

Orphan Works: Definitional Issues

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When discussing orphan works, two basic definitional questions arise: (1) exactly what is the “orphan works” problem?, and (2) what is the size of this problem? The answers to these two questions are central to understanding how proposed solutions work to remedy the situation. Though both questions have long been posed, the answer to the first (what is the “orphan works” problem) can vary based on the type of work or the particular user, and the answer to the second (what is the size of the problem) remains difficult to state with precision. This paper explores both and identifies areas where further research is needed.

Probably the most commonly used description of the “orphan works” problem is that adopted by the U.S. Copyright Office in its *Orphan Works Notice of Inquiry* and subsequent *Orphan Works Report*: “[O]rphan works’ [is] a term used to describe the situation where the owner of a copyrighted work cannot be identified and located by someone who wishes to make use of the work in a manner that requires permission of the copyright owner.”¹ A broader issue, however—the inability to connect copyright owners with potential users—has led many to consider orphan works as part of a greater problem of market failure. Proposals to address this overall problem have also considered works that are out-of-print or not commercially available, categories which also generally include “orphan works.” Even broader solutions, such as extended collective licensing (“ECL”) regimes, have essentially the same goal. These solutions tend to enable uses for all works in a particular category regardless of commercial availability (e.g., particular types of television programs), but for a narrow set of uses that are particularly susceptible to high transaction costs and market

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About this Paper: This white paper is the first in a series from the Berkeley Digital Library Copyright Project, an effort organized by Berkeley Law professors Pamela Samuelson, Jason Schultz, and Jennifer Urban. The project aims to investigate copyright obstacles facing libraries and other like-minded organizations in their efforts to realize the full potential of making works available digitally. More information can be found on the project’s website, available here: <http://www.law.berkeley.edu/12040.htm>.

¹ REGISTER OF COPYRIGHTS, REPORT ON ORPHAN WORKS 1 (2006), available at <http://www.copyright.gov/orphan/orphan-report-full.pdf>; see also Orphan Works Notice of Inquiry, 70 Fed. Reg. 3739, 3741 (Jan. 26, 2005) (describing orphan works as those “whose owners are difficult or even impossible to locate”).

failure.

The size of the problem, in terms of the number of works considered orphans or the value of those works, is known to be significant. Depending on the type of collection considered, these estimates range in number from hundreds of thousands to millions of orphans, but data supporting those estimates only allows for rough approximation. Evaluation of the severity of the problem, which includes the social and economic costs and benefits of using these works, is based almost entirely on anecdotal or localized evidence. We know from these studies that the problem is large and significant, but the data on how large and how significant is incomplete. The remainder of this white paper reviews these two questions in more detail.

I. Defining the Orphan Works Problem

The orphan works problem is variously defined along a spectrum of common concerns about efficiently connecting and facilitating negotiation among copyright owners and potential users. The narrowest definitions focus strictly on the inability of a potential user to identify and locate the owner of the copyrighted work from whom permission must be sought. On the other end of the spectrum is a focus on situations where the user is able to locate an owner, but is unable to easily obtain permission to use the particular work at issue.

A. U.S. Copyright Office Approach

When the U.S. Copyright Office first solicited comments on the issue of orphan works in January of 2005, it posed the question, “How should an ‘orphan work’ be defined?”² The notice itself hinted at several possible facets of that definition, including the method of search for rightsholders that would lead to the designation as an “orphan,” the impact of the age of the work, and the relevance of the published or unpublished status of the work.³ The Copyright Office issued its *Orphan Works Report* in 2006, recounting the comments received in response to the initial inquiry. In that report the Copyright Office explained that “there appears to be consensus in the record that an ‘orphan work’ is a copyrighted work for which an owner cannot be identified or located, irrespective of whether the work is being exploited commercially.”⁴ While acknowledging the

² Orphan Works Notice of Inquiry, 70 Fed. Reg. 3739, 3741 (Jan. 26, 2005).

³ *Id.*

⁴ REGISTER OF COPYRIGHTS, *supra* note 1, at 34, n. 68. For a helpful external summary and analysis of the comments, see Denise Troll Covey, *Rights, Registries and Remedies: An Analysis of Responses to the Copyright Office*

broader context of market failure into which the orphan works problem fits, the report explained its approach in terms of the particular problem of usage risk to potential users:

In the situation where the owner cannot be identified and located . . . the user faces uncertainty—she cannot determine whether or under what conditions the owner would permit use. Where the proposed use goes beyond an exemption or limitation to copyright, the user cannot reduce the risk of copyright liability for such use, because there is always a possibility, however remote, that a copyright owner could appear and bring an infringement action after that use has begun.⁵

Concentrating on the risk of liability from unknown rightsholders, the Copyright Office maintained that the problem turned on an inability to identify and locate owners.⁶

The Copyright Office's focus on identification and location of the owner as the defining characteristic expressly limited the reach of its study—and its proposed solution⁷—to other related issues. The report states that “[w]hile we have refrained from offering a categorical definition of ‘orphan works,’ . . . the term certainly must mean what it implies: that the ‘parent’ of the work is unknown or unavailable.”⁸ Thus, the Copyright Office did not include, for example, works whose owners could be located, but who were unresponsive to requests for permission to use the work.⁹ At the same time, the Copyright Office's approach did not distinguish orphan works based on factors such as the age of creation, or the published or unpublished status of the work.¹⁰ These criteria are

Notice of Inquiry Regarding Orphan Works, in FREE CULTURE AND THE DIGITAL LIBRARY: SYMPOSIUM PROCEEDINGS 106–40 (Martin Halbert ed., 2005), available at http://works.bepress.com/denise_troll_covey/45

⁵ *Id.* at 15. In many cases, the report notes, such a risk will be thought so severe that the use is avoided altogether.

⁶ *Id.* at 1. Note that the Copyright Office intentionally left open the option that other solutions—for example, fair use or other specific exceptions to the owner's exclusive rights—might also remedy issues of access or use. *Id.* at 94. Hence the orphan works problem considered in the report consists only of uses that “require[] permission of the copyright owner.” *Id.* at 1.

⁷ Introducing its ultimate recommendation, the report reemphasized this focus: “First, any system to deal with orphan works should seek primarily to make it more likely that a user can find the relevant owner in the first instance.” *Id.* at 93.

⁸ *Id.* at 34.

⁹ *Id.* at 34, 97 (“This area touches upon some fundamental principles of copyright, namely, the right of an author or owner to say no to a particular permission request, including the right to ignore permission requests. As noted above, the primary goal of this study is to prompt owners and users to find each other and commence negotiation—it is not intended to allow use of works in disregard of the owner's wishes after that owner has been found.”).

¹⁰ In so doing, the Copyright Office approach was inclusive because it reached not just to the large number of commercial, published works, but also to the many more non-commercial works (e.g., personal photographs or letters) whose owners are even more difficult to locate. This was of particular concern to Copyright Office

certainly relevant to identifying owners (older works and unpublished works are thought to pose more difficulty in locating rightsholders), but the report explained that commenters resisted categorical restrictions, “pointing to the fact that the *sine qua non* of an orphan work—the fact that its owner cannot be located—has no necessary tie with the age of the work.”¹¹ Thus, the report cast a wide net over the types of works that it would include in its definition of “orphan works,” but was narrow in terms of the problem it sought to address—only remedying the relatively severe problem of unidentifiable and un-locatable owners, who in turn raise the risk that unauthorized uses might trigger costly infringement suits from unknown plaintiffs. Similarly, the Copyright Office’s proposal was broad in the type of users that it contemplated covering, reaching not just to libraries or non-profits, but to all users who would be subject to this risk. The central focus on risk reduction is borne out in the Copyright Office’s ultimate recommendation, a proposal to legislatively restrict the range of remedies that copyright owners can seek if users first engaged in a “reasonably diligent search” for the rightsholder.¹²

The approach of the Copyright Office reflects one of the most widely embraced characterizations of the problem. Between 2006 and 2008 Congress considered a series of orphan works bills, all of which tracked the Copyright Office’s owner-location approach.¹³ The bills all adopted variations of the Copyright Office’s remedy-limitation solution, and all used a “diligent search” standard for locating rightsholders as a qualifying factor to fall within the bills’ provisions. A number of academic articles and best practices have also accepted that identification and location are central to the problem, through either explicit discussion of the term or through an implicit

roundtable participants, such as Wal-Mart, who are routinely confronted with customers seeking to digitize non-commercial works such as old family photographs. *See* Library of Congress, Copyright Office, Roundtable Discussion on Orphan Works 33–35 (Aug. 2, 2005, Berkeley, CA) (statement of Joe Lisuzzo, Wal-Mart Stores, Inc.), *available at* <http://www.copyright.gov/orphan/transcript/0802LOC.PDF>.

¹¹ *Id.* at 79–80, 100 (“Our recommendation does not categorically exclude unpublished works from being subject to the orphan works provision.”); 102–03 (age is not a specific factor in the Copyright Office’s recommendation, though it may be an important consideration in determining what is a “reasonably diligent search” for the rightsholder).

¹² *Id.* at 96. Note that this white paper only attempts to explore the framing of the orphan works problem. A subsequent white paper will review in detail the universe of proposed solutions.

¹³ The bills were: Orphan Works Act of 2006, H.R. 5439, 109th Cong. (2006); Orphan Works Act of 2008, H.R. 5889, 110th Cong. (2008); and Shawn Bentley Orphan Works Act of 2008, S. 2913, 110th Cong. (2008). None were ultimately enacted.

assumption that this is what is meant by the term “orphan works.”¹⁴ In Europe, where efforts to address the orphan works problem are further along, discussion of “orphan works” also follows this approach; though the broader issues associated with out-of-print works is also under review, they are addressed as a related, but separate matter.¹⁵

B. *The Google Books Approach*

The Google Books Search Settlement is perhaps the most visible solution to the problem of works whose owners are not, strictly speaking, unable to be located, but nevertheless are difficult to make use of because of an inability to bargain with the copyright owner for rights. The settlement itself barely uses the term “orphan work” at all,¹⁶ but rather, addresses the broader issue of market availability—i.e., allowing uses of works that are not commercially available. The 2009 Amended Settlement Agreement defines “commercially available” to mean “with respect to a Book, that the Rightsholder of such Book, or such Rightsholder’s designated agent, is, at the time in question, offering the Book (other than as derived from a Library Scan) for sale new, from sellers anywhere in the world, through one or more then-customary channels of trade”¹⁷ Books that are orphans, i.e., whose owners cannot be located, would be included in this definition, but so would books that

¹⁴ See, e.g., Olive Huang, *U.S. Copyright Office Orphan Works Inquiry: Finding Homes for the Orphans*, 21 BERKELEY TECH. L.J. 265, 265 (2006) (“‘Orphan works,’ then, are those whose rightsholders cannot be located.”); Bernard Lang, *Orphan Works and the Google Book Search Settlement: An International Perspective*, 55 N.Y. L. SCH. L. REV. 111, 116 (2010-11) (“A work is said to be orphan when its rightsholder cannot be identified or found, even after a diligent search, so that it is not possible to obtain a license for exploiting protected uses of the work.”); Pamela Samuelson, *The Google Books Search Settlement as Copyright Reform*, 2011 WISC. L. REV. 479, 483 (identifying “orphans” as “books whose rights holders cannot readily be located”); SOCIETY OF AMERICAN ARCHIVISTS, ORPHAN WORKS: STATEMENT OF BEST PRACTICES 3 (2009), *available at* <http://www.archivists.org/standards/OWBP-V4.pdf> (“There are two ways an item can be orphaned: The identity of the rights owner cannot be determined; [or] The identity of the likely rights owner is known, but he or she cannot be located.”)

¹⁵ See, e.g., i2010: DIGITAL LIBRARIES HIGH LEVEL EXPERT GROUP, COPYRIGHT SUBGROUP, FINAL REPORT ON DIGITAL PRESERVATION, ORPHAN WORKS, AND OUT-OF-PRINT WORKS (2008) (addressing “orphan works”—i.e., those whose “rightsholders cannot be identified or, if they can be identified, they cannot be located”—as distinct from “out of print” works). European approaches are discussed further *infra* notes 22 to 29 and accompanying text.

¹⁶ The only apparent use of the term “orphan works” is in reference to Google’s ability to take advantage of those works should orphan works legislation be enacted. See *The Authors Guild Inc. v. Google, Inc.*, Case No. 05 CV 8136-DC, Amended Settlement Agreement, § 3.8, at 45; § 7.2(b)(v), at 95. (Nov. 13, 2009) [hereinafter Amended Settlement Agreement].

¹⁷ *Id.* § 1.31, at 6. The term “Book” is narrowly defined to exclude items such as periodicals, personal papers, works with substantial musical notation, and works published outside of Canada, the United Kingdom, Australia, or the United States. See *id.* § 1.19, at 4–5.

are simply difficult to purchase. The settlement agreement provides access to both types of works in a common way, by granting Google what is in effect a “compulsory license”¹⁸ to use these works in a variety of commercial and non-commercial ways.¹⁹ In return, Google would pay a portion of any revenues generated from these uses.²⁰

C. Extended Collective Licensing

The type of broad access solution proposed by the Google Book Search Settlement has been analogized to systems already in place in other countries which enable particular uses of works without negotiation between individual rightsholders and potential users.²¹ In several Scandinavian countries, for example, extended collective licensing (“ECL”) regimes allow users to pay license fees to a collective rights management organization for the use of certain specific categories of works (e.g., archived television programming) or for specific uses (e.g., educational photocopying or public broadcasting).²² Because these systems are designed to address uses where high transaction costs for work-by-work rights clearance would prove burdensome, the authorizing statute extends the authority of these collective management organizations to license on copyright owners’ behalf even where the particular owner is not a member of the collective. Licenses are granted for a specific purpose, and users are given certainty that their use presents no risk of infringement.²³

¹⁸ Samuelson, *supra* note 14, at 513. The Amended Settlement does so by allowing Google to make use of these works without first obtaining owner permission for a set fee *See* Amended Settlement Agreement, *supra* note 16, § 2.1(a), at 23, § 3.3(a)-(c), at 33–34.

¹⁹ *See* Amended Settlement Agreement, *supra* note 16, § 3.3, at 33–34 (authorizing Google to make display uses of these works); *see also* Samuelson, *supra* note 14, at 520 (outlining the ways in which Google may commercialize these works).

²⁰ Amended Settlement Agreement, *supra* note 16, § 2.1(a), at 24 (Google would pay 63% of revenues generated).

²¹ *See, e.g.*, Pamela Samuelson, *Legislative Alternatives to the Google Book Settlement*, 34 COLUM. J.L. & ARTS (forthcoming 2011).

²² *See* JOHAN AXHAMN & LUCIE GUIBAULT, INSTITUUT VOOR INFORMATIERECHT, CROSS-BORDER EXTENDED COLLECTIVE LICENSING: A SOLUTION TO ONLINE DISSEMINATION OF EUROPE’S CULTURAL HERITAGE?, at 43 (2008) *available at* http://www.ivir.nl/publicaties/guibault/ECL_Europeana_final_report092011.pdf (summarizing the features of various Nordic extended collective licensing systems).

²³ Proceeds from licenses are to be distributed from the collective to copyright owners, and rightsholders typically retain the right to opt-out of the collective. *See id.* (listing ECL systems which allow opt out for “outsiders” of the collective rights organization).

In some ways, ECL systems are much broader than the Google Books Settlement approach because they reach to include not just orphan or out-of-print works, but all works that fall within the specific class of works or uses at issue. ECL licenses are narrower, however, because they are for specific types of use, while the Google Books Settlement would permit broad levels of commercial and non-commercial uses. Both, however, take aim at the broader problem of market failure, and consequently both are aimed at particular problem areas where transaction costs make bargaining for use difficult. In contrast to the Copyright Office's framing of the problem, these approaches are narrow in the type of works they consider problematic (out-of-print books in the Google Books Settlement; specific uses in ECL systems), but broad in terms of the problem to be addressed—namely, the inability of users to negotiate with owners in a meaningful, efficient way.

The two approaches—with the Copyright Office's owner-identification approach on the one hand, and a broader market failure approach on the other—illustrate how orphan works solutions can be broadly designed to reach a variety of content types with a common solution, and how solutions can be tailored to specific problem uses or types of works. Both approaches have strengths and might be combined in a variety of ways.

D. The European Union Approach

The European Commission has combined elements of the approaches described above to address both orphan works and out-of-print materials. In its proposed orphan works directive, orphan works are designated as such only after a “diligent search” reveals that no owner can be located.²⁴ The proposed directive allows for relatively broad uses of orphans, but limits that allowance to particular classes of users: “publicly accessible libraries, educational establishments or museums as well as by archives, film heritage institutions and public service broadcasting organizations.”²⁵ For out-of-print works, the European Commission has developed a broad “Memorandum of Understanding on Key Principles on the Digitisation and Making Available of Out-of-Commerce Works.”²⁶ The memorandum specifically aims to guide voluntary licensing

²⁴ *Commission Proposal for a Directive of the European Parliament and of the Council on Certain Permitted Uses of Orphan Works*, at 10 COM (2011) 289 final (May 24, 2011), available at http://ec.europa.eu/internal_market/copyright/orphan_works_en.htm

²⁵ *Id.* at 9.

²⁶ Memorandum of Understanding Key Principles on the Digitisation and Making Available of Out-of-Commerce Works (Sept. 20, 2011), available at http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/20110920-mou_en.pdf

solutions between owners of out-of-print books, and libraries and archives that wish to digitize those works.²⁷ The Commission describes the proposal as “sector specific,” and explains that it is intended to work in conjunction with an orphan works solutions by facilitating licensing where it is possible.²⁸

This mixed approach illustrates that the problem can be approached in a more nuanced way. Solutions that aim to address broad categories of works and uses, like that proposed by the Copyright Office Report, are workable in specific contexts. But more specific solutions for particular types of works and users that are most susceptible to harm from market failure is another practical option to address the situation. To assess the impact of either approach, or a mixture of these approaches, more detailed data is needed on the type and number of works involved, and the possible benefits and costs of increased access for users and owners. A review of existing research on that point is presented below.

II. The Size of the Orphan Works Problem

While the problem and basic concept of “orphan works” has received some definition, there is disagreement on the exact size of the problem. “Size” in this context raises at least two distinct, but related, empirical questions: (1) how many orphan works are there?, and (2) how big, or severe, is this problem—particularly, in economic or social terms? Empirical studies have shown that there are a great number of orphan works, but detailed data on the exact size and nature of these works has been difficult to muster. In many cases this is because the sample groups analyzed are unique subsets of larger collections, and generalizing results from those samples to an entire collection population is challenging. The value of these works is similarly difficult to assess because of this problem. While the first question (number of works) has received some attention, the second (severity of the problem) has received very little systematic study. Both are deserving of further research.

²⁷ Memorandum of Understanding (MoU) on Key Principles on the Digitisation and Making Available of Out-of-Commerce Works – Frequently Asked Questions, MEMO/11/619 (Sept. 20, 2011), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/619&format=HTML&aged=0&language=EN&guiLanguage=en>

²⁸ *Id.*

A. How Many Orphan Works Are There?

Estimates on the number of orphan works vary significantly. For some works—in particular, those that are not commercially published (e.g., personal photographs, letters, or even emails)—the number of orphans is almost inestimable.²⁹ But for others, estimates are obtainable. The best available figures are of the number of commercially published orphan works (in particular, published monographs), because bibliographic data is generally available and samples are generalizable from collection to collection. However, even this data is spotty and is based on samples of rights analyses that may not extend to broader collections of works.

For “books”³⁰ the best estimates indicate that up to 50% of twentieth century publications should be considered “orphans” in that owners cannot be located. John Wilkin recently reviewed the HathiTrust project holdings—a digital library with a collection of over 5 million monographic titles at the time of the study—to estimate the number of orphan works in its collection.³¹ With a collection that is representative of research library holdings in general,³² Wilkin is able to roughly divide the collection into copyright-relevant segments (i.e., country and year of publication). Based on sample data from a Carnegie Mellon University project to secure rights for contemporary publications, he estimates that roughly 50% of the volumes in the HathiTrust collection of 5 million are likely to be orphans, explaining that “12.6% will come from the years 1923–1963, 13.6% from

²⁹ This is especially true for works of this type produced under the 1976 Copyright Act. Under prior law, creative works needed to comply with certain formalities to obtain copyright protection (including registration, renewal, and using proper copyright notice); in many cases, owners only bothered to comply for works that were commercially viable. For works produced under the 1976 Act, copyright protection adheres automatically upon fixation. That, combined with extension of the term of copyright protection and the rapid growth of unpublished and personal works created and stored on digital information systems, results in a large number of works that are protected by copyright and whose owners are difficult or impossible to locate. The use of these works by the general public may not be great in comparison to formally published works, but they nevertheless remain a troublesome issue for future digital information systems.

³⁰ Various referred to as “monographic volumes” or “monographic language materials” in the studies noted below. One study distinguishes between titles and works, explaining that “[a] work will often have multiple manifestations or derivations (paperback, library version, large print, etc.) and thus, while the statement that there may be ‘millions of Orphans titles’ may be partially correct, it is entirely misleading when the true measure applicable to the GBS discussion is how many orphan works exist.” Michael Cairns, *580,388 Orphan Works – Give or Take* (Sept. 9, 2009), <http://personanondata.blogspot.com/2009/09/580388-orphan-works-give-or-take.html>.

³¹ John P. Wilkin, *Bibliographic Indeterminacy and the Scale of Problems and Opportunities of “Rights” in Digital Collection Building*, RUMINATIONS (Feb. 2011), <http://www.clir.org/pubs/ruminations/01wilkin/wilkin.html>

³² *Id.*

1964–1977, and 23.8% from 1978 and years that follow.”³³ Wilkin is quick to note, however, that the estimates for the later years are “just guesses” built on extrapolating rights analyses samples for works with earlier publication dates. Thus, the first conclusion of the study must be that “we *still* need better data,”³⁴ especially for those later years.

Others have produced similar estimates. One study by Michael Cairns uses publishing data to verify estimates of the number of published works that should be considered orphans.³⁵ Of an estimated population of approximately 2 million works (as distinct from particular volumes) published in the United States since 1920, he is able to conclude that approximately 600,000 (or 25%) should be considered “orphans.”³⁶ Estimates for the number of orphan books in European collections are comparable, though those estimates vary significantly based on the date of publication and the collection from which the sample was taken.³⁷

Beyond books, estimates are difficult to make with any level of certainty. For copyrighted works in general, the British Library estimates that over 40% of all in-copyrighted works should be considered orphan works,³⁸ and surveys by the UK’s Joint Information Systems Committee (JISC) indicate that the number of creative works held in UK cultural institutions could well exceed 50 million.³⁹ While useful starting points in gauging the size of the problem, both estimates are based on unverifiable data or survey results. Similar estimates are also available for specific content types such as photographs or audiovisual works, though examples and data tend to be localized or anecdotal. The Gowers Review (a 2006 report on UK intellectual property law) notes, for example, that those familiar with museum copyright issues estimate that nearly 90% of museum works have

³³ *Id.* This amounts to “800,000 US orphans and nearly 2 million non-US orphans” in the HathiTrust collection.

³⁴ *Id.*

³⁵ Cairns, *supra* note 30.

³⁶ *Id.*

³⁷ See ANNA VUOPALA, ASSESSMENT OF THE ORPHAN WORKS ISSUE AND COSTS FOR RIGHTS CLEARANCE (2010, report for European Commission), http://ec.europa.eu/information_society/activities/digital_libraries/doc/reports_orphan/anna_report.pdf (summarizing estimates that range from 13% of all in-copyright books to up to 70% for certain collections).

³⁸ See BRITISH LIBRARY, ORPHAN WORKS AND MASS DIGITIZATION, <http://pressandpolicy.bl.uk/imagelibrary/downloadMedia.ashx?MediaDetailsID=635>.

³⁹ JISC, IN FROM THE COLD: AN ASSESSMENT OF THE SCOPE OF ‘ORPHAN WORKS’ AND ITS IMPACT ON DELIVERY TO THE PUBLIC 18 (2009), <http://www.jisc.ac.uk/media/documents/publications/infromthecoldv1.pdf>

no known author, and that for sound recordings, researchers in the British Library were unable to identify rightsholders for over 50% of works in a sample of over 200.⁴⁰

This research all indicates that there are a large number of orphans, but to truly understand the impact of the orphan works problem (however defined) it is important to have a basic grasp of the number of works that are at issue. The efforts noted above to quantify the number of orphan works are a useful starting point, but inadequate to inform more particularized legal solutions. Efforts should be made to produce clearer and more generalizable sample data evaluating the copyright status of works across a range of content types (e.g., books, serials, sound recordings). With that, some of the bibliographic data already leveraged to produce the estimates discussed above may yield yet more information about both quantity and the specific nature of the works at issue. In the context of a more content- or use-specific approach to the problem (as taken by the Google Books Settlement or in Scandinavian ECL regimes) this data could prove valuable in crafting particularized legal solutions for specific categories of works or uses. Even with the more general approach like that of the *Copyright Office Report*, this data could be used to, for example, more accurately gauge the potential costs of a “reasonably diligent search” for rightsholders across entire collections that might be digitized or used in other ways.

B. How Severe Is This Problem?

The severity of the problem is not well quantified. Numerous studies outline the problematic rights-clearance procedures that must be resolved in cases of orphan works, and these studies illustrate that dealing with orphan works is extremely problematic and costly in many situations. The JISC study mentioned above is one of the most recent assessments of those costs. JISC surveyed cultural institutions (predominately libraries and archives in the UK) on their experiences with orphan works. The survey yielded over 500 respondents from institutions with collections ranging from less than 1,000 items to over 1 million.⁴¹ When asked what percentage of the collection was made up of orphan works, many responded “don’t know,” but most also agreed that the inability to

⁴⁰ See GOWERS REVIEW OF INTELLECTUAL PROPERTY 69 (2006), available at <http://www.official-documents.gov.uk/document/other/0118404830/0118404830.pdf>

⁴¹ JISC, *supra* note 39, at Appendix A: Statistical Calculations, Accuracy, and Respondent Profile, 30–31. See also *Commission Staff Working Paper: Impact Assessment on the Cross-Border Online Access to Orphan Works*, at 11–12 COM (2011) 289 final (May 24, 2011), available at http://ec.europa.eu/internal_market/copyright/docs/orphan-works/impact-assessment_en.pdf

trace rightsholders either frequently or occasionally affected their projects.⁴² Based on the responses that did attempt to quantify the percentage of orphan works in their collection, the report was able to estimate that among the 500 respondents, over 13 million orphans were thought to be held.⁴³ Most respondents were unable to quantify precisely the amount of time spent seeking rightsholders for potential orphan works, but as the report notes, even with a rough (and conservative) estimate of four hours of search time per work, searches for owners would result in an extraordinary amount of time expended when multiplied across the estimated 13 million orphans. Other studies have explicitly translated time spent on rights analysis for orphan works into a dollar figure representing staff time wasted. Cornell University Library, for example, submitted as a comment to the Copyright Office's Notice of Inquiry an explanation of staff time spent searching for rightsholders of 343 monographs identified as still in copyright, but out of print. In staff time, the library spent over \$50,000, but was ultimately unable to identify owners for over half (58%) of the works in question.⁴⁴

These studies and others like them are useful in assessing the severity of the problem to the extent that they concretely illustrate the types of situations where rights analysis and owner identification can be costly. No study to date has quantitatively addressed, however, how orphan works accessibility or inaccessibility harms or hurts particular communities or the public at large. Likewise, no existing study attempts to quantify the value of these works, either in their current state or as digitally accessible copies. Initial assessments of the economic impact of large-scale digitization efforts (namely, Google Books) have concluded that those efforts do not harm, and perhaps even help, publishers' businesses.⁴⁵ A similar—and deeper—understanding of what orphan works access might mean, in terms of economic costs and benefits to users and owners, is essential. Of course, evaluating cultural materials only in terms of variables that can be tabulated for economic comparison is contrary to the purpose for which libraries and archives collect and maintain those works. Accordingly, serious study of the qualitative social value of these works should also be made. While quantifying more precisely the number of orphan works is a significant first step,

⁴² *Id.*

⁴³ *Id.* at 18.

⁴⁴ Response by the Cornell University Library to the Notice of Inquiry Concerning Orphan Works, 70 Fed. Reg. 3739 January 26, 2005, Comment OW0569, *available at* <http://www.copyright.gov/orphan/comments/OW0569-Thomas.pdf>.

⁴⁵ See generally Hannibal Travis, *Estimating the Economic Impact of Mass Digitization Projects on Copyright Holders: Evidence from the Google Book Search Litigation*, 57 J. COPYRIGHT SOC'Y U.S.A. 907 (2011).

understanding the value of access to those works is by far more important for informing legal and policy decisions about how and where the rules of access should be modified.

Conclusion

The orphan works problem is generally considered to be the situation where the owner of a copyrighted work cannot be located by someone who wishes to make use of the work in a manner that requires permission. This focus on owner identification has led much of the discussion of the problem so far, though broader conceptions of market failure have spurred alternative solutions to take form in the shape of the Google Books Settlement and in statutory ECL regimes. These solutions have tended, perhaps necessarily, to focus on specific types of works or specific uses. But the difference between the approaches is largely a matter of degree; where the complete inability to locate an owner may signal an absolute obstacle to a market transaction, uses of out-of-print works or specific uses covered by ECL regimes are associated with transactions that are costly, but not impossible, to overcome. Drawing from both approaches, it may be useful to further study how aspects of each might be combined into more nuanced sets of solutions. In either case, it is important to understand the size of the problem at issue, and detailed research on that point is scarce. More work should be done to create sample data on orphan status that can be extrapolated to broader collections. Likewise, study of the value of these works and the costs associated with the problems they cause is necessary to effectively implement targeted legal and policy changes.