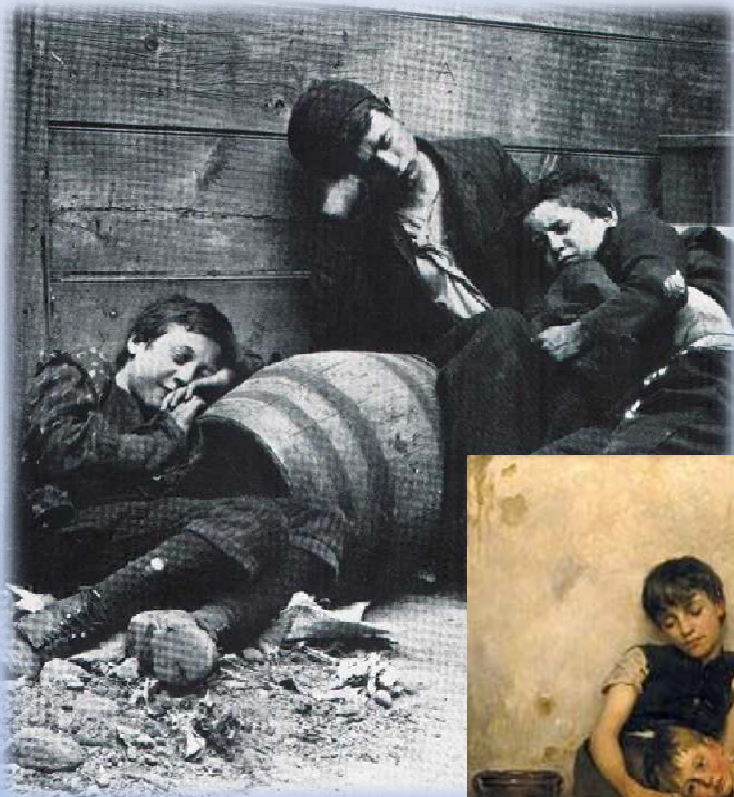


# Abandoning the Orphans: An Open Access Approach to Hostage Works

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# Orphan Metaphor



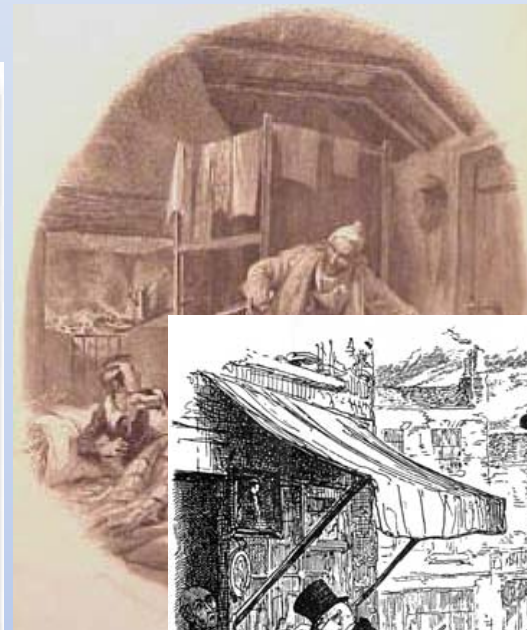
*Orphans* (1885)  
by Thomas Kennington



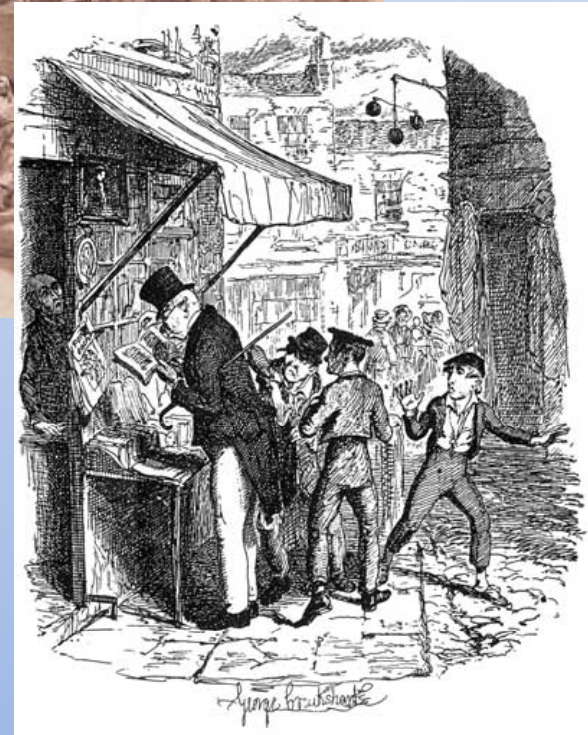
Caspar David Friedrich,  
*Wanderer Above the Sea of Fog* 1818



# Orphanages, Work Houses, or....



GE.



# A new metaphor



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## 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

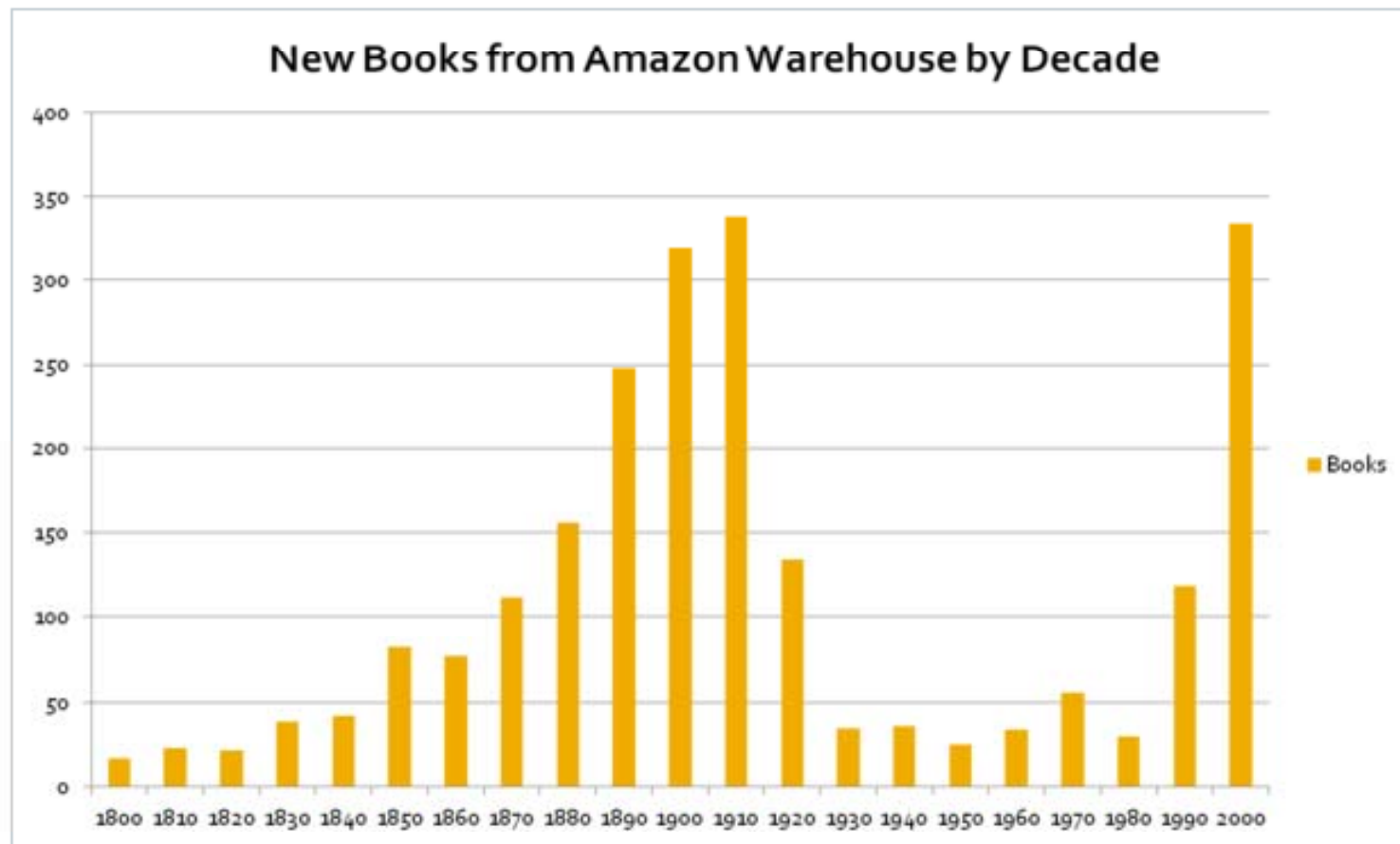
# Reducing Waste

- 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



*Paul Heald*

Rebecca J. Rosen, *The Missing 20th Century: How Copyright Protection Makes Books Vanish* theatlantic.com March 30, 2012 (reporting on presentation of study by Prof. Paul Heald)

Prof. Heald's talk: [http://www.youtube.com/watch?feature=player\\_embedded&v=-DpfZcftI00#!](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



Photo credit: John Olson

Photo credit: Stuart Paul Mullenberg

# 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

