days</td>
</tr>
<tr>
<td>Canadian Institute for Historical Microreproductions(^{244})</td>
<td>15 August 1997</td>
<td>31 October 1997</td>
<td>77 days</td>
</tr>
<tr>
<td>Éditions CEC(^{245})</td>
<td>25 November 1997</td>
<td>12 January 1998</td>
<td>48 days</td>
</tr>
<tr>
<td>Kitchen Sink Entertainment Inc.(^{246})</td>
<td>21 October 1997</td>
<td>14 January 1998</td>
<td>85 days</td>
</tr>
<tr>
<td>Canadian Institute for Historical Microreproductions(^{247})</td>
<td>5 January 1998</td>
<td>13 February 1998</td>
<td>39 days</td>
</tr>
<tr>
<td>Manitoba Genealogical Society(^{248})</td>
<td>16 December 1997</td>
<td>13 March 1998</td>
<td>87 days</td>
</tr>
<tr>
<td>Media Library of the University of Ottowa(^{249})</td>
<td>4 February 1998</td>
<td>13 March 1998</td>
<td>37 days</td>
</tr>
</tbody>
</table>

\(^{239}\) Copyright Board of Canada, "File: 1997-UO/TI-3" 1.
\(^{240}\) Copyright Board of Canada, "File: 1997-UO/TI-7" 1.
\(^{242}\) Copyright Board of Canada, "File: 1997-UO/TI-14" 1.
\(^{243}\) Copyright Board of Canada, "File: 1997-UO/TI-10" 1.
\(^{244}\) Copyright Board of Canada, "File: 1997-UO/TI-17" 1.
\(^{245}\) Copyright Board of Canada, "File: 1997-UO/TI-21" 1.
\(^{246}\) Copyright Board of Canada, "File: 1997-UO/TI-19" 1.
\(^{247}\) Copyright Board of Canada, "File: 1998-UO/TI-4" 1.
\(^{249}\) Copyright Board of Canada, "File: 1998-UO/TI-6" 1.