Becoming an Orphan
What? How? Says who?

Denise Troll Covey
Principal Librarian for Special Projects
ALA – June 2007
Requests to digitize & provide OA

• 1999-2001 Feasibility study
  – Random sample of books in the library catalog
  – Initial and follow-up request letters

• 2003-2004 Posner project
  – Collection of fine and rare books
  – Initial request letter
  – Follow-up call or email
Age and print status

Published < 1970
- Feasibility – 35%
- Posner – 88%

Feasibility - Out of print
Feasibility - In print
Posner
## Study results

<table>
<thead>
<tr>
<th></th>
<th>Feasibility study</th>
<th>Posner project</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Owners</td>
<td>Books</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td>368</td>
</tr>
<tr>
<td>1. Copyright protected</td>
<td></td>
<td>351</td>
</tr>
<tr>
<td>Pursued permission</td>
<td>209</td>
<td>277</td>
</tr>
<tr>
<td>2. Owners contacted</td>
<td>165</td>
<td>225</td>
</tr>
<tr>
<td>3. Owners responded</td>
<td>106</td>
<td>150</td>
</tr>
<tr>
<td>4. Permission granted</td>
<td>57</td>
<td>66</td>
</tr>
<tr>
<td><strong>Overall success rate</strong></td>
<td>27%</td>
<td>24%</td>
</tr>
</tbody>
</table>
Overall trends

• Publication date is a predictor of locating the copyright owner and acquiring permission
  – The older the work, the more difficult to locate
  – The more recent the work, the more likely permission will be denied

• Publishers of out-of-print books are more difficult to locate, less likely to respond, but more likely to grant permission than publishers of in-print books

• Method of contact affects response rate
  – Phone calls and email are more effective than letters
Publisher/owner-type trends

- **Commercial** – difficult to locate; somewhat likely to respond and grant permission for older works, but not likely to respond or grant permission for recent works.

- **Scholarly associations** – relatively easy to locate; slightly more likely to respond and grant permission than commercial publishers.

- **University presses** – relatively easy to locate; more likely to respond but less likely to grant permission than scholarly associations.

- **Special** – easy to locate; likely to respond & grant permission.

- **Authors & estates** – difficult to locate; not likely to respond, but if they do respond, likely to grant permission.

Could not identify type for 13% of Posner content.
Generic problem maze

- Determining © status
  - Library of Congress recently hired an intern to develop “good faith effort” procedure to determine copyright status

- Identifying the © owner

- Locating the (presumed) © owner

- Getting a response from the (presumed) © owner

- Persuading the © owner to grant permission

- Risk aversion

- Project scale

- Cost
Million Book Project study

- Asked publishers of books cited in *Books for College Libraries* for non-exclusive permission to digitize and provide open access to all of their out-of-print, in-copyright books

<table>
<thead>
<tr>
<th>Overall</th>
<th>Feasibility</th>
<th>Posner</th>
<th>MBP</th>
</tr>
</thead>
<tbody>
<tr>
<td>Location rate</td>
<td>79%</td>
<td>69%</td>
<td>100%</td>
</tr>
<tr>
<td>Response rate</td>
<td>50%</td>
<td>60%</td>
<td>55%</td>
</tr>
<tr>
<td>Success rate</td>
<td>27%</td>
<td>43%</td>
<td>23%</td>
</tr>
<tr>
<td>Total books</td>
<td>66</td>
<td>173</td>
<td>52,900</td>
</tr>
</tbody>
</table>
Publisher problem maze

• Go out of business, merge, move, etc.
• Respond with referral, but no contact information
• Define “out of print” differently from librarians, authors and one another
• Change contractual policies over time
  – Automatic v. requested © reversion to author
• Use 19th C recordkeeping methods
  – Don’t know what they published, what © they own, or what rights they have
  – Looking through paper files doesn’t scale
Cost of determining © status

• Experiment U.S. Copyright Office title search
  – Submitted 7 titles; promptly billed $150; told get results in 4-6 weeks
  – 15 weeks later reported found one title

• Posner project cost projections
  – $6000-$7000 for works published 1923-1963
    • $8000 if include works with no date
  – Decided cheaper to consult renewal records ourselves and seek permission when in doubt
Cost of seeking © permission

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<tr>
<td></td>
<td>Low estimate</td>
<td>Actual costs</td>
<td>Actual costs</td>
</tr>
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<td>Books</td>
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<tr>
<td>Permission</td>
<td>57</td>
<td>66</td>
<td>45</td>
</tr>
<tr>
<td>Cost per book</td>
<td>$200</td>
<td>$78</td>
<td>$0.69</td>
</tr>
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Labor

- Feasibility – Intermittent multiple workers, including two volunteers
- Posner & MBP – One dedicated worker; acquired and polished skills
Proposed Orphan Works Act of 2006

• Accepts Copyright Office recommendations (Jan 2006)
  – Prior to infringing, each user must perform a “good faith, reasonably diligent search to locate the owner”
  – If unable to find the owner, may use the work
  – If © owner comes forward and search is found reasonable, then limited remedies are available

• Requires Register of Copyrights to
  – Make information available from authoritative sources to help users conduct and document reasonable searches
  – Conduct public inquiry on remedies for © infringement claims seeking limited monetary relief

• Proposed amendment would exempt sculpture, photographs, and graphic arts until the Copyright Office implements a searchable database for these formats
New opportunity & reduced cost

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<tr>
<td>Owner not located</td>
<td>44</td>
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<td>Cost per book permission</td>
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We documented contact information, dates and responses. Thorough documentation of the many “good faith, reasonably diligent” searches will increase labor costs.
PROBLEM: define orphan work

• U.S. Copyright Office begged the question
  – “…we have refrained from offering a categorical definition…and have invited…definitions, but ….”
  – “Requiring a search for the owner seems to flow naturally from the NOI’s definition of orphan work”

• U.S. Copyright Office used conflicting definitions
  – The term must “mean what it implies: that the ‘parent’ of the work is unknown or unavailable.”
  – © owners are “difficult or even impossible to locate”

See U.S. Copyright Office report pp. 34 & 71
Roundtable participation

• **Criteria of viable definition drive solution**
  – Case–by–case approaches = reasonable effort or compulsory licensing

• **Criteria of viable solution drive definition**
  – Categorical approaches = default licensing or exemption for libraries, archives, and museums

![Bar chart showing participation by different categories: Definition, Registries, Consequences, Reclaiming, International. The chart compares CA (dark blue) and DC (light blue).]
“To locate” versus “to be available”

• Locate – onus is on the user
  – To determine or specify the position or limits of
  – To find by searching, examining, or experimenting
  – To place at a certain location; to station or situate

• Available – onus is on © owner or © work
  – Present & ready for use; at hand; accessible
  – Capable of being gotten; obtainable
  – Qualified & willing to be of service or assistance
Availability

• **Availability of copyright owner**
  – The “fundamental principles of copyright” include “the right to ignore permission requests”
    See U.S. Copyright Office report p. 9

• **Availability of copyrighted work**
  – Out-of-print works are neither generating revenue for © owners nor easily accessible to readers

• **How does this situation protect © owners’ legally valid interests and serve public good?**
Missed opportunity & reduced cost

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Had to invent “3-strikes” rule to establish closure when owner didn’t respond.
## Missed opportunity & reduced cost

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<td><strong>TOTAL</strong></td>
<td><strong>194</strong></td>
<td></td>
</tr>
<tr>
<td>Work not available</td>
<td>231</td>
<td>$1.67</td>
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- Cost estimated on $10 per hour labor, 10 minutes per book
- Posner out-of-print books estimated based on publication dates and feasibility study % out-of-print books per decade
Definitions of “out of print”

• Librarian (traditional) definition
  – New copies of the work (e.g., ISBN, edition) are not available in the marketplace

• Publisher definitions *
  – No copies are available in our warehouse
  – No more recent version or edition is available
  – Meaningless term: books are never out of print because of the possibility of print on demand

• European Digital Library initiative definition
  – Not commercially available, as declared by © owner

* from Million Book Project © permission study
Books published in English in the United States (WorldCat)
- Presumed copyright owner cannot be located = orphan
- Presumed copyright owner does not respond
- Out of print (traditional definition)

Estimates based on results of random sample feasibility study
Commendable

• Public process and sequence of events to address the orphan works problem
• Proposal to enable all types of uses of all types of works by all types of users
• If charged with © infringement and promptly stop infringing, no monetary damages
• Limited injunctive relief acknowledges user reliance
Not so commendable

• Not cheap and easy – is funding available?
  – Orphan status applies to *infringing use* of the work, not to the work itself = redundant work and costs

• Ambiguous – will uncertainty liberate or chill?
  – “Reasonable” is used to modify the search, © owner compensation, attorney fees, availability of assistance and technology, willingness of buyer and seller, and assessment of responsibility given circumstances

• Treats symptoms, not cause
  – Why not recommend reconsideration of the © term and change from opt-in to opt-out system?
Relevant court cases

• **Eldred v. Ashcroft** – U.S. Supreme Court 2003
  – Request: Apply First Amendment review to extensions of existing copyrights
  – Dismissed: If no change in the “traditional contours of © protection,” no First Amendment review required
  - Long tradition of placing existing and future © in parity

• **Kahle v. Gonzales** – U.S. Court of Appeals 2007
  – Request: Apply First Amendment review to radical change in the “traditional contours of copyright protection” (from opt-in to opt-out system)
  – Dismissed: Same as Eldred v. Ashcroft
Relevant trends in the U.S.

• Libraries are closing
  – “There are signs and signals that the assumptions … are changing under the very ground on which we and our libraries stand” (Saran Ann Long, *New Library World*)

• Gov’t is working to eliminate the digital divide
  – Provide affordable broadband access for rural households and other underserved groups (Rural Opportunities Act)

Eliminating the digital divide will not compensate for eliminated access to library materials *unless* the materials can be digitized and provided open access.
OCLC research and contribution

• Exploring creating a cooperatively built and maintained Registry of Copyright Evidence with
  – Data aggregation and normalization
  – Dynamic confidence indicator based on data available and weight of different indicators; weights can be changed
  – Features to enable authorized users to enter, enhance, correct and update records
  – Interface to enable machine-level interaction with the data

• Planning to develop best practices for orphan works
  – Guidelines for reasonable search and documentation

• Exploring creating authority file of publisher provenance
  – Expansion of Firms Out of Business (FOB) database?
Registry of Orphan Evidence?

MISSING

Publisher A
Last known address
Reasonable search

Publisher B
Last known address
Reasonable search

Author C
Last known address
Reasonable search

Estate D
Last known address
Reasonable search

Library Coalition for Identified Missing Parents & Recovery of Apparently Neglected Children
1-800-SHARE-ID
www.missingparents.org
Thank you!

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