For institutions planning on mass-digitization of their collections, orphan works (works where the author is unknown or cannot be located or works where information regarding the copyright provenance is unknown) are an obstacle. While institutions such as archives, libraries, and museums may have the capacity to digitize their collections, they may be reluctant to act when a rights holder of a specific work cannot be identified, because digitization of that work could constitute infringement. The U.S. Copyright Office has opined, “For good faith users, orphan works are a frustration, a liability risk, and a major cause of gridlock in the digital marketplace.”

A 2008 EU report found that the amount of orphan works held by public institutions ranged from 5-10% of their collections. The UK’s National Museums Director’s Conference estimated that institutions hold about 50 million orphan works in their collections. And the British Library estimated that 40% of the copyrighted work in its archive is orphaned.

Two years ago, the British government reviewed its copyright laws and concluded, “legislation enabling the licensing of orphan works would aid researchers, spur innovation and drive economic growth.” Orphan works legislation has been enacted this year through the Enterprise and Regulatory Reform Act 2013 ("ERRA"). ERRA is a broad piece of legislation that makes changes to many existing laws, including copyright licensing. ERRA makes changes to the UK’s Copyright, Designs, and Patents Act 1988. The pertinent portion that applies to orphan works reads,

“116A Power to provide for licensing of orphan works
(1) The Secretary of State may by regulations provide for the grant of licences in respect of works that qualify as orphan works under the regulations.”

(continued on page 3)
American Law Institute Holds 41st Annual Legal Issues in Museum Administration Course in Chicago, IL

The American Law Institute held its 41st Annual Legal Issues in Museum Administration Course in Chicago this year at the historic Millennium Knickerbocker hotel on April 10-12. 2013’s LIMA course was the first since parting ways with the American Bar Association last year. Notable topic areas were:

- Authentication Issues
- Rights and responsibilities regarding digital and exhibition Copies
- Architect selection, historic preservation issues, and construction contracts
- Children in the museum
- High-risk activities and projects on museum premises

The Smithsonian Institution co-sponsored this year’s course. Chicago’s Museum of Contemporary Art and the Art Institute of Chicago hosted receptions for attendees.

In The News

400-Year Old Spanish Shipwreck’s Artifacts Unveiled

Nearly 17,000 objects have been recovered from the Spanish galleon Jesus y Nuestra Senora del Rosario, one of eight ships sunk by a hurricane in September of 1622. The excavation commenced twenty years ago and was the world’s first deep-sea underwater archaeological excavation. 39 gold bars, nearly 1,200 silver pieces, and 6,600 pearls were recovered along with precious stones and an astrolabe. A tortoiseshell lice comb, two parrot bones, beads, pottery, and tableware were among the objects recovered giving a glimpse into everyday life in the 17th Century. The shipwreck was found 400 miles off the Florida Keys at a depth of approximately 1,200 feet. The excavation is chronicled and objects are presented in the book, Oceans Odyssey 3: The Deep-Sea Tortugas Shipwreck, Straits of Florida: A Merchant Vessel from Spain’s 1622 Tierra Firme Fleet, edited by Greg Stemm and Sean A. Kingsley.

http://www.tinyurl.com/malc002

FBI Says It Knows Who Pulled Off 1990 Boston Art Heist

The FBI says it has, with a high degree of confidence, identified the individuals involved in the 1990 Isabella Stewart Gardner Museum art heist. Although the Massachusetts statute of limitations has expired, the new details are part of a publicity push to raise awareness about the stolen art. The FBI believes the art – valued at $500 million and includes works from Rembrandt, Vermeer, and Degas – may still be in the Northeast.

On March 28, 1990, two men dressed as police talked their way into the Isabella Stewart Gardner Museum where they disabled security cameras and tied up guards, then made off with 13 works of art. Because Isabella Steward Gardner’s will contains a “poison pill” type of provision that calls for liquidation of the entire museum if the art is changed, empty frames are displayed where the stolen art once stood. “The key goal here is to recover those paintings and bring them back,” Massachusetts U.S. Attorney Carmen Ortiz said.

http://tinyurl.com/malc001

(continued on page 4)
The new legislation is a broad commercial licensing scheme that requires a licensing fee to be paid to the government whenever an orphan work is used. While the law is expected to “give citizens and businesses access to a trove of historical content that was previously locked away,” some institutions are upset. First, institutions such as archives, libraries, and museums are not exempt. This means institutions will have to pay an upfront licensing fee upon use, rather than pay when the rights holder is identified and comes forward. While the new legislation does clear the obstacle to mass-digitization for those institutions that can afford to pay the licensing fees, it has come under criticism for being unworkable. At least one opponent of the new legislation called it a “covert tax.”

A key portion of the law that will likely be at issue in the near future is the requirement that the licensee perform a “diligent search” of the copyright holder. “Diligent search” has not been defined, but other countries that have enacted similar requirements for orphan works have defined “diligent search” as being done in good faith and/or exhaustive. A cursory Internet search will not suffice.

In the U.S., the Copyright Office issued a notice in the Federal Register on October 22, 2012 seeking comments on the issue of orphan works and mass digitization. This is the first inquiry after the Shawn Bentley Orphan Works Act died in Congress in 2008 and suggests that another bill may be in the works. Comment acceptance closed on March 6, 2013.

5. Id.
6. Id.
7. Supra note 2.
8. Supra note 1.
**News**

**Museums Respond Creatively to Slipping Attendance**

Museums are responding to the problem of slipping attendance by relying less on “blockbuster” exhibits and more on cultivating deeper relationships with the community.

Some are finding creative ways to do this, such as jettisoning admission fees, offering no-cost membership, tailoring membership to individual patrons’ interests, allowing members to preview objects and vote for acquisitions, and offering rewards for attendance at lectures and special events.

[http://tinyurl.com/malc004](http://tinyurl.com/malc004)

**Report: Today’s Public Trusts Museums More Than Past Generation**

The Museums Association has released its *Public Perceptions of – and Attitudes to - the Purposes of Museums in Society* Report. Highlights of the report: The public understands that museums have a broad societal role beyond appealing to individual visitors. As attitudes toward museums have become more favorable than that of the previous generation, trust has also grown. Museums are widely perceived as being “the guardians of factual information and as presenting all sides of the story.”

[http://tinyurl.com/malc006](http://tinyurl.com/malc006)

**About Us**

The Museum and Arts Law Committee is within the Section of Science & Technology Law, one of 22 sections within the American Bar Association.

[http://tinyurl.com/scitechmac010](http://tinyurl.com/scitechmac010)

Our committee undertakes a variety of projects related to all types of museums and all types of art that are being affected by new developments. Naturally, this requires an appreciation for how those institutions and communities function in general. The Committee thus welcomes active participation from those involved in museums or the arts. In addition to attorneys and law students, membership is also open to non-attorneys who may join as Associates at:

[http://tinyurl.com/scitechmac011](http://tinyurl.com/scitechmac011)

Current projects the Committee is exploring include authenticating artwork, collecting digital forms of art, digitization for archival and commercial purposes, and copyright issues in ownership, derivation, and conservation.

**Get Involved!**

**NEWSLETTER**

We’re currently accepting submissions for the Fall and Winter 2013 Newsletters. Please email submissions, suggestions for topics you would like to see covered and/or questions to Barron Oda, our Newsletter Editor, at boda@hawaii.edu.

**WEBSITE**

We are looking for volunteers to help maintain our website so it is both up to date and interesting. If interested (even if still unsure) contact Gil Whittmore, gilwhittem@aol.com for more information.

**MOBILE MEDIA**

The Mobile Media revolution is the theme of the Section's work this year. If you have suggestions for ways to explore how mobile media is posing new legal issues for museums, contact Gil Whittmore at gilwhittem@aol.com.

**LIAISON**

A major goal of the Committee is to act as a liaison between the museum/arts community and the legal profession. If you know of national, regional or local museum/arts groups we should be contacting, send an e-mail to gilwhittem@aol.com.

**SUGGESTION BOX**

We’re currently accepting suggestions for additional legal topics that would be helpful to museum audiences. Please email suggestions to katlewis864@gmail.com.