

**Before the  
COPYRIGHT OFFICE,  
LIBRARY OF CONGRESS  
Washington, DC**

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Orphan Works and  
Mass Digitization  
(FR Doc. 2012-25932;  
Copyright Office Docket  
Number 2012-12)

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**COMMENTS OF THE  
NATIONAL WRITERS UNION  
(UAW LOCAL 1981, AFL-CIO)**

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The National Writers Union (UAW Local 1981, AFL-CIO) welcomes the opportunity to submit these comments in response to the Notice of Inquiry by the U.S. Copyright Office, "Orphan Works and Mass Digitization," FR Doc. 2012-25932, Copyright Office Docket Number 2012-12, published at 77 *Federal Register* 64555-64561 (October 22, 2012).

The National Writers Union (NWU) is a national labor union that advocates for freelance and contract writers. The NWU includes local chapters as well as at-large members nationwide and abroad. The NWU works to advance the economic conditions of writers in all genres, media, and formats. NWU membership includes, among others, book authors, journalists, business and technical writers, website and e-mail newsletter content providers, bloggers, poets, playwrights, editors, and academic writers. The NWU is a national amalgamated union (Local 1981) of the United Auto Workers, AFL-CIO.

Through this proceeding, the Copyright Office is seeking comments regarding two issues which we believe are distinct, raise different issues, and should be considered separately: (1) so-called "orphan works" and (2) mass digitization of copyrighted works, paper copies of which are currently held by libraries, archives, and commercial entities. In particular, the Copyright Office "is interested in what has changed in the legal and business environments during the past few years [since the decision by Congress in 2008 not to adopt any of the then-pending "orphan works" bills] that might be relevant to a resolution of the problem and what additional legislative, regulatory, or voluntary solutions deserve deliberation."

The NWU believes that the so-called "orphan works" problem has been greatly exaggerated. This "problem" has been to a significant degree manufactured as a polemical device, and to a greater degree appropriated and misused to serve commercial interests

antithetical to those of writers and other creators. Regardless of the benign *intentions* of many scholars, academics, and librarians, the (false) perception they promote of an "orphan works crisis" primarily serves Google, other search engines and Web spiders and distributors of digital content, print publishers, and other commercial "partners" and profiteers in copyright-infringing mass digitization and digital distribution schemes. These for-profit companies are the real parties of interest in this inquiry, and these would be the principal potential beneficiaries of a statutory financial windfall from "orphan works" and/or mass digitization legislation – at the expense of the incomes of working writers and other creators.

To the extent that there is a real "orphan works" problem (other than the "problem" for copyright thieves of writers and other creators who seek our fair share of the revenues generated by the fruits of our creative labor), that problem can be significantly reduced by legislative and administrative changes by Congress and the Copyright Office to restore to writers and other creators rights that are or might otherwise be "orphaned," to make it easier to find writers and other creators, and to make it easier and cheaper to register and update information about holdings of specific rights and how to contact creators. All of these measures can and should be enacted, and given time to work and for their effects to be evaluated, before any legislation specifically directed to "orphan works" is even considered.

In addition, the NWU believes that any "orphan works" legislation similar to the bills considered by Congress in 2008, or any legislation or regulation purporting to authorize mass digitization and distribution of digital copies without the permission of the holders of the rights to digital copying of the works being copied, would contravene the intent of the copyright clause of the U.S. Constitution and the letter of the Berne Convention and the WIPO Copyright Treaty.

Should such legislation be enacted, the NWU will encourage and assist our members in other countries, and other foreign writers and creators, to seek redress through their governments, and sanctions against the U.S. government, for these violations by the U.S. government of its treaty obligations – just as we have already urged, and will continue to urge, the U.S. government to seek sanctions against the governments of other countries that have violated their treaty obligations by enacting "orphan works" legislation and/or granting statutory licenses for mass digitization without rightsholders' permission.<sup>1</sup>

### **1. The nature and extent of the "orphan works" problem**

An "orphan work" is generally defined by proponents of "orphan works" legislation as a copyrighted work for which "the rightsholder cannot be found by a would-be user after diligent search."

Almost every word of that definition contains ambiguities or complications that would render that definition hopelessly vague and unsuitable for use in a statute or regulation.

As discussed in the NWU white paper, "Facts and Fallacies of Orphan Works,"<sup>2</sup> holdings of rights in published works are rarely undivided except in the case of "works for hire" or works subject to an unconscionable (and impermissible in some countries) "all-rights" contract, making it unclear to which of multiple holders of particular divided rights to a work this definition refers.

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1 See comments of the NWU, "Request of the U.S. Intellectual Property Enforcement Coordinator for Public Comments: Development of the Joint Strategic Plan on Intellectual Property Enforcement (FR Doc. 2010-3539)," August 10, 2012, pp. 5-9, available at <<http://www.nwubook.org/NWU-IPEC-2012.pdf>>, and NWU comments to the U.K. House of Commons Select Committee on Culture, Media and Sport in response to an inquiry regarding "Support for the Creative Economy," November 9, 2012, available at <<http://www.nwubook.org/NWU-UK-ERRB.pdf>>.

2 NWU, "Facts and Fallacies of Orphan Works," April 4, 2012, available at <<http://www.nwubook.org/NWU-orphan-works-4APR2012.pdf>> and attached as an appendix to these comments. This white paper was produced for, and distributed at, the symposium on "Orphan Works and Mass Digitization" at the University of California Berkeley, which was referenced in the Copyright Office Notice of Inquiry at 77 FR 64558, note 31.

The concept of "finding" or "identifying" the holder(s) of particular specified rights to use a work in a specific way, in a specific medium, at a specific time, in a specific place, and for a specific purpose conflates three distinct tasks, of quite different types, for which different skills are required and different entities are qualified. One of these tasks is essentially judicial in character and thus entirely unsuited to be performed by librarians or archivists:

1. Finding (attributing) who is or are the author(s) or creator(s) of the work and thus who was or were, at the time of its creation, the holder(s) of all rights in the work;
2. Finding (adjudicating) who is or are the current holder(s) of the rights in question, based on tracing the chain of copyright ownership and/or chain of contractual assignments or licenses, and including adjudicating questions of interpretation of the terms of those contracts, such as which rights (as between those rights currently held by different rightsholders) are implicated by a particular use; and
3. Finding (locating and determining how to contact) the person(s) or legal entity or entities determined to be the holder(s) of the rights in question.

It's unclear what degree of certainty, according to what substantive criteria, procedural rules, and standard of evidence and burden of proof, would be required of a would-be user with respect to any of these three "findings" in order for a work to be deemed "orphaned" under this definition. It's also unclear whether a work would be deemed "orphaned" if a would-be user was unable to make any one of these three "findings" with sufficient certainty. That would seem to be the obvious implication of the definition cited above. But if that were to be the case, that would mean that in the event of a dispute between claimants to rights, or between holders of divided rights each of whom believes that their rights cover the contemplated use, the would-be

user would be entitled to treat the work as "orphaned" if they were unable to make a definitive "finding" or "identification" (adjudication) as to which rightsholder(s) holds the rights to the particular contemplated use. Despite the presence of multiple locatable holders of rights to the work, it would be fair game for copying without the permission of any of them, in the same manner as if it were anonymous or if the rightsholder(s) could not be located. That would be highway robbery from rightsholders, not the "rescue" of "abandoned" or "hostage" works.

The continued existence of such fundamental problems in proposed statutory definitions is indicative, we suspect, of the fact that proposals for "orphan works" legislation have largely been drafted by academics removed from the practices, norms, and business models of commercial writing. In light of this, the Copyright Office and Congress should take special care in future workshops and hearings to seek out and learn from working writers and other creators about the ways – many of them unanticipated by noncommercial advocates for these proposals – that "orphan works" and mass digitization legislation would affect our working lives.

The "poster children" for orphan works and mass digitization legislation are letters, notes, papers, ephemera, and other documents held by archives, which are anonymous (or their creators deceased and their heirs unknown or unlocatable), and which so far as their archival curators know have never been published and are not being, or ever likely to be, exploited commercially (archivists presuming themselves to be expert predictors of the future commercial value of literary rights in particular works, despite not normally being involved in such commercial publishing activities). Proponents of such legislation have been beating the bushes for anecdotal evidence of such works, and have found some examples of particular untraceable rights.

But the real question is not whether *some* such works exist, but how many, how large a fraction of the body of work likely to be defined as "orphaned" they constitute, and above all what scholarly, noncommercial, and/or creative activities with respect to these works, which do not conflict with their normal commercial exploitation (a point to which we will return), are actually prohibited by current copyright law.

Copyright law does not prohibit archivists or librarians from preserving these works or making them available to library patrons or archive visitors. Copyright law does not prohibit anyone from reading these works, quoting from them within the limits of "fair use," or creating new and original works inspired by them. Both the Berne Convention and Section 108 of the Copyright Act (17 USC §108) allow libraries and archives to make additional copies of such works, even copies in different media (such as digital copies of works acquired on paper), for purposes of preservation, and to allow patrons to read those copies.

What is prohibited by U.S. copyright law (and which must be prohibited to fulfill U.S. obligations pursuant to the Berne Convention) is not the *use* of existing legitimate copies, but the making of *additional* copies beyond the bounds of "fair use." That's publication or republication at best, plagiarism or piracy at worst, not scholarship or creativity.

Nor is the issue digitization of works on paper, or the creation of digital libraries, both goals which the NWU unhesitatingly and enthusiastically supports. With the exception of a small minority of archival material, most library collections consist of books which are either in the public domain, or the rights to copying of the text of which in digital form are held by identifiable and locatable authors (or their identifiable and locatable heirs) who would be happy, for reasonable compensation, to license their inclusion in digital libraries.

It is print publishers, not writers, who have resisted licensing for library use of digital copies (e-books) of works they have published on paper – even when those print publishers never acquired and don't hold the digitization rights to most older works,<sup>3</sup> and aren't honoring their contractual agreements with writers for the division of revenues for more recent works.<sup>4</sup>

The only digital libraries prohibited by U.S. law and the Berne Convention are those populated with content obtained by theft or expropriation of creators' (or other rightsholders') intellectual property. The NWU is eager to join librarians, academics, the reading public, and the Copyright Office in lobbying for the appropriation of funds for the creation and maintenance of a national public digital library. But just as the librarians, the software architects, the database administrators, and the bricklayers who would build the edifice to hold the servers of the digital library should be paid (and would expect to be paid) for their labor, so should the writers, photographers, illustrators, musicians, and other creators of its contents.

Nothing in current copyright law precludes or restricts the creation of digital libraries, or the licensing by libraries of digitization rights to most of their current collections of work in analog formats. Why then are librarians and academics so insistent on achieving these goals through "orphan works" or "mass digitization legislation, rather than normal private or nonprofit fundraising or the appropriation of government funds?

The real root of the problem is that (a) libraries and academic archives don't believe that enough money is or will be available from these sources to fund the digital library of their dreams, and (b) Google and other large commercial digital content distribution companies have

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3 The decision of the Supreme Court in *New York Times Co. v. Tasini*, 533 U.S. 483 (2001), a case involving the then president of the NWU, makes clear that the assignment or licensing of rights to reproduction of a work on paper does not necessarily include or imply the assignment of rights to reproduction in digital or other media. The same principles obviously apply to contracts for the publication of printed books.

4 See "NWU Supports Librarians' Objections to Publishers' E-Book Licensing Terms", October 5, 2012, available at <<http://www.nwu.org/nwu-supports-librarians039-objections-publishers039-ebook-licensing-terms>>.

ample cash in hand to fund these projects, but will only do so if they are allowed to realize sufficient profits on their investments. This has created an unfortunate pressure on noncommercial entities to lobby for the ability of their commercial "partners" to exploit and profit from rights given to them by statute under charitable pretexts. The problem this creates for writers and other creators is that, as discussed later in these comments, those revenues will be "earned" by cannibalizing revenues that would otherwise be earned by writers and other creators through our own licensing or exploitation of rights to use of our work in digital forms.<sup>5</sup>

## **2. Should archived Web pages be subject to an "orphan works" law?**

Unless works published online are explicitly excluded from "orphan works" legislation, the majority of works potentially subject to being deemed "orphaned," and an even larger percentage of those which actually will be so deemed, will be works published on the Web.

The numbers of Web pages far exceed the numbers of in-copyright books. As early as 2005, the Internet Archive (Archive.org) had already collected copies of more than 40 million Web pages for which it hoped to obtain statutory permission to treat by default as "orphaned."<sup>6</sup> Google, Microsoft's Bing, and other (for-profit) search engines all operate Web "crawlers" or "spiders" whose goal is to collect copies of everything available on the public Web.

In their comments in response to this inquiry, the members of the Library Copyright Alliance (LCA) state, "The leading search engines, operated by two of the world's most profitable companies, routinely cache billions of web pages without the copyright owners'

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5 See NWU, "Facts and Fallacies of Orphan Works" (attached); see also Edward Hasbrouck, "What do authors fear from 'Orphan Works' licensing proposals?", available at <<http://hasbrouck.org/blog/archives/002004.html>>.

6 "Orphan Works Reply Comments of the Internet Archive", May 9, 2005, p. 11, available at <<http://www.copyright.gov/orphan/comments/reply/OWR0129-InternetArchive.pdf>>

permission. This industry practice has faced absolutely no legal challenge in the United States since the Amazon.com decision in 2007."<sup>7</sup>

It would be a mistake to accept the erroneous inference of the LCA's members – as parties with little or no direct contact or familiarity with the problems of working Web writers – that a lack of Federal copyright infringement lawsuits against Google, Microsoft, the Internet Archive, or their counterparts and competitors is indicative of belief by freelance creators or small Web publishers that these companies' caching, copying, and redistribution of our work, for their exclusive profit, does not infringe our copyrights.

As has been made clear to the Copyright Office in the course of your ongoing inquiry into remedies for small copyright claims,<sup>8</sup> Federal civil litigation is prohibitively expensive for individuals or small publishers, even against infringers with shallower pockets than Google or Microsoft. This is especially true in the case of works first published online, because of the difficulty and expense of timely registration of copyright in frequently updated Web content and the consequent unavailability of attorneys' fees or statutory damages.

(The registration procedures of the Copyright Office have not kept pace with the digital age. For example, to register copyright in a Web site or blog, one must file a separate application and pay a separate fee to register the new content first published on each day. At \$35 per application, that means annual fees of \$12,775 to register copyright and preserve eligibility for statutory damage and recovery of attorneys' fees for a blog that is updated daily. Few blogs or

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7 "Comments of the Library Copyright Alliance in Response to the Copyright Office's Notice of Inquiry Concerning Orphan Works and Mass Digitization," January 14, 2013, available at <<http://www.librarycopyrightalliance.org/bm~doc/lca-orphanworks-comments-14jan13.pdf>>.

8 Comments of the NWU, "Remedies for Small Copyright Claims," (FR Doc. 2011–27824), January 16, 2012, available at <[http://www.copyright.gov/docs/smallclaims/comments/37\\_nwu\\_org.pdf](http://www.copyright.gov/docs/smallclaims/comments/37_nwu_org.pdf)>, and testimony of NWU witnesses Susan E. Davis (New York) and Edward Hasbrouck (Los Angeles) at Copyright Office public hearings, November 2012, <<http://www.copyright.gov/docs/smallclaims/public-hearings-112012.html>>.

self-published Web sites, even profitable ones, can add such an expense and remain profitable. Nonregistration of copyright in such works cannot be taken as any indication of lack of interest in exploiting them commercially, even if registration were not a prohibited formality.)

We haven't sued Google, Microsoft, the Internet Archive, or their counterparts because we can't afford to, not because we think what they are doing is legal. We continue to protest the failure of the Department of Justice to bring criminal charges against these large, sophisticated for-profit corporate infringers of the rights of individual writers and other creators.

Every click on one of the infringing digital copies served up by one of these companies from their "cache" to a Web browser is a click, and the associated clickstream of advertising revenue, diverted from the distributor(s) of legitimately authorized copies of the work(s) included on that Web page. The same would be true of each click on a copy of a work made available on the Internet under any "orphan works" scheme. The holders of rights to such digital distribution lose advertising revenue they would otherwise have earned, regardless of whether the infringers charge for such copies or distribute them with commercial intent.

In effect, the LCA argues that the sort of "orphan works" legislation its members supported in 2008 is no longer needed because they have learned that they are effectively immune from civil lawsuits by individual victims of their infringing activities. Congress doesn't need to legalize their infringing mass digitization programs, they now say, because there is no significant risk that their victims will be able to enforce our rights against them.

Instead of overtly reducing the scope of our (nominal but unenforceable) rights in our creative work, the LCA now proposes to further reduce our ability to enforce those rights, by reducing the availability of statutory damages for works somehow deemed "orphaned."

But as was also made clear by the NWU and other witnesses in the ongoing Copyright Office inquiry into remedies for small copyright claims, statutory damages are vital to effective redress for infringement. That's especially true online, where establishing actual damages for partial diversion of the advertising revenue clickstream for a work is likely to require audits and expert analysis of multiple layers of online advertising and affiliate networks.

In addition to the policy objections to such a measure to deny or reduce statutory damages for infringement of work the infringer claims they thought was "orphaned," any such measure would exacerbate the ongoing U.S. violation of Article 14 of the WIPO Copyright Treaty: "Contracting Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements." No *effective* action against infringers is currently available to most individual victims of infringement by large corporations, especially for foreign holders of copyrights not timely registered in the U.S., who are entitled to protection of their rights without formalities but who are ineligible for statutory damages or recovery of attorneys' fees.

Works included on archived Web pages are particularly likely to be deemed "orphaned." It's far less common for Web pages to contain explicit statements of authorship than it is for printed books or journals. A single Web page may be dynamically generated from a database of articles, comments, photographs, illustrations, etc., created by, and to which rights are held by, multiple contributors. Providing attribution within the page would require complex scripting that is beyond the abilities of most Web publishers. We have been unable, for example, to find any plug-in for a blogging or content management platform such as Wordpress designed to provide a

copyright and authorship notice, generated on-the-fly from information embedded in the content management database, for use as part of a dynamically generated multi-author Web page.

Many blogs and other Web sites are *deliberately* anonymous, including many sites which include advertising and which generate revenues for the holders of rights to their content.

Content that was once available on the Web, but is no longer, may have been removed because a time-limited license for online distribution has expired (and the work is now being distributed in some other, but perhaps not obviously linked, form, such as a work that attracted such a readership in Web form that it has been adapted into an e-book, which may or may not carry the same title or author name or pseudonym as the prior Web version), or because the author no longer chooses to make it available (perhaps because her opinions have changed and she no longer believe it to be accurate or wants it to be relied on, or because a revised or updated version has been published elsewhere, again perhaps with a different title and/or attribution). Whatever the reasons for these choices, they reflect the exercise by copyright holders of our rights to control whether or how our work is distributed, not the "abandonment" of those rights.

The Web sites most likely to be deemed "orphaned" would be pirate sites. These sites typically contain a mix of copyright-infringing text fragments copied from other sites (to attract search engines and thus eyeballs for the advertisements) and ads to generate revenue. Source and authorship attribution is, of course, *deliberately* removed from pirated content; content from multiple sources is often combined indiscriminately on the same page; and titles and other meta-data are typically modified for purposes of search engine optimization.

Any high-traffic Web page is likely to be targeted by such pirates. A typical scenario would be for text from such a legitimate site to be reproduced on one or more pirate sites. Copies

of those infringing sites would be "cached" by archives and search engines, and those "cached" copies, deliberately stripped by the pirates of author, title, or other identifying clues, would be deemed "orphaned." The original work would thus come to be available as "orphaned" (perhaps from an "archive" site with higher search engine ranking than the author's legitimate personal site), even while the author was continuing to try to exploit the work on her own or another Web site.

Material published online should not be subject to any "orphan works" law.

### **3. Mass digitization and "diligent search"**

There's something fishy about the arguments made by proponents of mass digitization of "orphan works" who protest to legislators and regulators that diligent individualized searches for rightsholders and holdings are prohibitively time-consuming and costly, while simultaneously trying to reassure writers and other creators that before our work is deemed "orphaned" and used without our permission, exactly that sort of diligent, individualized search will be conducted.<sup>9</sup>

In practice, we suspect that "diligent" would remain as pretextual rhetoric, but subject to definitions and procedural requirements (or the lack thereof) that would permit works to be deemed "orphaned" on the basis of automated database searches that are anything but "diligent." If genuinely diligent searches were conducted, "orphan works" legislation would not realize the savings in rights clearance time and cost to would-be users that is claimed as its intended benefit.

The only savings to rightsholders, if genuinely diligent individualized searches were performed, would be in short-cutting the steps currently required by a would-be licensee *after* the

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<sup>9</sup> See e.g. the comments by proponents of "orphan works" schemes in response to NWU member Ursula K. Le Guin's blog post, "Kidnapped," January 21, 2013, <<http://bookviewcafe.com/blog/2013/01/21/kidnapped/>>.

completion of a successful search for the holder of the applicable rights: negotiating the price and other terms of the license. Under an "orphan works" scheme, the would-be licensee would be able to avail themselves of, and impose on rightsholders, standardized terms and prices. This is why, as a would-be user, the searcher would have an interest in the *failure* of the search.

Genuinely diligent searches are especially unlikely to be carried out in the context of mass digitization projects. Mass digitization will inevitably be conducted on the basis of mass searches that will be neither individualized nor diligent but inevitably automated, database-driven, and thus systematically error-prone and more likely to overlook commercial exploitation and claims to rights by individual creators than those by large publishers.<sup>10</sup>

Indeed, Google has repeatedly and explicitly stated to the Copyright Office that the only search for rightsholdings or rightsholders which Google believes it is feasible to conduct is an automated search of a single database, and that Google seeks "orphan works" legislation which would define a search of a single database as "reasonable *per se*".<sup>11</sup> Not presumptively reasonable or diligent, but conclusively so: "Only where a user failed to conduct a 'reasonable *per se*' search would the question of reasonableness remain a litigable issue."<sup>12</sup>

In light of these statements about the actual intent of the leading company carrying out mass digitization, writers and other creators must interpret the reassurance from advocates of "orphan works" legislation that "A diligent search for you will be carried out before any of your

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10 See NWU, "Facts and Fallacies of Orphan Works" (attached); see also Edward Hasbrouck, "What do authors fear from 'Orphan Works' licensing proposals?", available at <<http://hasbrouck.org/blog/archives/002004.html>>.

11 "Google's Response to Notice of Inquiry Regarding Orphan Works", March 25, 2005, available at <<http://www.copyright.gov/orphan/comments/OW0681-Google.pdf>>; "Google's [Reply] Response to Notice of Inquiry Regarding Orphan Works," May 9, 2005, available at <<http://www.copyright.gov/orphan/comments/reply/OWR0134-Google.pdf>>

12 "Google's [Reply] Response to Notice of Inquiry Regarding Orphan Works," May 9, 2005, p. 3, available at <<http://www.copyright.gov/orphan/comments/reply/OWR0134-Google.pdf>>

work is deemed to be orphaned," as meaning, "A robot will query a single database for an exact match before your work is deemed 'orphaned' and fair game for use without your permission."

It's understandable for "search engines" to overstate, as a matter of marketing, the extent to which their automated processes provide an adequate substitute for human search expertise. Yet anyone who has ever tried to substitute the first answer to any substantive question provided by an Internet search engine for the answer provided by a professional researcher – a professional journalist or scholar or librarian, for example – will immediately recognize how far short of a truly diligent search "Let's see what Google or Bing or Wikipedia says" actually falls.

Regardless of the search algorithm, there is currently no single database, nor even any collection of databases, containing comprehensive information about holdings, assignments, transfers, or licenses of rights, or contact information for all holders of rights, for works that are being actively exploited. Nor can or should creators or other holders of rights, particularly foreign creators and other foreign rightsholders entitled by the Berne Convention and the WIPO Copyright Treaty to protection of their rights and availability of redress for infringements "without formalities," be required to participate in any such system.

Most copyright registrations contain no current contact information. For example, copyright in books is typically registered by the publisher in the name of the author, but providing contact information for the author only "in care of" the publisher's office. Publishers relocate their offices, change their names, and undergo mergers, acquisitions, and restructurings. Rarely do they bother to pay the fees (\$105 to record a document related to a single work) to record new contact information for each work they have published, each time they move. Why

would the erstwhile print publisher bother, since they aren't the copyright holder and may no longer be exploiting the book, even if the author is continuing to exploit it in digital form?

For a freelance writer who has published many short works, much less a blogger or self-publisher of a Web site who publishes new work daily, the Copyright Office document recording fees (not to mention the administrative burden) for a change of address are clearly prohibitive.

Similarly, most assignments, transfers, and licenses of rights, and their reversions or terminations, are never recorded with the Copyright Office or in any database.

Bibliographic databases are even less likely than copyright registration records to be useful in establishing current rightsholdings. Fundamentally, bibliographic databases are databases about what has been *published*. As such, they rarely, if ever, contain any information about current rightsholdings. As discussed in the NWU white paper on "Facts and Fallacies of Orphan Works" attached as an appendix to these comments, having published an edition of a work is not evidence of currently holding any rights to that work, much less of what those current rightsholdings, if any, might be.

Self-publishing, especially online self-publishing, is especially unlikely to be reflected in any bibliographic or licensing database. As we saw in the claim process for the proposed Google Books Settlement, it will be relatively easy for publishers to dump their entire backlist catalogs into databases of rights claims. But it will be relatively more burdensome for individual writers and creators to list or claim rights to all our works. Past publishers will likely still be included in such databases, even if they held only limited rights (for example, print and not digital rights) or no longer hold any rights at all to our work. As a result, searches based on bibliographic databases will systematically favor claims to rights by past publishers over claims to those same

rights by writers and other creators. Self-published work will be much more likely to be misidentified as "not being exploited" or "orphaned" than work published by larger publishers.

A common "failure mode" for a search based on bibliographic data will be that a publisher of an edition of a work is misidentified (i.e., misadjudicated) by the searcher as the likely holder of certain rights in a work, when in fact those rights are held by the author. If that publisher or its successor-in-interest cannot be located, the searcher will claim that she was unable to locate "the rightsholder," even though the author was never searched for (because the author was mistakenly believed not to be the holder of the rights at issue). A separate, explicit statutory requirement for a search for, and notice to, all authors and other creators, even if they are not believed to be the holders of the rights at issue, is essential to mitigate this risk.

Any valid copyright interest originates with the creator as the original holder of all rights. The *only* way to "search" for current holdings and holders of rights is to (1) start with the creator (or the creator's heirs), (2) ask the creator whether and if so to whom and on what terms and conditions she has transferred, assigned, or licensed which rights, and (3) trace the chain(s) of currently valid successors in interest, assignment, transfer, or licensing of those rights.

In its comments in response to this inquiry, the Society of American Archivists (SAA) admits that it doesn't intend to conduct the sorts of "diligent" searches that would have been required by the bills considered by Congress in 2008.<sup>13</sup> But the SAA claims that no such search is necessary to safeguard writers' and other rightsholders' interests, because "When rightsholders were identified and responded to a rights request, 91% granted royalty-free permission, suggesting that even for recent unpublished archival material there is so little of monetary import

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13 Comments of the SAA, "RE: Notice of Inquiry on "Orphan Works and Mass Digitization," January 29, 2013, available at <[http://www2.archivists.org/sites/all/files/SAA\\_OrphanWorks\\_Comments012913.pdf](http://www2.archivists.org/sites/all/files/SAA_OrphanWorks_Comments012913.pdf)>.

as to undercut a cost-benefit justification for extensive searching... Most unpublished material found in archival repositories is of little commercial value and the rights owners of that material have little interest in exploiting the material itself."

But with all due respect for archivists' expertise within their profession, we are unsure what, if any, skill they have as appraisers of the commercial value of copyrights, or what basis archivists have to claim knowledge of how those rightsholders who don't respond to archivists' requests for donations of rights are exploiting those rights. And the Berne Convention does not authorize exceptions to copyright on the basis of such an analysis.

Even of that minority of books which publishers (who unlike archivists have some business expertise in this area) predict are sufficiently likely to succeed commercially so much so that those publishers invest in them with advances to writers against future royalties, the vast majority never "earn out" those advances. Each book is its own entrepreneurial venture. Like most business start-ups, most books are commercial failures. The same is true of music and movies.

Does that mean that, because most books, songs, movies, etc., are commercial failures, archives or libraries or commercial "caches" and search engines should be permitted, with impunity, to reproduce the entire corpus of such works – including the small minority of successes which are profitable, some hugely so? Of course not, any more than it should be permissible to expropriate or interfere with the business models of a whole class of new businesses, merely because, "Most of them are going to fail anyway, so nobody cares." Working writers know that success is a long shot, but we care if we are denied even the chance of success.

SAA suggests that if rightsholders were required to register their interests (which they can't be required to do, since that would constitute a formality prohibited by the Berne Convention), "A 'diligent search' would then consist simply of an automated search of the registry." Archivists should, however, know better than to use the word "simply" in reference to such a search. What would one search for in the registry, and how would one search for it?

For an undated work with no explicit title or statement of authorship -- such as many items in archival collections, and many Web pages -- how would the work be "registered" and, equally or more importantly, how would that registry entry be indexed or searched?

Perhaps the closest current analogy to the sort of searches that would be required, even with a registration requirement in violation of the Berne Convention, would be the searches conducted by teachers to identify plagiarism in student work. Despite an entire industry of automated services that attempt to match the text of student papers with a corpus of potentially copied work, such searches are still (a) unreliable and (b) dependent on searching for and trying to match each sentence or phrase in the suspect paper, not solely the title or other meta-data.

Given that mass digitization *necessarily* entails, and is essentially admitted by its leading proponents and practitioners to entail, the abandonment of "diligent search" in favor of automated, database-driven, and thus *necessarily* cursory and fallible search for rightsholders and the scope and terms of their rightsholdings, the appropriate legal framework for the evaluation and implementation of mass digitization proposals is either that of "opt-in" licensing of the necessary rights, or that of taking those rights by eminent domain.

We're not sure what precedents exist for the taking of intellectual property by eminent domain, or what argument would be made for it in the case of mass digitization. Since holders of

rights taken by eminent domain must be compensated at fair market value, "We can't afford to acquire a digital library collection by purchasing the necessary rights" is not such an argument. And since takings by eminent domain require individualized, due process, judicially reviewable determinations of fair market value for each property to be taken, "We can't afford to assess the individual value of digital rights to each analog work in our collection" is not a valid argument either.

#### **4. What is "normal exploitation?"**

Laws permitting reproduction of copyrighted work without the permission of the author or other copyright holder, such as for "orphan works," are permissible under Article 9 of the Berne Convention only "provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."<sup>14</sup> Conflict with "normal exploitation" is part of the so-called "three-step test" for compatibility of national legislation or regulations with the Berne Convention.

Any inquiry into the compatibility of "orphan works" legislation with the Berne Convention must therefore begin with an inquiry into, and understanding of, the normal modes of exploitation of the works which might be deemed "orphaned" under the proposed legislation.

Unfortunately, such an inquiry has yet to be conducted.

Proposals for "orphan works" legislation have largely originated with legal scholars, including notably many of the same scholars and academics who, in their pleadings in other copyright-related litigation, have argued strenuously and explicitly that their interests as

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<sup>14</sup> Berne Convention for the Protection of Literary and Artistic Works, as amended, available at <[http://www.wipo.int/treaties/en/ip/berne/trtdocs\\_wo001.html#P140\\_25350](http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P140_25350)>.

academic writers are antithetical to those of commercially motivated writers: "The signatories to this letter are academic authors whose works of authorship are typical of the books and other works found in the collections of major research libraries... Our primary motivation in preparing these works is to share the knowledge we have cultivated with other scholars and interested members of the public. Although we are not indifferent to revenue streams we receive from books that we publish, the main reward we wish to attain from our intellectual labors is the satisfaction of contributing to the ongoing dialogue about issues of concern to us and, perhaps as an added bonus, a reputation for excellence in scholarship among our peers."<sup>15</sup>

For the same reasons that these academics argue that commercially motivated writers do not understand and cannot adequately represent their interests as academics, we would argue that most academics do not understand and cannot adequately represent the interests of those writers who depend for our livelihoods on royalties or revenues for sale, licensing, or other commercial exploitation of our written work by ourselves or third-party publishers.

Unfortunately, few if any of these academic proponents of "orphan works" legislation have bothered to consult writers of commercial work, or to conduct any serious scholarly or academic research into the actual norms and modes of exploitation utilized by working writers. Instead, scholars and librarians have relied on ill-founded, unverified, and incorrect speculation about how they assume we do and don't exploit our copyrights and earn our livelihoods.

Proponents of "orphan works" legislation have often assumed that no such inquiry is necessary, and have propagated the baseless myth that "by definition" orphan works are not being exploited and are generating no revenues for their rightsholder(s). According to this myth,

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15 Pamela Samuelson et al., Letter to U.S. District Judge Denny Chin, "Academic Author Objections to Plaintiff's Motion for Class Certification, Case No. 05 CV 8136 (DC)", February 13, 2012, available at <[http://www.law.berkeley.edu/files/Academic\\_authors\\_letter\\_to\\_Judge\\_Chin\\_021312\\_final.pdf](http://www.law.berkeley.edu/files/Academic_authors_letter_to_Judge_Chin_021312_final.pdf)>.

which has come (without debate) to dominate the discourse of "orphan works," the holder(s) of the rights to any work which is being exploited by its rightsholder(s) in any normal way will "necessarily" be found by a diligent search, and that work will not be deemed orphaned.

Let us be clear: This claim is false, and is entirely unsupported, either definitionally or factually. Nothing in the definition of "orphan works," or the criteria for deeming works "orphaned," relates to whether they are being exploited by their rightsholders. It is normal, and increasingly common, for rightsholders to exploit works commercially in ways that do not, in and of themselves, provide any means for even the most diligent searcher to identify or locate who is engaging in that exploitation or who holds which, or any, rights to those works. Often, such exploitation is not reflected in any public or private bibliographic or other database.

Exploiting works commercially, particularly in advertising-supported digital business models for content delivery, does not require rightsholders to engage in "transactions" with readers, users, or licensees, or to offer works for sale or licensing.

This is a fundamental conceptual error which underlies the entire case for the legality of "orphan works" legislation, particularly in relation to the Berne Convention. It is not a minor defect or one which can be cured by minor revisions to search methodologies.

Advertising-supported digital self-publication, for example, is attractive to, and engaged in by, some authors precisely *because* it enables them to exploit their works commercially without having to disclose their identities or engage in transactions with purchasers or licensees.

Muckrakers, whistleblowers, leakers, and writers on controversial topics or in stigmatized genres may prefer to keep this work anonymous, even while they try to make a living from it.

This may be especially true if they also write more "mainstream" or socially acceptable work, which they don't want to have tainted (and its marketability damaged) by association.

A particularly large share of erotica, for example, has long been published anonymously, especially when it is written by writers who also publish in other genres in their own names. Online self-publication allows writers of erotica to monetize this work anonymously.

In cases like these, a writer may be making her best efforts to ensure that her identity cannot be found by even the most diligent search, at the same time that she is actively exploiting, and perhaps successfully earning a living from, that anonymous work.

Advertising-supported digital self-publication is also attractive to some writers because it doesn't require that a writer spend time "marketing" rights to her work. Many writers are better writers than business people, and choose business models that enable them to focus their time on creating new work, rather than on sales or marketing. With a self-published blog or Web site, a writer need only sign up as an affiliate of Google AdSense or another advertising network, and place a snippet of code in the template for her pages. Once that's done, the ad network takes care of marketing the advertising space on the Web site, and all the writer/self-publisher has to do after that (aside from writing) is cash the advertising revenue-share checks or add in their checkbook the advertising revenue directly deposited in their checking account.

Since such an author has already decided how she believes she can best exploit and monetize her work, and is not doing so through seeking to sell or license her work to third parties, she has no reason to respond to unsolicited requests from would-be licensees or republishers of her work, and is likely to ignore them on the assumption that they are spam or simply as a waste of time. Most e-mail messages sent to any address that appears on the Web are

spam, and most requests to copy Web content are from entities that are unwilling to pay for such usage. As a result, many Web publishers choose not to put any contact information on their sites, and ignore or delete unread requests to republish their Web content on other Web sites or in other media.

As these examples should help make clear, the fact that a written work is not being offered for licensing, that the rightsholder(s) cannot be identified, or that a rightsholder does not respond to unsolicited requests for licensing of their work to third parties may all be evidence of the fact that the work is already being exploited commercially in the way the rightsholder believes best serves her interests. This is not, as the proponents of "orphan works" legislation would have us believe, evidence that the work has been "abandoned" or is not being exploited. A quick rule of thumb: if advertisements appear on the same Web page as the work, someone is exploiting the work commercially, and it should not be subject to being deemed "orphaned."

Many of the works being placed online by their creators are works that were previously published on paper in some form, although that fact may not be obvious from either version.

We don't mean to suggest that advertising-supported digital self-publication is the best or only business model utilized by freelance writers. It is, however, one of the normal modes of exploitation of copyrights. As such, it can't be ignored by the Copyright Office or Congress in assessing whether proposed "orphan works" legislation is compatible with the Berne Convention.

Any "orphan works" scheme, even one that involves genuinely diligent, individualized manual searching for rightsholders, will inevitably conflict with these normal modes of exploitation by writers of our copyrights, and will therefore violate the Berne Convention.

## 5. Developments since 2008

As part of this inquiry, inquiring minds at the Copyright Office want to know "what has changed in the legal and business environments during the past few years that might be relevant to a resolution of the problem."

The most obvious and significant change, we submit, is the continued growth of that publishing industry segment with which copying authorized by "orphan works" legislation would be most likely to conflict: advertising-supported online distribution of "free" content.

As the fastest-growing publishing segments and business models, digital publication, self-publication, and advertising-supported business models for the delivery of "free" digital content should be even more difficult to ignore or dismiss than they were five years ago.

According to a report commissioned by the Internet Advertising Bureau (IAB) and produced by researchers at the Harvard Business School, the advertising-supported Internet ecosystem in the U.S. grew from \$300 billion in 2007 to \$530 billion in 2011.<sup>16</sup> Of an estimated 5.1 million full-time-equivalent jobs in the U.S. in this sector in 2010, the same report estimates that "there are 25,000 self-employed [full-time] web content creators" (writers).<sup>17</sup>

The idea that this entire advertising-supported online publishing industry, which does not require that a work be offered for sale or licensing or that there be any "transaction" between the author/self-publisher and the reader, represents "market failure" as claimed by proponents of "orphan works" legislation, rather than market success, was already patent nonsense in 2008. But it's even more obvious today that, for better or worse, this is "normal exploitation" of copyrights.

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16 Internet Advertising Bureau, "Economic Value of the Advertising-Supported Internet Ecosystem", <<http://www.iab.net/economicvalue>>.

17 Leora D. Kornfeld, Principal Investigator, "Economic Value of the Advertising-Supported Internet Ecosystem", September 2012, p. 31, available at <<http://www.iab.net/media/file/Economic-Value-Report.pdf>>.

In other venues, such as in lobbying against "do-not-track" mechanisms or rules, and against proposed changes to European data protection rules which might impact profiling of Web browsers and targeting of online advertising, Google and other IAB members have argued that Internet advertising revenues which enable profitable delivery of "free" online content are essential to the viability of the Internet economy and digital publishing.

It is the height of hypocrisy for Google and other companies which rely on these business models for their own profits, and are key enablers of them for others as advertising brokers, so willfully to blind themselves to the importance of these models for writers and other creators.

For some of the same reasons that Google has chosen this business model for the digital delivery and commercial exploitation of its "free" advertiser-supported content, many writers and other creators have chosen this business model for the monetization of our own work – work which Google and others, ironically, would be likely to deem "orphaned" and then to kidnap for their own use.

What has not changed since 2008 is that copyright-infringing mass digitization by Google and its library partners continues unchecked, without even the pretense of a diligent search (or any search) for rightsholders or any mechanism for those who might wish to do so to "opt out" or grant permission for the scanning of works to which we hold the digitization rights.

Perhaps equally significant are some of the things that are still *not* happening, but that we would expect to see if the claims made in support of the alleged need for "orphan works" legislation were correct.

If there were a genuine crisis or impairment of research and scholarship because of the inability to make use (beyond "fair use") of "orphan works," we would expect evidence of that in

scholarly and academic journals, institutions, and Web sites. Small advertisements in journals by researchers seeking to locate primary sources of information concerning particular topics, such as the papers of a particular person or entity, have long been commonplace. But what we don't see on any regular basis, if at all, are similar advertisements seeking to locate the holders of rights to reproduce such material beyond "fair use." We don't see such ads in scholarly journals. We don't see "Wanted!" posters seeking rightsholders to particular works at entrances to libraries. We don't see links on scholarly Web sites to the (nonexistent, so far as we can tell) lists of thousands or millions of works for which the holders of some rights cannot be identified or found and as a result of which scholarship or research are being held back. Nor do we see any place where the holders of rights to such works could identify ourselves, "claim" our rights, or offer to license those works for the desired scholarly uses.

If libraries and archives were as interested as they claim to be in obtaining rights to digitization (or other use beyond "fair use" or use permitted by "first sale" rights) to works in their collections, we would expect that they would be soliciting licenses of rights to such use, and making it as easy as possible for rightsholders to license such use. But we know of no library, library consortium, or archive that has made a standing offer to holders of digital rights (who in most cases are the writers and other creators) to license digitization or digital distribution of works in their collection, much less that has established any Web-based or otherwise automated system, linked to their catalog of paper holdings, for the holders of digitization rights to these works to offer, or to accept a library offer, to license digitization or distribution in digital form, or to indicate whether or where these works are already available in digital form.

Libraries and archives often claim that they are "unable" to obtain permission to digitize their collections. But so far as we can tell, that claim remains untested, since they have yet to try to obtain such permission from us, or to create any mechanism through which we could grant it.

Meanwhile, writers have continued to take the lead in making our works – including "backlist" works which were previously published in paper editions – available in digital forms.

These efforts take a wide variety of forms, including e-books and incorporation of content into writers' Web sites. It's important to note, however, that even diligent searches would not find many of these new digital editions or recognize that they contain, in whole or in part, work included in prior paper editions. Digital publication allows different formats and structures than paper. Works previously published on paper, but now reissued by their authors in digital form, may have been revised, updated, reorganized, retitled (many Web sites don't have "titles" in the same way as books), and/or reissued with different author attribution or without author attribution. The contents of a single paper book may have been incorporated into two or ten shorter form e-books, or 100 Web pages, none of them bearing the same title as the previous single-volume paper edition or explicitly stating their relationship to the prior paper edition. Web sites are renamed, restructured, and moved. Work no longer available on one Web site or at one URL may be available on another, without any obvious link between, or meta-data shared by, the two sites. The only way to find out if a writer has published all or part of the content of a particular paper edition in another edition or format is, it *should* be obvious, to ask that writer.

The Copyright Office notice of inquiry also notes the existence of "orphan works" legislation in jurisdictions including Canada and, more recently, France and the European Union, and currently under consideration by Parliament in the United Kingdom.

The Canadian law, Section 77 of the Copyright Act (R.S.C., 1985, c. C-42),<sup>18</sup> "Owners Who Cannot be Located," provides an excellent example of some of the provisions which we believe should be included in any U.S. "orphan works" legislation, to mitigate its harms, but which were not included in the bills considered by Congress in 2008. Each of these should be included in any proposal for U.S. "orphan works" legislation: (1) A would-be user must apply in advance for a license for particular uses of particular works which they believe to be "orphaned." (2) Self-certification of having conducted a search is not sufficient. The license application and the evidence submitted in support of the claim of having conducted a diligent but unsuccessful search for the rightsholder(s) is considered by a quasi-judicial administrative tribunal, the Copyright Board, a government agency which operates according to defined rules of substantive and procedural due process, and whose decisions are subject to judicial review. (3) Grants of licenses by the Copyright Board are discretionary, not mandatory, and the Copyright Board may impose whatever conditions it sees fit on the licenses it grants. (4) Licenses granted by the Copyright Board for the use of "orphan works" in Canada are limited to use in Canada; the Copyright Board is not authorized to license global distribution on the Internet.

The French "Loi n° 2012-287 du 1er mars 2012 relative à l'exploitation numérique des livres indisponibles du XXe siècle" has been strongly protested by French authors, by other European authors, and by the NWU, as a violation of writers' moral and other rights and of French obligations pursuant to the Berne Amendment.<sup>19</sup> Similar objections have been raised to the European Union legislation. The NWU has requested, and continues to request, that "the U.S.

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18 Available at <<http://laws-lois.justice.gc.ca/eng/acts/C-42/page-71.html>>.

19 See references to the law, and to objections and objectors to it, cited in comments of the NWU, "Request of the U.S. Intellectual Property Enforcement Coordinator for Public Comments: Development of the Joint Strategic Plan on Intellectual Property Enforcement (FR Doc. 2010-3539)," August 10, 2012, pp. 6-7, available at <<http://www.nwubook.org/NWU-IPEC-2012.pdf>>.

government (including U.S. diplomatic representatives to foreign countries, multinational entities such as the European Union, and treaty bodies such as WIPO) ... [u]tilize available mechanisms, including U.S. bilateral and multilateral diplomacy and other mechanisms for enforcement and protection of U.S. treaty rights, to protest and seek sanctions against [these] violations of the Berne Convention in the form of foreign legislative or regulatory measures which fail to take account of, and would interfere with, these normal forms of commercial exploitation by U.S. writers of our works, and/or would impose impermissible 'opt out,' 'claim,' or copyright registration formalities on U.S. writers as a condition of continued protection of our rights against unauthorized digital or other copying in foreign countries."<sup>20</sup>

The provisions related to "orphan works" and to "extended collective licensing" for mass digitization in the U.K. Enterprise and Regulatory Reform Bill, under consideration in Parliament at the time of writing of these comments, have been even more widely protested by creators (including writers and photographers) and other rightsholders.<sup>21</sup> Over 70 organizations representing creators and rightsholders, including some of the largest news services and photo licensing agencies, have endorsed a joint statement to Members of Parliament opposing these proposals for reasons including that "clauses 66-68 by removing property rights of UK citizens and foreigners may breach the UK's obligations under the Berne Convention and TRIPS."<sup>22</sup> This consortium has delivered a formal "letter before claim" to the U.K. government, as the first step

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20 Ibid, pp. 8-9.

21 See Olivier Laurent, "Photography industry shows mass opposition to government copyright changes," British Journal of Photography, January 11, 2013, available at <<http://www.bjp-online.com/british-journal-of-photography/news/2235856/photography-industry-shows-mass-opposition-to-government-copyright-changes>>.

22 See the executive summary of the joint briefing paper for Members of the House of Lords, available at <[http://www.stop43.org.uk/docs/ERRB\\_Grand\\_Committee\\_Briefing\\_to\\_Peers.PDF](http://www.stop43.org.uk/docs/ERRB_Grand_Committee_Briefing_to_Peers.PDF)>.

in initiating judicial review by U.K. courts of the proposed legislation.<sup>23</sup> The NWU<sup>24</sup> and organizations of U.S. photographers and illustrators<sup>25</sup> have made similar objections.

So far as we know, there has not yet been any review by any of the relevant treaty enforcement bodies (nor could there be, for proposals not yet enacted) of whether any of these laws violate the treaty obligations of the countries that have enacted them. We continue to urge the U.S. government to bring complaints and seek sanctions against such countries.

## **6. Provisions that could mitigate the damage of "orphan works" legislation**

The NWU opposes any "orphan works" legislation similar to the bills considered by Congress in 2008 or suggested by the LCA or SAA in response to this inquiry, and believes that any "orphan works" legislation is likely to violate U.S. treaty obligations.

We also believe, however, that these proposals could be modified so as to significantly reduce the extent to which they would expropriate our intellectual property rights and impair our ability as writers to earn our fair share of the revenues generated by our creative work.

Such changes, as discussed below, would not cure, but would mitigate, the extent to which such legislation, if enacted, would conflict with U.S. treaty obligations and writers' rights.

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23 Press release, "International Media & Archive Consortium Warns of Judicial Review over UK Government Plans to Weaken Copyright", January 15, 2013, <[http://www.stop43.org.uk/docs/LBC\\_FINAL\\_15.01.12.pdf](http://www.stop43.org.uk/docs/LBC_FINAL_15.01.12.pdf)>.

24 NWU comments to the U.K. House of Commons Select Committee on Culture, Media and Sport in response to an inquiry regarding "Support for the Creative Economy," November 9, 2012, available at <<http://www.nwubook.org/NWU-UK-ERRB.pdf>>.

25 Letter to Dr. Vince Cable, U.K. Secretary of State for Business, Innovation and Skills, from the heads of the American Society of Media Photographers, Professional Photographers of America, National Press Photographers Association, Picture Archive Council of America, and American Photographic Artists, November 8, 2012, available at <[http://asmp.org/pdfs/US\\_UK68ERRB.pdf](http://asmp.org/pdfs/US_UK68ERRB.pdf)>.

In addition to provisions similar to those in the Canadian Copyright Act noted above, we recommend that any proposed "orphan works" legislation include the following provisions:

- a) A free, voluntary, registry of creator and rightsholder contact information should be established. This registry should be operated by the Copyright Office as a neutral body accountable to the due-process standards of the Administrative Procedure Act and less likely than a private registry to be captured by any particular sector of rightsholders, such as publishers and/or distributors, to the detriment of other sectors of rightsholders such as writers and other creators. Work attributed or believed to be attributable to any creator listed in this registry should not be subject to being deemed "orphaned." Creators and other rightsholders should be able to, but should not be required to, link their listing(s) in this contact database with any or all of their copyright registrations. This registry should be fully operational for at least two years, to allow creators around the world to learn of its existence and importance and register their contact information before it is used as the basis for any determinations of "orphan" status.
- b) Copyright Office fees for recording of documents, such as contracts for assignment, licensing, transfer, or reversion of rights, or notices of changes of name or address, should be eliminated or, failing that, drastically reduced.
- c) Licenses for specified uses of a work, specific rights to which are deemed "orphaned," should be granted by the Copyright Office only in response to an application including certification by the applicant that she has conducted a diligent,

- individualized search including a search of the Copyright Office's registry of creator and rightsholder contact information, and has made a diligent attempt to contact any identified or suspected creator(s) of the work, even if that creator or those creators are not believed to be the holder(s) of the rights sought to be exercised.
- d) No online usage of "orphan works" should be permitted by these licenses.
  - e) The Copyright Office should post public notices of its proposed administrative determinations of "orphan" status or grants of licenses in a searchable database on its Web site for at least 90 days before any exercise of those rights is authorized, and should send notice of such proposed determinations to any known creator(s) of the works at issue, regardless of whether a creator is believed to hold the rights at issue.
  - f) Copyright Office fees should be drastically reduced, and procedures clarified and simplified, for registration of copyright in multiple small works, such as content elements of frequently updated and/or dynamically generated blogs, Web sites, etc.
  - g) Registration requirements should be abolished, and eligibility for statutory damages and recovery of attorneys' fees should be extended to unregistered works.

To reiterate, these provisions would mitigate, but would not cure, the extent to which "orphan works" legislation would conflict with U.S. treaty obligations and writers' rights.

## 7. NWU recommended alternative approaches to the "orphan works" problem

At least with respect to written work (text),<sup>26</sup> most genuinely "orphaned" rights are rights that were held by corporations which have been dissolved without recording an explicit transfer, assignment, or designation of a successor-in-interest to those rights.

Even the most ardent promoters of "orphan works" legislation (or of expropriation of rights to copying of "orphan works" at users' discretion as "fair use") recognize that it is easier to trace natural persons and chains of inheritance than chains of corporate succession and assignment or transfer of rights between corporations. This is becoming increasingly true as death and probate records are being digitized, aggregated, indexed, and made searchable online.

The majority of the genuine "orphan works" problem, particularly as it relates to published works (whether in library collections or online) involves rights held by dissolved corporations. "Rightsholders are often impossible to find because they are corporate entities that no longer exist."<sup>27</sup>

Writers and creators, who are unable to exploit our own work because the rights, or some of them, are held by a former publisher, are the most frequent victims of this problem.

To some degree, the problem of rights that are orphaned because they are or were held by dissolved (or inactive and unlocatable) corporations is part of a larger class of problems that could best be addressed as part of a broader reform of corporate personhood.

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26 The situation may be different with respect to photographs, illustrations, music, or other types of graphic work. As writers, we will not presume to speak for photographers, illustrators, or other visual artists. As frequent collaborators with, and allies of, these working professionals, however, we strongly endorse the objections made to the application of "orphan works" legislation to graphic work made by the wide range of organizations and individuals in the Illustrators Partnership, as available in the Copyright Office record at <http://www.copyright.gov/orphan/comments/OW0660-Holland-Turner.pdf> and <http://www.copyright.gov/orphan/comments/reply/OWR0139-IPA.pdf>.

27 Comments of Lawrence Lessig, et al., on behalf of Save the Music and Creative Commons, March 22, 2005, p. 12, note 5, available at <http://www.copyright.gov/orphan/comments/OW0643-STM-CreativeCommons.pdf>.

But within the scope of copyright, the best way to liberate the "orphaned" rights held hostage by defunct corporations is to return them to their rightful owners: their creators. This could easily be accomplished by reform of Section 203 of the Copyright Act (17 USC §203).<sup>28</sup>

Section 203 provides for reversion of rights (except for rights to works for hire) on demand of the creator, between 35 and 40 years after the transfer or license of the rights in question, and provided that a specified list of formalities (including service of notice in writing on the rightsholder between two and ten years before the reversion, and registration of the reversion for a minimum Copyright Office fee of \$105 for a single work) is complied with.

The complex and expensive formalities, the requirement for actual notice to the rightsholder years in advance, the relatively long time before the right of reversion can be exercised, the relatively short window of time during which it can be exercised, and the exclusion of works for hire all mean that Section 203 is rarely invoked. It fails to accomplish its goals, and provides little actual benefit to authors and other creators.

These limitations on Section 203 also disserve third parties and the reading public, to whom creators would be willing to license or directly distribute our work if we were able to reclaim the rights to it from former publishers.

Section 203 expressly requires "serving an advance notice in writing ... upon the grantee or the grantee's successor in title." There's no provision for the common situation where a writer has assigned or licensed certain rights to a corporation, partnership, or other entity that no longer exists or cannot be located, and for which there is no explicit record of a successor in interest.

In light of this language, it's unclear if a writer can ever exercise her rights under Section 203 with respect to "orphaned" rights held hostage by a former publisher.

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<sup>28</sup> Available at <<http://www.copyright.gov/title17/92chap2.html#203>>.

To address this part of the "orphan works" problem, the NWU recommends that Section 203 be amended in the following ways, in order of priority beginning with the most important:

- a) Reversion of rights pursuant to Section 203 should be automatic after a specified term of years, without the required notice, registration, or other formalities.
- b) The language exempting "works made for hire" from Section 203 should be deleted.
- c) The term of years before reversion of rights under Section 203 should be substantially reduced from its current 35 years, preferably to no more than 20 years.
- d) Reversion of rights held by a corporation, partnership, or other entity other than a natural person should be automatic and immediate on the dissolution of the corporation, partnership, or entity, unless a notice of designation of a successor to its copyright interests is recorded with the Copyright Office prior to such dissolution.

These reforms to Section 203 should be enacted, and given time to assess their effect, before any other legislation related to "orphan works" is considered.

We look forward to the opportunity to participate in future hearings or workshops on these issues, and to work with the Copyright Office and Congress to enact these reforms.

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Respectfully submitted,

\_\_\_\_\_/s/\_\_\_\_\_  
\_\_\_\_\_

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Appendix: NWU white paper, "Facts and Fallacies of Orphan Works" (April 4, 2012)

## Facts and Fallacies of "Orphan Works"

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*[Abstract: Proposals for dealing with the perceived problem of “orphan works” have been developed without the participation of one of the most important classes of stakeholders: the authors and other creators of the works that are, or might be determined to be, “orphaned”. Publishers have often been taken as proxies or spokespeople for authors (under the portmanteau of “rightsholders”) despite the conflicts between publishers' and authors' interests. As a result, much of the discussion of “orphan works” has become detached from the realities of writers' rights in our own work, the ways we earn a living from our writing in the digital age, and the impact that these “orphan works” proposals would have on our livelihoods as writers. This article discusses some of the fallacies underlying proposals for “orphan works”, and suggests the need for a new round of discussion between those who want to make use of “orphan works” and the writers and other creators – who are also often the rightsholders – of these works.]*

There has been a growing chorus of proposals for changes to copyright law, or for actions outside the law (or, arguably, within existing law), to deal with so-called "orphan works": written or other copyrighted works, the holder(s) of certain rights to which are unknown to (or cannot be found by) those who wish to exploit those rights by making new copies of all or part of the work.

None of these proposals, so far as I can tell, has originated with the creators of those works that are, or might be deemed to be, "orphaned."<sup>2</sup> Since "authors of orphan works" are, erroneously, presumed to be – by definition – unidentifiable, the views of such writers typically have not been solicited in the debate concerning "orphan works", and our interests have in some cases not been considered at all, and in other cases misrepresented (often by parties whose interests conflict with those of working writers, but who have claimed to speak for us).

Moreover, the interests of writers in general (and perhaps also those of other creators, although as a writer I will not presume to speak for other creators) have often been ignored in the formulation of proposals for dealing with "orphan works", or elided through explicit or implicit definitions and conceptualizations which too often have become detached from the fundamental underlying principles of copyright law that establish creators' rights to our work.

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1 Co-Chair, Book Division, National Writers Union (UAW Local 1981, AFL-CIO), <<http://www.nwubook.org>>. The NWU has not been able to evaluate individually each of the many proposals by government bodies, international organizations, non-governmental organizations, businesses, and individuals around the world for defining and dealing with "orphan works". However, the general principles expressed in this article have been approved by the NWU as elements which would need to be taken into consideration in any "orphan works" scheme in order for it to be potentially acceptable to the NWU.

2 No, this is not oxymoronic. As discussed further below, most genuinely "orphaned" works are works to which some rights were held by a *publisher* that has gone out of business, not works whose *author(s)* cannot be found. Nothing in the definition of an "orphan work" implies that the author(s) are unknown or cannot be found.

It's one thing to propose that laws or treaties be changed, or new practices be authorized, that adversely affect writers' economic and/or other interests. But it's another matter to make such proposals without clearly and explicitly acknowledging and evaluating the ways that those interests – our ability to make a living through our work as writers – would be affected.

In the interest of facilitating such an open and informed discussion, and of grounding it in a more accurate conceptualization of what "orphan works" are, and who holds what rights to them, the following are some fundamental principles to follow in developing and considering proposals related to "orphan works", and some fallacies to avoid in our thinking about them.

### **1. The fallacy of the "orphan author"**

People rarely disappear or become impossible to find. And because there are many reasons, both governmental and commercial, for wanting to find missing people, the people-finding industry and its tools are well-developed and generally highly effective. No new infrastructure need be developed specifically in the copyright context to locate "missing" authors.

Most of the cases where it is genuinely impossible to locate the holder(s) of digitization rights (or any other rights) are those where the publisher/assignee of those rights has ceased trading without leaving an explicit record of the assignment of those rights to a successor.

Authors who are unable legally to use, distribute, or license rights to our own work because of the disappearance of an erstwhile publisher to which some rights were assigned are the paradigmatic case of would-be users or exploiters of rights to "orphan works".

*The problem of "orphan works" should be recognized as largely (not entirely, but certainly predominantly) a problem of "orphan publishers", not "orphan authors".*

### **2. The consequences of an "orphan publisher"**

Most of the current proposals related to "orphan works" would provide that if after due diligence a work appears to be "out of print" or "out of commerce" and/or "the rightsholder" (typically meaning the one-time publisher of a particular print edition) can't be located, certain rights of reproduction and use (most often of digitization and certain uses of digital copies) should be granted by default to a certain class of third parties such as libraries.

But in the case of an "orphan publisher", where the holder of the relevant rights is not the author, should such a default grant of rights if that publisher/rightsholder can't be found (or, more often, no longer exists as a corporation or other legal entity) be to libraries or the public at large?

Or should the default re-assignment of rights held by "orphan publishers" be reversion of those rights to the author(s), who can then decide whether, to whom, and on what terms they do or don't want to assign or license some or all of those rights?

*If any "orphan works" scheme is to be adopted, the default in cases of orphan publishers must be reversion of the orphaned rights to the author(s). Only in cases where neither the current holder(s) of those rights nor the author(s) or their heirs can be found should the possibility of any default grant of rights to third parties even be considered.<sup>3</sup>*

I would argue for this on the grounds of fundamental fairness, and on the grounds that the inalienable "moral rights" of the author, as protected by the Berne Convention, should be deemed to include the right to reversion to the author(s) of any rights assigned to an "orphan publisher".

It is unreasonable to expect writers to support any proposal for default assignment to third parties of rights to "orphan works", unless that proposal would first provide for reversion to the author(s) of any rights assigned to an "orphan publisher".

### **3. The fallacy of "the rightsholder"**

Many, perhaps most, "orphan works" proposals refer to "the" (singular) holder of "the" (singular) rights to a work, or simply to "the rightsholder" (again, in the singular). Any such reference is inherently inadequate to describe actual rightsholdings, in light of the infinite divisibility of copyright and the possibility for assignments of rights to be limited as to the time, place, media, format, purpose, etc. of permitted copying of all or part(s) of a work.

Few assignments of rights are entirely unlimited, and even purported assignments of rights to unknown future use may be (and, I and most authors would argue, should be) unconscionable and impermissible under the law in some jurisdictions. New technologies continue to create new rights which could not previously have been assigned to anyone. Rightsholdings in a work are rarely entirely undivided except in cases of single-author works to which the author has never assigned any rights, and therefore still holds all rights herself.

Few assignments of rights are unconditional. In addition to the obvious conditions of payments of royalties or other compensation, common conditions on licenses – such as those in the various forms of standard Creative Commons licenses – include requirements for attribution, inclusion of a particular hyperlink and/or notice in each copy, and so forth. The assignment of a conditional license implies reservation by the assignor of rights to all reproduction that doesn't satisfy those conditions, and thus leaves the holdership of rights to reproduce the work divided.

References to "the rightsholder" or "the holder of the rights to the work" should be changed to refer to, e.g., "the holder(s) of the rights to reproduction of the work in digital form", and/or an initial definition should be added, stating that "All references in this document to 'the rightsholder(s)' refer to the holder(s) of the specific rights defined as follows: [definition]."

<sup>3</sup> This would be neither unprecedented nor extreme. Copyright law in some other countries, although not in the U.S., already provides for automatic reversion of rights to authors in a much wider class of circumstances. Article L132-17 of the French "Code de la propriété intellectuelle", for example, provides for the automatic termination of any publishing contract, and reversion to the author of all rights that had been assigned by that contract, if the publisher fails to keep copies of the work available.

Without knowing which rights an entity holds (or when they held those rights), merely knowing that an entity (perhaps among others) held, at some time, some rights to reproduce that work somewhere, in some form(s), for some purpose(s), provided that some unknown conditions are or were met, is of extremely little use in determining, and certainly not dispositive of, which entity or entities hold(s) any particular right(s) to that work today.

*To be of use or meaning, databases or registries of rightsholdings must be designed to include, and must be populated with valid data concerning, multiple holders of non-exclusive and/or exclusive but limited rights to any work, divided along dimensions including, but not limited to, the time(s), place(s), media, and purpose(s) of reproductions to which rights are held.*

#### **4. The fallacy of "the publisher"**

A "work" of text can be, and often is, published in any number of editions and formats by any number of publishers (and/or by the author as self-publisher) at different times and in different places and formats, and/or in editions differing only in the purposes for which they are licensed (as is common, for example, of software editions licensed solely for academic use).

A single "work" may have, or have had, no publisher, or many publishers.

References to "the publisher" are inappropriate except as they relate to a specific edition of a work in a particular format. Except as they relate to such a specific edition, references to "the publisher of a work" should be changed to "a publisher of an edition of a work".

Even assuming a particular edition to have been duly licensed from the creator (the original copyright holder) at the time it was produced, there should be no presumption, explicit or implicit, that a publisher (i.e. the holder of a license at some time, somewhere, to reproduce the work in a particular way) of any particular edition of a work, especially a work in print form, ever held the rights to digitization of the work, or that a one-time publisher still holds any rights. And that an edition of a work is out of print says nothing about whether the work is out of print.

*"A publisher" cannot be equated with "the holder of digitization rights". A publisher may never have held any digitization rights, and may no longer hold any rights to the work at all.*

#### **5. The fallacy of substituting a search for "the publisher" for a search for the current holder(s) of digitization or other particular rights**

Most of the proposals concerning "orphan works" are concerned primarily, or at least initially, with rights to digitization of works somehow determined to be "orphans".

Once the foregoing points are recognized, it becomes clear that a search for "the holder(s) of digitization rights" is necessarily something quite different from a search for "the publisher".

Finding a publisher (one of an unknown number of such publishers) of a work is useful only as a possible aid to identifying the current holder(s) of digitization rights to that work.

As with the chain of title to an item of tangible property such as a vehicle, which begins with the manufacturer and proceeds through a chain of transfers of title, a proper determination of current holdership of any particular rights to a copyrighted work, including digitization rights, necessarily begins with the creator (who by definition holds the original undivided copyright) and proceeds through a chain of assignments of the particular rights in question.

A proper search for the holder(s) of digitization rights (or any other particular rights) to a work thus necessarily begins with a search for the author(s) of the work (original holder(s) of all rights) and proceeds from there to determine if those rights are the subject of a currently valid assignment or chain(s) of assignments of those particular rights to another party or parties.

A subsidiary but nonetheless significant issue is what sort of documentation of a valid chain of assignment(s) of rights, tracing back to the creator as original copyright holder, should be required from someone other than the creator asserting holdings of such rights, e.g. a publisher claiming to hold rights to license an e-book to end users or e-book distributors.

*In the absence of evidence of a currently valid assignment or assignments of specific rights in a work, the author(s) are presumably the holders of all rights in the work. A search for "the rightsholders" should be conceived of first and foremost as a search for the author(s).*

A search for publisher(s) of the work is at most one of the possible components of due diligence in searching for the author(s), and can never be sufficient in itself to identify the current holder(s) of digitization or any other particular rights of interest.

*No search for the holder(s) of rights to a work should ever be considered "diligent" or adequate unless it includes a search for the author(s) of the work, independent of any search for any of the publisher(s) of the work and independent of any records of print publication.*

## **6. The fallacy of "bibliographic data", collecting society registries, or other databases as dispositive of the status of "commercial exploitation"**

Many of the proposals related to "orphan works" would make distinctions among works, or authorize, by default, certain sorts of copying and/or use (such as digitization and making available of digital copies under certain conditions by libraries or academic or nonprofit entities), on the basis of whether the works in question are listed in databases of works "in print", registered with collecting societies, or available through "customary channels of commerce".

These proposals reflect a fundamental and fundamentally fallacious assumption, central to many of these proposals, that all "publication" or other "exploitation" of a work – copying, distribution of copies from writers to readers, or licensing for other use – occurs through

something called a "publisher" or licensing or collecting society, and will "customarily" be reflected in some bibliographic database or licensing or collecting society registry.

This leads to two further erroneous assumptions. One, that a work that is "out of print" and/or unavailable for licensing through a collecting society is "unavailable" (except perhaps in libraries), when in fact many "out of print" works are available, for reading online and/or for free or paid download, through increasingly customary commercial distribution channels including authors' Web sites. Two, that if bibliographic databases show a work to be "out of print", then it must be the case that "nobody is earning any money from the work," and there is no revenue stream to be damaged by allowing the digitization or other use of the work.

Publishers wish that authors were unable to exploit our own work commercially without a publisher or other intermediary. Perhaps that was once true, to a degree, but it is no longer.

Many authors exploit the commercial potential of our works by direct distribution of digital copies. This includes, but is not limited to, works that were once published on paper, but that are no longer available from some or all of the original print publisher(s) in that format.

This can take the form of, for example, publication of all or part of the work on the author's Web site (generating revenue through advertising or through paid subscriptions to the Web site), or licensing of PDF or other e-book copies directly by the author or through distributors or other intermediaries who may, or may not, consider themselves to be "publishers".

Such digital "self-publication", including but not limited to Web publication:

- (a) Is, and must explicitly be recognized as, a "customary channel of commerce";<sup>4</sup>
- (b) Is unlikely to be reflected in any bibliographic database;
- (c) Is engaged in by authors who are located around the world, often in countries other than the country or countries where their works are or were published in print form;
- (d) Is engaged in by authors many of whom are not members of any organization(s) of writers or participants in any licensing society or societies, in their own or any other country. (This is true, in particular, for the overwhelming majority of U.S. authors.)

For all of these reasons the equation of "not shown in any current bibliographic database or collecting society registry" with "out of print", "out of commerce", "not available to readers", or "not generating any revenue for the rightsholder(s)" is clearly fallacious, and reflects a

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4 When I made this point on behalf of the NWU to members and staff of IFRRO and staff of the European Commission's ARROW project at the 2011 IFRRO World Congress, they were taken aback, and claimed that in years of work on this issue they had never before heard it suggested that self-publication or Web publication could be considered "customary channels of commerce".

complete disconnect between the drafters of such proposals and the increasingly digital and disintermediated customary business models of freelance writers in the digital age.

*Any "due diligence" search for whether a work is "in commerce" must explicitly be required to include, at an absolute minimum, a search for whether the work is being exploited commercially directly by the author, or under license from the author, including through inclusion in Web content, the distribution of digital copies, or other self-publication.*

The current EU and UK orphan works proposals, for example, make no mention of self-publication, leaving it unclear whether authors/self-publishers are to participate in the schemes as authors, publishers, or both, and if so how. IFRRO similarly has no clear path for participation by self-publishers. No scheme that presumes that every author and work has a "publisher" can easily be applied to disintermediated distribution of textual material directly from writers to readers, or to intermediaries who may be "distributors" but not clearly "publishers".

*It's also critical to recognize, in light of the above, that an author may suffer financial damages from a grant of licensing to digitize or reproduce a work deemed "out of commerce" that are many times greater than the revenue, if any, generated by those copies.*

For example, having a work digitized and made available by an academic library for the use of its students, for free, may completely destroy the revenue stream that the author was enjoying through the sale or licensing to such students, through the author's Web site, of PDF copies of the work. No scheme for distribution of any revenues for licensing of the library's copies will be adequate to compensate the author for the revenue loss that results from the availability of free or lower-priced digital copies resulting from the library's digitization.

Allowing only non-commercial digitization or use of works deemed "orphans", or holding revenues for presumptive licenses to use of such work (at default prices) in escrow and turning them over on demand to the holder(s) of the rights to those uses, is not sufficient to make up for the damage that may have been done to the rightsholder(s) other revenue stream(s) such as advertising on a Web site on which the author has placed all or part(s) of the work.

## **7. The fallacy of standardized or default pricing for licenses to use or copy written works**

Writing is a craft profession. Written works are not commodities. The publishing industry is a craft industry, not a production industry. There is no default price for any right to any particular written work. Every right to every use of every work is subject to new negotiation.

Neither writers nor publishers have default or standardized prices. Sometimes, a publishing entity or a department within an entity will have one or more standard offering prices, but those are only starting points for negotiation. A strong negotiating position – based on attributes of the writer or the work or the would-be licensee, including attributes that may change over time such as the writer's reputation or the level of current interest in the subject of the work – nearly always enables a rightsholder to negotiate changes to any "standard" price proposal.

Any assignment-by-default of certain rights to use of "orphan works" necessarily requires setting prices for those rights. This in turn requires either (1) a giveaway of those rights (which would be an unfair taking of rights from the rightsholders), (2) the delegation of *individualized* pricing power to some new or existing entity (which would require more work by that entity, and create more problems, than such a scheme could possibly solve), or most likely (3) the setting of default prices for standardized licenses for certain uses of *categories* of work that are assumed – on the basis of some attributes other than individualized appraisal – to be of similar value.

If default prices are contemplated, they will have to be imposed, either through the legislative process or, as in the some proposals, by a specially-created or specially-entitled government agency or by a licensing entity to which price-fixing authority is delegated by law.

Many "orphan works" proposals attempt to evade these problems by delegating pricing to some other entity or a "player to be named later". But delegation or postponement will not solve any of the pricing problems inherent in a scheme applicable to millions of works, each of which will need to be either individually priced, or individually assigned to a default pricing category – by someone and according to some substantive criteria and some decision-making process.

*Pricing decisions will eventually have to be made. The foreseeable pricing problems need to be acknowledged and confronted before any "orphan works" proposal is approved.*

## **8. The fallacy of administrative simplicity and efficiency of an "orphan works" scheme**

Proposals for "orphan works" schemes are typically based on the purported difficulty of "clearing" rights to large collections of works by individually identifying and obtaining licenses from the rightsholders for the desired uses of those works, especially for mass digitization.

But rarely have the difficulties of administrating and adjudicating disputes over rightsholdings *within* proposed "orphan rights" schemes been assessed or compared.

Disputes over rightsholdings, especially over holdership of digital rights, are the rule rather than an exception. Print publishers have claimed, and are likely to continue to claim, that they hold rights to reproduction in digital form of tens of millions of in-copyright books and articles which were published under contracts which include no explicit assignment of digital rights. Authors generally believe these claims to be specious, unsupported by law, and merely an attempt to legitimate a sweeping theft of digital rights to backlists by publishers from authors.

Whatever one's beliefs about the merits of these disputes – which rest in part on the individual language of tens of millions of individual contracts – there's no denying the fact that many, perhaps most, claims of rights made under any "orphan works" scheme will be disputed.

There will also be disputes about other issues including where a particular work was published or first published and how to categorize works for pricing and inclusion or exclusion.

Is this work a book, a monograph, a journal article, or a Web page, for example, especially if the same work has been published by different publishers (or no publisher) in each of these formats?

Enactment of an "orphan works" scheme will not make these and other longstanding, ongoing, and vigorously-contested disputes over holdship of rights, particularly digital rights, go away. Any "orphan rights" scheme, especially one that encompasses digitization rights, will either have to include a legislative disposition of these rights – a profoundly weighty legislative determination and assignment of billions or tens of billions of dollars in the value of these rights – or will have to include within the scheme mechanisms for adjudication of those disputes.

An "opt out" provision – even if it weren't a "formality" prohibited by the Berne Convention – would not solve this problem, since it would be necessary either to assign to e.g. publishers the "right" to opt out regardless of their actual rightholdings or lack thereof (thereby making a *de facto* determination and reallocation of their rights vis-a-vis authors), or to adjudicate which publishers or other third parties have been assigned rights, with respect to each claimed work, sufficient to meet legally valid criteria of eligibility to opt out for those works, much less to receive any share (and if so, what share) of any revenues for use of those works.

The task of assessing evidence presented by publisher or other third-party (non-author) claimants to rights, and adjudicating disputes over who holds which rights to individual works, will not necessarily be any different under an "orphan works" scheme than it is for courts today.

To be sure, current mechanisms for adjudicating disputes over rights are grossly inadequate to provide a meaningful possibility of redress for writers whose rights are infringed, particularly when the infringers are often – as is typical – large publishing corporations.<sup>5</sup>

But that doesn't mean things would be any better or fairer for writers under an "orphan works" scheme. On the contrary, the suggestion that administration of such a scheme will be "uncomplicated" suggests that it will be structured so as to sweep such disputes under the rug – and, in effect, decide them by default. Most likely, those defaults would implicitly resolve these disputes in favor of publishers as against writers by giving publishers "rights" without the need to provide any evidence of current holdings of rights (merely of past publication of those works), which appears to be publishers' real underlying goal in the formulation of these schemes.

Any "orphan works" proposal needs to spell out (1) who will adjudicate disputes including disputes over rightsholdings, eligibility to opt out or opt in, and classification of works, (2) the substantive standards for such determinations; (3) the procedures to be followed, (4) the standard of proof to be required of publishers or other third-party claimants to rights, and (5) the mechanisms for administrative and/or judicial review of such determinations.

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5 See "Comments of the National Writers Union on Coordination and Strategic Planning of the Federal Effort Against Intellectual Property Infringement," March 23, 2010, available at <<http://www.nwubook.org/NWU-ip-enforcement.pdf>>, and "Comments of the National Writers Union on Remedies for Small Copyright Claims," January 16, 2012, available at <<http://www.nwubook.org/NWU-copyright-small-claims.pdf>>.

Any delegation of such adjudicative authority with respect to rights under U.S. law would, of course, have to be reviewed for compliance with the Administrative Procedure Act as well as Constitutional entitlements regarding due process and takings of rights.

Mechanisms need to be provided both for recognizing the individuality of each work and each contract for the assignment of rights, but also for equitable collective adjudication of similar disputes such as those by groups of writers with similar contracts with a particular publisher for similar licensing of similar works, so that individual rightsholders are not deprived of the benefit of current provisions for collective bargaining and class action litigation of joined claims.

The defaults in any "orphan works" scheme must match the defaults in the law. Under both U.S. law and the Berne Convention, the author or other creator of a work holds, by default, all rights to that work except those she has expressly assigned to others.

*Any "orphan works" scheme must incorporate those same defaults: Authorship must constitute, by default, prima facie evidence of holdership of all rights to the work (including, of course, rights to reproduction or other use of the work in digital form). The burden of proof must be on any publisher or other third party claiming rights in a work (including the "right" to opt in or opt out of the scheme, assign the work to a particular pricing or distribution category, authorize digitization or use of the work in digital form, or receive any share of revenues for licensing or use of the work) to provide sufficient evidence of a currently valid assignment or chain of assignments from the author(s) or creator(s) of the particular rights claimed.*

*Evidence merely of having previously published the work should not be considered evidence of current rightsholdings, nor should evidence of print publication be considered evidence of assignment of rights to digitization or other digital copying or use of the work.*

Only after all this is spelled out could any real assessment be made as to whether such a scheme would be simpler, easier, or cheaper, or which parties to current disputes it would favor.

## **9. The fallacy of "the place of publication" or "the place of first publication"**

One of the fundamental rights guaranteed by the Berne Convention is the right to equal recognition and protection by and in any state that is a party to the Berne Convention, without "formalities", of creators' rights to work first published in any other Berne Convention party.

This means, for example, that although work first published in the U.S. must be registered with the U.S. Copyright Office (a requirement which I and the NWU believe should be repealed)<sup>6</sup> in order for rightsholders to exercise and/or enforce certain of their rights and remedies in the U.S., work first published in any other Berne Convention party is not, and cannot be, subject to that U.S. copyright registration requirement.

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6 See "Comments of the National Writers Union on Remedies for Small Copyright Claims," January 16, 2012, available at <<http://www.nwubook.org/NWU-copyright-small-claims.pdf>>.

(This, of course, gives even U.S.-based writers a strong incentive to make sure that our work is first published in any Berne party other than the U.S., such as by hosting of our Web sites on servers in Canada or further abroad, to avoid the burden of trying to ensure proper and timely ongoing registration of U.S. copyright in updates to dynamically-generated Web pages.)

The Berne Convention requirement for equal protection of copyright without formalities, regardless of the place of publication, has become more and more significant as publishing technology has transcended borders and rendered the concept of the "place" of publication increasingly obsolete.

Unfortunately, a patchwork of "orphan works" schemes have been proposed in individual countries or groups of countries (such as the European Union), disregarding the growing importance of common treatment worldwide of copyrighted work, based on the Berne Convention principles. Many, perhaps most, of these proposals to date reflect assumptions rooted in the obsolete notion that each work has a single "place" of publication or first publication, which "place" is known to the author and/or publisher and readily identifiable by inspection of any copy of the work. These assumptions are invalid, and doom any scheme based on them.

No law, at least in the U.S., requires even a paper copy of a book to contain any internal indication or claim with respect to the place(s) of publication or place of first publication of the work(s) included in the book. Many books do not, in fact, contain any such internal evidence of the place(s) of publication or first publication of the included works. And any requirement to include such a declaration in order to preserve rights would be, as applied to books first published in other countries, a "formality" prohibited by the Berne Convention.

It's common for books (and works published in other formats or media) to contain textual and other material that was first published in periodicals, ephemera, or online in another country or countries from that where the book is first published (for example, material first published on an author's blog hosted by a service in the U.S., and later included in a book published elsewhere), without that fact being discernible from the book itself or any bibliographic database.

Cloud Web hosting and other digital distribution services often deliberately have servers in multiple countries, and have as a design goal that the location(s) of the servers should be "transparent" to both customers and users. "Transparent" in this context is a term of art meaning that customers and users do not know, or need to know, where those servers are.

Depending on what, if any, server logs are created by the cloud service provider, and how long those logs are retained, it may not be possible even for the cloud service provider to determine, after the fact, from which servers copies of a work have been distributed and thus in what countries it has been published. It's especially unlikely that it will be possible to determine, perhaps long after a work was first published, where the server from which a work was first downloaded was located, and thus in what country the work was first published. (This includes work which is published in print form, but all or part of which was first published online.)

It's also unclear, in the common case where elements of the digital distribution chain are located in several countries, which step in the process constitutes "publication" and thus determines the "place(s)" of publication or first publication.

Nothing whatsoever about any "place of publication" can typically be determined from a digital copy of a work. And even paper copies of books are less and less likely to contain an unambiguous declaration of the country of publication or first publication. Publishing of printed books is increasingly dominated by transnational corporations. Typical books that might once have named a single city as their place of publication on the title or copyright page now routinely contain instead either a laundry list of a dozen or more of the locations of the publishing conglomerate's regional offices around the world, or a URL for the publisher's Web site.

Any "orphan works" scheme that depends on categorization of works on the basis of the country in which they were first published is based on out-of-date concepts of publishing. Any such scheme is likely to prove unworkable, and any such requirement for authors or other rightsholders to be able to specify in which Berne party a work was first published (in order, for example, to know which national or regional registry of potentially "orphaned" works to consult to "claim" their rights) would constitute a "formality" prohibited by the Berne Convention.

*Indeed, any requirement that authors or other rightsholders take affirmative action – such as to register themselves or their works with a collecting society or bibliographic database, to "claim" works to which they hold rights, or to "opt out" of an "orphan works" or other license-by-default scheme – to avoid having rights (including digitization rights) presumed to be "orphaned" or "not being exploited", and in consequence having rights assigned to third parties by action of law, would be "formalities" forbidden by the Berne Convention.*

And such requirements would be especially burdensome to authors or other rightsholders who have to join or check multiple "possibly orphaned" registries or lists for a work that may, in different people's judgments, have been published or first published in multiple countries, or any of multiple instantiations of which, at least arguably published in different countries, might be deemed to be "orphaned" despite the existence of other editions or differently-published copies.

Nor can the results of a search limited to editions published or first published within any one country or region be considered dispositive of whether a work is "in print". It is routine for an edition of a work published in one country to be out of print, while an edition in another country – not necessarily linked by internal evidence or in any database – remains in print. (This is, of course, especially likely where editions in different countries have different titles.)

Rather than being built around obsolete notions of geographically-defined publishing, any "orphan works" scheme should be designed as much as possible on the basis of the global nature of contemporary publishing, both in print and online. It may be difficult to do away with a complex legacy of laws that require the designation for certain limited purposes of at least a nominal place of publication for a particular copy of a work. *But any "orphan works" proposal must be tested against the case of works, including those first published online, whose country of*

*first publication is unknown and unknowable even to the publisher(s) and/or rightsholder(s), and must not be adopted unless it provides unambiguous procedures for dealing with such works.*

## **10. The need for dialogue between authors and those who want to exploit our work**

Authors have a greater stake than anyone else in seeing that our work is available to readers, even when erstwhile publishers of our work have disappeared without a trace.

Authors have taken the lead in making our "out of print" personal backlists of books, articles, and other work available, commercially or otherwise. Authors have long had a much better sense than publishers of the value of the "long tail" of our backlist works, and have consistently been on the cutting edge of new ways to commercialize and distribute them, long before and often "under the radar" of slower-moving legacy print publishers.

Publishers may claim to have difficulty tracing authors of "out of print" books, but would-be readers routinely track down and contact authors of "out of print" books to find out how to obtain our works. Authors have, as would be expected, responded to such reader inquiries by finding ways to make our works, including our backlists, available to new readers. And a new industry of service providers has developed to facilitate these efforts by authors.

Yet much of the discussion about "orphan works" has been a discussion between those parties who want to exploit those works (libraries, publishers, etc.), *and not the creators of those works*. It's past time for dialogue between those parties who want to exploit "orphan works" and the authors of works which might be so classified.

As the foregoing analysis should make clear, many of the fundamental flaws in the "orphan works" proposals to date result from those proposals having been developed without consulting the authors of the works in question. The resulting proposals have, not surprisingly, been completely detached from the contemporary realities of working writers' business models.

*The necessary dialogue between writers and third-party would-be exploiters of our work can only be conducted on the basis of recognition of the principles discussed above.*

*Before that can happen, however, there's an even more basic precondition: Authors of works which are, or might be deemed to be, "orphan works", must be recognized as a class of stakeholders who can and must be included in any policy-development or decision-making process regarding "orphan works", especially if it is to be represented as a "multi-stakeholder" process or the outcome is to be represented as reflecting any "consensus" among stakeholders.*

Authors would welcome the opportunity, on the basis of these understandings, to enter into a dialogue with anyone interested in licensing and helping to distribute our works, including our "orphan works" – as long as they are interested in doing so on terms which respect our rights.

Let's talk with each other, rather than merely about each other.