Unhand That Orphan

Evolving Orphan Works Solutions Require New Analysis

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Anyone who has ever cleared rights for a motion picture, television program, sample, or other work knows the frustration of having the trail run cold and not being able to determine the owner of a copyright or other intellectual property. If the owner of a fundamental underlying work in copyright cannot be found, that inability almost always results in the work not being used and a new work being created.

However, as bona fide national libraries make their holdings available to users by means of an online presence, it has become necessary to confront the prospect of reproducing a library's holdings in a digital format and the copyright issues presented. The scope of obtaining necessary permissions for a large national library to digitize itself can be quite daunting. National libraries are required to operate within applicable copyright laws, including international treaties, and should remain above reproach in compliance with the law. For the time being, at least, this means operating within a legal system that recognizes authors' rights as primary and the rights of the collective (or "commons") as secondary.[1]

In addition, the concept of orphan works in the United States has taken on a distinctly commercial tone in sharp contrast to the policy goals in other Western civilizations. Large commercial interests in the technology fields (especially Google, Inc.[2]) see a potential incremental value in exploiting artwork created by the hard-to-reach owners in order to avoid or reduce the number of lawsuits for infringement by other easy-to-reach large commercial interests in the creative fields. Thus, an expansive definition of "orphan works" coupled with a loose definition of "search" became a very attractive business proposition. According to Google's counsel at the 2005 Copyright Office Roundtable on Orphan Works: "I would encourage the Copyright Office to consider not just the very, very small scale, the one user who wants to make use of the work, but also the very, very large scale and talking in the millions of works."[3]

Different jurisdictions have treated orphan works differently. The U.S. approach was to solicit legislative suggestions from the public during 2005 that were formalized in a Copyright Office report released in 2006.[4] The report was an exhaustive analysis of the public commentary with a legislative recommendation. There was considerable opposition in the artist community[5] regarding the methodology of the Orphan Works Report, and some commentators have noted a pervasive similarity between the recommendations in the Orphan Works Report and the submission of the law students at the Glushko-Samuelson legal clinic.[6]

No legislative solution has been passed by the U.S. Congress as of this writing, but there have been many legislative attempts since 2005. During the same period, the European Commission made considerable progress in dealing with orphan works from a cultural preservation perspective, and, of course, Canada has had an orphan works clearance process in place for many years. One of the hallmarks of orphan works legislation in other jurisdictions is an abundance of government oversight to prevent abuses. The hallmark of the U.S. approach is that there is virtually none—absent litigation—which, as a practical matter, is only available to rich copyright owners.

It now appears that the better approach in the United States is for the public, including the creative community, to revisit the orphan works issue anew in light of progress and themes adopted in other jurisdictions. Thus, the United States could receive the benefit of other jurisdictions' experience and work to harmonize U.S. law with our treaty partners. Absent this reexamination, orphan works legislation will become a jurisdictional bad dream, if not yet another arbitration against the United States for treaty violations before the World Trade Organization.[7]

Given the disastrous results of unsupervised commercialism in so many aspects of our world economy, the delicate ecosystem that sustains the world's culture cannot be left to happenstance and to repeat the same failure of self-regulation that led to the peer-to-peer ("P2P") debacle.[8]

The problem of orphan works has risen again as the concern for cultural preservation has led to large-scale digitalization of works housed in libraries and institutions. Analysis of the definition of orphan works, exploration of the need for cultural preservation, and examination of the Canadian and European approach provide a framework from which the United States can construct a legislative solution to deal with the problem of orphan copyrights in the digital age.

ORPHAN WORKS DEFINED

An "orphan work" is generally thought to be a work of copyright for which the author cannot be found after a good-faith search of relevant documents.[9] Laws dealing with orphan works establish a kind of rateless compulsory license of limited duration that typically substitutes some trustworthy actor for the missing copyright owner and allows a relatively narrow group of potential users the right to make certain limited reproductions of the work without obtaining the consent of the copyright owner.[10]

In practice, that trustworthy actor either is a government agency[11] or is subject to a very restricted use by a specific and trustworthy (and often quasi-governmental) actor, subject at some point to government oversight.[12] The orphan works issue has been addressed in some jurisdictions for a number of years, but the general treatment has been to permit uses of orphan works as a "fair use." However, if the taking of the work is substantial and the exploitation of the work is commercial in nature, the legislative trend has been to require a user to get a license, go before a government body, or not use the work.

Another aspect of the orphan works problem is that copyright owners of certain categories of copyrights are historically easier to find than owners of other categories. In businesses where a creator would customarily relinquish ownership of his or her copyright as a work made for hire (such as in the motion picture or music businesses[13]), the copyright

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owner may not be easily locatable, while the featured artist may be more readily found. Recording artists and musicians are also members of professional labor unions (such as the American Federation of Television and Radio Artists or the American Federation of Musicians), or are affiliated with SoundExchange, all of whom often pay residuals to the artist and musicians for a long time after their recording agreements have expired.

Songwriters are affiliated with the American Society of Composers, Authors and Publishers; Broadcast Music, Inc.; the Society of European Stage Authors & Composers; or one of the dozens of authors' rights societies around the globe. These societies typically keep current records on their members, particularly if the member is receiving any income.

However, in the visual arts and the many other categories of copyright and artistic endeavor, identifying a work and finding the work's author are difficult if not impossible. If legislators create an orphan works system that ignores these realities, they are knowingly and essentially denying large groups of creators the protection of the law, if not the Constitution.

THE CULTURAL PRESERVATION FACTOR

It was only a matter of Internet time before the mandate of national cultural institutions[14] included making their collections available online, particularly in Europe.[15] In order to give the public online access to their holdings, libraries[16] were required to "digitize" their holdings both as a means of preservation[17] and to make these holdings[18] available online.

Digitizing holdings necessarily involves reproduction, and reproduction implicates an exclusive right of a copyright owner under the laws of almost every jurisdiction.[19] In order to digitize library holdings, librarians and archivists will immediately run up against legal restrictions in creating reproductions of all categories of copyright, including books, illustrations, images, manuscripts, paintings, photographs, and recordings. Some of these materials are in the public domain, some are in copyright, and some are simply hard to identify.

It is important to note that in order for European libraries to comply with their various mandates,[20] it seems that the library need only digitize its holdings (i.e., make a copy) and that such digitalization will eliminate the need to create a derivative work.[21] We will refer to these reproductions as "1:1 reproductions," meaning that the library or archive reproduction is an exact reproduction of the original[22] and is not intended for commercial use except in a very limited sense.[23]

The legislative mandate in Europe has been that libraries digitize only works in the public domain or works for which they have obtained permission of the copyright owner. Obtaining permission of the copyright owner requires finding the copyright owner from whom to seek permission. This requirement raises two distinct questions: Who is the copyright owner? And where is she or he located? And here is where the orphan works problem arises.

DIGITIZING HOLDINGS NECESSARILY INVOLVES REPRODUCTION, AND REPRODUCTION IMPLICATES AN EXCLUSIVE RIGHT OF A COPYRIGHT OWNER UNDER THE LAWS OF ALMOST EVERY JURISDICTION.

The European approach stands in stark contrast to the approach in the United States. For example, the Orphan Works Act of 2006[24] and the Shawn Bentley Orphan Works Act[25] (passed in the Senate but defeated in the House of Representatives in the 110th Congress) would allow essentially unbridled commercialization of orphan works—as defined by the user to whose commercial advantage a determination of "orphan" will benefit.[26] As of this writing, no orphan works legislation is currently pending in the U.S. Congress.[27] It is informative to review the laws in other Berne Convention jurisdictions to study these precedents.

OVERVIEW OF ORPHAN WORKS TREATMENT IN CANADA AND THE EUROPEAN UNION

Canadian Orphan Works

The Copyright Board of Canada has the exclusive "power to issue licences for the use of works when the copyright owner cannot be located."[28] There are a number of instructive limitations on the board's power to issue a commercial orphan work license for a user that is not an educational institution, archive, museum, or library (which have their own rules).[29] These limitations include publication of the work in Canada, an exhaustive search for the owner, royalty limitations, and application to the Canadian Copyright Board.

Published Works Only. The potential user must demonstrate that the orphan work was published in Canada with the consent of the original copyright owner. Unpublished works are not accepted. This is a sensible threshold requirement, as it requires an affirmative act on the part of the original owner indicating that he or she desires the work to be exploited in some manner. The requirement also implies that the identity of the original owner is known and that the publication can be proved by a commercial copy or comparable definitive evidence (e.g., exploitation by a digital distributor under a license from the original owner).

Territory. Licenses granted by the Copyright Board are "only valid in Canada."[30] This is sensible, as it is likely a violation of international treaties (such as the Berne Convention) for one signatory to grant rights that could violate the laws of another signatory country. It is also consistent with the requirement that the work be published in Canada for consideration.

Every Reasonable Effort. The board requires that an applicant make an exhaustive search for the original copyright owner and admonish potential applicants that "[t]here are many ways you can

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locate a copyright owner. Try as many as you can before applying to the Board."[31]

Royalty. The board will fix a royalty in any license it issues and usually orders that royalties be paid directly to a copyright collective society that would normally represent the unlocatable copyright owner. This allows the copyright owner who later comes forward to approach an independent third-party payer to recover the royalties. The board does allow the copyright collective society to pay out uncollected sums to its members in "black box" payments, but requires the copyright collective society to reimburse the copyright owner for any orphan works monies contributed to the black box for a period of up to five years after the board's license expires.

Application to the Copyright Board. A potential user must apply to the Copyright Board for a license and provide the board with evidence that the applicant met the "every reasonable effort" standard as well as salient information about the work to be licensed.[32]

The Canadian approach to orphan works has many admirable attributes for a commercial solution. It assumes that commercial uses of orphan works will be limited, documented, and compensated.

European Orphan Works

While, as of this writing, none of the member states of the European Union have passed orphan works legislation, the European Commission's view on orphan works is found in several documents. Directive 2001/29/EC suggests an exception for specific acts of otherwise unauthorized 1:1 reproduction by publicly available libraries, educational establishments, museums, or archives if the 1:1 reproduction furthers the commission's policy goals for libraries in Europe.

The i2010 European Digital Libraries Initiative has the expressed policy goal to make all of Europe's cultural resources and scientific records accessible to present and future consumers, which seems to contemplate 1:1 reproduction for this narrow purpose. The exception does not seem intended to apply to consumers generally, but rather to specific entities that fulfill the commission's policy goals.[33] For example, the European Library Portal[34] offers access to the combined resources of the 45 national libraries of Europe. Another example, Europeana,[35] aims to be a single access point for consulting digital copies of materials held by libraries, museums, and archivists. Europeana is run by the European Digital Library Foundation.

Overview of European Guidelines. The European guidelines[36] were developed by bringing together extensive working groups of experts in the large categories of copyright (text, audiovisual, visual/photography, and music/sound) to draft recommendations for member states of the European Union to develop their own national solutions and laws. The guidelines focus almost exclusively on the use of works by libraries and archives and not by consumers.[37]

The commission engaged in an admirably comprehensive, and even refreshingly candid, process that indicates great care for both cultural heritage and the rights of creators. The result is a process that is designed to actually find each rights holder of a particular orphan work before the work is used.

For example, the working group for music/sound drafted criteria for searches for rights holders in the country of publication/production, such as checking credits and other information appearing on a commercial copy of the work and following up through those leads to find additional rights holders (e.g., contacting a record producer to find the performers); checking the databases/membership lists of relevant associations or institutions representing the relevant category of rights holder (including collecting societies, unions, and membership or trade associations); and utilizing public search engines to locate rights holders by following up on whatever names and facts are available, including online copyright registration lists maintained by government agencies such as the U.S. Copyright Office.

Core Principles of the European Guidelines. The European Guidelines also list certain "core principles" for the national solutions to cover, including guidance on what constitutes a diligent search, a provision for withdrawal and remuneration if the rights holder reappears, and special treatment for cultural and nonprofit establishments who are fulfilling their "dissemination purposes." The principles developed by the Copyright Subgroup can be summarized:[38]

> In the discussions concerning the Digital Library Initiative the formula "to digitise once, to disseminate widely" has frequently surfaced. The Copyright Subgroup notes in this connection that the effort to avoid duplication is important and should be encouraged. It also notes that the precept to "disseminate widely" does not by itself entail the liberty to disseminate *freely* under all circumstances, lest the opportunity for uncontrolled *secondary* dissemination destroy the incentives to create in the first place and to invest in the *primary* exploitation on works. Indeed, in many contexts creators and publishers may not be expected to engage in the difficult and risky task of creating a new work, if the initial digital copy were to be available without limits immediately after it is first made.

Another important element of the European Guidelines includes the creation of a publicly searchable orphan works (and public domain works) database.[39] Anyone wishing to utilize an orphan work must register that work in the European Orphan Works Database to be created and maintained under the acronym "ARROW" (Accessible Registries of Right on Orphan Works) with an emphasis on interoperability, standardization of metadata, and copyright information on European literary works.[40] This creates a form of notice that would facilitate connecting rights holders and users of orphan works after the use has occurred.

Finally, the European Guidelines propose development of a cross-country European database to provide assistance to potential users in their searches and the creation of Rights Clearance Centres ("RCCs") to act as portals and common access points for clearance of rights and to grant licenses for orphan works pursuant to a procedure approved by rights holders. They suggest an extensive step-by-step process for rights clearance.[41]

U.S. TREATMENT OF ORPHAN WORKS AND RECOMMENDATIONS FOR FUTURE LEGISLATION

Overview

Orphan works legislation in the 110th Congress was outright opposed by many creator groups,[42] and many others voiced serious concerns.[43] The legislation bore

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little, if any, resemblance to the laws of other Berne Convention treaty partners. The supporters of the bill included Google, Inc.; Public Knowledge; the Electronic Frontier Foundation; and the Recording Industry Association of America. The Small Business Administration ("SBA") was concerned enough about the implications of the legislation for small business that it held a roundtable in New York at the Salmagundi Club and gave the legislation considerable attention.[44]

The United States' approach in the 110th Congress can be summarized: Any person can use any work (foreign or domestic) of any kind for any purpose (commercial or noncommercial, 1:1 reproduction or derivative work) if they are unable to find the copyright owner following a "reasonably diligent search" in accordance with "best practices" in "good faith."

If the copyright owner later comes forward, the user (called an "infringer" in the legislation) must demonstrate that he or she conducted the requisite search if the copyright owner brings a lawsuit, but the copyright owner may not obtain statutory damages or an injunction and shall only be entitled to recover a "reasonable fee." There is no notice or registration requirement for the user of the orphan work. There is no database of orphan works.

The legislation charges the Copyright Office with determining the meaning of "reasonably diligent search" and "best practices" on a category-by-category basis, which bears a passing similarity to the European Guidelines, although the U.S. approach clearly lacks the rigor and attention to authors' rights found in other jurisdictions.

RECOMMENDATIONS

There is clearly a compelling argument for 1:1 reproductions of orphan works, whether the digitizing is done by libraries making their holdings available online or by archivists to save films, photographs, or sound recordings that are currently stored in a decaying format. There will be an equally compelling argument for allowing digitized works to be copied into the next format that replaces current digital storage media when digital becomes a decaying format (particularly given the known stability issues with digital formats).

Very few members of the creative community have objected to the 1:1 reproduction of orphan works by bona fide libraries and archivists, particularly in the not-for-profit setting. Some, but not many, members of the creative community object to these not-for-profit institutions selling commercial items that include orphan works. It seems that copies by national cultural repositories for archival purposes (such as is found in the European Commission recommendations) are not controversial.

But there is likewise a compelling argument for why the creative community is justifiably skeptical of creating further exceptions to the rights of creators under the copyright laws. Artists did not think that librarians would be making deals with giant technology companies to benefit private commercial interests, and, yet, it happened. This is likely what motivated tens of thousands of artists to object to the orphan works legislation proposed in the 110th Congress and passed in the U.S. Senate. Many of the objecting artists felt completely abandoned by U.S. copyright authorities and did not believe that the legislation was legitimately aimed at correcting the problem its advocates claimed to solve.

CARE MUST BE TAKEN TO PROTECT THE WORLD'S ARTISTS THROUGH ADOPTING APPROPRIATE LEVELS OF GOVERNMENT OVERSIGHT OF THE COPYRIGHT LAWS AND REJECTING THE SELF-REGULATION.

The general theme of the objections fell into five categories: lack of government oversight, costly remedies shut out small artists, challenges of implementing a "reasonably diligent search," no limitation on the status of the user, and breach of international treaties.

Too Little Government Oversight. Many artists objected to what was widely perceived to be a complete disconnect between a random infringer and any verification of the infringer's bona fides and compliance in using a supposedly orphan work.

The objection most frequently heard from opponents of the legislation was that they expected a high degree of disingenuousness from infringers based on the rampant infringement that was already occurring online. This objection was given particular emphasis because neither the Senate nor House bills had a U.S. equivalent of Europe's ARROW or the Orphan Works Database. The Senate bill had no notification requirement at all, and the House bill had a "dark archive" to be maintained in the Copyright Office (apparently offline), and only disclosed to copyright owners if they found out about the infringement in the marketplace and also sued the infringer.

Costly Remedies Shut Out Small Artists. Of the several aspects of the legislation that concerned the SBA, perhaps the most grievous issue was the complete reliance on litigation for a copyright owner to enforce any rights at all. This issue was also of concern to the American Association of Independent Music and the Association of Independent Music Publishers. Both of these organizations represent "independents" in the music industry, meaning companies not owned by the four major labels or major publishers.

The objection revolved around the removal of the threat of statutory damages. Small business copyright owners are on equal footing with any other copyright owner when it comes to statutory damages, and the threat of litigation is often enough to get an infringer to the bargaining table. Advocates of the legislation would usually respond that copyright owners were not prohibited from suing, so they were no worse off than they were under the status quo ante. This is true, of course—other than taking away their right to statutory damages and attorney fees.

Challenges of Implementing a "Reasonably Diligent Search." Many members of the creative community objected to the standard of requiring infringers to conduct a "reasonably diligent search." The SBA

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questioned whether it would even be possible to implement this requirement until a searchable digital fingerprint catalog was available for all works. This is particularly true of still images, which are very difficult to fingerprint in a searchable manner.

The objecting artists found it highly unlikely that any search for visual images could be either reasonable or diligent, as in many cases there was no database to search, and there was no meaningful incentive for infringers to conduct a laborious hand search. The music industry likely has more searchable databases than any other category of copyright, and even those databases require a precise text search, which may itself require even the good-faith infringer to guess.

No Limitation on Status of Users. Because the legislation was not limited in scope to U.S. copyrights used in the United States by bona fide libraries or archives, there could literally be millions of uncompensated uses of orphan works that would remain uncompensated if copyright owners did not sue or spend considerable resources to track down the infringers. This would essentially create a rateless compulsory license, as a practical matter (which may itself rise to the level of a "taking").

Breach of International Treaties. Advocates of the statute argued that companies such as Google (very much involved in the legislative process) would create searchable databases of works, and that artists need only digitize their collections and then provide Google with a copy of their works in a digital format for inclusion in a database. Opponents objected to these databases as a de facto registration requirement for enjoying the exclusive rights of a copyright owner, as they violate the "no formalities" rules of the Berne Convention.

CONCLUSION

If orphan works legislation is reintroduced in Congress, it would be well to consider the extensive treatment that this subject has received in other countries. There are compelling policy goals for advancing the availability of cultural heritage online as well as advancing the preservation of artistic works and cultural artifacts. In a time of economic crisis, care must be taken to protect the world's artists through adopting appropriate levels of government oversight of the copyright laws and rejecting the self-regulation, which clearly has failed. ❖

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ENDNOTES

1. "The social meaning of 'ownership' is in flux, and is likely to be more influential over the long run than anything a court declares." D. Bollier, *available at* http://www.onthecommons.org.

2. One example of this interest in orphan works is the Google Books Settlement, which has been met with some alarm; *see* Statement of the British Booksellers Association, *available at* http://www.thebookseller.com/documents/BA_Google_Statement.pdf; Fred von Lohmann, Google is Done Paying Silicon Valley's Legal Bills, Deeplinks Blog, Electronic Frontier Foundation, Nov. 20, 2008, http://www.eff.org/deeplinks/2008/11/further-thoughts-google-book-search-settlement; Chris Castle, Is Google's Culture Grab Unstoppable? Dec. 31, 2008, *available at* http://www.theregister.co.uk/2008/12/31/chris_castle_google_books_and_beyond/.

3. U.S. Copyright Office, Orphan Works Round Table, *available at* http://www.copyright.gov/orphan/transcript/0726LOC.PDF.

4. U.S. Copyright Office, Report on Orphan Works 1 (2006) ["Report on Orphan Works"].

5. *See* Statement of the Illustrators Partnership of America, *available at* http://www.copyright.gov/orphan/comments/OW0660-Holland-Turner.pdf.

6. *See* Illustrators Partnership of America, *available at* http://www.illustratorspartnership.org.

7. The Fairness in Music Licensing Act (an amendment to the U.S. Copyright Act of much smaller scope than the orphan works legislation) resulted in a WTO arbitration. *See* World Trade Organization, Report No. WT/DS160/R, Report of the Panel, United States: Section 110(5) of U.S. Copyright Act, *available at* http://www.wto.org/english/tratop_e/dispu_e/1234da.pdf ("DS160"). The DS160 panel of arbitrators recommended "that the [WTO's] Dispute Settlement Body request the United States to bring subparagraph (B) of Section 110(5) into conformity with its obligations under the TRIPS Agreement." *Id.* at 75. *See also* Laurence R. Helfer, *World Music on a U.S. Stage: A Berne/TRIPs and Economic Analysis of the Fairness in Music Licensing Act*, 80 B.U. L. Rev. 93 (2000).

8. *See* Chris Castle, *Soft Power and the Demise of "Free" Culture*, Feb. 5, 2009, *available at* http://blog.artsandlabs.com/2009/02/soft-power-and-the-demise-of-free-culture.html ("there is no such thing as a 'free' culture").

9. "[T]he situation where the owner of a copyrighted work cannot be identified and located by someone who wishes to make use of the work in a manner that requires permission of the copyright owner. Even where the user has made a reasonably diligent effort to find the owner, if the owner is not found, the user faces uncertainty—she cannot determine whether or under what conditions the owner would permit use. Where the proposed use goes beyond an exemption or limitation to copyright, the user cannot reduce the risk of copyright liability for such use, because there is always a possibility, however remote, that a copyright owner could bring an infringement action after that use has begun." Report on Orphan Works, *supra* note 4, at 1.

10. *See, e.g.*, Copyright Act of Canada, R.S.C., 1985, ch. C-42, § 77; i2010: Digital Libraries High Level Expert Group—Copyright Subgroup, Final Report on Digital Preservation, Orphan Works, and Out-of-Print Works (June 4, 2008), *available at* http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/reports/copyright/copyright_subgroup_final_report_26508-clean171.pdf ("Copyright Subgroup Final Report").

11. *See* Copyright Act of Canada § 77.

12. i2010 European Digital Libraries Initiative appears to contemplate 1:1 digitization but no derivative works; for example, the European Library Portal offers access to the combined resources of the 45 national libraries of Europe; www.europeanlibrary.org offers free searching and delivers digital objects, some free, some requiring payment.

13. Whether work for hire actually applies in the record business is a subject of hot debate. *See* Randy S. Frisch & Matthew J. Fortnow, *The Time Bomb in the Record Company Vaults*, Ent. Pub. & the Arts Hndbk. 111 (1994).

14. *See, e.g.*, Directive 2001/29/EC on harmonization of copyright in information society exception for specific acts of reproduction by publicly accessible libraries, educational establishments, museums, or archives (note: not mandatory) (Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001, OJ L 167/10 of 22 June 2001) ("Directive 2001/29/EC").

15. The goal of the i2010 European Digital Libraries Initiative is to make Europe's cultural resources and scientific records accessible to all and preserve them for future generations (Communication i2010: digital libraries of 30 September 2005, COM(2005) 465 final; Commission Recommendation of 24 August 2006, on the digitization and online accessibility of cultural material and digital preservation (2006/585/EC), OJEU L 236/28 (31.8.2006)).

16. References to "libraries" or "archivists" in this article refer to repositories of physical objects and persons engaged in the restoration of physical works, such as films or television programs. These words do not include mere online "libraries" with no physical counterpart. The Bibliothèque Nationale is a "library"; Google Books is not.

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17. Digital storage media are inherently unstable as a means of long-term archiving. *See* Nels Olson & Jian Zheng, NIST/LoC Final Report to ODAT, Presentation to the January 30, 2007, Meeting of the Government Information Preservation Working Group ("GIPWG") (a joint working group of the National Institute of Standards and Technology and the Library of Congress); Fred R. Byers, *Care and Handling of CDs and DVDs—A Guide for Librarians and Archivist* (NIST Special Publ'n 500-252, National Institute of Standards & Technology, Gaithersburg, MD, Oct. 2003).

18. *See, e.g.*, Chandru J. Shahani, Basil Manns & Michele Youket, *Longevity of CD Media: Research at the Library of Congress* (The Library of Congress, Washington, D.C., Dec. 15, 2004).

19. *See* Berne Convention for the Protection of Literary and Artistic Works (1971) (Berne Convention), art. 9, Right of Reproduction.

20. In order to deliver digital works to users over the Internet, there will almost certainly be a need to create buffer and cache copies of the work concerned, so the reproduction safe harbor for orphan works needs to be narrowly drafted, but not so narrowly that the drafting frustrates the policy purpose underlying the digital delivery to users of the library's holdings.

21. "A 'derivative work' is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a 'derivative work.'" 17 U.S.C. § 101. Similarly, the Berne Convention protects the author's rights to make and authorize derivative works in the exclusive rights granted in article 8 (Right of Translation), article 12 (Right of Adaptation, Arrangement and Other Alteration), and article 14 (Cinematographic and Related Rights).

22. In the case of three-dimensional objects, such as sculpture or antiquities, the reproduction involved will likely be a two-dimensional photograph until such time as three-dimensional reproduction technology is widely available online.

23. For example, if a library were to publish a book of a collection or exhibit.

24. H.R. 5439, 109th Cong., 2d sess. (2006).

25. S. 2913, 110th Cong., 2d sess., introduced Apr. 24, 2008.

26. *See* James V. DeLong, *Google the Destroyer*, TCS Daily, Jan. 7, 2008, *available at* http://www.ksrlaw.com/NewsPage.aspx?id=Publications&article=1199752418745. "Google is in a different position. Its major complements already exist, and it need not worry in the short term about continuing the flow. For content, we have decades of music and movies that can be digitized and then distributed, with advertising attached. A wealth of other works await digitizing—books, maps, visual arts, and so on. If these run out, Google and other Internet companies have hit on the concept of user-generated content and social networks, in which the users are sold to each other, with yet more advertising attached."

27. For an excellent review of the 2008 orphan works legislative activity in the United States, see Professor Jane C. Ginsburg's paper *Recent Developments in U.S. Copyright Law Part I: "Orphan Works"* (Paper 08152, Columbia Public Law & Legal Theory Working Papers, 2008).

28. *See* Copyright Board of Canada, Unlocatable Copyright, http://cb-cda.gc.ca/unlocatable/brochure-e.html ("Unlocatable Copyright").

29. Copyright Act of Canada, R.S.C., 1985, ch. C-42, § 77: "(1) Where, on application to the Board by a person who wishes to obtain a licence to use (a) a published work, (b) a fixation of a performer's performance, (c) a published sound recording, or (d) a fixation of a communication signal in which copyright subsists, the Board is satisfied that the applicant has made reasonable efforts to locate the owner of the copyright and that the owner cannot be located, the Board may issue to the applicant a licence to do an act mentioned in section 3, 15, 18 or 21, as the case may be. (2) A licence issued under subsection 1 is non-exclusive and is subject to such terms and conditions as the Board may establish. (3) The owner of a copyright may, not later than five years after the expiration of a licence issued pursuant to subsection 1 in respect of the copyright, collect the royalties fixed in the licence or, in default of their payment, commence an action to recover them in a court of competent jurisdiction."

30. *See* Unlocatable Copyright, *supra* note 28.

31. *See id.* ("The Board will grant a licence only if you have made every reasonable effort to find the copyright owner.")

32. The application should include a description of the work (type, title, year of production, etc.); the names and nationalities of the creator (author, performer, producer, broadcaster, as the case may be), of the copyright owner, and of the publisher; if the creator is dead, the date of death; how the applicant intends to use the work with specificity, including the suggested retail sale price; a copy of the material to be used; how soon the applicant plans to use the work and for how long; any information as to what royalties the applicant is paying or has paid for similar uses of similar works; a detailed description of all efforts made to try to locate the copyright owner and the results, with copies of all relevant material documenting the efforts; and the name, title, address, telephone number, fax number, and e-mail address of the person who prepared the license application or the person seeking the license.

33. *See also* Commission Recommendation of 24 August 2006, on the digitization and online accessibility of cultural material and digital preservation (2006/585/EC) ("2006 Recommendation").

34. Located at http://www.europeanlibrary.org.

35. Located at http://www.europeana.eu.

36. *Available at* http://ec.europa.eu/information_society/activities/digital_libraries/experts/hleg/meetings/index_en.htm).

37. *See, e.g.*, Copyright Subgroup Final Report, *supra* note 10, at 8. "Therefore, the Copyright Subgroup wishes to underline that these recommendations deal with digital copying for the purpose of preservation only and are strictly limited to the purpose of preserving, for the long term, items of cultural and national heritage produced and distributed in different formats and editions. Any copies made in excess of that permitted by applicable law may not be used to increase the number of copies available for access to end users until the expiry of copyright, provided that access to any copy may occur only for onsite consultation."

38. *See id.*

39. *See* 2006 Recommendation ¶ 6(c).

40. *See* Copyright Subgroup Final Report, *supra* note 10, annex 5.

41. *Id.* at 25.

42. *See* Illustrators Partnership of America (http://www.illustratorspartnership.org).

43. These included the American Association of Independent Music, the National Music Publishers Association, the Association of Independent Music Publishers, and the National Association of Recording Industry Professionals.

44. Webcast *available at* http://videos.cmitnyc.com/asip.html.

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