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Becoming an Orphan: What? How? Says Who?

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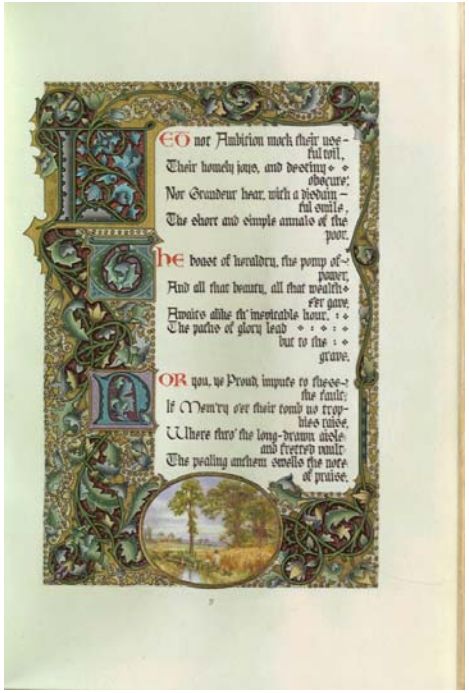
Becoming an Orphan

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

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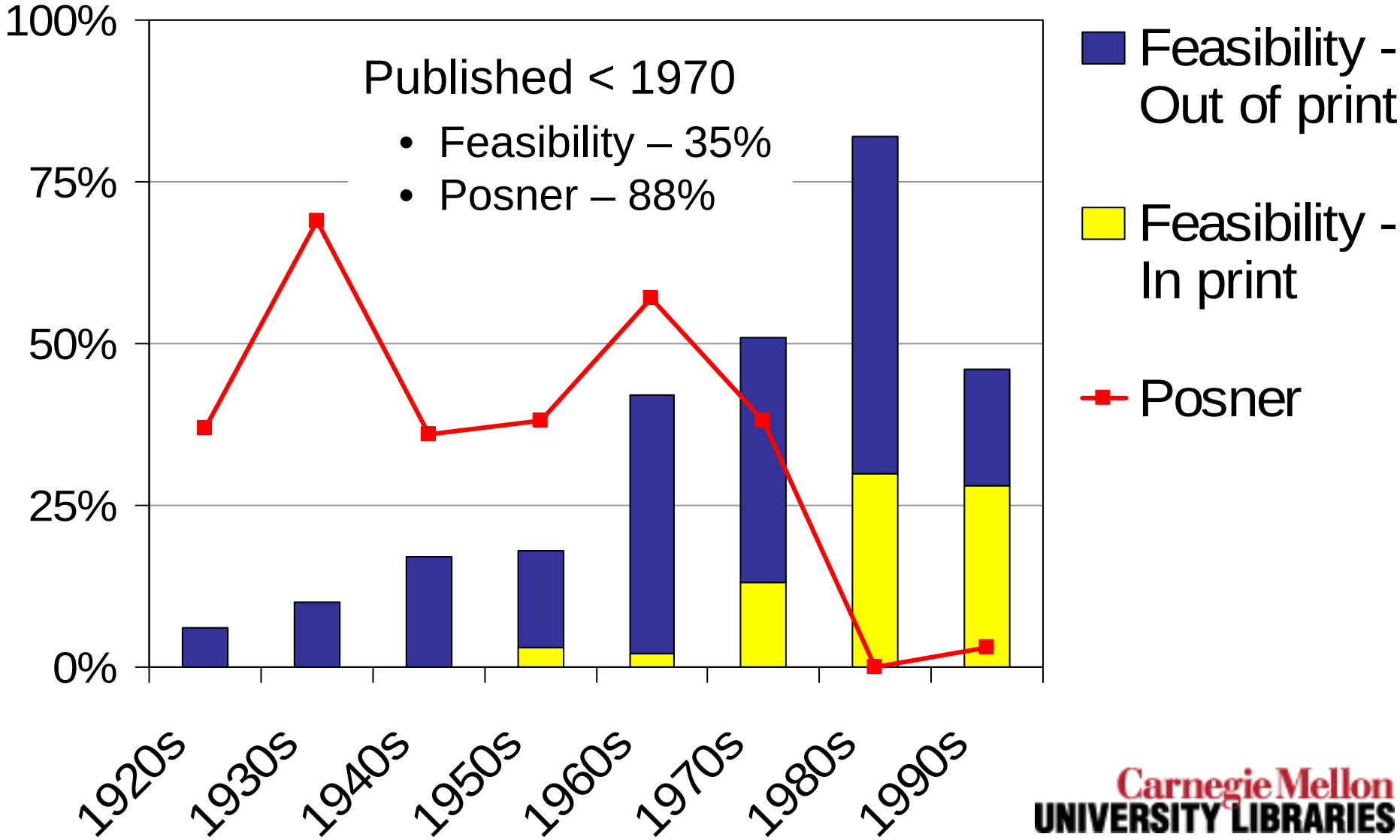
Age and print status



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Study results

	Feasibility study		Posner project	
	Owners	Books	Owners	Books
Total		368		1106
1. Copyright protected		351		284
Pursued permission	209	277	104	284
2. Owners contacted	165	225	72	247
3. Owners responded	106	150	64	230
4. Permission granted	57	66	45	173
Overall success rate	27%	24%	43%	61%

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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

	Feasibility	Posner	MBP
Overall	Owners	Owners	Owners
Location rate	79%	69%	100%
Response rate	50%	60%	55%
Success rate	27%	43%	23%
Total books	66	173	52,900

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

	Feasibility		Posner		MBP	
	Low estimate		Actual costs		Actual costs	
	Owners	Books	Owners	Books	Owners	Books
Permission	57	66	45	173	84	52,900
Cost per book		$200		$78		$0.69

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

	Feasibility study		Posner project	
	Owners	Books	Owners	Books
Permission granted	57	66	45	173
Cost per book permission		$200		$78
Owner not located	44	+ 53	32	+ 37
Cost per book permission		$111		$64

We documented contact information, dates and responses.

Thorough documentation of the many “good faith, reasonably diligent” searches will increase labor costs.

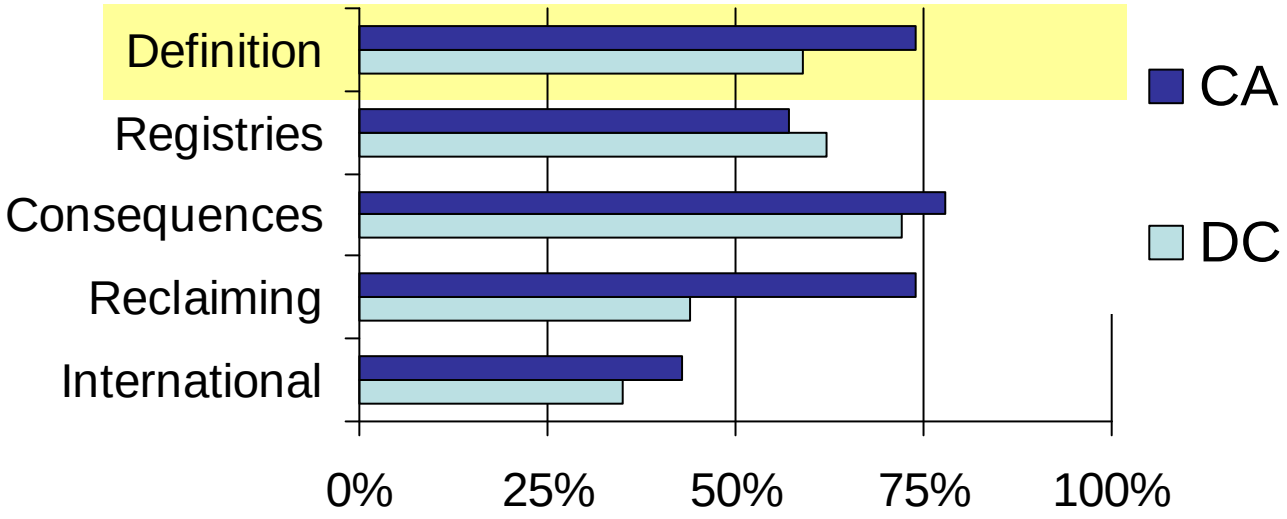
PROBLEM: define orphan work

- 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



“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

	Feasibility study		Posner project	
	Owners	Books	Owners	Books
Permission granted	57	66	45	173
Cost per book permission		$200		$78
Owner not located	44	+ 53	32	+ 37
Cost per book permission		$111		$64
Owner not available	59	+ 75	5	+ 14
Cost per book permission		$68		$60

Had to invent “3-strikes” rule to establish closure when owner didn’t respond.

Missed opportunity & reduced cost

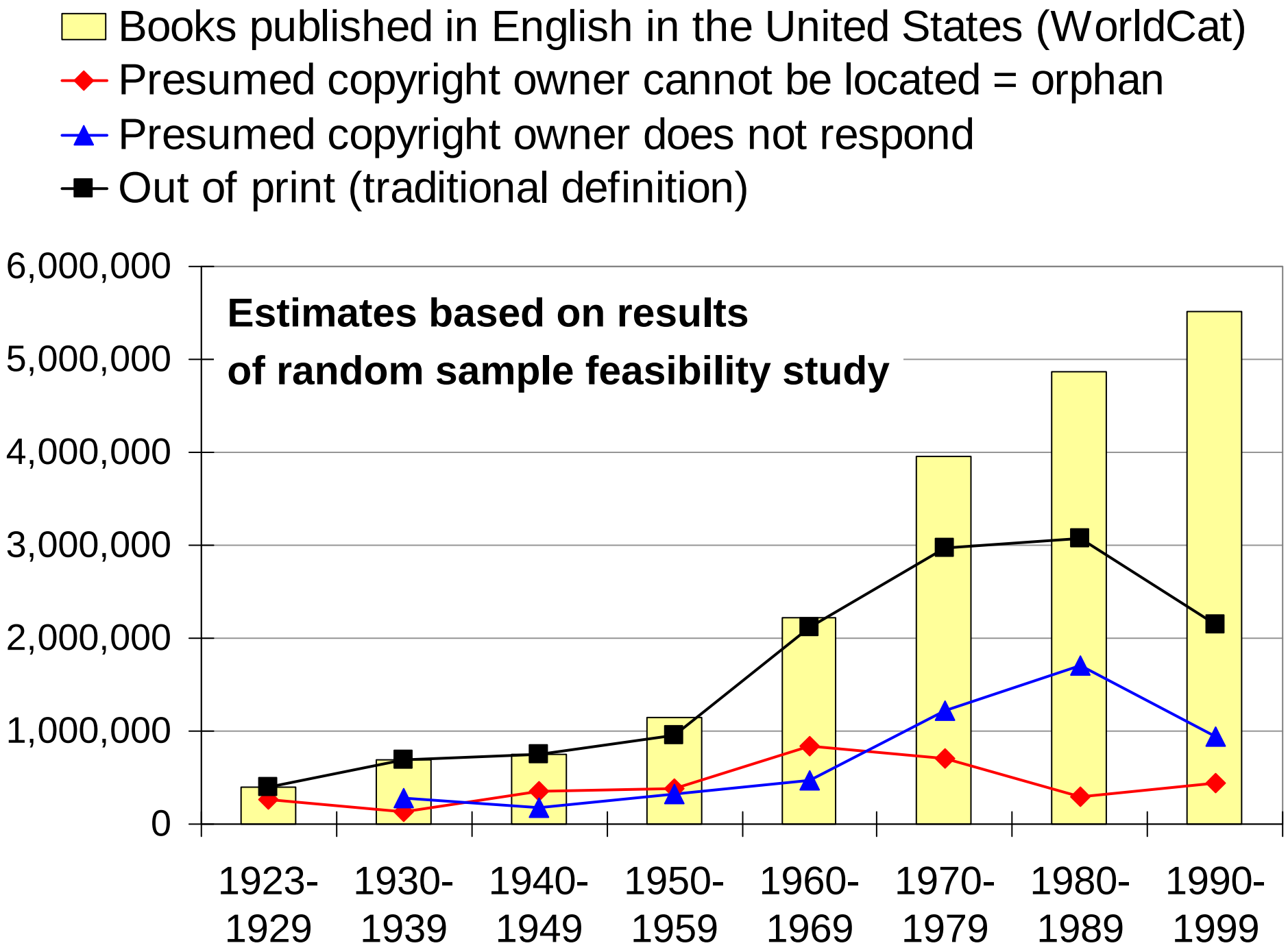
	Feasibility study		Posner project	
	Books	Cost per book	Books	Cost per book
Copyright protected	277		284	
Permission granted	66	$200	173	$78
+Owner not located	+ 53	$111	+ 37	$64
+Owner not available	+ 75	$68	+ 14	$60
TOTAL	194		224	
Work not available	231	$1.67	258	$1.67

- 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
6,000,000
5,000,000
4,000,000
3,000,000
2,000,000
1,000,000
0
1923-1929
1930-1939
1940-1949
1950-1959
1960-1969
1970-1979
1980-1989
1990-1999

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)

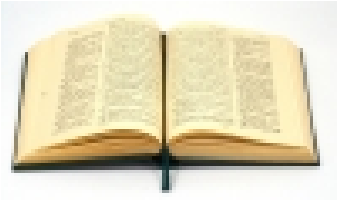
Eliminating the digital divide will not compensate for eliminated access to library materials *unless* the materials can be digitized and provided open access

OCLC research and contribution

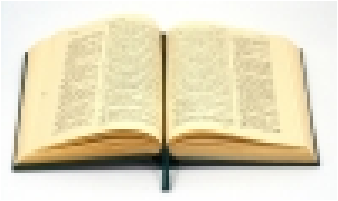
- Exploring creating a cooperatively built and maintained **Registry of Copyright Evidence** with
  - Data aggregation and normalization
  - Dynamic confidence indicator based on data available and weight of different indicators; weights can be changed
  - Features to enable authorized users to enter, 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?

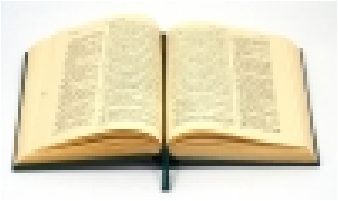
M I S S I N G



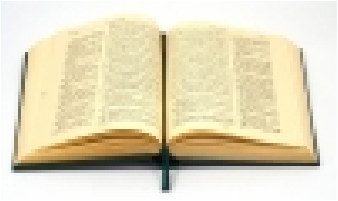
Publisher A
Last known address
Reasonable search



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!

Denise Troll Covey

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