

THE ORPHAN WORKS PROBLEM: PRESERVING ACCESS TO THE CULTURAL HISTORY OF DISADVANTAGED GROUPS

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I. INTRODUCTION

The United States Holocaust Memorial Museum is home to a vast archive of survivors' accounts, documentary film footage, family photographs, artwork, and musical scores created in concentration camps.¹ Today, the museum's mission to preserve the history of the Holocaust by making these collections available in public exhibits and publications is hindered by copyright law.² In one example, the museum recently acquired a diary written in a Polish ghetto by a young woman who did not survive the war, but the museum cannot locate the woman's surviving family members or heirs in order to clear the diary's copyright.³ In another example, an individual donated an album of photographs that he had discovered in a hotel room in Germany shortly after World War II, but the

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¹ *Balancing the Interests of Copyright Owners and Users: Hearing Before the H. Subcomm. on Courts, the Internet and Intellectual Property and the H. Committee on the Judiciary*, 110th Cong. 64–67 (2008) (statement of Karen Coe, Assoc. Legal Counsel for the U.S. Holocaust Memorial Museum), available at <http://judiciary.house.gov/hearings/printers/110th/41420.PDF> [hereinafter Statement of Karen Coe].

² *Id.*

³ *Id.* at 2.

photographer remains unknown.⁴ Because museum staff cannot identify or locate the rights holders for these items, they cannot publish or display them without exposing the museum to the risk of a copyright infringement lawsuit, should the rights holders come forward in the future.⁵

The Polish woman's diary and World War II photo album are examples of "orphan works," or in-copyright works whose rights holders are difficult or impossible to find.⁶ Orphan works comprise a large proportion of the works that are still under copyright⁷ and include a vast number of old works that are not being commercially exploited by rights holders because they are out-of-print, unpublished, or anonymous but nonetheless have historical or cultural significance.⁸ The Holocaust Museum is not alone in encountering this problem; libraries, museums, and archives all over the country contain treasure troves of culturally and historically significant works that they cannot make available to the public because the copyright owners cannot be located.⁹

This Note will address the special implications of the orphan works problem on the cultural heritage and history of historically marginalized groups, particularly its impact on access to early twentieth-century works created by racial and religious minorities, women, the poor, and Native Americans and other indigenous people. Unlike other legal scholarship and commentary that has addressed the orphan works problem, this Note addresses the problem as it relates to the works of disadvantaged communities.

Obtaining rights for works by disadvantaged groups tends to be especially difficult, particularly for early works and for "outsider" genres, such as folk and Native American art. Typically, a copyright clearance search involves checking the Copyright Office's registry and other established

⁴ *Id.*

⁵ *Id.* at 3.

⁶ U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS: A REPORT OF THE REGISTER OF COPYRIGHTS, 5 (2006), available at <http://www.copyright.gov/orphan/orphan-report-full.pdf> [hereinafter ORPHAN WORKS REPORT].

⁷ Estimates vary. The U.S. Copyright Office says it cannot "quantify the extent or scope of the problem," although there is good evidence it is significant. ORPHAN WORKS REPORT, *supra* note 6, at 2. More than an estimated fifty percent of all works are orphans based on historical registration data. Reply from Lawrence Lessig et al., Save the Music & Creative Commons, *Orphan Works Reply Comments*, U.S. COPYRIGHT OFFICE 7 (May 9, 2005), <http://www.copyright.gov/orphan/comments/reply/OWR0114-STM-CreativeCommons.pdf>.

⁸ ORPHAN WORKS REPORT, *supra* note 6.

⁹ Statement of Karen Coe *supra* note 1, at 2–3

rights databases and then contacting corporate owners for permission.¹⁰ When dealing with works by disadvantaged groups, however, these usual methods of locating rights holders are less likely to succeed for a variety of reasons. Minority and poor white musicians were routinely excluded from performing rights organizations until the 1940s,¹¹ and were less likely to register their copyrights.¹² Women and minority visual artists often created their works apart from the established gallery system, and their artworks tended to be less exhibited and well-known.¹³ Traditional artworks by minorities have often been conceived of as folk curiosities or decorative objects rather than fine art,¹⁴ and, as a result, identifying information for these works is often lost.¹⁵ If the creators were obscure during their lifetimes and are now dead, it may be impossible to find out who now holds the rights.

The social justice movements of the last half of the twentieth century led to a renewed interest in the works of minorities and women, resulting in the creation of new university ethnic studies departments and new museums founded to preserve and interpret the cultural history of disadvantaged groups (e.g., the UCLA Fowler Museum, the California African American Museum, and San Francisco's Mexican Museum and Contemporary Jewish Museum).¹⁶ Generalist art museums have begun to exhibit

¹⁰ See U.S. COPYRIGHT OFFICE, HOW TO INVESTIGATE THE COPYRIGHT STATUS OF A WORK, Circular 22 (2009); see Letter from Jeffrey P. Cunard for Jule L. Sigall, Initial Comment of the College Art Association in Response to Notice of Inquiry on Orphan Works (Mar. 25, 2005) (on file with the U.S. Copyright Office), available at <http://www.copyright.gov/orphan/comments/OW0647-CAA.pdf> [hereinafter CAA Initial Comment].

¹¹ Olufunmilayo B. Arewa, *Blues Lives: Promise and Perils of Musical Copyright*, 27 CARDOZO ARTS & ENT. L.J. 573, 599–600 (2010).

¹² Guthrie T. Meade, Jr., *Copyright: A Tool for Commercial Rural Music Research*, 30 W. FOLKLORE 206, 206, 208 (1971).

¹³ See Linda Nochlin, *Why Have There Been No Great Women Artists?*, in WOMEN, ART AND POWER AND OTHER ESSAYS, 145–78 (1988) (influential 1971 essay describing institutional disadvantages women artists faced).

¹⁴ See Exhibition: *The Quilts of Gee's Bend*, WHITNEY MUSEUM OF AM. ART, (New York, Nov. 21, 2002–Mar. 9, 2003) (organized by Museum of Fine Arts, Houston) [hereinafter Exhibition: *The Quilts of Gee's Bend*]; see also Michael J. Prokopow, *Material Truths: The Quilts of Gee's Bend at the Whitney Museum of Art: An Exhibition Review*, 38 WINTERTHUR PORTFOLIO 57 (2003) (addressing the hierarchical treatment by museums of artworks made by marginalized groups such as Gee's Bend quilters). Because works by minorities were often considered to be merely decorative or functional objects rather than fine art, provenance information for these works was less likely to be kept or cataloged by the works' owners.

¹⁵ See Molly Torsen, "Anonymity, Untitled, Mixed Media": *Mixing Intellectual Property Law with Other Legal Philosophies to Protect Traditional Cultural Expressions*, 54 AM. J. COMP. L. 173 (2006).

¹⁶ See *About the Museum*, FOWLER MUSEUM AT UCLA, <http://www.fowler.ucla.edu/about>

more work by multicultural artists and women (e.g., the de Young Museum's 2006 exhibitions of Chicano art,¹⁷ the Los Angeles Museum of Contemporary Art's (MOCA) 2011 exhibition of work by feminist artists).¹⁸ Other examples include reissues of early recordings of music by African Americans and Mexican Americans, exhibitions of traditional folk art by women and non-Western artists, increased public and curatorial interest in Native American art, and resources devoted to documenting and preserving Mexican American murals from the 1960s to the 1980s.¹⁹ Most of these projects require obtaining permission for works that may still be under copyright.²⁰

Under current copyright law, would-be users of orphan works must obtain permission from the rights holders. In addition, professional ethical rules and standards of academic integrity motivate museum curators and

(last visited July 18, 2011); *History*, CAL. AFRICAN AM. MUSEUM, <http://www.caamuseum.org/cah.htm> (last visited July 18, 2011); *The Museum*, THE MEXICAN MUSEUM, <http://www.mexicanmuseum.org/information/index.asp> (last visited July 18, 2011); *Mission*, CONTEMPORARY JEWISH MUSEUM, http://www.thecjm.org/index.php?option=com_content&task=view&view=article&id=3 (last visited July 18, 2011).

¹⁷ Exhibitions: *Chicano Visions: American Painters on the Verge*; *Chicano Encounters: Local Places and Global Communities* and *Chicano Now: American Expressions*, DE YOUNG MUSEUM (San Francisco, July 22–Oct. 22, 2006).

¹⁸ Exhibition: *Wack! Art and the Feminist Revolution*, GEFEN CONTEMPORARY AT MOCA (Los Angeles, Mar. 4–July 16, 2007).

¹⁹ See, e.g., Tim Brooks, *LOST SOUNDS: BLACKS AND THE BIRTH OF THE RECORDING INDUSTRY 1980–1919* (2004) (includes discography of reissued early African American recordings); *About the Project*, UCLA FRONTERA COLLECTION OF MEXICAN AND MEXICAN AMERICAN RECORDINGS, <http://frontera.library.ucla.edu/project.html> (project to preserve early Mexican and Mexican American recordings and make them accessible to the public) (last visited July 18, 2011); *Past Exhibitions*, CRAFT AND FOLK ART MUSEUM, <http://www.cafam.org/past.html> (listing recent folk art exhibitions, including exhibits centered on women and non-Western artists) (last visited July 18, 2011); W. Jackson Rushing, *NATIVE AMERICAN ART IN THE TWENTIETH CENTURY: MAKERS, MEANINGS, HISTORIES* xviii–xiv (1999) (explaining that numerous recent exhibits show the widespread vitality and growing public interest in Native American art; however, Native American art remains underrepresented in university and art school curricula); Eva Sperling Cockcroft & Holly Barnet-Sánchez, *SIGNS FROM THE HEART: CALIFORNIA CHICANO MURALS* (1993) (documenting the history of the Chicano murals); *SPARC: Creating Sites of Public Memory Since 1976*, SOCIAL AND PUBLIC ART RESOURCE CENTER, http://www.sparcmurals.org:16080/sparcone/index.php?option=com_content&task=view&id=13&Itemid=43 (Los Angeles organization which preserves public art, particularly Chicano murals and other works that “reflect the lives and concerns of . . . women, the working poor, youth, the elderly and newly arrived immigrant communities.”) (last visited July 18, 2011).

²⁰ Works created as long ago as 1891 can still be under copyright in some cases. 17 U.S.C. § 302 (2003); see Copyright Term and the Public Domain in the United States, CORNELL UNIV., <http://www.copyright.cornell.edu/resources/publicdomain.cfm> (last visited July 18, 2011) [hereinafter Copyright Duration Chart], *infra* Section II.B.1.

scholars to give proper credit to copyright holders.²¹ However, the cost of trying to identify and locate the rights holder to ask for permission is often prohibitive to museums and educational institutions, impeding many socially valuable uses of orphan works.²² In most cases, the actual likelihood that the owner of an orphan work will emerge and bring an infringement suit is very small.²³ But because defending an infringement suit is expensive and rights holders may be awarded significant damages if they win—up to \$150,000 per work used—many would-be users would rather avoid the risk by forgoing use of the work altogether.²⁴ Even if the scholar or curator who oversees the project would be willing to take a small risk, institutional “gatekeepers” such as publishers or museum counsel tend to take a conservative approach and usually veto proposed uses of copyrighted works that are not cleared.²⁵ As a result, socially valuable projects, such as those previously mentioned, must be aborted or scaled back, and public access to the cultural heritage of disadvantaged groups is impeded.

This Note will propose a solution to the orphan works problem in hopes of promoting broader cultural access and participation. Section II will provide background on the scope of the orphan works problem and how it arose. Section III will explore the special impact the problem has on the works of historically disadvantaged groups. Section IV will compare and evaluate three potential solutions to the orphan works problem that might increase access to cultural works: (1) proposed 2008 legislation that would have limited the liability of good faith users of orphan works, (2) private licensing schemes such as the Google Books Rights Registry, and (3) Canada’s compulsory license approach. Section V will argue that, rather than any of these three approaches, extended collective licensing as currently practiced by the Nordic countries would best serve the goal of promoting access to cultural and historical works of minorities and other disadvantaged groups while fairly compensating rights holders that *do* come forward. Given the long history of exploitation and fraud committed against disadvantaged groups over the control and profits from their cul-

²¹ CAA Initial Comment, *supra* note 7, at 30; see *A Code of Ethics for Art Historians and Guidelines for the Professional Practice of Art History*, COLLEGE ART ASS’N, available at <http://www.collegeart.org/guidelines/histethics> (last visited July 18, 2011).

²² ORPHAN WORKS REPORT, *supra* note 6.

²³ CAA Initial Comment, *supra* note 7, at 5.

²⁴ 17 U.S.C. § 504(c)(2) (2010) (“In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than \$150,000.”).

²⁵ CAA Initial Comment, *supra* note 10, at 5.

tural works, it is especially important to ensure that orphan works reform does not harm the interests of artists and rights holders within these groups.

II. BACKGROUND ON THE ORPHAN WORKS PROBLEM

A. SCOPE AND SIGNIFICANCE

The orphan works problem is pervasive and seriously impacts the activities of museums, scholars, universities, and libraries.²⁶ In early 2005, Senators Orin Hatch and Patrick Leahy prompted the Copyright Office to study the problem.²⁷ The Copyright Office issued a Notice of Inquiry in the Federal Register inviting comments from the public.²⁸ Over 850 initial and reply comments were received from institutions and individuals who had encountered the problem of locating rights holders for orphan works.²⁹ Comment participants included major museums, such as the J. Paul Getty Trust, the Metropolitan Museum of Art, the Los Angeles County Museum of Art (LACMA), the Museum of Modern Art (MOMA), the Smithsonian, and the Whitney Museum of Art; the university libraries of Carnegie Mellon, Cornell, Harvard, Stanford, and the University of Michigan, as well as the American Association of Law Libraries, the Library Copyright Association, and the College Art Association (which represents art historians, curators, and visual resources librarians); various cultural preservation groups; and many intellectual property and legal public interest organizations, including Public Knowledge, the Electronic Frontier Foundation, Creative Commons, and various law school clinics.³⁰ The unusual volume and breadth of comments indicates that the orphan works problem impacts a wide variety of interests that affect the public.

After receiving two rounds of comments and hosting roundtable discussions, the Copyright Office issued its Report on Orphan Works in

²⁶ See Statement of Karen Coe, *supra* note 1.

²⁷ See ORPHAN WORKS REPORT, *supra* note 6 (letter from Orin G. Hatch and Patrick Leahy to Marybeth Peters, Register of Copyrights).

²⁸ Notice of Inquiry on Orphan Works, 70 Fed. Reg. 3,739 (Jan. 26, 2005).

²⁹ ORPHAN WORKS REPORT, *supra* note 6, at 1.

³⁰ Initial comments received and reply comments are available at the U.S. Copyright Office website. See *Orphan Works Initial Comments*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/orphan/comments> (last visited July 18, 2011); *Orphan Works Reply Comments*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/orphan/comments/reply> (last visited July 18, 2011).

2006.³¹ The report concluded that the problem was substantial and change in the law was needed to address it, ultimately recommending statutory language for Congress to adopt.³²

Although Congress has not enacted the Copyright Office's recommendations, the orphan works problem has recently been in the news because of a settlement between Google and the Authors Guild and the Association of American Publishers, over the operation of Google Books, a service offered by Google that provides full copies of texts online.³³ Google's digitization project has the potential to make copies of tens of thousands of out-of-print books easily accessible to the public online, many of which are orphan works.³⁴ At the same time, the settlement is controversial because it could potentially give Google a monopoly over the rights to orphaned books,³⁵ an issue to be further discussed later in this piece. The Google settlement has brought additional attention to the problem of clearing rights to orphan works, particularly for large-scale digitization projects.³⁶

B. CAUSES

Orphan works exist when the rights holder of a copyrighted work cannot be located. The orphan works problem has been exacerbated by developments in our copyright system: lengthened copyright terms, the elimination of formalities, and the restoration of foreign works' copyrights in the United States. These changes greatly increased the number of in-copyright works that are orphaned and made the transaction costs of locating rights holders more expensive, while diminishing the number of works in the public domain.

1. Term Extensions

The duration of copyright has been greatly expanded over time. The first Copyright Act in 1790 granted authors only an initial fourteen-year

³¹ ORPHAN WORKS REPORT, *supra* note 4.

³² *Id.* at 2–3; *see infra* Section IV for a discussion of the Copyright Office's proposed approach.

³³ *See infra* Section IV.B.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

term with a fourteen-year renewal option.³⁷ Congress doubled this term in 1831 and further extended it in 1909, 1962, and 1976.³⁸ In 1998, Congress passed the Sonny Bono Copyright Term Extension Act (CTEA), which extended the terms to the life of the author plus seventy years, and the earlier of 120 years after creation or ninety-five years after publication for works by corporate authors.³⁹ The CTEA increased the terms for works published before 1978 to a total of ninety-five years after publication.⁴⁰ As a result, most works that were either registered or first published with a copyright notice in the United States after 1923 will not enter the public domain until 2018 at the earliest.⁴¹ This result of CTEA is commonly referred as the “1923 rule.”

In certain cases, even pre-1923 works may still be protected by copyright if they are both unpublished and unregistered.⁴² Under current law, works that are unpublished and unregistered are protected for the life of the author plus seventy years; unpublished anonymous and pseudonymous works, works-for-hire, and works for which the author’s death date is unknown are protected for 120 years from the date of creation.⁴³ Thus, some works created as long ago as 1891 may still be under copyright today.⁴⁴ Whether or not a work is considered “published” within the meaning of the copyright statutes is not always intuitive, particularly for musical works and visual artworks, which may not be “published,” even if publicly displayed for years.⁴⁵

The 1923 rule does not apply to sound recordings fixed before 1972, which are excluded from federal statutory copyright protection.⁴⁶ Instead,

³⁷ Copyright Act of 1790, 1 Stat. 124 (1790); see Pamela Brannon, *Reforming Copyright to Foster Innovation: Providing Access to Orphan Works*, 14 J. INTELL. PROP. L. 145, 152–53 (2006) (discussing term length history).

³⁸ See Brannon, *supra* note 37, at 153.

³⁹ Pub. L. 105-298, 112 Stat. 2827 (1998).

⁴⁰ *Id.*

⁴¹ See Brannon, *supra* note 37, at 154. The maximum duration of copyright for works published in the United States before 1923 is 75 years under the Copyright Act of 1976; thus, all works in this category have entered the public domain. See Pub. L. No. 94-553, 90 Stat. 2541 (1976). However, the 1998 Sonny Bono Copyright Term Extension Act increased the terms of all copyrighted works that were still within their renewal terms on October 27, 1998 to 95 years. 17 U.S.C. § 304(b) (2010). Therefore, the terms of post-1923 copyrighted works will not expire until 2018 at the earliest. *Id.*

⁴² 17 U.S.C. § 302 (2010).

⁴³ See Copyright Duration Chart, *supra* note 20.

⁴⁴ See *id.*

⁴⁵ See *id.*

⁴⁶ 17 U.S.C. 301(c) (2010) (“Notwithstanding the provisions of section 303, no sound re-

pre-1972 sound recordings are covered by state common law copyright, which is indefinite.⁴⁷ Therefore, almost no sound recordings are in the public domain,⁴⁸ and no new sound recordings will enter the public domain until 2067, at the earliest.⁴⁹

In addition, would-be users of music recordings must clear not only the sound recording they wish to use, but the underlying musical work as well. Old unregistered musical works may still be in copyright if they are considered “unpublished.”⁵⁰ Within the meaning of the copyright statutes, “published” is a legal term of art; for example, 17 U.S.C. § 303(b) expressly provides that “[t]he distribution before January 1, 1978, of a phonorecord shall not for any purpose constitute a publication of any musical work embodied therein.”⁵¹ Thus, unregistered musical works from the nineteenth century may still be under copyright today if they were never published as sheet music.⁵² The rights to use musical works can be obtained through a mechanical license under 17 U.S.C. § 115, even if they are unregistered.⁵³ However, confusion over whether a license is necessary may have a chilling effect on uses of old musical works. Alternatively, users may inadvertently expose themselves to legal risk when they use musical works that they mistakenly assume are in the public domain.

As a practical matter, long copyright terms increase the number of works that are orphans. The Copyright Office’s 2006 study was motivated

cording fixed before February 15, 1972, shall be subject to copyright under this title . . .”).

⁴⁷ *Goldstein v. California*, 412 U.S. 546 (1973); David Nimmer, NIMMER ON COPYRIGHT, § 2.10 (2009).

⁴⁸ There is an exception for sound recordings published without a valid copyright notice between 1978 (when sound recordings became eligible for federal copyright) and 1989 (when the United States joined the Berne Convention and eliminated formalities requirements). Between 1978 and 1989, some works may have lapsed into the public domain for failure to comply with then-required formalities.

⁴⁹ Copyright Duration Chart, *supra* note 20.

⁵⁰ 17 U.S.C. 302 (2010).

⁵¹ 17 U.S.C. § 303(b) (2010). Congress enacted this language to resolve a split between the Second and Ninth Circuits over whether the sale of a phonorecord constitutes a copy of the underlying recorded work that divests its common law rights, under the 1909 Copyright Act. Nimmer, *supra* note 47, § 4.05[B].

⁵² In enacting the language of 17 U.S.C. § 303(b), Congress intended to codify the Second Circuit’s interpretation of the 1909 Act; however the amendment’s broad language unintentionally extended the duration even for old records that were distributed before 1909. Nimmer, *supra* note 47, § 4.05[B][7]. Thus, Nimmer points out, one could even imagine a scenario in which nineteenth-century Bellini arias that were never released as sheet music would still be protected today, in spite of massively distributed recordings. *Id.* at n.111.

⁵³ See *infra* Section V.

in part by *Eldred v. Ashcroft*,⁵⁴ a 2003 Supreme Court case upholding the CTEA.⁵⁵ In his dissent in *Eldred*, Justice Breyer expressed concern that lengthened terms “can inhibit or prevent the use of old works (particularly those without commercial value).”⁵⁶ Judge Richard Posner characterized this problem as one of transaction costs: “the longer a work remains under copyright the greater is the cost of locating the owner—and so the greater are the transaction costs of obtaining permission to copy the work.”⁵⁷ Posner predicted that the CTEA’s increase in term lengths would have only a trivial effect on incentivizing creative works, but would hinder the accessibility of such works, particularly because the CTEA was a retroactive extension.⁵⁸

2. Automatic Protection and Elimination of Formalities

The United States’ compliance with the Berne Convention, a multilateral copyright treaty that harmonizes copyright protection across national borders, has created a drastic shift in copyright law from a conditional system—one that requires compliance with statutory formalities to receive protection—to an unconditional one—one in which all works are automatically protected at the moment of fixation without the need for the author to take any affirmative steps.⁵⁹

Historically, United States copyright law included a system of procedural requirements, referred to as “formalities.” These requirements were pared down by the Copyright Act of 1976 and adoption of the Berne Convention in 1989. Until 1976, Congress required creators to register their copyrights, to give notice to the public by marking published works with the “©” symbol, and to affirmatively renew their rights after a relatively short initial term.⁶⁰ Unless creators took these steps, copyright did not attach to the work. Formalities served the incentive function of copyright because they filtered out works for which copyright would provide no cre-

⁵⁴ 537 U.S. 186 (2010).

⁵⁵ See ORPHAN WORKS REPORT, *supra* note 6 (letter from Orin G. Hatch and Patrick Leahy to Marybeth Peters, Register of Copyrights).

⁵⁶ *Eldred v. Ashcroft*, 537 U.S. 186, 250 (2003) (Breyer, J., dissenting).

⁵⁷ Richard A. Posner, *Intellectual Property: The Law and Economics Approach*, 19 J. ECON. PERSPECTIVES 57, 61 (2005).

⁵⁸ *Id.* at 59–60.

⁵⁹ Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 488 (2004). The United States adopted the Berne Convention in 1989. Nimmer, *supra* note 47, § 17.01.

⁶⁰ Sprigman, *supra* note 59, at 491–92.

ation incentive —i.e., works that had little or no commercial value.⁶¹ By filtering commercially “dead” works out of copyright, requirements for formalities helped preserve a robust public domain.⁶²

The Copyright Act of 1976⁶³ marked a dramatic shift from a conditional opt-in system to an unconditional opt-out one.⁶⁴ Congress eliminated the publication, notice, and registration requirements in order to bring the United States into compliance with the Berne Convention, which prohibits any prerequisite formalities for the “enjoyment and exercise” of copyright.⁶⁵ Under the current unconditional system, copyright automatically attaches to a work from the moment it is “fixed” in a tangible form. A creator is not required to register the work or take any other affirmative steps.⁶⁶ This system protects unwary creators and those without legal or economic resources, but makes clearing rights much more difficult. Without registrations or renewals available, tracking rights holders is substantially more difficult, particularly for works that are not famous.

Automatic protection significantly limits the amount of works in the public domain. This is a concern because all creative works are cumulative to some extent, relying on preexisting material as “building blocks.”⁶⁷ Because copyright now automatically attaches at fixation, creators who do not want or need copyright protection must specifically opt out of the default protections. Creative Commons licensing is one way that creators can do this if they choose.⁶⁸ However, the creator must take an affirmative step to contract out of default protections, and most will probably not go through this effort, especially if they do not have any financial interest in

⁶¹ *Id.* at 489. The Supreme Court has emphasized that the Copyright Clause contains an implicit balance between access and incentives. *See* *Fogerty v. Fantasy*, 510 U.S. 517, 526 (1994) (“Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music and the other arts.”).

⁶² *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

⁶³ Pub. L. No. 94-553, 90 Stat. 2541 (1976).

⁶⁴ *See* ORPHAN WORKS REPORT, *supra* note 6, at 47.

⁶⁵ Berne Convention for the Protection of Literary and Artistic Works, art. 5(2) July 24, 1971, 102 Stat. 2853, 331 U.N.T. 217 [hereinafter Berne Convention]. The United States acceded to the Berne Convention in 1988. Berne Convention Implementation Act, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

⁶⁶ *See* 17 U.S.C. § 102(a) (2005).

⁶⁷ *See* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1109 (1990) (acknowledging that all creativity is to some degree derivative of what came previously).

⁶⁸ *See* About, CREATIVE COMMONS, <http://creativecommons.org/about> (providing information about various types of “some rights reserved” Creative Commons licenses) (last visited July 18, 2011).

their work.

The unconditional aspect of copyright makes it more difficult to locate the rights holders of orphan works. The elimination of formalities means that culturally significant but commercially “dead” works cannot be put to socially valuable uses because of the prohibitive costs of identifying the owner and clearing the rights.⁶⁹ Moreover, with no central registration record, it is harder for users to challenge false or dubious infringement claims for old works.

The earlier examples of the photographs and Polish woman’s diary in the Holocaust Museum collection illustrate these problems. Both the photographs and diary were created between 1939 and 1945, during World War II. Assuming that the photographs are anonymous and that the date of death for the author of the diary is unknown, both items are protected for 120 years from their creation.⁷⁰ If the works were never previously published, they would not have to have complied with the formality requirements at the time of creation to receive protection.⁷¹ It is unlikely that either work was registered because they are personal artifacts, not works created for commercial purposes. With no registration records and very little contextual evidence surrounding either work, the Holocaust Museum would have difficulty challenging anyone who might come forward claiming to be an heir to the creators, should the Museum use the works.

Although current law provides a voluntary registration system that rights holders can use to create a presumption of “constructive notice” in infringement suits,⁷² most rights holders do not register their works.⁷³ Furthermore, it is difficult to search the registry for pre-1978 works, visual images, or music. The online version of the registry only contains post-1978 records, and is only searchable by text.⁷⁴ For works before 1978, users must check the print *Catalog of Copyright Entries*, or pay the Copyright Office or a third-party service to conduct a search.⁷⁵ The voluntary registry system is helpful in locating owners of well-known, commercially

⁶⁹ Sprigman, *supra* note 59, at 515.

⁷⁰ See Copyright Duration Chart, *supra* note 20.

⁷¹ See *id.*

⁷² 17 U.S.C. 410(c) (2010).

⁷³ Sprigman, *supra* note 59, at 495.

⁷⁴ See *Search Copyright Information*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/records> (last visited May 26, 2011). The Copyright Office has concluded that it is not feasible to make the pre-1978 records available online. See ORPHAN WORKS REPORT, *supra* note 6, at 29–30; Sprigman, *supra* note 59.

⁷⁵ ORPHAN WORKS REPORT, *supra* note 6, at 6

valuable works with standardized titles, but is of little help in locating the owners of orphan works, particularly in the case of visual works or sound recordings.

3. Restoration of Foreign Works Under the Uruguay Round Agreements Act

Further exacerbating the problem of orphan works is enactment of Section 514 of the Uruguay Round Agreements Act (URAA).⁷⁶ The URAA effectively gave full United States copyright protection to “hundreds of thousands, if not millions” of previously expired foreign works that were in the public domain.⁷⁷ Because the large majority of foreign works are not registered, the problems discussed above now apply to a much larger class of works. For example, even though the Polish woman’s diary and German photographs were made in foreign countries, they would now receive the same copyright protection as if they had been made in the United States. Furthermore, the costs of searching abroad for foreign rights holders may be much higher, particularly in countries where copyright is a relatively recent and less-established legal concept.⁷⁸

Recent developments in our copyright regime have made it difficult for would-be users to determine whether or not a work is in the public domain and to locate the rights holders for old or obscure works. Longer terms, the lack of formalities and renewal requirements, and the expansion of copyright over a greater number of works in the United States and abroad have made the task of locating rights holders much more daunting and expensive. These changes have resulted in a system that is very confusing for users to navigate; for example, Cornell University’s copyright duration chart provides the rules for over fifty different categories of works with different conditions and term lengths that depend on various factors, including when the work was made, whether it was registered or published with notice, and numerous special rules for certain media like sound recordings and architecture.⁷⁹ Nonprofit organizations that would

⁷⁶ Uruguay Round Agreements Act, Pub. L. 103-465, 108 Stat. 4809 (1994); 17 U.S.C. § 104A(a)(1) (2010) (“Copyright subsists, in accordance with this section, in restored works, and vests automatically on the date of restoration.”)

⁷⁷ CAA Initial Comment, *supra* note 10, at 6.

⁷⁸ *See id.* at 16 (LeGrace Benson, Professor Emerita at S.U.N.Y., describes how she was unable to trace current ownership of Haitian artists’ works which she had photographed herself: “Copyrights in Haiti are *practically irrelevant* I have encountered difficulties with *every* project.”).

⁷⁹ Copyright Duration Chart, *supra* note 20.

put orphan works to use often have limited financial resources, and may not have access to legal counsel to interpret the complex, sometimes overlapping rules. In addition, they may not be able to devote the extensive resources needed to date a work or determine its publication status. The lack of clarity surrounding whether an old work has entered the public domain has a chilling effect on many socially valuable uses.

III. ORPHAN WORKS AND SOCIAL JUSTICE

Despite the problems described above, it is somewhat less difficult for museums and scholars to clear the rights for famous works, or for works within traditional fine art genres like painting and sculpture.⁸⁰ However, when dealing with works created by disadvantaged groups, whose creative traditions were not as historically valued, the search for rights holders becomes much more difficult. Because of this, the orphan works problem disproportionately impacts access to cultural works by minorities, women, and other disadvantaged groups.

A. WHY CULTURAL HISTORY MATTERS FOR SOCIAL JUSTICE

Expressive and historical works are important because they inform people's social identities and influence attitudes, values, and worldviews. "[A]ccess to the stream of human cultural production and intellectual output over time is what anchors us to our history and informs our identities as part of a broader social network."⁸¹ This observation is particularly true with respect to the cultural traditions of minorities and women because these groups have been historically marginalized and misrepresented within society. Exposure to the cultural heritage of disadvantaged groups is important both for group members and non-members because it informs how people see the world and their place in it.

Moreover, the cultural history of disadvantaged groups should be considered and included within the mainstream canon of art and cultural history. Important works by artists from these disadvantaged groups have been excluded from our history for too long and deserve to be properly experienced. Scholarly research and public education about these works are valuable because they enrich the knowledge base of society.

⁸⁰ CAA Initial Comment, *supra* note 10, at 7.

⁸¹ Diane L. Zimmerman, *Cultural Preservation: Fear of Drowning in a Licensing Swamp*, in *WORKING WITHIN THE BOUNDARIES OF INTELLECTUAL PROP.* (Rochelle C. Dreyfus, Diane L. Zimmerman & Harry First, eds., 2010) [hereinafter Zimmerman, *Cultural Preservation*].

If this all was not enough, cultural works are an integral to the human experience of being connected to one's community, an idea recognized by the United Nations in its Universal Declaration of Human Rights.⁸² The Declaration specifically alludes to intellectual property policy as a means to achieve social equality, stating that "[e]veryone has the right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits."⁸³ Promoting access and preservation of expressive works by disadvantaged groups advances this basic human right, a goal that in and of itself is worthwhile.

B. CULTURAL WORKS OF HISTORICALLY DISADVANTAGED GROUPS TEND TO BE ORPHANS

Locating rights holders is not usually a problem for well-known works from the twentieth century, such as famous paintings, Hollywood films, and major-label music recordings.⁸⁴ Most of these types of works have ample identification. The artists who created them are usually well known or can be found in the databases of established rights organizations, such as the American Society of Composers, Authors and Publishers (ASCAP) or Broadcast Music, Inc. (BMI) for musicians, or the Artists Rights Society (ARS) for visual artists.⁸⁵ In contrast, the status and attribution for works by minorities, women, and other disadvantaged groups can be much harder to determine.

Much scholarship exists on how intellectual property law has failed to protect the interests of marginalized groups.⁸⁶ Hierarchies of power and culture shaped the development of copyright and the industries and institu-

⁸² Universal Declaration of Human Rights, Art. 27(1), G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948).

⁸³ *Id.*

⁸⁴ CAA Initial Comment, *supra* note 10, at 7.

⁸⁵ *See id.*

⁸⁶ *See* Arewa, *supra* note 11, at 599–600; *See also* David B. Jordan, *Square Pegs and Round Holes: Domestic Intellectual Property Law and Native American Economic and Cultural Policy: Can It Fit?*, 25 AM. INDIAN L. REV. 93, 93 (2000) (explaining how intellectual property law is ill-equipped to protect Native American tribes' cultural heritage and intellectual wealth); K.J. Greenc, *Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues*, 16 AM. U. J. GENDER SOC. POL'Y & L. 365, 367 (2008) (using a critical race theory approach to explore how black women artists have been impacted by intellectual property law); Sherylle Mills, *Indigenous Music and the Law: An Analysis of National and International Legislation*, 28 YEARBOOK FOR TRADITIONAL MUSIC 57, 66–69 (1996) (arguing that Western copyright laws fail to protect non-Western music from becoming prey for the commercial "world music" industry).

tions through which it is applied. As a result, works by minorities, women, and other groups have often been excluded.⁸⁷ Intellectual property law does not function in a neutral vacuum but exists within a “cultural battleground of hegemony, social dominance, and resistance.”⁸⁸ For much of the twentieth century, minorities and other disadvantaged groups were systematically denied credits and royalties for their works.⁸⁹ Because of discrimination and a lack of legal or economic resources, early artists from these groups are less likely to have registered their copyrights⁹⁰ or to be represented by contemporary rights organizations.

The works of disadvantaged groups were often obscure when they were produced or were considered folk curiosities rather than fine art worthy of serious attention and preservation. The works’ marginalized status often meant that identifying information and records of any rights transfers were lost. When there is no information about the author, date of creation, or copyright status apparent in the work itself, as is the case for many works by disadvantaged groups, the search for the rights holder usually stops as soon it has begun.⁹¹ It is especially hard to locate current rights holders when the artist is deceased and was relatively obscure from the start. The artist’s estate often passes onto heirs for whom finding current contact information is just as difficult.⁹² All of these factors make copyright clearance for early works by disadvantaged groups systematically more difficult to obtain.

C. EARLY MUSIC RECORDINGS BY MINORITIES AND POOR WHITES

Before World War II, the performance rights organization ASCAP routinely excluded black and country artists, who tended to be poor and whose music was regarded as “illiterate,” reflecting the then-dominant

⁸⁷ Arewa, *supra* note 11, at 600; Reebee Garofalo, *How Autonomous is Relative: Popular Music, the Social Formation and Cultural Struggle*, 6 POPULAR MUSIC 77, 81 (1987).

⁸⁸ Greene, *supra* note 86, at 380.

⁸⁹ Lateef Mtima, *Copyright Social Utility and Social Justice Interdependence: A Paradigm for Intellectual Property Empowerment and Digital Entrepreneurship*, 112 W. VA. L. REV. 97, 122–23 (2009).

⁹⁰ See Arewa, *supra* note 11, at 609 (2010); see also *ABKO Music v. LaVere*, 217 F.3d 684, 686 (9th Cir. 2000) (Blues musician Robert Johnson did not register copyright for songs he recorded in the 1930s; in the 1970s, the Rolling Stones filed registrations for their adaptations of Johnson’s works, and Johnson’s heirs sued to recover royalties).

⁹¹ ORPHAN WORKS REPORT, *supra* note 6, at 29.

⁹² CAA Initial Comment, *supra* note 10, at 18 (quoting independent art historian Sandra Langer).

views about what types of works were worthy of protecting.⁹³ In response to ASCAP's discrimination, the competing performance rights organization BMI, formed in 1939, extended protection to "hillbillies" and "bluesmen."⁹⁴ However, locating rights holders for pre-1939 musical works from disadvantaged groups tends to be difficult because they are not represented in the databases due to ASCAP's past exclusion.⁹⁵

Artists from disadvantaged groups were historically less likely to register their works with the Copyright Office.⁹⁶ For example, very few country and blues artists from the 1920s to 1930s registered their works. This is due to a variety of factors, including the artists' lack of understanding of copyright formalities.⁹⁷ Although some record companies registered their music compositions as works for hire,⁹⁸ this was only done sporadically, leaving the majority of blues and country music from this era unregistered.⁹⁹

Although users can obtain the rights to underlying musical compositions through a mechanical license, even if the composition was not registered,¹⁰⁰ registration information can often be a helpful clue in tracking down who owns the rights to the sound recording.¹⁰¹ However, when copyrights to early twentieth century "ethnic music" were registered, it was often by publishers and music agents who published sheet music and songbooks, who had no connection with the record companies.¹⁰² Thus, even if a musical composition was registered, knowing the registrant may not help would-be users locate rights holders for sound recordings of rural

⁹³ Arewa, *supra* note 11, at 599–600; Robert C. Kloorsterman and Chris Quispel, *Not Just the Same Old Show on My Radio: An Analysis of the Role of Radio in the Diffusion of Black Music among Whites in the South of the United States of America, 1920 to 1960*, 9 POPULAR MUSIC 151, 159 (1990).

⁹⁴ Arewa, *supra* note 11, at 600; Kloorsterman and Quispel, *supra* note 93 ("Broadcast Music Incorporated (BMI) accommodated both the blacks and the whites who, before then, were denied entry to an organization.").

⁹⁵ See Kloorsterman and Quispel, *supra* note 93.

⁹⁶ Meade, *supra* note 12, at 208.

⁹⁷ *Id.*

⁹⁸ Many of Southern Music's renewals indicate that its compositions are works made for hire, which implies that the artists were under contract to compose these pieces for its publishing company. *Id.* at 209. Southern Music was the only recording company of this era that consistently registered country and blues compositions. *Id.* at 213

⁹⁹ *Id.* at 213.

¹⁰⁰ 17 U.S.C. § 115(b)–(c) (2010); see *infra* Section V.

¹⁰¹ This would only be true for recordings of original songs and not for covers of other artists' songs.

¹⁰² Meade, *supra* note 12, at 214.

and ethnic music from this era.

The difficulty faced by the Frontera Collection at UCLA is one concrete example of how clearance problems have hindered current access to the cultural heritage of minorities. The Frontera Collection is the largest archive of Mexican and Mexican American vernacular recordings in existence, consisting of one hundred thousand recordings and thirty thousand musical performances.¹⁰³ However, many of the artists and musical works in the collection are not well known and do not appear in established rights databases.¹⁰⁴ Moreover, many of the record labels represented were small community-based companies with limited distribution, and many of them have gone out of business or have been absorbed by larger labels. Consequently, UCLA cannot make many of these valuable recordings available to the public because of the risk of legal liability.¹⁰⁵

Another example is a reissue project of early twentieth century African American musical recordings that was planned by the University of Illinois but never completed because of the time and cost involved in obtaining copyright permissions.¹⁰⁶ The reissues were intended to accompany author Tim Brooks' *Lost Sounds: Blacks and the Birth of the Recording Industry, 1890-1919*,¹⁰⁷ a study of the contributions of African Americans to the recording industry prior to the Jazz Age. The recordings and Brooks' study reveal vital new information about African American culture and history during that period. As discussed previously, old musical recordings dating as far back as the nineteenth century may still be under copyright today.¹⁰⁸

When Brooks was unable to clear the recordings that he wished to use, he instead opted to include a section in his book entitled "Using Copyright Law to Suppress Black History," in which he argues that United States copyright laws have the practical effect of suppressing the circula-

¹⁰³ Letter from Gary E. Strong for Jule L. Sigall, Initial Comment of the in Response to Notice of Inquiry on Orphan Works (Mar. 2005) (on file with the U.S. Copyright Office), available at <http://www.copyright.gov/orphan/comments/OW0473-Strong.pdf> [hereinafter Strong Initial Comment].

¹⁰⁴ *Id.* at 11.

¹⁰⁵ *Id.* at 10.

¹⁰⁶ Letter from Tim Brooks for Jule L. Sigall, Initial Comment of the in Response to Notice of Inquiry on Orphan Works (Mar. 23, 2005) (on file with the U.S. Copyright Office), available at <http://www.copyright.gov/orphan/comments/OW0579-Brooks.pdf> [hereinafter Brooks Initial Comment].

¹⁰⁷ *Id.* at 2.

¹⁰⁸ See *infra* Section II.B.1.

tion of historic black recordings.¹⁰⁹ Brooks concludes that “[t]he bottom line is that early black recorded history—indeed, all early recorded history—is being held hostage by ill-advised laws that serve no one’s interests, except perhaps those of the lawyers who are kept employed enforcing them.”¹¹⁰ He implores scholarly, archival, and political communities to take action before important works are lost.¹¹¹

In 2005, Brooks conducted a study on the availability of historical recordings at the request of the Library of Congress and the National Recording Preservation Board, concluding that current copyright law restricts access to culturally significant works created by members of disadvantaged groups.¹¹² He found that the least reissued recording genre was ethnic music, defined as “the music of minorities and foreign-language immigrant groups,” of which only one percent of the tens of thousands of recordings made during the early twentieth century is available today.¹¹³ Blues, gospel, jazz, and ragtime were also poorly served, with only about ten percent of recordings made between 1890 and 1960 available today.¹¹⁴ Although Brooks notes that most of the unavailable recordings in his study have a known owner, the orphan works problem was significant enough that the Association for Recorded Sound Collections (ARSC) included legalizing the use of orphan recordings as one of its five recommendations that it took to Congress in late 2007.¹¹⁵

D. TRADITIONAL FOLK ART BY WOMEN, MINORITIES, AND THE POOR

Historically, female artists have been underrepresented in galleries and museums.¹¹⁶ Feminist activists and scholars have called attention to this problem and advocated for more inclusion of works by women, from both contemporary and past eras.¹¹⁷ As a part of this movement, feminist

¹⁰⁹ Brooks, *supra* note 19, at 10–11.

¹¹⁰ *Id.* at 10.

¹¹¹ *Id.* at 11.

¹¹² Tim Brooks, *Only in America: The Unique Status of Sound Recordings under U.S. Copyright Law and How It Threatens Our Audio Heritage*, 27 AM. MUSIC 125, 128 (2009).

¹¹³ *Id.* at 129.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 132.

¹¹⁶ See Nochlin, *supra* note 13.

¹¹⁷ See *id.* The Guerrilla Girls are an example of an activist group that advocated for inclusion of women artists through their advertising campaigns in art world publications. See *Guerrilla Girls Bare All: An Interview*, GUERRILLA GIRLS, <http://www.guerrillagirls.com/interview/>

art historians also brought new attention to traditional forms of craft and folk art by women. One reason for the disparity may be that, in the hierarchy of fine art, conventional media such as painting and sculpture have been privileged over traditionally “feminine” crafts like weaving and needlework.¹¹⁸ While sexism brought about the neglect of craft and folk art, these works are worthy of serious scholarly study and attention.¹¹⁹ As a result of the feminist movement’s revival of traditionally feminine crafts, contemporary female artists, such as Miriam Shapiro and Judy Chicago, began incorporating craft techniques and materials into their work.¹²⁰ Additionally, more museums have begun displaying examples of traditional craft and folk art that was made in past eras, both from the United States and internationally.¹²¹ However, a disproportionate number of these works are orphans. Craft and folk works tend to have rights clearances problems because they are material objects originally made for practical or decorative use. Their identifying information thus often becomes separated from the works themselves. As discussed above, when there is not any identifying information for a work, most would-be users simply forgo the use because the risk of liability is too great.¹²² Furthermore, even if there is some information, the attribution and dating for these works may be contentious, their prior publication status unknown, and little scholarship or records available to enable users to perform due diligence.

In 2002, the Whitney Museum of Art in New York City hosted an exhibition of quilts made by African American women from the rural tenant community of Gee’s Bend, Alabama.¹²³ The exhibition was notable because the museum went to great lengths to establish the quilts’ legitimacy as expressive works of art on par with modernist painters, such as Mark Rothko and Frank Stella, when typically, “objects like quilts are displayed in museums of vernacular, folk, or popular culture—the types of museums with collections that include, among other things, unusual weathervanes [and] well-carved cigar store Indians.”¹²⁴ By drawing attention to the

index.shtml (last visited July 18, 2011).

¹¹⁸ Marcia Morse, *Feminist Aesthetics and the Spectrum of Gender*, 42 PHIL. E. & W. 287 (1992).

¹¹⁹ *Id.*

¹²⁰ *Id.* at 294 n.3.

¹²¹ See CRAFT AND FOLK ART MUSEUM, *supra* note 19; *Past Exhibitions*, FOWLER MUSEUM AT UCLA, <http://www.fowler.ucla.edu/exhibitions/past> (last visited July 18, 2011).

¹²² ORPHAN WORKS REPORT, *supra* note 6, at 32.

¹²³ Exhibition: *The Quilts of Gee’s Bend*, *supra* note 14; see Prokopow, *supra* note 14.

¹²⁴ Prokopow, *supra* note 14, at 59.

quilts' artistic qualities, the curators sought to challenge wrongful assumptions about what types of works are culturally significant. In this way, the exhibition "rightly made people think about what museums do and why."¹²⁵

Rights clearances can make projects such as *The Quilts of Gee's Bend* exhibition difficult. Clearing the rights to craft and folk artworks like old quilts is especially problematic because they are often produced collaboratively, and knowing precisely who made which one can be difficult. While some of the women who made the first Gee's Bend quilts have died, the living Gee's Bend quilters have established their own collective to manage their intellectual property rights, which are now quite valuable after all the attention they received from art museums.¹²⁶ But problems persist. In 2007, two quilters filed lawsuits against the art dealers who loaned the quilts for the exhibition. The quilters alleged that the dealers had falsely claimed to own licensing rights to certain quilts that they had made before 1984.¹²⁷ The lawsuit settled out of court in 2008. The Gee's Bend suit was not an orphan works case, but one of competing claims by multiple alleged "parents." However, the suit illustrates the difficulty that would-be users may encounter in determining who owns the rights to folk artworks.

E. NATIVE AMERICAN ART

Parallel to the renewed interest in folk art, recent decades have seen an increase in public and curatorial attention to the material culture of Native Americans and other indigenous cultures, which may involve similar rights clearances problems.¹²⁸ Some contemporary Native American artists and activists have protested the marginalized treatment of their material culture as mere anthropological curiosities or decorative souvenirs.¹²⁹ In

¹²⁵ *Id.*

¹²⁶ See THE QUILTS OF GEE'S BEND, <http://quiltsofgeesbend.com> (last visited July 18, 2011). The Quilters Collective has licensed images to books, postage stamps, and clothing. It has also licensed the right to make mass-produced copies of the quilts. The Gee's Bend quilts have skyrocketed in value after the Whitney exhibition—at a 1966 auction, the average price paid was \$27 per quilt; after the Whitney exhibition, they have sold for as much as \$20,000, although the most valuable quilts in the original show have never been for sale. Prokopow, *supra* note 11, at 57–58; Shaila Dewan, *Handmade Alabama Quilts Find Fame and Controversy*, N.Y. TIMES, July 29, 2007, at A14.

¹²⁷ Dewan, *supra* note 126.

¹²⁸ See Rushing, *supra* note 19.

¹²⁹ See Kay WalkingStick, *Editor's Statement: Native American Art in the Postmodern Era*, 51 ART JOURNAL 15, 15–17 (1992) (calling for more serious critical discussion of Native

addition to producing new contemporary artwork with political content, these activists have brought new attention and serious interpretive and art historical study to traditional works of Native American art.¹³⁰ For example, in 1999, the Portland Art Museum founded a Center for Native American Art with input from members of the local tribes represented.¹³¹

Because much Native American art from the early twentieth century can be hard to attribute and date, obtaining the rights to publish or exhibit these works is often difficult. Moreover, tribal concepts of communal ownership of art often conflict with Western concepts of individual ownership in copyright law.¹³² Although legal concepts like “joint authorship” might seem to be a workable fit for communally owned tribal art, in practice “it is impossible to know whether a particular work was meant to be perceived as a unit by two or more unknown authors, because authors are rarely nameable or even alive.”¹³³ As a result of the difficulty in identifying and locating owners, important Native American artworks remain locked in museum storage, unseen by the public.

In sum, the orphan works problem disproportionately affects access to the cultural traditions of minorities and disadvantaged groups because the rights holders for these works tend to be difficult to locate, and without identification of rights holders, the risk of liability is too much for those organizations that might be inclined to share these works with the public. The omission of works by minorities in reissue projects and museum exhibitions results in the suppression of these groups’ cultural heritage, and in doing so, perpetuates an incomplete version of cultural history.¹³⁴

American art and protesting stereotypical treatment and tokenization by galleries and museums).

¹³⁰ See *id.* at 16–17 (describing work by contemporary Native American Artists such as Jimmie Durham, Joe Feddersen and Quick-to-See Smith).

¹³¹ See *Native American Art*, PORTLAND ART MUSEUM, <http://portlandartmuseum.org/collections/permanent/Native-American-Art> (last visited July 18, 2011).

¹³² See Amina Para Matlon, *Safeguarding Native American Sacred Art by Partnering Tribal Law and Equity: An Exploratory Case Study Applying the Bulun Bulun Equity to Navajo Sandpainting*, 27 COLUM. J. L. & ARTS 211, 214 (2004).

¹³³ Torsen, *supra* note 15, at 182.

¹³⁴ See CAA Initial Comment, *supra* note 10, at 25 (Composer Kevin Cooper describes problems locating rights holders of songs from non-white cultures in compiling an international folk songbook: “[T]he omission of songs results in a book that resembles the multicultural music education of the past with an imbalance of songs from mostly white, European cultures and superficial songs written about cultures but not by the cultures themselves.”).

F. ORPHAN WORKS ARE VITAL TO TELL THE HISTORIES OF
DISADVANTAGED GROUPS

Access to orphan artistic and cultural works of disadvantaged groups is curtailed by copyright laws, and that very lack of access poses significant problems for how the histories of those disadvantaged groups are told. Artistic and cultural works play an integral part in the historic narratives of these disadvantaged groups.

In disseminating the histories of disadvantaged groups, historians often rely on personal photographs, diaries, and contemporaneous accounts. Historical artifacts also play an important part in constructing the narrative. Historical works are especially powerful when they embody perspectives that were underrepresented (or completely unrepresented) in other sources during their respective times. For example, a recent Skirball Center exhibition of photographs documenting the Civil Rights Era included images that were taken by anonymous demonstrators at marches.¹³⁵ These images communicate an important perspective missing from other historical sources like newspapers that covered the same events. Historic snapshots and firsthand accounts are especially valuable in communicating the history of marginalized groups to contemporary audiences because they tell the stories from group members' own perspectives and put a human face to historical events.

Moreover, personal accounts by ordinary individuals can have a profound impact on public sentiment towards disadvantaged groups. For example, the publication of Anne Frank's diary changed the way that many people understood the Holocaust. Her diary has had a huge influence worldwide, has been published in fifty-six languages, and is one of the world's most famous books.¹³⁶

However, most historic photographs are undated, unsigned, and unattributed.¹³⁷ Typically, museums and archives acquire collections of old photographs by donation, but individual donors rarely know the copyright status of the materials they donate,¹³⁸ as in the case of the German World War II photo album donated to the Holocaust Memorial Museum, discussed earlier. Ephemera, diaries, recordings, and personal papers are also

¹³⁵ Exhibition: *Road to Freedom: Photographs of the Civil Rights Movement, 1956-1968*, SKIRBALL CULTURAL CTR. (Nov. 19, 2009–May 9, 2010).

¹³⁶ Ralph Blumenthal, *Five Precious Pages*, N.Y. TIMES, Sept. 10, 1998, at A1.

¹³⁷ Strong Initial Comment, *supra* note 103, at 5.

¹³⁸ ORPHAN WORKS REPORT, *supra* note 6, at 31.

often unsigned and unattributed, making their origins difficult to trace,¹³⁹ and often the rights holders of these important artifacts are impossible to locate. Consequently, risk-averse museums and universities tend to forgo public uses of these materials to avoid the risk of infringement suits if a rights holder should come forward later. Most museums restrict reproduction and publication of materials they cannot clear.¹⁴⁰ Some also limit their public exhibitions to works for which circumstantial evidence, such as the date or author of the work, allows the museum to perform some degree of due diligence.¹⁴¹ Even further, many institutions forgo proposed uses even if they would have a strong argument for fair use of the works based on educational grounds. Fair use outcomes are inherently uncertain, given that the rule is applied on a case-by-case basis.¹⁴² The institutions that wish to use historical orphan works by disadvantaged groups are often non-profit organizations with limited budgets, who may not have the financial means to defend an infringement lawsuit even if their fair use defense is legally strong.¹⁴³ Taken together, the result of these problems is an ability of historians at these institutions to construct complete expositions of histories for disadvantaged groups.

Anne Frank's diary was discovered by her father after the war.¹⁴⁴ If Anne Frank's family members had not survived, no one may have obtained the rights to publish it. Her diary might have suffered the same fate as the diary of the young Polish woman that remains locked away in the Holocaust Museum's collection, inaccessible to the public until approximately 2025.¹⁴⁵ Historical orphan works may be of immeasurable value for a number of disadvantaged groups. For example, they may help put a human face on the history of gays and lesbians during the era of the 1969 Stonewall riots or earlier, the African American Civil Rights movement, the internment of Japanese Americans during World War II, or the histories of different immigrant groups within the United States throughout the twentieth century. However, works made by disadvantaged groups

¹³⁹ Strong Initial Comment, *supra* note 103, at 5–6.

¹⁴⁰ ORPHAN WORKS REPORT, *supra* note 6, at 31

¹⁴¹ *Id.*

¹⁴² CAA Initial Comment, *supra* note 10, at 5.

¹⁴³ *Id.*

¹⁴⁴ The Anne Frank diary copyright is owned by the Anne Frank-Fonds, a foundation chaired by Anne's cousin. *Id.* In 1998, a copyright dispute arose over five newly discovered pages of the diary that were published without the foundation's permission. *Id.*

¹⁴⁵ As discussed above in Section II.B, works that are unpublished and unregistered remain in copyright for the life of the author plus seventy years. Thus, the Polish woman's diary could still be under copyright until 2025 if she died during World War II.

during wartime or in the midst of social upheavals or diasporas tend to be more difficult to attribute and clear.¹⁴⁶ Providing access to historical works made by members of these groups through reform in the law has the potential to promote public understanding of these historical events, which are too often neglected in school curriculums and popular conceptions of history.

G. PROVIDING ACCESS TO WIDER SEGMENTS OF THE PUBLIC THROUGH DIGITIZATION PROJECTS

Mass-scale online digitization projects are underway to increase access to cultural works to a broader audience; But, in order to fully preserve and provide access to works from disadvantaged groups, orphan works reform is necessary.¹⁴⁷

Digitization projects have the potential to make works more widely accessible to the poor, to people with disabilities, and to others with limited mobility. Through such projects, works could be made easily available to anyone with access to the Internet. Digitization is also an effective way to preserve works embodied in deteriorating media, such as early films and musical recordings.¹⁴⁸ It has the added advantages of making collections easier to index and search and providing the ability to make inexpensive backup copies. For these reasons, many museums and libraries have initiated such projects.¹⁴⁹

Under current copyright law, digitizing a work usually requires locating rights holders, which can be a more daunting task than the actual digitization itself. Legislation enacted in 2005 provides libraries and archives

¹⁴⁶ See, e.g., Statement of Karen Coe, *supra* note 1, at 2 (describing Holocaust Museum's difficulty clearing Jewish WWII materials); CAA Initial Comment, *supra* note 10, at 17 (describing problems clearing artwork by anonymous North Vietnamese artists to include in a Vietnam War veterans project).

¹⁴⁷ See generally Zimmerman, *Cultural Preservation*, *supra* note 81, 36–40 (discussing problems caused by orphan works and the need for digital preservation); Diane L. Zimmerman, *Can Our Culture Be Saved? The Future of Digital Archiving*, 91 MINN. L. REV. 989 (2007) (discussing problems associated with orphan works and advocating for copyright law reform).

¹⁴⁸ Only about twenty percent of feature films from the 1920s still survive, many of which are still under copyright. *Why Preserve Film?*, NAT'L FILM PRES. FOUND., <http://www.film-preservation.org/preservation-basics> (last visited July 18, 2011) (discussed in Zimmerman, *Cultural Preservation*, *supra* note 81, at 7.).

¹⁴⁹ See, e.g., Letter from Denise Troll Covey for Jule L. Sigall, Initial Comment of Carnegie Mellon University in Response to Notice of Inquiry on Orphan Works (Mar. 22, 2005) (on file with the U.S. Copyright Office), available at <http://www.copyright.gov/orphan/comments/OW0537-CarnegieMellon.pdf> [hereinafter Carnegie Mellon Initial Comment].

some rights to make unlicensed preservation copies of works in their collections, but these rights are quite limited.¹⁵⁰

Locating rights holders to digitize works is expensive. For example, Carnegie Mellon University's search costs to digitize 278 rare books in its collection came to about \$78 for each volume, not counting the expense of legal counsel or the creation of a database to track the rights clearance project itself; this was after staff eliminated ten percent of the books with multiple rights holders from the project on the ground that it would be impractical to obtain permission for them.¹⁵¹ Without reform in the law, socially valuable digitization projects, such as Carnegie Mellon's, will not be financially feasible for the majority of libraries and non-profit organizations who wish to undertake them.

IV. PROPOSED SOLUTIONS

This Section will address three proposed solutions intended to assist would-be users of orphan works, with the special impact on disadvantaged groups in mind. The previous Section discussed how the works of disadvantaged groups are disproportionately neglected because large portions of these works are orphan works. These groups can benefit from solutions that resolve the following special problems associated with clearing works: (1) they are less likely to be registered or represented in databases of rights organizations; (2) they often have no identifying information at all; and (3) the organizations that wish to use these works are often non-profit museums or educational institutions with limited financial resources.

First, I will evaluate the limited remedies approach that was proposed in the Copyright Office's 2006 report and introduced in the 2006 and 2008 bills. Second, I will examine the Book Rights Registry, one component of the proposed class action settlement between Google and the Authors' Guild. Third, I will turn to Canada's orphan works statute, which allows users to apply for a compulsory license from the Canadian Copyright Board. While all of these approaches have some benefits, the limited re-

¹⁵⁰ 17 U.S.C. § 108 (2010), *amended by* Pub. L. No. 109-9, § 402, 119 Stat. 218, 227 (2005). For most works, libraries may reproduce only a single copy for purposes of preservation or replacing items that are lost, damaged, stolen or deteriorating, or in obsolete formats. *Id.* Libraries may make up to three replacement copies of phonorecords for the same purposes, if they first make a reasonable effort to determine that a replacement cannot be obtained at a fair price. *Id.* Digital copies may not be made available to anyone outside the premises of the library. *Id.*

¹⁵¹ Carnegie Mellon Initial Comment, *supra* note 149, at 4.

medies and Canadian approaches are ineffective in promoting access to works by disadvantaged groups. Although the Google approach has the potential to greatly benefit disadvantaged groups, it has serious antitrust and privacy concerns. The best reform solution is to adopt an extended collective licensing approach such as the one that is currently in place in the Nordic countries, which will be introduced in the next Section.

With respect to works by disadvantaged groups, it is especially important to ensure that any changes to the law do not disadvantage artists and rights holders. Historically, copyright law has often failed to protect disadvantaged groups' rights over their own cultural heritage.¹⁵² Disadvantaged artists were often denied credits and royalties from their works, which were appropriated and exploited by outsiders.¹⁵³ In light of this history, any proposed solution to the orphan works problem must avoid harming the interests of disadvantaged groups while broadening public access to cultural history.

A. LIMITED REMEDIES APPROACH IN 2008 BILLS

Since the Copyright Office completed its 2006 Report on Orphan Works, several bills have been introduced into Congress implementing the report's recommendations. The first bill introduced in 2006 did not become law.¹⁵⁴ In April 2008, similar bills were introduced in the House and the Senate that would limit remedies to "reasonable compensation" for cases in which the user performed a "diligent effort" in their search for a rights holder prior to use.¹⁵⁵ The goal of the legislation was to strike a balance between promoting socially productive uses of orphan works, while protecting rights holders from opportunistic infringers. Although Congress did not enact the 2008 bills, debate on the issues continues, and Congress may introduce legislation again in the future.

A limited remedies approach seems attractive because it theoretically eliminates the risk of injunctions or huge monetary damages for would-be users of orphan works, including museums and other non-profits who wish to use works by disadvantaged groups. At the same time, the

¹⁵² Arewa, *supra* note 11, at 609 (discussing disadvantages faced by early African American recording artists).

¹⁵³ See, e.g., *ABKO Music v. LaVere*, 217 F.3d 684, 686 (heirs of blues musician Robert Johnson sued to obtain royalties from hit Rolling Stones songs copying Johnson's works).

¹⁵⁴ H.R. 5439, 109th Cong. (2006).

¹⁵⁵ Shawn Bentley Orphan Works Act of 2008, S. 2914, 110th Cong. (2008); Orphan Works Act of 2008, H.R. 5889, 110th Cong. (2008).

approach does not diminish the incentive function of copyright because the minority of rights holders who *do* come forward would still be able to obtain reasonable compensation if their works were mistakenly deemed to be orphans. The bills' approach also encourages rights holders to register their works if they have a commercial interest in them, diminishing incentives for "copyright trolls" to purposely wait for uses to be made just so that they can win large damage amounts. The 2008 bills also did not impose any formality requirements on creators and thus would comply with Berne Convention obligations.

The proposed bills, however, had major drawbacks.¹⁵⁶ Both potential users and rights holders were rightly concerned that the standards of a "reasonably diligent search" and "reasonable compensation" were too vague.¹⁵⁷ From the perspective of would-be users, the search standard does not let them know with certainty that they are within safe harbor. Risk-averse users may still decide to forgo using works rather than risk expensive lawsuits. On the other side of the debate, artists and rights holders opposed the bills because they feared they would lose control over their works.¹⁵⁸ They worried that if the safe harbor standard was too relaxed, infringers could perform a sham search, then invoke the defense for works that were never true orphans to begin with.¹⁵⁹ These concerns are particularly relevant in the case of rights holders who are members of disadvantaged groups, in light of the history of discrimination and outright fraud committed against these groups concerning control of their cultural works.

Furthermore, "reasonable compensation" would be difficult for courts to calculate because orphan works by definition are not currently being commercially exploited. Thus, there probably will not be a market of comparable licenses for courts to look to for guidance in setting rates.¹⁶⁰

¹⁵⁶ See Ryan Andrews, Note, *Contracting Out of the Orphan Works Problem: How the Google Book Search Settlement Serves As a Private Solution to the Orphan Works Problem and Why it Should Matter to Policy Makers*, 19 S. CAL. INTERDIS. L.J. 97, 111–14 (2009) (describing drawbacks of the 2008 bills and advocating for private solutions like Google Books as an alternative).

¹⁵⁷ *Id.* at 113.

¹⁵⁸ See, e.g., Frank Stella, *The Proposed New Law is a Nightmare for Artists*, THE ART NEWSPAPER (June 1, 2008), available at <http://www.theartnewspaper.com/article.asp?id=8580>. Rights holders of digital images are especially concerned that orphan works legislation would lead to widespread infringement of their works, because digital works can be easily copied and metadata is often removed or lost. See *Why Visual Works Are Vulnerable to Being Orphaned*, STOCK ARTISTS ALLIANCE, <http://www.stockartistsalliance.org/orphan-works-issues> (last visited July 18, 2011).

¹⁵⁹ See, e.g., Stella, *supra* note 158.

¹⁶⁰ CAA Initial Comment, *supra* note 10, at 38.

The College Art Association (CAA) argued that an ambiguous “reasonable” royalty standard “would defeat the whole purpose” of orphan works reform, which is to let would-be users know the extent of their risk exposure with certainty. Instead, the CAA would prefer to pay no royalty at all for non-commercial uses.¹⁶¹ On the other side of the debate, the vague nature of “reasonable compensation” also impacts those rights holders who discover their works have been used as orphans and must go to court in order to enforce their rights concerning the works. Even if they win, judicially determined “reasonable compensation” would be unpredictable. Furthermore, both users and rights holders were concerned that litigation costs would potentially be increased by the 2008 bills because determining what constitutes a “reasonably diligent search” and “reasonable compensation” would likely require costly experts at trial.

In addition to these drawbacks, the limited remedies approach would likely be ineffective in promoting uses of works by disadvantaged groups because for it will be more difficult for would-be users to demonstrate that they meet the “diligent search” standard. As discussed above in Section III, such works—especially folk artworks, Native American art, and historic photographs and documents—are more likely to contain no identifying information on the work itself. If the artist of the work is unknown and it has no provenance or other information at all, the search for the rights holder usually stops altogether. In such cases, it would be difficult for a museum or other would-be user to demonstrate to a court that it performed a “diligent search.” Coupled with the problem of uncertain remedies even if the defense is available, the tedious task of diligent searches would deter many would-be users from using these works. For these reasons, the 2006 and 2008 bills are less than ideal.

B. BOOK RIGHTS REGISTRY OF THE GOOGLE SETTLEMENT

Beginning in 2004, Google partnered with libraries to digitize their collections, including in-copyright books, and made the entire text of many books freely available online.¹⁶² In 2005, the Authors Guild and the Association of American Publishers filed a class action lawsuit alleging that Google’s project constituted copyright infringement on a massive

¹⁶¹ *Id.*

¹⁶² See *Google Book Search Library Project: An Enhanced Card Catalog of the World’s Books*, GOOGLE BOOKS, <http://books.google.com/googleprint/library.html> (last visited July 18, 2011) (describing the Google Books project).

scale.¹⁶³ Google settled the lawsuit for \$125 million.¹⁶⁴ The court granted preliminary approval to the settlement on November 19, 2009.¹⁶⁵ Final approval is pending.¹⁶⁶

The pending settlement agreement calls for the creation of a nonprofit entity called the Book Rights Registry to act as a de facto collective licensing agency for books in the project, including out-of-print and orphaned books. The Registry will collect a portion of the revenue generated by Google's use of the works and distribute it proportionately to rights holders.

The settlement is relevant to the orphan works problem because up to seventy-five percent of books included are out-of-print, but still under copyright.¹⁶⁷ Many—but not all—of the books in this category are likely to be orphans for which the rights holder cannot be readily found. The Registry would have the authority to enter into non-exclusive licenses on behalf of all the rights holders in the settlement, including the absent owners of orphan works.¹⁶⁸ While the settlement is “opt-in” with respect to rights holders of “commercially available” in-print books, which require express permission before Google can display or sell access to the books, the settlement is “opt-out” with respect to “commercially unavailable” out-of-print works.¹⁶⁹ This means that Google can use the “commercially unavailable” digitized books without permission, and is only required to remove them from the project at the express request of the rights holder.¹⁷⁰ If rights holders do not come forward after ten years, the Registry will distribute their share of the revenue to literacy-based charities.¹⁷¹

The Google settlement has the benefit of potentially facilitating broad public access to millions of books that were previously out-of-print and inaccessible, and especially benefiting lesser-known authors by making

¹⁶³ See Amended Settlement Agreement, *Authors Guild, Inc. v. Google, Inc.*, No. 05 Civ. 8136 § 6.7 (S.D.N.Y., Nov. 13, 2009), available at <http://www.googlebooksettlement.com> [hereinafter Amended Settlement].

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Lawrence Lessig, *On the Google Book Search Agreement*, LESSIG BLOG (Oct. 29, 2008, 7:25 PM), http://lessig.org/blog/2008/10/on_the_google_book_search_agre.html.

¹⁶⁸ See Amended Settlement, *supra* note 163.

¹⁶⁹ *Id.* § 3.2(b)–(i); see *id.* § 1.31 (“‘Commercially available’ means, with respect to a Book, that the Rightsholder of such Book, or such Rightsholder’s designated agent, its, at the time in question, offering the Book . . . for sale new, from sellers anywhere in the world[.]”)

¹⁷⁰ *Id.* § 3.5.

¹⁷¹ *Id.* § 6.3.

their works available to new audiences. Allowing the Registry to issue blanket licenses resolves the problem of prohibitively high transaction costs in locating and negotiating with individual owners. Without the Registry, such a large-scale digitization project would probably not be financially feasible even for a well-funded entity like Google.

Moreover, disadvantaged groups can potentially benefit from the Google settlement. Google's promise to provide public libraries and schools with access terminals would ensure that the digital books are available to people who cannot afford subscriptions.¹⁷² Noting that access to books and education are critical to social equality, some civil rights leaders and educators have argued that Google Books would help level the playing field for minorities and the poor.¹⁷³ Another benefit of digitizing books on a mass scale is that these works would be more easily made available to people with print disabilities such as learning disabilities or visual impairments.¹⁷⁴ People with limited mobility would also benefit, because the project would allow them to access books through the Internet from anywhere in the world.

However, there are significant problems with the settlement. The Department of Justice is currently reviewing the proposed settlement for potential antitrust violations.¹⁷⁵ The settlement has been criticized because it effectively gives Google a monopoly over rights to orphan books.¹⁷⁶ The settlement indemnifies Google and no one else, making it more difficult for competitors such as Amazon or Yahoo! to enter the market for digital books. Future users of orphan works will probably not be able to recreate Google's approach of using the class action device to create a collective rights organization, either because they lack Google's resources or are unwilling to take the risk of using the works before permission is ob-

¹⁷² See *id.* § 4.8.

¹⁷³ Grant Gross, *Civil Rights Activists Champion Google Book Deal*, PC WORLD (July 29, 2009), http://www.pcworld.com/businesscenter/article/169275/civil_rights_activists_champion_google_book_deal.html.

¹⁷⁴ *What is a Print Disability?*, LEARNING THROUGH LISTENING, <http://www.learningthroughlistening.org/About-Learning-Ally/Understanding-Learning-Ally/The-Population-Learning-Ally-Serves/What-is-a-Print-Disability/63> (last visited July 14, 2011).

¹⁷⁵ See Letter from Att'y Gen. William F. Cavanaugh for Hon. Denny Chin (July 2, 2009) (announcing that the United States had opened an antitrust investigation into the settlement), available at http://graphics8.nytimes.com/packages/pdf/technology/20090702_GOOGLE_DOJ_Letter.pdf.

¹⁷⁶ Statement of Interest of the United States of American Regarding Proposed Class Settlement, *Authors Guild, Inc. v. Google, Inc.*, No. 05 Civ. 8136, 2009 WL 3045979, at *10–12 (S.D.N.Y., Sept. 18, 2009) [hereinafter Statement of the United States]; James Grimmelmann, *How to Fix the Google Book Search Settlement*, 12 J. INTERNET L. 1, 1 (2009).

tained.¹⁷⁷ Also, even if Google's competitors made the effort to scan books without authorization, once the Registry exists, there is no guarantee that a future class of plaintiffs would have the incentive to settle on similar terms. While access to Google Books is free for users for now, the settlement reserves the right to charge fees for online access and institutional subscriptions.¹⁷⁸ With no effective competitors, Google could charge inflated monopoly prices for subscriptions.¹⁷⁹

Further, the settlement raises concerns about fairness to rights holders, particularly with respect to independent authors who are unaware of their rights. Google has defined its initial "opt-out" category very expansively to encompass all books that are not "commercially available,"¹⁸⁰ meaning not currently offered for sale new.¹⁸¹ Not all of these books are true orphan works. Many of the "unresponsive" authors of out-of-print books in the opt-out category could probably be located if Google attempted to search for them. Some critics allege that the settlement disproportionately harms unsophisticated or unwary rights holders, who may not know they are included in the class or be aware of their right to opt out. In this way, the settlement disadvantages small-time authors of lesser-known, out-of-print works.¹⁸²

Furthermore, Google's use of the class action mechanism has broad implications for the future of digital rights for books. The Department of Justice has argued that this is a misuse of the class action process,¹⁸³ and the Copyright Office has expressed concern that the settlement is using the judicial system as an "end run around legislative process and prerogatives."¹⁸⁴ Because the settlement will have far-reaching effects on the de-

¹⁷⁷ Zimmerman, *Cultural Preservation*, *supra* note 81, at 15.

¹⁷⁸ See *The Google Books Settlement Agreement: The Future of Google Book*, GOOGLE BOOKS, <http://books.google.com/googlebooks/agreement> (last visited July 18, 2011) ("Once this agreement has been approved, you'll be able to purchase full online access to millions of books . . . We'll also be offering libraries, universities and other organizations the ability to purchase institutional subscriptions[.]")

¹⁷⁹ See Jonathan Band, *The Long and Winding Road to the Google Books Settlement*, 9 J. MARSHALL REV. INTELL. PROP. L. 227, 295 (2009).

¹⁸⁰ Amended Settlement, *supra* note 163, § 3.2.

¹⁸¹ *Id.* § 1.31.

¹⁸² It is not clear if this group disproportionately includes more authors from disadvantaged groups or not; this would be an interesting question for further study.

¹⁸³ Statement of the United States, *supra* note 176, at 5.

¹⁸⁴ *Competition and Commerce in Digital Books: the Proposed Google Book Settlement: Hearing before the Comm. on the Judiciary*, 111th Cong. 64-75 (2009) (statement of Marybeth Peters, Register of Copyright).

velopment of the digital book industry and the future rights of copyright owners, the legislative process may be a more appropriate realm for this type of reform.

C. CANADA'S COMPULSORY LICENSE SCHEME

Another approach to copyright reform for orphan works is Canada's Orphan Works Act, which allows would-be users to apply for compulsory licenses to use orphan works from the Canadian Copyright Board.¹⁸⁵ To be eligible for a compulsory license, applicants must prove they have expended "reasonable efforts" in searching for the rights holder.¹⁸⁶ If they can successfully prove the owner cannot be located, then the Board issues a license for the proposed use.¹⁸⁷ The Board sets license terms and royalties on a case-by-case basis.¹⁸⁸

The Canadian system has certain advantages. Firstly, it provides users with certainty that their use is legal. This is an advantage over the limited remedies approach in the proposed bills in the United States, under which users would not know if their search efforts would count as "reasonably diligent" until the issue arises in a lawsuit. Secondly, the flexible case-by-case aspect may be attractive because different types of works require different degrees of searching to determine their status; for example, a book that recently went out of print will require a different type of search than a photograph of an unidentified artwork from a foreign country, for which both the photographer and the artist of the underlying work are unknown. Lastly, rights holders' concerns that infringers will conduct sham searches in order to make use of their works for free will be diminished because the Board can screen fraudulent claims.

The Canadian system also has major drawbacks, particularly for would-be users of works by disadvantaged groups. The process of obtaining a compulsory license is expensive and slow. Applicants must correspond with the Board, similar to the process of obtaining a United States patent, which is resource-intensive. From a potential licensee's perspective, it is hard to predict if an application will succeed or if more costly

¹⁸⁵ Copyright Act, R.S.C., 1985, c. C-42, § 77 (Can.); see *Unlocatable Copyright Owners Brochure*, COPYRIGHT BOARD OF CANADA, <http://www.cbcd.ca/unlocatableintrouvables/brochure1-e.html> (last visited July 18, 2011) [hereinafter *Unlocatable Copyright Owners Brochure*].

¹⁸⁶ Copyright Act, *supra* note 174, § 77(1).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* § 77(3).

searches will be required. Thus, institutions that wish to use works by disadvantaged groups may not find it economically worthwhile to apply for licenses for uses that usually do not generate much—or any—revenue. For these reasons, museums and scholars generally oppose importing this approach to the United States.¹⁸⁹

Furthermore, in practice, Canada's system does not actually improve access to orphan works because it is so rarely used. The Canadian Board has only received about 240 applications for licenses since the law was implemented in 1990.¹⁹⁰ Without data to suggest otherwise, the reasons behind this low number are likely the same as those identified above—the process is costly and time-consuming, and the search guidelines are not transparent. Because the process is inefficient and has unpredictable results, would-be users are likely deterred from applying for licenses.¹⁹¹

In addition, would-be users of works by disadvantaged groups may also be deterred from applying for the same reasons that it would be difficult to meet the “diligent search” standard in the United States bills. If there is no identifying information about a work, and the search hits a dead end right away, a would-be user may simply assume that the Board would not find that there was a sufficiently “diligent search.” Of the few licenses that the Board has approved, most are for architectural plans and textual works that presumably contained some information such as author, title, and date in the works themselves. In contrast, few applications for visual works, music, or historical items have been received.¹⁹² Thus, in practice, the Canadian approach may not be very effective at providing licenses for works that lack identifying information, as is the case for a disproportionate number of works made by disadvantaged groups.

V. EXTENDED COLLECTIVE LICENSING IN NORDIC COUNTRIES

A promising alternative solution to the three approaches discussed in the previous Section is extended collective licensing, which has been used by Scandinavian countries since the early 1960s.¹⁹³ Extended collective

¹⁸⁹ See, e.g., CAA Initial Comment, *supra* note 10, at 39–40.

¹⁹⁰ See *Unlocatable Copyright Owners Brochure*, *supra* note 185.

¹⁹¹ See CAA Initial Comment, *supra* note 10, at 39–40.

¹⁹² See UNLOCATABLE COPYRIGHT OWNERS BROCHURE, *supra* note 185.

¹⁹³ Thomas Riis & Jens Schovsbo, *Extended Collective Licenses and the Nordic Expe-*

licensing functions as a hybrid between compulsory licensing and collective rights organizations.¹⁹⁴ In recent years, Scandinavian countries have expanded collective licensing to encourage non-commercial uses of cultural works by non-profit and educational institutions. Norway enacted an extended collective license in 2005 specifically for libraries and museums.¹⁹⁵ A separate collective organization manages licenses for commercial uses.¹⁹⁶

Under the Nordic system, extended collective rights organizations that comprise a “substantial number” of rights holders within a given genre of works are authorized to make agreements that affect all the rights holders in that genre.¹⁹⁷ The organizations are authorized to act not just on behalf of actual members in the collective, but also on behalf of similarly situated rights holders presumed to belong to the class, even if they are from foreign countries. A Ministry of Culture oversees the collectives’ activities and may be involved in setting remuneration rates. Membership in the collectives is not typically mandatory; rights holders who do not wish to be represented may opt out and manage their rights on their own.¹⁹⁸

Because consent is presumed even for non-members, an extended collective can issue licenses for orphan works, regardless of how difficult a search for the rights holders may be. The collective distributes the license revenue to each rights holder, including to unrepresented owners who come forward after their works are used. This aspect is analogous to the United States mechanical license for cover songs when the rights holder of the original song is not registered with the Copyright Office.¹⁹⁹ If the

rience—It’s a Hybrid but Is it a VOLVO or a Lemon, 33 COLUM. J.L. & ARTS at 471, 471 (2010) [hereinafter Riis & Schovsbo]; see also Zimmerman, *Cultural Preservation*, *supra* note 81, at 33; DANIEL GÉRAIS, APPLICATION OF AN EXTENDED COLLECTIVE LICENSING REGIME IN CANADA: PRINCIPLES AND ISSUES RELATED TO IMPLEMENTATION 14 (2003), available at http://aix1.uottawa.ca/~dgervais/publications/extended_licensing.pdf (discussing extended compulsory licenses).

¹⁹⁴ Riis & Schovsbo, *supra* note 193, at 472.

¹⁹⁵ Nor. Copyright Stat., § 16a.

¹⁹⁶ Nor. Copyright Stat., § 14.

¹⁹⁷ Zimmerman, *Cultural Preservation*, *supra* note 81, at 51; See also KOPINOR, <http://www.kopinor.org> (Web site of Norway’s collective copyright organization) (last visited July 18, 2011).

¹⁹⁸ See Riis & Schovsbo, *supra* note 193, at 476 (discussing the inability of certain rights holders to opt out under Danish law).

¹⁹⁹ 17 U.S.C. § 115(b) requires that would-be users serve notice on the song’s rights holder. Section 115(b)(1) provides that if “the registration or other public records of the Copyright Office do not identify the copyright owner and include an address at which notice can be served, it shall be sufficient to file the notice of intention in the Copyright Office.” *Id.* The use can then

parties disagree on the default amount of license remuneration, a copyright tribunal may mediate the dispute.

Extended collective licensing is an especially effective way to promote access to orphan works by disadvantaged groups because it enables collectives to negotiate licenses on behalf of similarly situated absent rights holders, who are not members of the collective. Even though disadvantaged groups were historically underrepresented in rights organizations, the Nordic system does not require rights holders to actually join the collective. As an illustration of this point, in the case of the historic minority sound recordings that Tim Brooks and UCLA wished to use, it would not matter that the works in question were unregistered, “unpublished” for legal purposes, or that the artists did not appear in ASCAP or BMI databases. Under an extended collective licensing system, Brooks and UCLA would have been able to obtain licenses negotiated by similarly situated owners of music rights on behalf of the absent rights holders. If rights holders were to come forward later, they would be entitled to remuneration from the license revenue generated from the use.

Extended collective licensing also makes it easier for users to clear works that contain no identifying information in the work itself, as is the case for most folk art works, traditional Native American artwork, and historical photographs and documents. Unlike the proposed 2008 bills and the Canadian approach, the Nordic system does not have a required search standard; users simply pay a fee to the collective, and the collective issues a license for the use. To illustrate the point, this system would greatly benefit the Holocaust Museum in its dilemma over the photos and the Polish woman’s diary. The museum may not have the financial resources to perform searches that would qualify as “reasonably diligent” under the 2008 bills’ approach, or be able to convince a board to grant a compulsory license under the Canadian system. Under an extended collective licensing approach, however, the museum could simply contact the respective collective rights organizations for photographs and literary works, and pay them license fees based on what similarly situated rights holders would charge for analogous uses. Because the museum could obtain licenses in advance, it would know with absolute certainty that it could use the works without risk of future lawsuits.

In addition, the extended collective licensing approach does not harm the interests of rights holders because it is a voluntary system. It has “the effectiveness of compulsory licenses but at the same time leave right hold-

be made royalty-free until the owner registers the work with the Copyright Office. *Id.*

ers in control of the use of their works.”²⁰⁰ If rights holders do not want to participate, they will not be made worse off. Under this model, rights holders who are not represented by the collective still retain the right to collect remuneration after their work has been used.

Admittedly, there may be concern that the collectives would disproportionately benefit from licensing works of absent rights holders, and that the remuneration amount may be less than what the rights holders could have negotiated on their own. As with the Google settlement, this system seems to inherently disadvantage independent rights holders of lesser-known works, who would wish to opt out but are unaware of their rights. However, an extended collective licensing system could be set up to distinguish between commercial and non-commercial uses, as Norway’s system does, which would eliminate some concern over commercial exploitation of disadvantaged groups’ works. Furthermore, some Nordic countries with this system have copyright tribunals in place to resolve remuneration disputes, providing rights holders with a last resort if the license fee is too low.²⁰¹ A copyright tribunal could likely resolve compensation disputes more efficiently than a full infringement trial in a regular court could, because tribunals are specialized in adjudicating this type of dispute.

Some scholars have expressed hesitation over whether the Nordic model violates the Berne Convention’s prohibition of formalities²⁰² and its exclusivity provision, which gives authors of literary and artistic works the exclusive right to authorize reproduction of their works.²⁰³ However, the conventional understanding is that the Nordic countries’ extended collective licensing systems constitute management decisions that are consistent with the Berne Convention provisions.²⁰⁴ As long as the extended collective is voluntary, copyright owners’ exclusive rights under the Berne Convention to authorize copies would not be impinged. Furthermore, the procedure of sending an opt-out notice to a collective is usually regarded as being of a different character than the formalities banned by the Berne Convention. The preamble of a 2001 European Directive expresses support for extended collective licensing, clarifying that the Directive “is without prejudice to the arrangements in the Member States concerning

²⁰⁰ Riis & Schovsbo, *supra* note 193, at 472.

²⁰¹ The Danish system provides this kind of tribunal. *Id.* at 492.

²⁰² Berne Convention, *supra* note 65, at art. 5; see discussion *infra* Section II.B.2.

²⁰³ *Id.* at art. 9(1); Riis & Schovsbo, *supra* note 193, at 482.

²⁰⁴ See GERVAIS, *supra* note 193, at 19.

the management of rights such as extended collective licenses.”²⁰⁵ Despite some scholars’ concerns that the Nordic systems are expanding in ways that could potentially violate the Berne Convention provisions, extended collective licensing systems have existed without challenge for decades, and are generally regarded as consistent with international law.²⁰⁶

A more serious obstacle to importing the Nordic model to the United States is the difference in legal and social traditions. In Nordic countries, extended copyright collectives have been an established tradition within the legal culture for decades. The Nordic rules developed from a context of collective labor law agreements embodying values of solidarity within Nordic culture.²⁰⁷ The extended collectives’ uniform pricing model means that in effect, the most popular works subsidize the least popular ones; in this way, the collectives support “economic solidarity” between rights holders.²⁰⁸ For these reasons, transplanting the system to countries with different cultural and legal values should be cautioned.²⁰⁹

On the other hand, counterparts to extended collective licensing already exist in the United States in the form of blanket licenses provided by performance rights organizations (ASCAP, BMI, and SESAC) and the statutory mechanical license for cover song rights.²¹⁰ Both of these have an equalizing effect between popular and lesser-known works similar to that in the Nordic extended collective licensing model. In particular, the process for obtaining a mechanical license when the copyright owner is unregistered is quite similar to the Nordic model. If the copyright owner’s address is not identified in public records, the user may file notice in the Copyright Office and then use the song royalty-free until an owner comes forward.²¹¹ The congruity of values between these processes and the Nordic model may help foster a transition to the full use of the Nordic system.

Another concern is political feasibility. It may be difficult to establish a Nordic-style extended collective license in the United States because the entertainment industry and other content producers might oppose it.²¹²

²⁰⁵ 2001 O.J. (L 167) 10, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:167:0010:0019:EN:PDF>.

²⁰⁶ See GERVAIS, *supra* note 193, at 19.

²⁰⁷ Riis & Schovsbo, *supra* note 193, at 495–96.

²⁰⁸ *Id.* at 24.

²⁰⁹ *Id.*

²¹⁰ 17 U.S.C. § 115(b)–(c) (2010).

²¹¹ *Id.*

²¹² See Letter from Steven Metalitz for Jule L. Sigall, Initial Comment of the Motion Picture Association of America in Response to Notice of Inquiry on Orphan Works (Mar. 25, 2005)

Thus far, rights holders have been understandably hesitant about orphan works reforms, fearing that their content will be mistakenly deemed orphaned and that reforms will create a “back door” for infringement if the definition of an orphan work is too broad.²¹³ Even though this model would not impact the existing rights of content owners, they would still have to go through the effort of opting out of the system if they did not want a collective to negotiate licenses on their behalf. For movie studios and publishers with large back catalogs, opting out might involve significant administrative costs.²¹⁴

On the other hand, the Nordic system could be politically feasible because intermediaries, such as Google and Amazon, whose businesses rely on obtaining copyright permissions, are growing increasingly politically influential. This type of system would advance their interests by making it easier to obtain rights for the content they use. The Nordic extended collectives are very similar to the Google Settlement Registry, but with the added benefit that they grant access to orphan works for all users, and thus avoid monopoly problems.²¹⁵ Google might potentially decide to lobby for this type of system if the Department of Justice strikes down (or significantly amends) its proposed settlement on antitrust violation grounds.

VI. CONCLUSION

Historical hierarchies of culture and power have influenced the way that copyright operates in practice. Past marginalization continues to negatively impact current access to works created by disadvantaged groups. It is systematically more difficult for would-be users to locate rights holders for early cultural and historic works by minorities, women, and other disadvantaged groups for several reasons. Early twentieth century artists from

(on file with the U.S. Copyright Office), available at <http://www.copyright.gov/orphan/comments/OW0646-MPAA.pdf> [hereinafter MPAA Initial Comment]. The MPAA advocates sector-specific search standards that would include best practices developed by the U.S. Copyright Office and interested parties. *Id.* at 4. The MPAA, however, also suggests that an escrow system could be implemented for works whose owners cannot be located after a diligent search, in which users of orphan works would be required to pay a reasonable license fee into escrow. *Id.* at 6. The funds would be available for recovery in a later action if the owner comes forward. *Id.*

²¹³ See Stella, *supra* note 158; see also MPAA Initial Comment, *supra* note 212, at 2 (proposing a narrow definition of “orphan works,” such that “[a]s a general rule, few if any commercially released U.S. motion pictures are ‘orphan works’”).

²¹⁴ See Brief for DC Comics at 3, *Authors Guild, Inc. v. Google, Inc.*, No. 05 Civ. 8136 (S.D.N.Y., Sept. 3, 2009).

²¹⁵ See Zimmerman, *Cultural Preservation*, *supra* note 81, at 51.

disadvantaged groups were excluded from performance rights organizations, and their works are much less frequently registered. Works by disadvantaged groups often have no identifying information, particularly for folk art, Native American art, and historical photos and documents. Because these works tend to be more difficult to attribute and date and chain of title information is often lost, it is more difficult to perform copyright due diligence. For these reasons, the usual clearance search methods are less likely to succeed.

As a result, museums, scholars and activists who wish to provide access to the neglected cultural history of minorities, women, and other disadvantaged groups encounter problems locating the rights holders. Many would-be users of these works are unable to run the risk of defending an expensive infringement suit, even if the actual likelihood that a rights holder will come forward is remote. The end result is that important cultural and historical works, such as the Polish woman's diary and World War II era photographs donated to the Holocaust Museum discussed in the introduction, remain locked up in museum vaults and inaccessible to the public.

Out of the proposed solutions to the orphan works problem, the Nordic model of extended collective licensing is best equipped to promote access to the cultural heritage of disadvantaged groups. Extended collective licensing would allow museums and scholars to inexpensively and efficiently obtain licenses on behalf of absent rights holders, providing users with legal certainty without the need to demonstrate sufficient due diligence under vague search standards. Extended collective licensing also provides a mechanism for compensating the small percentage of rights holders who eventually *do* come forward, which is especially important in light of the history of exploitation of disadvantaged groups' cultural history by outsiders. For these reasons, extended collective licensing is an attractive new solution that could effectively promote wider public access to the too-often neglected cultural heritage of disadvantaged groups, while also protecting the interests of rights holders who belong to these groups.