Abandoning the Orphans: An Open Access Approach to Hostage Works

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Orphan Metaphor

Orphans (1885)
by Thomas Kennington

Caspar David Friedrich,
Wanderer Above the Sea of Fog 1818
Orphanages, Work Houses, or....
A new metaphor

Hostage works
  – Held hostage by the automatic and extensive nature of © rights (and the remedies) & the absentee owner

Solution needed:
Special Forces Operatives
  – Activity and Actors applauded for their role in freeing hostages
Fundamentals of a new metaphor

• Copyright’s utilitarian mission: provide an incentive to . . .
  – Create
  – Disseminate

• Hostage works:
  – The incentive worked for creation
    • NB: Care should be taken to design rules that will not harm incentive for future creation
  – The incentive is failing for a desired dissemination/exploitation
    • NB: Not because the © owner is making a strategic choice of non-exploitation
Reducing Waste

• The hostage work problem is a problem of a type of waste
• Neglected/abandoned property – another form of waste
  – Adverse possession of real property
    • Demerit theory
    • Merit theory
    • Transaction based theory
  – Abandoned tangible property
    • Positive value: Rules for designating new owners (rivalrous consumption)
    • Negative value: owner’s responsibility to appropriately dispose of it (tangible = takes up space)
Doctrine of Waste

• When ownership is divided (e.g. life estate and remainder; tenant and owner) current owner may be liable to subsequent owner for “waste”
  – permissive, voluntary, and ameliorative waste
• No obligation to avoid waste if property is owned in fee simple
• Copyright has a “life estate” and a remainder: copyright owner & the public
  – Not being available to consider exploitation possibilities = waste (permissive waste?)
  – Public has an interest in minimizing waste and being compensated for it when it occurs

Prof. Heald’s talk: http://www.youtube.com/watch?feature=player_embedded&v=-DpfZcftI00#!
Freeing the Hostages & the real “hostage work problem”

• Freedom comes from information
  – dissemination of *reliable* and *authoritative* info. concerning copyright status and copyright owner status
  – not costless to gather and disseminate

• **Hostage work problem**: Risk of underproduction of information concerning which works are hostage works
  • Option: grant a limited right (*a la* adverse possession or abandoned property)
    – E.g. generic drug challenges to patent validity – semi-exclusivity for a limited period
Better Option: Open access Compensating for waste

• Proposal: eliminate monetary liability for an entity that
  (1) Is not negligent in identifying which works are “hostage” works & in maintaining accessible records leading to that identification
    -negligence: duty of care will develop over time & with “best practices” models
    -duty to maintain and correct records (injunctive relief)

AND

(1) Provides an open-access copy of the work with attached information concerning copyright and copyright owner status
    -compensates the public for the waste engaged in by the current absentee owner of the copyright
Open Access

• Open Access: Budapest, Bethesda, Berlin
  – free availability on the public internet

• Open Access: based on copyright owner consent
  – Open Access of Hostage works: based on attaching provenance information to digital copies, including the date and name of the entity making the determination
    • Human Readable & Machine Readable
Freeing the Hostages

• Incentive to act as “special forces”?  
  – Elimination of liability for that entity  
    • important for libraries & nonprofits  
  – Permit identifying entity that meets the two requirements  
    to make additional uses that are commercial in nature  
    • important for commercial actors & deriv. work makers

• Third party uses once a hostage work has been identified?  
  – Open access providers: should have similar protections  
    from monetary liability  
  – Other uses (commercial use, deriv. work, etc.): Reliance on  
    laches/estoppel/statute of limitations  
    • eliminate the “rolling” statute of limitations doctrine in this  
      context
Open Access for Orphan Works
Maturing Orphans?

- matured orphan = an emancipated adult in control of his or her life choices
- matured copyright = public domain
- Open Access as a step in the maturation process

Freeing the Hostages!

- Open Access as liberator of hostage works