Rights, Registries & Remedies
An Analysis of Responses to the Copyright Office Notice of Inquiry Regarding Orphan Works

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Change

• Technology *has changed* the economics of how we can grow culture & create knowledge
  – Opportunity for unprecedented creativity

• Copyright law *should change* in a way that both respects © owners & leverages this opportunity
  – Law is complex, vague, & threatening

• 89 percent of librarians agree: *copyright is one of the major challenges to building the digital library*
Copyright Office Notice of Inquiry

• Study the problem of orphan works
  – Tentative definition: copyright owner can’t be found
  – Does law impose “inappropriate burdens” on users?
  – Are orphan works “being needlessly removed from access & their dissemination inhibited”?

Notice of Inquiry posted to the Federal Register January 26
Initial comments due March 25 – Reply comments due May 9
Public hearings July – August
Report due by the end of the year
Responses & Public Hearings

• 721 initial comments & 146 reply comments

• Public hearings
  – Washington DC (38) & Berkeley, CA (29)
  – Topics of discussion
    • Identity of orphan works & use of registries
    • Consequences of an orphan works designation
    • Reclaiming orphan works
    • International considerations
How extensive is the problem?
Should something be done?

Initial comments
Reply comments

Experience
No
Yes
NIMBY
Random Sample Initial Comments

Demographics

One to One

- Art
- Photography
- Authors
- Film
- Music
- Other
- Cultural heritage

One to Many

No Yes NIMBY

No Yes NIMBY
Reactions & Interactions

Criteria of viable definition drive solution

• Case–by–case approaches
  – Compulsory licensing
  – Reasonable effort accommodation

Criteria of viable solution drive definition

• Categorical approaches
  – Default licensing (Creative Commons)
  – Exemptions for cultural heritage
Identity of Orphan Works

Case–by–case

Hybrids

• © owner cannot be identified
• © owner cannot be found

Categorical

• © owner does not respond
• © owner uncertain of ownership
  – Grants or denies permission anyway

“Overloading the boat?”
Assumptions

• If © owner cannot be found or does not respond
  – Can we assume owner abandoned the work?
    • Yes
    • No – might want to be found
      – User might not have conducted a sufficient search
    • No – might choose not to be found or to respond
      – Is this a legitimate exercise of © ?
  – Can we assume owner wants to be paid for use?
    • Yes – compensation is the purpose of ©
    • No – permission is often given for free
Case–by–Case Reasonable Effort

- Does reasonableness vary based on
  - Type of use? Amount of work used?
  - Type, publication status, or age of work?
  - User’s skill & resources?

- Difficulty of developing sector guidelines

- Uncertain defense of infringement
  - Level of risk contingent on remedies
  - Self–censorship & gatekeeping

- Cost & risk prohibitive for large projects
Identity of Orphan Works

Case–by–case

Hybrids

Categorical

• Meet certain threshold requirements = orphan
  – Age of work?
  – Print status?
  – Non–profit use only?
  – Registration to opt out?

“Don’t embroider the existing situation. Do something to benefit the citizenry.”
Exemptions & Default Licensing

- Threshold requirements are contentious
  - Age or print status of work?
    - Difficult to determine
  - Non-profit use only?
    - Basis for disallowing for-profit use
  - Registration to opt out of orphan works regime?
    - Burden on © owner
      - International issue of formalities
    - © owner loses control & adequate compensation
      - International issue of full enjoyment & exercise
      - Free use or low-fee use
Books published in English in the United States (WorldCat)
- Books for which copyright owner cannot be found
- Books for which copyright owner does not respond
- Books out-of-print

Estimates based on results of random sample feasibility study conducted at Carnegie Mellon.
Orphan Designation Questions

• To what does an orphan designation apply?
  – The work – exemptions & default licensing
  – The use – reasonable effort accommodation

• How long does an orphan designation endure?
  – Until the © owner steps up or claims infringement
  – In perpetuity

• What use does an orphan designation enable?
  – A particular use by a particular user
  – Any use by any user
  – Other
Register Works & Ownership

- Voluntary / mandatory = international issue of formalities

- Consequences of NOT registering
  - Incentive for user to check registry
    - Default licensing = orphan
    - Reasonable effort = keep looking
  - Incentive for © owner to register
    - Limited remedies = currently not working

- Burden on © owner

- Benefit preservation, access, & use
Register Searches & Uses

- Voluntary / mandatory
- Accuracy, scope, & ease of use / piggybacking
- Consequences of registering
  - Incentive for user to register
    - Reasonable effort approach = helpful in litigation
  - Incentive for © owner to check registry
    - Find users & deny or grant permission (compensation)
- Burden on user & © owner
- No benefit for preservation, access, & use
Contours of Consequences

No change  Limited remedies  Public domain

Reply comments
- No: 0%
- Limited remedies: 90%
- Public domain: 10%

Initial comments
- No: 8%
- Limited remedies: 72%
- Public domain: 20%
Comments on Solutions

Initial comments:
- 50% with analysis
- 25% with analysis
- 25% without analysis

Reply comments:
- 38% with analysis
- 19% with analysis
- 43% without analysis

Legend:
- Red: Public domain
- Yellow: Simple solution advice
- Green: Detailed solution advice
Reclaiming: How Limit Remedies?

• Different remedies for different users & uses?
  – Take–down option for non–profit online access?
  – No injunctions for other users & uses?

• Compensating the © owner
  – Issues with reasonable effort approach
    • Who proves unreasonableness?
    • No attorney fees? No statutory damages?
    • Cap? Reasonable royalty? Who determines fee? How?
    • How budget for large projects?
  – Issues with default license approach
    • Default fee could be too low – *incentive to register*?
To be fair, the solution must

- Provide incentive to recognize the value of using or making orphan works available
- Provide incentive for © owners to become locatable
- Recognize that users have rights & invest time & money in pursuing permission & using works
- Recognize that © owners can appreciate use & free ride on users’ creation of markets
To succeed, the solution must

• Be cheap & easy
  – Reasonable effort is expensive & hard
    • Most difficult to implement
    • Least likely to solve the problem
    • Seems to have the most support
  – Exemptions & default licensing are cheap & easy
    • Easiest to implement
    • Exemptions will solve some aspects of the problem & seem to have some support
    • Default licensing could solve the entire problem, but seems to have little support
Assumptions

• All © owners want to negotiate permission & to be paid for each use of their work

• Current © term & permission practice are appropriate for all © works

✓ Permission is often given for free

✓ Increasing use of Creative Commons licenses
  ✓ September 29, 2004 – Use of CC licensing has increased by 50% every fiscal quarter for the past year. (> 4 million sites)
  ✓ Summer 2005 – 53 million CC licenses & Yahoo CC search
"Upside down pyramid on a funnel"

"If many chickens come home to roost, the solution was poorly designed."
Additional slides

Issues from comments & public hearings
Discussion demographics from public hearings
(percentage of participants engaged in conversation)
Fundamental Differences

• Purpose of copyright
  – Encourage creation by compensating © owners
  – Encourage creation & use

• Policy goal for orphan works
  – Enable preservation, access, & use
    • At least non-profit cultural custodianship & personal use
  – Help users locate © owners & ask permission
    • Short of that, approximate reasonable bargain
  – Enable © owners to signal what they want
  – Restore balance
What Can or Must the User Do?

- Register search, use, or intent to use?
  - Burden & loss of competitive advantage

- Disclose use of orphan work?
  - Invite false claims of © ownership

- Attribute © ownership?
  - Accuracy (often only presumption of ownership)

- Pay prior to use? Who determines fee? How?
  - Unfair for real orphan & public domain works
  - Could be cheaper than reasonable search
  - Permission often given for free
  - Does not scale for large projects
Discussion Demographics

Identity of orphan works

- DC
- CA

Use of registries

- DC
- CA

Categories:
- Art
- Photography
- Authors
- Film
- Music
- Publisher
- Other copyright
- Other
- Cultural heritage
- Not speaking
Discussion Demographics

Consequences of orphan identity

Reclaiming ownership

DC
CA

Art
Photography
Authors
Film
Music
Publisher
Other copyright
Other
Cultural heritage
Not speaking
Discussion Demographics

- International issues
  - Compliance
    - Formalities
    - Enjoyment & exercise of ©
  - Solution must apply to foreign works
    - Ownership often unknown
    - Global relationships
  - Economic / moral views
  - Market practice can differ from law
  - U.S. law applies only in the U.S.