

## **Who Is Concerned About Broader Access to Orphan Works and Why?**

June M. Besek<sup>1</sup>  
Berkeley, California  
April 12, 2012

I've heard a number of concerns related to broader access to orphan works from right holders, and from copyright practitioners in the public, private and academic sectors. These folks are not generally opposed to broader use of orphan works, and their concerns are not insurmountable, but they do illustrate the challenges.

### **The Breadth of the Orphan Works Definition**

How do you define "orphan work"? In the legislation proposed a few years back, it was a work whose right holder couldn't be identified or located after a diligent search.

Assuming that's the definition employed, what is a "diligent" search? The scope of "orphan works" whose users are entitled to special consideration under the law will be affected by how the requirements of a diligent search are defined.

Obviously a diligent search will vary with the type of work; different sources are relevant in tracking down the authors and owners of different types of works. But should it – and ultimately will it – vary with the type of user, or with the type of use? If the user is a nonprofit or an individual, should less be expected in terms of a diligent search? Perhaps the more relevant question is not who the user is, but what the use is, and how it could potentially harm the right holder. An individual or a nonprofit user can do just as much harm to the copyright owner as a commercial for-profit user.

---

<sup>1</sup> Executive Director, Kernochan Center for Law, Media and the Arts and Lecturer-in-Law, Columbia Law School.

## **Second Concern: The Specter of “Use It or Lose It.”**

The huge appetite for content on the Internet has led to another definitional concern. That is, the possibility that an orphan works regime may expand not just to works whose owners can't be identified or located, but also to works whose owners aren't making them available. In other words, the concern is that the orphan works regime will morph into a “use it or lose it” regime. This is not far-fetched; you've likely heard about the recent French law designed to promote digitization of books that has a “use it or lose it” aspect. The notion that an author or copyright owner may no longer have the right to decide whether and under what circumstances to publish is very concerning to some. The original concept of the proposed U.S. orphan works legislation was that a work would not be considered an orphan if the right holder says NO. Will that continue to be the case?

### **The Consequences of Misidentifying Works as Orphans.**

What happens when a work is treated as an orphan but it's not an orphan? Not all works are “orphans” because the right holder hasn't been conscientious. (For example, rights information may have been stripped when the work was uploaded to the internet without authorization, where the hapless user encountered it and tried without success to identify it.) How does a right holder reclaim rights and be made whole? The work may now be in use by many people and organizations. How will the word get out? Does the right holder have to track down and notify each? I'll talk about registries in a minute. But let's suppose there were a central registry, could the right holder make its presence known by that means? Presumably yes, on a going forward basis, but what about those uses already commenced? Would users have any obligation to check the registry periodically and discontinue use of works no longer orphans, or is the burden on the right

holder to track everyone down, even if the work became an orphan through no fault of his?

### **How Do Registries Get Started?**

The ultimate goal of an orphan works regime is, or should be, to minimize the number of orphan works. In this regard, registries would be very useful—registries that allow a user to identify the work and the right holder even if he or she doesn't have the title of the work or a complete copy. Such registries could also provide information about how to seek permission to use the work, if the right holder is willing to license. But how are such registries to be created and funded? Who should bear the burden? (The answer may vary from sector to sector.) Right now the government doesn't seem like a fruitful source of funding; are there foundations or other organizations that might provide the seed money?

### **The Role of Collective Management Organizations**

What is the role of collective licensing organizations in the orphan works/mass digitization sphere? Several models for dealing with works whose owners can't be identified have been suggested. There is the orphan works legislative proposal I discussed above, where a user has to do a diligent search and can then use the work if the right holder cannot be identified or located. If the right holder later comes forward the user can be liable for damages, but damages are limited. But of course in many cases it is likely the right holder won't come forward at all.

In contrast to that proposal is the Extended Collective License (ECL) mechanism that exists in the Nordic countries. The Google Books Settlement would have created, in effect, a kind of ECL. No search is required in such a case, but payment is made upfront.

The disquieting thing is that some proponents of mass digitization want elements of both approaches – they like the “no diligent search required” aspect of an ECL or the Google settlement, but at the same time, don’t want to make any upfront payments.

An ECL might not be a good fit for U.S. law for a number of reasons. And a purely voluntary collective that a right holder must opt into may be desirable and useful, but doesn’t solve the orphan works problem. Some have suggested instead a compulsory license to enable mass digitization. Obviously the notion of a compulsory license to permit mass digitization in order to ensure all works could be included would be a source of great concern to right holders. (To cite just a few issues: is it realistic to think that the government could administer such a license fairly and efficiently, based on our experience with other compulsory licenses? Is it appropriate to have a compulsory license with so much potential impact on normal exploitation of works? How would this comport with our international obligations?)

While collective licensing in some form may be at least part of the answer to the orphan works and mass digitization issues, it’s important to recognize that collective licensing organizations face serious challenges and are not a panacea. For example, it is a challenge to fairly divide the money they collect without spending a substantial part on administration. They need information and cooperation from users, which may or may not be forthcoming. Sorting out competing claims to the revenues from a particular work can also be complicated and resource-consuming. Collective management organizations also could encounter some significant enforcement problems. ASCAP, a “poster child” for collective management organizations, has a great deal of difficulty enforcing performance rights in musical compositions on the Internet, as its general counsel

detailed in a symposium we held at Columbia last year. Once an entity applies for an ASCAP license ASCAP cannot sue, but after making the application some entities refuse to provide revenue and usage data, or they assert that third parties are responsible for virtually all of the use on their services, thus effectively creating a stalemate. In part ASCAP's problems stem from the terms of the consent decree under which it operates, but it is quite possible that a collective licensing organization created in another context would face similar antitrust issues and ultimately confront analogous enforcement problems.

### **The Potential Rise of the “Opt Out Regime” for Uses of Copyrighted Works.**

Another concern of right holders is that the United States will adopt an “opt out” regime under which their works are essentially available for certain uses – uses that far outstrip traditional copyright limitations and exceptions – unless the right holders take affirmative steps to indicate that the works are off limits for such uses. There is the high-level concern about changing the fundamental nature of copyright – essentially forcing copyright owners to post the virtual equivalent of “no trespassing” signs around their works. And then a practical concern: how can this effectively be done? If the right holder makes his work available on the Internet, an instruction in the metadata can signify to all the right holder's desire not to have the work copied. It's not so easy if the source of the disputed rights is an analog copy. The burden of opting out with respect to many possible users is something I mentioned earlier in a slightly different context.

### **International Ramifications**

The regime the United States adopts will undoubtedly be scrutinized by other countries. Are we going to distinguish between the U.S. and foreign works in our treatment of

orphan works and mass digitization? Presumably not, although of course our orphan works regime can govern only uses here in the United States. But it is quite possible that the standards we adopt for diligent search as a condition for use of orphan works, or any regime we put in place for mass digitization, will affect the standards elsewhere, and other countries may allow what the United States allows and more. For example, it's not clear right now what effect, if any, the new French law will have on U.S. works or French translations of U.S. works. But if we do not impose rigorous standards for mass digitization or other uses of orphan works, we can be fairly confident that other countries will be less likely to do so.

### **Nonprofit vs. For-Profit Organizations**

My next-to-last point is, to what extent should nonprofit organizations -- educational institutions, libraries and archives -- get a better deal with respect to orphan works or mass digitization than for-profit companies? The important goals of these entities -- education, scholarship, access to information -- has led to a number of exceptions in the copyright law -- for example, sections 108, 110, and their treatment under fair use. But to the extent that we as a society want to promote mass digitization and efficient access to information, is it wise to give such entities a significant competitive advantage over commercial entities? Are these organizations best suited to take advantage of it? If, for example, libraries are moving into the publishing business do we want to insulate them from challenges commercial publishers might face when engaging in similar activities? Or conversely, should the same privileges be provided to commercial entities? If we don't do so, will we distort the market?

### **Legislation is the Appropriate Way to Address these Issues**

The final concern I've heard is that any systematic mass digitization of works should be authorized by legislation and not done in reliance on fair use. The issues surrounding digitization are complex (What can be digitized and by whom? What can be made available and to whom? What security is required for these valuable assets?). You have only to look at two examples of *negotiated* mass digitization proposals (the proposal of the Section 108 Study Group on an exception to permit digitization of published works for preservation, and the proposed settlement in the Google book search litigation) to see the important considerations that must be taken into account (such as security, preservation, etc.).

The copyright community and the user community share a certain trepidation about going to Congress. But many people believe it is better than the alternatives, such as proceeding pursuant to "best practices" developed unilaterally by like-minded individuals, however well-intentioned they may be. This is an area that requires a considered balance of interests, and it belongs in the legislative arena.