Copyright and the Universal Digital Library

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Abstract: This paper describes research and recent events related to copyright that could significantly impact the creation of the universal digital library. Three research studies were undertaken by Carnegie Mellon University Libraries to increase the success and lower the cost of acquiring copyright permission to digitize and provide open access to books. Initiated by Congress, the U.S. Copyright Office's notice of inquiry into orphan works has several possible outcomes, one of which would be a tremendous boost to the creation of the universal digital library. Initiated by associations of publishers, questions about the Google Print Library Project are increasing disequilibrium in the copyright system precipitated by digital technologies, and if not checked could seriously harm the creation of the universal digital library.

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CONTEXT

Users clearly prefer the ease and convenience of surface Web access to information. Just as clearly, current copyright laws and licensing practices interfere with meeting their needs and expectations. Most students and faculty perceive a significant gap between their high priority needs and the service their library is providing (LibQual+™ 2002, 2003). According to a recent survey, 89 percent of librarians agree with the statement: "Copyright issues are one of the major challenges to the building of the digital library" (Carroll 2004: 9).

Under current copyright law, if a work is in the public domain, anyone can reproduce, distribute, make derivative works, or perform and display the work publicly without permission or payment. While a work is copyright protected, people must request permission from the copyright owner and often pay a permission fee on top of the transaction costs of identifying, locating, and negotiating with the rights holder. Given the current term of copyright protection and the increasing rate at which information is created and disseminated, most information is in copyright and out of print, neither generating revenue for copyright owners nor easily accessible to potential users. The two legal options that enable innovations built on past works—permission and fair use—are fraught with problems, risks, and costs that discourage rather than encourage preserving and cultivating culture. "Just at the time digital technology could unleash an extraordinary range of commercial and noncommercial creativity, the law burdens this creativity with insanely complex and vague rules and with the threat of obscenely severe penalties" (Lessig 2004: 19). The law allows, under certain conditions, the preservation (reproduction) of copyrighted works, but a *preservation* copy is not a *use* copy. It is a locked-up copy, at least for the copyright term of the work. Preservation is not enough if the goals are marketing and cultivating culture.

Despite the burgeoning success of the open access movement and Creative Commons licenses, both laudable efforts aimed at increasing access and use of new works, a tremendous amount of work remains to be done. Creating a digital library that is comparable to an excellent traditional library entails providing online access to older materials. The current copyright regime requires negotiating copyright permission to digitize and provide online access to library collections. Two recent events

driving an examination of copyright law will have a profound impact on the creation of a universal digital library: the U.S. Copyright Office's investigation of orphan works and the Google Print Library Project.

COPYRIGHT PERMISSION AND DIGITAL LIBRARIES

> The opportunity to create and transform becomes weakened in a world in which creation requires permission and creativity must check with a lawyer.
>
> – Lawrence Lessig, *Free Culture*, p. 173

Despite having limited budgets, libraries continue to fund the acquisition, storage, and circulation of redundant collections. While this likely makes sense for newer materials, it does not make sense for older works. Publishers and vendors are increasingly meeting user needs and expectations for online access to journals (including backfiles) and, in response to spiraling subscription costs, more and more articles are becoming available through open access. But libraries collect more than journals. A universal digital library must contain books. Efforts to date to provide online access to books, for example netLibrary and Questia, have met with little success, in part because of the cost of acquiring permission, which drives up the cost of licensing access to the online books. Carnegie Mellon University Libraries conducted three studies aimed at reducing the cost and increasing the success of acquiring copyright permission to digitize and provide open access to books.

The Random Sample Feasibility Study

From 1999 to 2001, Carnegie Mellon University Libraries conducted a feasibility study to determine the likelihood of publishers granting non-exclusive permission to digitize and provide free-to-read Web access to their copyrighted books. The goals of the project were to understand the process of acquiring permission and to identify the problems encountered.

Working from a statistically valid random sample of 368 titles in the Libraries' collection, 95 percent (351 titles) were identified as copyright protected. Many titles were eventually eliminated from the study because of third-party copyright ownership of elements like figures and illustrations that complicated the process of pursuing permission. The size of the final sample was 277 titles published by 209 publishers. Using intermittent labor to conduct the study, we sent request letters to the publishers. If the letters appeared to have been successfully delivered but we got no response, we sent a follow-up letter. Both the initial and follow-up letters included a contract that offered options for publishers to deny permission or to grant permission for either open access or access restricted to Carnegie Mellon users only.

Ultimately 21 percent of the publishers, accounting for 19 percent of the titles in the sample, could not be located. Of those successfully contacted, 36 percent of the publishers did not respond to our letters and 35 percent granted permission. The permissions granted enabled us to digitize and provide Web access to 30 percent of the books in the sample published by the publishers we contacted. Access to over half of the titles for which permission was granted was restricted to Carnegie Mellon users only.

Table 1 shows some of the results of the feasibility study. The *response rate* is based on the number of titles with copyright owned by those we successfully contacted. The *success rate* is based on the number of titles with copyright owned by publishers that responded. Additional details are provided below.

- *Analysis of Foreign and Domestic Publications* – Most of the books in the final sample were published in the United States. Foreign publishers were twice as difficult to locate as U.S. publishers. If we located them, the response rates for foreign and domestic publishers were roughly the same. However, foreign publishers were more likely to grant permission than U.S. publishers.
- *Analysis by Publisher Type* – The response and success rates varied across different types of

Table 1. Results of the feasibility study.

	Sample content	Not located	Response rate	Success rate
U.S. publishers	81%	16%	67%	40%
Foreign publishers	19%	33%	65%	64%
Scholarly associations	11%	11%	64%	76%
University presses	15%	6%	91%	41%
Museums & galleries	2%	0%	100%	100%
Commercial publishers	71%	25%	58%	36%
In print	27%	8%	77%	35%
Out of print	73%	24%	61%	49%

publishers. Most of the books in the sample were published by commercial publishers. They were the most difficult to locate, least likely to respond, and least likely to grant permission. Scholarly associations were only slightly more likely to respond than commercial publishers, and university presses only slightly more likely to grant permission than commercial publishers.

- *Analysis by Print Status* – Most of the books in the sample were out of print. Publishers of out-of-print books were more difficult to locate, less likely to respond, and more likely to grant permission than publishers of books that were still in print.
- *Analysis by Publication Date* – Most of the books in the collection were published after 1960. With rare exceptions, the older the work, the more difficult to locate the publisher; the more recent the work, the more likely permission was denied. If we could locate the publisher, there did *not* appear to be a correlation between the date of publication and the response rate.
- *Analysis of Transaction Costs* – We did not track transaction costs in the study, but based on the cost of paper and postage for letters and a conservative estimate of labor costs, we estimate the transaction cost was roughly $200 per title for which permission was granted.

The feasibility study revealed that it is possible but expensive to acquire permission to digitize and provide open access to books. Determining copyright status and identifying and locating copyright holders are significant problems. We agreed that future studies would track transaction costs.

The Fine and Rare Book Study

In 2001 Carnegie Mellon University Libraries received funding from Henry Posner Jr. and his wife Helen Posner to digitize and provide Web access to the Posner Memorial Collection of fine and rare books. The Collection contains 1106 volumes, roughly 26 percent of which are still in copyright (or were treated as if they were). By the conclusion of the study, we determined that these 284 copyrighted works were owned by 104 different copyright holders.

The copyright permission work began in 2002 with intermittent labor, but a full-time employee dedicated to the task was hired in 2003. As in the feasibility study, we began by sending request letters to the publishers. However, if a request letter appeared to have been successfully delivered but we received no response, rather than send a follow-up letter, we conducted a follow-up call or sent e-mail.

Almost a third (31 percent) of the publishers could not be located. Of those we contacted, almost all (93 percent) of them responded and most (65 percent) granted permission. The permissions granted enabled us to digitize and provide Web access to 71 percent of the copyrighted titles published by those we contacted. Few publishers (six percent) that granted permission to digitize and provide Web access to their books in the Posner collection restricted access to Carnegie Mellon users only.

Table 2 shows some of the analyses of the results. Again, the *response rate* is based on the number of titles with copyright owned by publishers we successfully contacted. The *success rate* is based on

Table 2. Results of the Posner study.

	Collection content	Not located	Response rate	Success rate
U.S. publishers	71%	6%	95%	76%
Foreign publishers	29%	31%	88%	70%
Scholarly associations	7%	0%	100%	74%
University presses	16%	0%	100%	37%
Special publishers	44%	0%	100%	95%
Commercial publishers	6%	0%	88%	57%
Other publishers	13%	100%		
Authors & estates	14%	15%	76%	68%

the number of titles with copyright owned by publishers that responded.

- *Analysis of Foreign and Domestic Publications* – As in the feasibility study, most of the books in the Posner collection were published in the United States and foreign publishers were far more difficult to locate than U.S. publishers. However, unlike the feasibility study, in the Posner study domestic publishers were more likely to respond and more likely to grant permission than foreign publishers.
- *Analysis by Publisher Type* – Again the response and success rates varied across different types of publishers. We could not identify or locate the owners of roughly 13 percent of the copyrighted titles in the collection. Of those we could identify, special publishers own most of the content and almost all of them granted permission. University presses were the least likely to grant permission.
- *Analysis by Publication Date*[1] – The copyrighted titles in the Posner collection are significantly older and the distribution of titles published per decade is more even than the books in the random sample feasibility study. Roughly 88 percent of the Posner titles were published prior to 1970, compared to 35 percent of the random sample. How much the age of the work affected the results in the Posner study is unclear. More diligence and persistence were expended on locating and following up with publishers in the Posner study than in the feasibility study. Consequently more publishers were found and more of them responded than in the feasibility study. Almost two-thirds of the permissions granted were for titles published prior to 1960.
- *Analysis of Transaction Costs* – Based on the cost of labor, paper, postage, and long-distance telephone calls, the transaction cost per title for which permission was granted was $78.

Though we located fewer of the publishers of copyrighted content in the Posner project than in the feasibility study, we greatly increased the response and success rates. Of those we successfully contacted, almost all of the publishers in the Posner study responded to our request, while only two-thirds of those we contacted in the feasibility study responded. Of those that responded, 75 percent of the publishers in the Posner study granted permission, in comparison with 45 percent in the feasibility study.

We attribute the increased success in the Posner project to a more informative initial request letter, to prompt follow up by e-mail or telephone, and the ability of publishers to see the quality of the digitized (public domain) books in the Posner Collection on the Web. We also believe that the age and nature of the Posner Memorial Collection were significant factors. The Posner collection contains more older books than were in the random sample, which probably accounts for the greater difficulty we encountered locating publishers. Furthermore, special publishers own the rights to most of the copyrighted titles in the Posner collection. Results from the feasibility study suggested that special publishers are likely to grant permission.

[1] Given the age and nature of the Posner Memorial Collection and data on print status by publication date in the feasibility study, we strongly suspected that most of the copyrighted content in the Posner collection was out of print. We did not code the print status of the copyrighted books in the collection.

The Posner project confirmed our belief that it is possible to acquire copyright permission to digitize books and provide open access to them on the Web. It also confirmed what we had learned in the feasibility study about how difficult and time consuming it is to determine copyright status and to identify and locate copyright holders. We agreed that future copyright permission studies should experiment with ways to reduce the cost and increase the success of acquiring copyright permission.

The Million Book Project Study

Funded by the National Science Foundation and the governments of India and China, the goal of the Million Book Project (MBP) is to digitize and provide open access to one million books. Led by Carnegie Mellon School of Computer Science and the University Libraries, the initial MBP collection development meeting was held in November 2001. Participants swiftly agreed that seeking permission to include copyrighted books in the Million Book Collection would require separate funding, and that the permission work should begin with titles cited in the bibliography *Books for College Libraries*.

There are about 50,000 titles cited in *Books for College Libraries*. Assuming that the titles were published in the United States, roughly 12,300 titles (25 percent) are definitely copyright protected, and another 35,500 titles (71 percent) could still be copyright protected. The copyright renewal records would need to be consulted for these 35,500 titles. Under these circumstances, a per-title approach (the approach taken in the feasibility and Posner studies) to seeking copyright permission would be prohibitively expensive. A new approach was required.

The 50,000 titles cited in *Books for College Libraries* (*BCL*) were published by about 5,600 publishers. To facilitate collection development and reduce the cost of seeking copyright permission, we switched from a per-title approach to a per-publisher approach for the Million Book Project (MBP). We agreed to treat *BCL* like an approval plan for publishers. Many libraries use publisher-based approval plans to select books for their collections.

With funding from MBP project partner University of California Libraries at Merced, we began sending letters and contracts to publishers in November 2003. The letters asked publishers for non-exclusive permission to digitize and offer free-to-read on the Web any of the following options:

- All of their out-of-print, in-copyright titles
- All of their titles published prior to a date of their choosing
- All of their titles published *N* or more years ago – they specify *N*
- A list of titles that they provide

Unlike the previous studies, the MBP did *not* offer the option to restrict access to Carnegie Mellon users only. It did, however, offer to give participating publishers copies of the electronic files—preservation-quality images and OCR text, which they could use in added-value, fee-based services.

Based on preliminary findings from the feasibility study (George 2001), copyright permission work in the MBP focused on university presses and scholarly associations. Following the procedures used in the Posner study, by January 2005 we had successfully contacted 364 publishers. As of February 2005, 61 percent of the negotiations had been completed. Looking only at the completed negotiations, over a third (38 percent) of the publishers granted permission and almost half (44 percent) denied permission. Some (11 percent) responded “not at this time.” A few (7 percent) are considered “not applicable” because copyright for their out-of-print books reverted to the author. We experimented with contacting authors of works cited in *Books for College Libraries*, but did not aggressively pursue this because of the cost of the per-title approach.

- *Analysis by Publisher Type* – As in the previous studies, the response and success rates for completed negotiations varied across different types of publishers. See Table 3. The response and success rates with all publisher types were significantly lower in the MBP than in the Posner project. Authors and estates were the most likely to grant permission. Among publishers, special publishers and scholarly associations were the most likely to grant permission. University presses were the least likely to grant permission and the most likely to respond “not at this time” or “not applicable.”

Table 3. Analysis of results by publisher type.

	Distribution of contacts	Response rate	Success rate	Not at this time	Not applicable
Scholarly associations	46%	52%	41%	8%	6%
University presses	29%	69%	23%	19%	12%
Special publishers	2%	33%	67%		
Commercial publishers	17%	15%	27%		
Authors & estates	6%	69%	94%		

- *Analysis by Permission Type* – Of the publishers that granted permission, only one-fourth granted permission for all or most of their out-of-print titles. Over half (60 percent) granted permission for titles that they specified. Some (10 percent) designated a date of publication prior to which their books could be scanned. Few (5 percent) specified a number of years from the date of publication prior to which their books could be scanned. Table 4 shows these results by publisher type. The two participating commercial publishers granted permission for all or most of their out-of-print titles. Most university presses and scholarly associations chose to provide a list of designated titles. Only scholarly associations chose the "moving wall" model of titles published N or more years ago.

Table 4. Analysis of permissions granted by publisher type.

	All out of print titles	Designated titles	Titles prior to N	Titles N or more years ago
Scholarly associations	21%	51%	19%	9%
University presses	10%	85%	5%	
Commercial publishers	100%			
Special publishers, authors & estates	42%	58%		

- *Analysis of Transaction Costs* – The number of titles for which permission has been granted is not yet known. Lists must be compiled of participating publishers' out-of-print, in-copyright titles or the titles they published prior to the designated date or time period. In other cases, we are waiting for the publisher to provide their list of designated titles. Without making projections for the lists yet to be received, we estimate that as of mid-February 2005 we had been granted permission to digitize at least 52,900 titles. Based on the cost of labor, paper, postage, and telephone calls, the transaction cost per title for which permission was granted was $0.69.

Table 5 provides comparisons of the results of the feasibility study, the Posner study, and the Million Book Project (MBP) copyright permission work to date. The *response rate* for the feasibility and Posner studies is based on the number of titles with copyright owned by publishers we successfully contacted. For the MBP, the response rate is based on the number of finalized negotiations as of February 2005 where the negotiation was closed by a response from the publisher. The *success rate* is based on the number of titles with copyright owned by publishers that responded.

Table 5. Comparison of the results of the three studies.

	Publishers				Titles	
	Total	Located	Response rate	Success rate	Permission granted	Transaction cost per title
Feasibility	209	165 (79%)	106 (64%)	57 (54%)	66	$200.00
Posner	104	72 (69%)	67 (93%)	45 (67%)	178	$78.00
Million books	364	364 (100%)	202 (55%)	84 (42%)	52,900	$ 0.69

The Posner study is our most successful project to date in terms of response and success rates. However, despite the lower overall success rate, the per-publisher approach taken in the Million Book Project (MBP) garnered permission for significantly more titles at less cost than the per-title approach of the previous projects. The MBP confirmed that dedicated personnel, experimentation, and flexibility are critical to success in acquiring copyright permission to digitize and provide open access to books. Continuing to apply what we learned from these studies could further reduce the cost and increase the success of seeking copyright permission for open access.

For further details about Carnegie Mellon University Libraries' research, see Denise Troll Covey, *Acquiring Copyright Permission to Digitize and Provide Open Access to Books* (Washington DC: Council on Library and Information Resources and Digital Library Federation), forthcoming 2005.

ORPHAN WORKS, COPYRIGHT, AND DIGITAL LIBRARIES

> Not *whether* creative property should be protected, but how. Not *whether* we will enforce the rights the law gives to creative-property owners, but what the particular mix of rights ought to be. Not *whether* artists should be paid, but whether institutions designed to assure that artists get paid need also control how culture develops.
>
> – Lawrence Lessig, *Free Culture*, p. 120

In the feasibility and Posner studies described above, roughly 20 to 30 percent of the copyright owners could not be identified or located. In both studies, most of the books were out of print.

In 2004, Brewster Kahle and Richard Prelinger attempted to challenge the constitutionality of existing copyright law in the Supreme Court on grounds that the copyright system denies public access to *orphan* works—defined as works protected by copyright but no longer available in print—without benefiting the creator or the public. The Supreme Court dismissed the case. However, in January 2005 the U.S. Copyright Office, prompted by the Senate Judiciary Committee, issued a Notice of Inquiry regarding *orphan* works—tentatively defined as "copyrighted works whose owners are difficult or even impossible to locate"—as the initial step in an investigation to determine whether current copyright law "imposes inappropriate burdens on users, including subsequent creators" and whether orphan works "are being needlessly removed from public access and their dissemination inhibited" (U.S. Copyright Office 2005).

The different definitions of an orphan work are important. How we define the problem determines its scope and constrains its solution. Figure 1 provides an indication of the significance of the definition using data from the random sample feasibility study to estimate the percentage of out-of-print works and copyright owners likely not to be found per decade.[2]

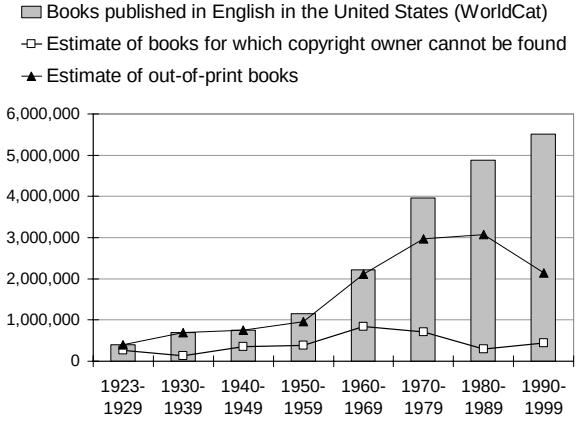


Figure 1. The estimated scope of the orphan works problem using different definitions.

[2] As of 1960 only seven percent of book copyrights were renewed (Ringer 1960). Most of the books published 1923-1963 are out of copyright. Figure 1 does not take this into account because potential users must determine the copyright status of each title. Since there is no definitive, affordable way to do this, they must either assume the work is in copyright or risk infringement.

The different definitions raise the critical question: When *is* a work orphaned: when the copyright owner cannot be found, or when the copyright owner chooses not to provide access to (disseminate) the work?

The problem of orphan works raises serious questions about the proper balance of private interest and public good inherent in copyright law. The burning questions are whether unauthorized use of copyrighted works—use that does not qualify as "fair use"—should be allowed in certain circumstances and if so, what those circumstances might be. The orphan works problem puts a spotlight on the difficulties inherent in a culture that requires permission, but provides little support for acquiring it.

Popular rhetoric frames the orphan works debate in opposing camps. On one side are those who argue that the orphan works problem threatens loss of our intellectual and cultural heritage and harms our ability to teach, learn, create, and compete in a global marketplace. Therefore the government should do something to address the problem. The opposing camp argues that allowing unauthorized use of copyrighted work (beyond fair use) would encourage copyright infringement and destroy our economy by eliminating the incentive to create. Therefore the government should strengthen protections, punish pirates and other infringers, and ensure that copyright owners are appropriately compensated. This polarization of the debate is reductive, misleading, and obstructive. Many stakeholders want to allow unauthorized use in limited circumstances and to do everything possible to compensate copyright owners.

The Responses

The U.S. Copyright Office posted the Notice of Inquiry to the Federal Register January 26, 2005. The Notice requested initial comments from interested parties by March 25, and reply comments by May 9, 2005. The Copyright Office received hundreds of responses, each of which shared some experience or expressed some concern about the problem of orphan works or its solution. Taken as a whole, they provide a diversity of perspectives on U.S. copyright law from a self-selected cross section of citizens and for-profit and non-profit organizations.

To get a handle on the general contours of the comments, I devised a simple coding scheme. Note that the results of this scheme do not accurately indicate the popularity or weight of positions for or against action to address the orphan works problem. Some comments were submitted by single individuals. Others were submitted by one or more organizations with thousands of members. Furthermore, all comments were not created equal. Some are very well informed, others are not. Nevertheless, some way to grapple with the volume of responses was necessary as a starting point.

Table 6 shows the results of my preliminary analysis. Few respondents objected (said "No") to any action that would allow unauthorized use of copyrighted work under any conditions. Very few approved action to address the problem everywhere but in their domain ("Not in My Back Yard" or NIMBY). The overwhelming majority approved of allowing unauthorized use in some circumstances. Many respondents shared personal experience with orphan works and proposed something about the solution to the problem. As expected, the reply comments focused more on the solution than the experience of the problem.

The general contours of the solution proposals are shown in Table 7. Overall, most of the solution proposals were "Simple," meaning that they suggested one to three elements or criteria of the solution. "Detailed solutions" provided more than three elements or criteria, and comments containing "Solution analysis" described advantages or disadvantages of different approaches to solving the problem of orphan works. More details and analyses were provided in reply comments than in initial comments. Among the initial comments, over a third

Table 6. Preliminary content analysis of initial and reply comments.

	No	**Yes**	**NIMBY**	**Experience**	**Solution**
Initial comments	8%	79%	1%	52%	54%
Reply comments	5%	86%	3%	33%	62%

Table 7. Preliminary analysis of solution proposals.

	Simple solutions			Detailed solutions	Solution analysis
	Public domain	Conditional public domain	Other		
Initial comments	26%	10%	42%	22%	19%
Reply comments	4.5%	4.5%	54%	37%	38%

recommended that orphan works become public domain immediately or conditionally; significantly fewer reply comments proposed the public domain as the solution. In conducting this analysis, I observed that proposals for the public domain came from individuals, not organizations, and were typically quite brief. Responses from organizations were longer, more detailed, and more analytic, which is not to say that no individuals proposed detailed solutions or provided analyses.

Most respondents approved of allowing unauthorized use of orphan works in some circumstances. However, the interaction of motives, priorities, values, knowledge, concerns, and presumptions color the responses and approaches to solving the problem. The same arguments are brought forth to address different issues and make different points. In some cases, the criteria for an acceptable definition of an orphan work shape the proposed solution. In other cases, criteria for an acceptable solution shape the definition of an orphan work.

The Issues and Proposed Solutions

Questions of Definition

Should an orphan work be defined as a work for which the copyright owner cannot be found? Should the definition of an orphan work include works for which the copyright owner cannot be identified? Sometimes diligent efforts to identify and locate the copyright owner yield no response. Since many requests for copyright permission are addressed to the presumed copyright owner who turns out not to be the current copyright owner, should some number of successful contacts (e.g., three successfully delivered letters requesting copyright permission) be criteria for designating an orphan work? Should the age of a work be considered in defining orphan work? Should the publication status of a work be a consideration in defining orphan work? Should the print status of a work be considered in defining orphan work? That is, if a work that had been commercially exploited (printed) is no longer commercially exploited (out of print), should this be the definition or a significant factor in designating an orphan work?

Questions of Scope

Should an orphan works designation apply to the work that meets the defining criteria or to a particular use that a particular user makes of the work? Should an orphan works designation apply to all types of copyrighted work? Should an orphan designation endure in perpetuity? Should the solution to the orphan works problem apply to all types of users? Should the solution to the orphan works problem apply to all types of uses?

Questions of Registration

Should copyright registration be required? Should copyright registration be voluntary? What would registration mean? What would be the implications of not registering? Under what circumstances would requiring registration breach relevant international treaties?

Proposed Solutions

Five different solutions were proposed:

- Make orphan works public domain either immediately or upon meeting certain conditions.
- Provide a “reasonable effort” accommodation with predictable limits or remedies for infringement if the copyright owner later comes forward.
- Provide government-sponsored compulsory licensing of orphan works for a reasonable royalty fee. Copyright owners who later come forward can collect the royalties paid for use of their work.
- Provide a default license for orphan works for a

minimal fee. Published and unpublished works not registered by a certain date acquire orphan status that persists in perpetuity. Copyright owners who later come forward can collect the fees paid for use of their work. Registration is required only for works that the copyright owner does not want to provide under the default license.

- Provide a safe-harbor exemption for non-profit libraries, archives, and educational institutions to enable the reproduction and dissemination of orphaned written work published some number of years ago and currently out of print. Limit the scope of allowable use to non-commercial use. Copyright owners who later come forward can stop dissemination of their work. Registration is required only for works that the copyright owner does not want made available under this exemption.

Insufficient details are provided in the comments proposing the public domain as a solution to understand how this option might work. Compulsory licensing and the reasonable effort accommodation are case-by-case solutions that would require users to demonstrate that the copyright owner could not be located. In the reasonable effort accommodation, if sometime later the copyright owner comes forward to claim infringement, users are liable. The default licensing and safe-harbor exemptions are categorical solutions to the problem of orphan works that make it easy to definitively identify orphan works and that do not leave users open to charges of copyright infringement.

Many responses to the Notice of Inquiry analyzed how a reasonable effort accommodation might work. The key questions to be answered are:

- What constitutes a "reasonable" and "good faith" effort? Who decides?
- Should users be required to document their efforts to locate copyright owners and to retain the documentation as evidence of their claim of reasonableness in case the copyright owner later comes forward to claim infringement?
- Should users be required to post a "notice of intent" to use a work prior to using the work for which they could not locate the copyright owner through a reasonable effort? If so, where should notices of intent be posted and for how long prior to use of the work?
- If the copyright owner later comes forward, who bears the burden of proof? Does the user have to prove that his or her effort was reasonable? Or does the copyright owner have to prove that the user's effort was unreasonable?
- Should people who want to use a work that a prior user's effort designated as an orphan be able to rely on the prior user's "reasonable effort" and orphan designation?
- What happens to the new work a user created using a (mistakenly) designated orphan work if the copyright owner later comes forward and claims infringement?
- What remedies should be available to the copyright owner? Should monetary damages be eliminated or capped? Should payment of a reasonable royalty be required? If so, who decides what the reasonable royalty is? Should money be deposited into an escrow account prior to use of the work?

The lengthy list of questions suggests that the reasonable effort accommodation is fraught with problems. It also suggests a great deal of interest in this approach to solving the problem of orphan works.

Public roundtable discussions of the orphan works problem and proposed solutions are scheduled for late July 2005 in Washington DC and Berkeley, California. A detailed look at the pros and cons of each issue and proposed solution articulated in the comments is available in Denise Troll Covey, "Rights, Registries, and Remedies: An Analysis of Responses to the Copyright Office Notice of Inquiry Regarding Orphan Works," Proceedings of the Symposium on Free Culture and the Digital Library, forthcoming 2005.

The Possible Outcomes

Table 8 is an attempt to apply criteria for an acceptable solution articulated in the responses to the Notice of Inquiry to the proposed solutions. No proposal is a perfect match or conspicuous winner. Ideally, all of the cells in the Table for a given solution would be "Yes." Part of the problem in applying the criteria is that many of the proposed

Table 8. Solution criteria and proposed solutions to the orphan works problem.

Solution criteria	Public domain	Compulsory license	Default license	Safe harbor exemption	Reasonable effort accommodation
Avoid harming copyright owners	NO	NO	MAYBE	MAYBE	MAYBE
Lower risk to users	YES	YES	YES	YES	MAYBE
Avoid unnecessary costs	MAYBE	NO	YES	YES	MAYBE
Avoid unnecessary bureaucracy	MAYBE	NO	YES	YES	MAYBE
Comply with international treaties	NO	MAYBE	YES	YES	MAYBE

solutions have more questions asked than answered. The Table also masks significant differences in the scope of application of the proposals.

The criteria reveal significant concerns about balance, certainty, and containing costs. The solution will require compromise and burden. The question is who gives and who endures. Under the current copyright regime, the balance is clearly tipped in favor of copyright owners, users are bewildered and threatened, and millions of valuable works apparently orphaned are not used. We need a practical solution and we need it now, a solution that is reasonable for creators, gatekeepers, and users of all stripes.

For reasons that should be obvious, making orphan works public domain is not a viable solution. The many costs associated with compulsory licensing, including the payment of a royalty prior to the copyright owner coming forward, make this proposal very unattractive from the perspective of trying to create a universal digital library. Similarly, a legal accommodation that would require libraries to exert a "reasonable effort" to locate the copyright owner or owners of hundreds of thousands if not millions of books would not have a profound impact on creating a universal digital library because of the transaction costs and risk of liability. Frankly, a reasonable effort accommodation might do little to help even individual users. Given the risk of liability, it might well suffer from the self-censorship and gatekeeping that plague the fair-use defense and provide no solution whatsoever to the orphan works problem.

Expanding U.S. Title 17 §108 to include a legal exemption that would enable libraries to cost effectively and with certainty identify, digitize and provide open access to orphaned books would be a tremendous boost to creating the universal digital library. The exemption proposed, however, would only allow non-commercial use of these works. It would facilitate preserving and cultivating our culture, but it is not enough. If a scholar wanted to use a portion of one of these books in a new book, such use would probably not be allowed. A legal exemption is likely an essential step in solving the orphan works problem, but access to works without the right to use them creatively would create a "read only" culture. Furthermore, our culture does not reside in books alone. To truly encourage the creation of new works and enhance scholarship, research, education, and lifelong learning, people must be able to access, manipulate, and use all kinds of works, all kinds of media.

The default licensing approach to solving the problem of orphan works is elegant in its simplicity, outward and forward looking in its thrust, commendable in reducing harm, burdens, and costs. Furthermore, it exposes and leverages the mistaken assumption that the current copyright regime is in the best interest of all copyright owners and all copyrighted works throughout their copyright term. If all copyright owners approved of the current regime there would be no open source software, no open access movement, and no Creative Commons licenses. There is a ground swell afoot that demonstrates strong dissatisfaction with current copyright law and practice. The problem is clearly bigger than orphan works.

I fully support default licensing. The time has come for radical change if we want to continue to have a free culture – not free as in free beer, but free as in not unnecessarily fettered by the past, but I sadly suspect that the default licensing proposal is ahead of its time. Very few responses to the Notice of Inquiry seriously considered the default licensing proposal.

Those who objected to any action that would allow unauthorized use of orphaned copyrighted works attacked the default licensing—free culture—movement, though their comments reveal that they do not understand it.

In my opinion, the ideal solution will not be framed to address the fears or protect the self-interests of content industries. Such a frame would only further burden users and cripple technological innovation. Instead the frame should harness the potential of the technology to create a future aligned with, but not controlled by, our past. Medieval monks controlled manuscript technology, censored what was copied, and were put out of business by print technology, which re-defined and democratized literacy itself. No one argues that this was a bad thing. Today those who rule in the analog world of print are at risk of losing their control in the digital realm. So be it. What we gain will far exceed what we lose. The default licensing proposal illumines and models a path that would both compensate copyright owners and encourage creativity and progress by embracing technology. What is needed is education and an easy, affordable process for registering works for which the default license is inadequate or inappropriate.

GOOGLE PRINT, COPYRIGHT, AND DIGITAL LIBRARIES

> [W]e should take care to remember what librarianship means in contradistinction to commercialized information, to remember the difference between individuals-as-citizens and individuals-as-consumers, and to remember that as librarians we are public stewards of the information commons and have an obligation to preserve and protect it…. We must not let anyone write off these concerns as "sentimental."
>
> – Rory Litwin, "On Google's Monetization of Libraries"

In December 2004, Google announced its Google Print Library Project to digitize both public domain and copyrighted books. Almost immediately there was a flurry of news articles, critiques, and inquiries about the project. Concerns about whether the project will create *The Library of Babel* envisioned by Jorge Luis Borges in 1941 or whether it will provide a significant public good are out of scope for this article. What is germane here is what it really means to be a library, whether Google can create a real library, and whether the Google Print Library Project can harm libraries and library users.

Why Google is Not a Library

Librarians are professionals with expertise in cataloging, organizing, contextualizing, and providing access to information. They have not only a mission, but a code of ethics to guide their work. The American Library Association (ALA) code of ethics includes providing equitable service, upholding intellectual freedom and resisting censorship, maintaining the privacy and confidentiality of user data, respecting intellectual property rights, prohibiting the advancement of private interests, and disallowing personal convictions to interfere with providing access to information (ALA 1995).

Google does not have a comparable code of ethics. As a commercial business, it has an understandable vested interest in generating revenue and satisfying stockholders. Therefore the Google "digital library" must and will operate under different constraints and serve a different master from traditional libraries. An analysis of the information available on the Google Print Library Project reveals the following reasons for concern – reasons why the Google "digital library" will not be a real digital library, though to the unwary it might be a compelling look-alike.

The Selection Criteria for Materials to be Scanned and Made Accessible

Libraries typically have plans, policies, or criteria for developing, digitizing, and weeding collections and for selecting materials to be moved to offsite storage. In the Google Print Library Project, few details are available on the selection criteria for

digitizing titles in the collections of participating libraries. However, whether what the libraries choose to be scanned will really be scanned is unclear. The publicity about the Google agreement with the University of Michigan indicates that all of the library's content will be digitized, but the Cooperative Agreement – the only library agreement with Google that is publicly available – states clearly that Google is not obligated to scan the available content.[3] Furthermore, Google reserves the right not to provide access to content that is scanned.[4]

Google stockholders could restrict what content is scanned or made available online. Unlike a library, where the ethics of the profession uphold intellectual freedom and equitable access to information regardless of whether the librarians agree with the politics or perspective of the material or the user, Google has no professional ethic to uphold. Lest someone dismiss the possibility for censorship or bias in the Google Print library, note that Google already shows favoritism in its indexing and ranking of pages. The sequence of items in a Google result set is based on the popularity (not necessarily the quality) of Web pages and the IP address of the user's computer (Google-Watch, no date). Webmasters have found their sites penalized by Google with no appeal process available. Given Google's popularity, being removed from the Google index means that people are not likely to find or cite your resource (Jensen 2005).

Standards and Privatization

Nothing is known about the digitization standards, metadata standards, or quality assurance processes in the Google Print project.[5] According to Google's senior business product manager Adam Smith, Google is using proprietary technology designed for high volume, high quality scanning that will not harm books.[6] The display format chosen for the project is PDF, the proprietary format of Adobe. There is no information available about whether Google will preserve the original scanned images so that they can be converted to whatever replaces PDF. Nor is any information available about what happens to the digitized books if Google or Adobe do not survive over time or adapt to changes in technology. A recent article, reflecting the panel discussion among Google executives and participating libraries at the American Library Association Conference in June 2005, indicates disagreement among the libraries as to whether the project is a preservation initiative (Library Journal 2005). Only Michigan believes it is.

The Google Print project supports only keyword, not fielded searching, and its proprietary technologies are not likely to follow international standards or support interoperability. Google has no professional commitment to stewardship or preservation or the standards that enable them. Furthermore it has been in business for only seven years. Traditional libraries have been operating for centuries. They are committed to implementing standards to enhance recall and precision and ensure interoperability, and to stewarding and preserving their collections. Relying on the proprietary, eleemosynary efforts of a volatile dot com to preserve and provide unbiased access to our heritage would not be wise.

Restrictions on the Use of Books

Google will disable saving and printing of all books digitized in the Google Print project, including public domain books (Johnson 2005). Initial understanding of the project was that participating libraries could use their copies however they chose, which suggested that use of the library copies might

[3] Google "shall have no obligation to Digitize any portion of the Available Content" (Cooperative Agreement, date not disclosed: 9). Harvard plans to digitize 40,000 public domain titles "randomly selected" and "therefore highly diverse in terms of age, topic, and language" (Harvard University Library 2004).

[4] According to the agreement with Michigan: "Google shall have no obligation to… use any portion of the Google Digital Copy as part of the Services"; "Notwithstanding anything to the contrary in this Agreement, Google is not required to make any or all of the Google Digital Copy available through the Services" (Cooperative Agreement, date not disclosed: 6).

[5] Even the Cooperative Agreement between Google and the University of Michigan gives no real indication: "Google shall at its sole discretion determine how best to Digitize the Selected Content, so long as the resulting digital files meet benchmarking guidelines agreed to by Google and U of M and the U of M Digital Copy can be provided to U of M in a format agreed to by Google and U of M" (Cooperative Agreement, date not disclosed: 3).

[6] ALA Conference talk by Adam Smith, Monday, June 27, 2005

be less restricted. More recent reports, however, indicate that access to the library copies will be restricted to those affiliated with the participating institutions.[7]

The ability to save and print pages is important to users. Given that there is no legal or contractual obligation to restrict what users can do with public domain books and Google's "pledge to respect and protect intellectual property rights" (Google 2005), many librarians wonder about fair use rights. These restrictions suggest that Google has some commercial intent for all of the digitized library books, both in and out of copyright.

Monetization

Google co-founder Larry Page is a "firm believer in academic libraries being able to 'monetise' the information they hold" (Chillingworth 2004). Screen shots of plans for the Google Print Library Project show that Google plans to commercialize the library books by targeting advertising and providing links to purchase the books. Google has a patent application pending on a payment service (Jesdanun 2005). Furthermore, according to the agreement with the University of Michigan, Google has the right to make copies of the digitized books and license or sell them.[8]

Though searching the Google Print "library" may be free of charge, Google's ultimate goal is to generate revenue for the corporation through the sale of advertisements or physical copies of the books or the licensing or sale of digital copies of the books (Brandt 2005). "How long will it take before the copyright-protected works in these collections are available on a pay-per-download basis, turning the equity-of-access principle of libraries, which is what gives libraries their essential democratic character, into the principle of access for those who can afford it?"(Litwin 2004).

Privacy and Confidentiality

Google gathers and retains user information through "cookies" and uses this information to target advertising and order results aligned with the user's interests.[9] Google uses a single cookie with a unique ID across all of their services; Gmail accounts make the cookie ID "personally identifiable" (Brandt 2004). Though it is unclear whether this functionality will apply to public domain books, use of in-copyright books in Google Print, currently available under agreements with publishers, requires users to create Google Gmail accounts to see more than five pages. "Google's program for scanning library books sometimes requires usernames to protect copyrights" (Jesdanun 2005).

Google already knows "what you search, what you read, where you surf and travel, whom you write"; the addition of a payment service will add billing information to user profiles (Jesdanun 2005). Google retains the data indefinitely and shares the data with outside parties serving as Google agents (Jesdanun 2005). Google will not say why the data are needed or respond to inquiries about its privacy policy or whether it gets subpoenaed for its data (Google-Watch, no date). Nothing in the Google

[7] Google "will be free to exploit its digital copies of Oxford's materials in any way it pleases; while Oxford's use will be no more or less restricted than it is of those same materials in their physical form"; Oxford copies will be "available to all accredited Bodleian users" (Carr 2005). Similarly, the Cooperative Agreement stipulates that the University of Michigan "will restrict access to the U of M Digital Copy" and ensure that substantial portions are not downloaded from U of M "or otherwise disseminated to the public at large." In addition, Google oversees partnership agreements, which must be "at least as restrictive as the limitations placed on U of M's use of the U of M digital copy." Google must be the "third party beneficiary" of any agreement, with the ability "to enforce the restrictions against the partner research library" (Cooperative Agreement, date not disclosed: 5).

[8] "To the extent portions of the Google Digital Copy are either in the public domain or where Google has otherwise obtained authorization, Google shall have the right, in its sole discretion, to make copies of such portions of the Google Digital Copy and to provide, license, or sell such copies to any party" (Cooperative agreement, date not disclosed: 6.)

[9] Google cookies expire in 2038. The "cookie places a unique ID number on your hard disk…. For all searches they record the cookie ID, your Internet IP address, the time and date, your search terms, and your browser configuration. Increasingly, Google is customizing results based on your IP number. This is referred to in the industry as 'IP delivery based on geolocation'" (Google-Watch, no date).

contract with the University of Michigan binds Google to maintain user confidentiality.[10]

Google has privacy statements, but unlike a library, no professional ethic to guide its treatment of user data. From the perspective of librarians, protecting privacy is protecting freedom (Litwin 2004). Because Google practice tends to set patterns and precedent, in April 2004 the World Privacy Forum and 30 other privacy and civil liberties organizations sent a letter to Google requesting the suspension of Gmail service until the privacy issues are addressed and Google's policies regarding data gathering and use are clarified. Google did not respond. In December 2004, Daniel Brandt of Public Information Research (PIR) and www.google-watch.org wrote a letter to Maurice Freedman of the American Library Association (ALA) urging ALA to pressure the libraries participating in Google Print to require Google to respect the anonymity of users of the digitized library books (Brandt 2004).

How Google Might Harm Libraries

When Google announced the Google Print Library Project in December 2004, many users were thrilled, but not authors and publishers. Concerns were raised about the potential for piracy and lost revenue from online access to copyrighted materials. But more importantly for current purposes, concerns were raised about the violation of copyright laws by Google and by the participating libraries.

Though "Google Print for Libraries" was being developed or negotiated simultaneously with "Google Print for Publishers," the publishers were not informed of this parallel track and understandably perturbed when they learned of it. What ensued was a series of letters from publishers to Google asking questions and making requests. The kick-off May 20, 2005 was a letter from the Association of American University Presses (AAUP 2005) describing their position and posing sixteen questions, including:

- Why does Google believe permission from copyright owners is necessary in agreements with publishers, but not necessary in agreements with participating libraries?
- How does the four-factor test for fair use, designed to apply to specific instances, apply to the unprecedented sweep of the Google Print Library Project?
- How does Google plan to protect its copies against misuse?
- What is the basis for Google's assertion of ownership of all rights to the digital files created in the Google Print Library Project?
- How does Google plan to protect copyright owners from future Google exploitation?

The AAUP gave Google 30 days to respond to their letter. In early June, attending the fourth annual Blackwell Publishing Executive Seminar in Washington DC, Google's senior business product manager Adam Smith did not address the AAUP's concerns, but focused instead on the potential benefits of Google Print: users will discover more quality content in Google and publishers will generate revenue from book sales. Smith's claim that 85% of the books being digitized in library collections are out of print strongly suggests a future fee-based, print-on-demand or pay-per-view service with royalties paid to the publishers (Albanese 2005). Similarly, attending the annual meeting of the AAUP in Philadelphia in June, Tom Turvey, Google's director of strategic partner development, Web search, and syndication, gave unsatisfactory answers to questions from the audience and appeared to dismiss the AAUP's concerns as a matter of "misinformation" about the project (Howard 2005).

The Association of American Publishers (AAP) sent a letter to Google explaining their position and requesting a meeting with Google executives and a six-month moratorium on digitizing copyrighted books. Random House, John Wiley & Sons, and Houghton-Mifflin also sent letters. The Association of Learned and Professional Society Publishers (ALPSP) issued a position statement on Google Print for Libraries. Google responded to the AAP on June 20 that they would schedule a meeting with the AAP, but wait to decide about the moratorium until after the meeting (Helm 2005). As of June 27, no date had been set for the meeting with the AAP and Google

[10] "Google shall maintain on its website a privacy policy that governs collection and use of information that Google obtains from a user of the Google Search Services" (Cooperative agreement, date not disclosed: 6).

had not responded to the letter from the AAUP (Milliot and Gold 2005). Meanwhile, on June 17, 2005, using the Michigan State Freedom of Information Act, Google-Watch.org prompted disclosure of the confidential contract between Google and the University of Michigan referenced earlier in this paper.

The copyright issues and arguments are as follows:

- Is it legal for Google to copy (digitize) copyrighted books? U.S. Title 17 §108 does not allow indiscriminate and wholesale digitization of library collections.[11] It explicitly prohibits the reproduction or distribution of copyrighted works for "any purpose of direct or indirect commercial advantage" without the permission of the copyright owner. According to Laura Gasaway, intellectual property expert and law professor at University of North Carolina, "While libraries are sometimes allowed to make digital copies when a copyrighted book is out of print, they aren't allowed to distribute those books digitally. As a public company, Google would have trouble justifying why it should hold onto a digital copy itself" (Helm 2005).

  The targeted advertisements in Google Print could violate §108 (Brandt, no date). Certainly a fee-based service like pay-per-view or print-on-demand would violate §108.

- Is it legal for Google to display a few sentences or "snippets" from copyrighted books that match the user's query? According to Susan Wojcicki, director of product management for Google Print: "We believe that our program is fully consistent with fair use under copyright law" (Young 2005).

  According to U.S. Title 17 §107, "the fair use of a copyrighted work, including such use by reproduction in copies … for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."[12] The four factors to be considered in determining whether a particular use is fair use are:

  1. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes
  2. The nature of the copyrighted work
  3. The amount and substantiality of the portion used in relation to the work as a whole
  4. The effect of the use upon the potential market for or value of the copyrighted work

  It is difficult to see how Google's claim of fair use is justified according to the four-factor test given the commercial nature of the Google enterprise and the full books to be made available for viewing snippet by snippet. The AAP argues that the claim of fair use is disingenuous because Google has to copy (scan) the entire book and keep the digitized pages in order to show the appropriate snippets (Nuttall 2005).

- Does the precedent of Kelly v Arriba Soft apply to Google Print? Google claims that it does. The ALPSP and AAUP argue that it does not because in the case of Google Print, the works have not already been digitized and made available on the Web by the copyright owner (ALPSP 2005: 2; AAUP 2005).

In addition to these arguments based on copyright law, Google has provided two justifications for the Google Print project: the benefits that the project provides and the ability for publishers to opt out of the project by instructing Google not to provide access to their books. According to the ALPSP, the potential benefits are irrelevant and no defence against copyright infringement (ALPSP 2005: 2). According to the AAUP, the opt out option is irrelevant and disingenuous – irrelevant because Google has no right to copy or distribute the material in the first place, and disingenuous because Google has provided little information about what publishers need to do to opt out (AAUP 2005: 2).

Associations of publishers are powerful lobbies in Washington DC. Publishers feel strongly that

[11] See http://www4.law.cornell.edu/uscode/html/uscode17/usc_sec_17_00000108----000-.html.

[12] See http://straylight.law.cornell.edu/uscode/html/uscode17/usc_sec_17_00000107----000-.html.

digitizing copyrighted books in the Google Print Library Project is large-scale infringement with the potential to seriously damage the market for their works. Google risks a class-action law suit in which the court could award up to $150,000 per work infringed. In addition to the many unanswered questions about what Google has a legal right to do, there are questions about whether the participating libraries have the right to give copyrighted material to Google for the purposes of digitization and whether in doing so they too might be liable for copyright infringement (Brandt 2005).

According to Siva Vaidhyanathan, Department of Culture and Communication, New York University, Google is inviting a "copyright meltdown" (Vaidhyanathan 2005). The Google Print Library Project has increased the panic, uncertainty, and disequilibrium in the copyright system precipitated by digital technologies. In response to the threat of a lawsuit, Google could decide not to scan copyrighted books without the permission of the copyright owners. If, however, they choose to continue as planned, a lawsuit is likely. And if a lawsuit ensues, whatever grounds Google uses to make its case, be they exemptions allowed under U.S. Title 17 §108 or §107 or the Sony exemption of copying for personal use, the suit will likely spearhead an investigation of these exemptions. In the worst case scenario, the result of such an investigation would overturn these exemptions as legislation appropriate for the analog world of physical artifacts, but no longer viable in the digital world of virtual, identical, instantaneous copies and distribution. In any case, the Google Print "library" will not be the universal digital library of our dreams.

A recent article by Clifford Lynch, Executive Director of the Coalition for Networked Information (CNI), makes an alarming observation:

> [S]ome would argue that digital libraries have very little to do with libraries as institutions or the practice of librarianship. Others would argue that the issue of the future of libraries as social, cultural and community institutions, along with related questions about the character and treatment of what we have come to call "intellectual property" in our society, form perhaps the most central of the core questions within the discipline of digital libraries – and that these questions are too important to be left to librarians, who should be seen as nothing more than one group among a broad array of stakeholders. (Lynch 2005)

I agree that there are many stakeholders in the development of digital libraries, but I feel strongly that if these developments are to create real libraries, then librarians must play a leadership role. Borrowing terminology used in the past to dispense with requiring notice and registration to secure copyright protection, I believe that from the perspective of users and libraries, the Google Print project is a "trap for the unwary." I feel the same about the "reasonable effort" accommodation to solving the orphan works problem. Perhaps now more than ever educating users about what is at stake in the copyright discussion, why Google or any other commercial Internet search service can never create a real library, and what default licensing brings to the table is a critical necessity. Ideally information literacy initiatives would embrace these issues as integral to the knowledge and skills required for responsible information behaviour in the digital age.

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