

Part I: Observations

1. I am the editor of The Online Books Page, the Internet's oldest and largest open-access index exclusively devoted to freely readable online books from sources across the Internet. I currently list over 23,000 such titles, and am working on upgrades of infrastructure to handle what may be millions of free titles available online in the not-too-distant future.
2. My site is hosted by the University of Pennsylvania, which employs me for digital library research, development and support. However, in these comments, I am speaking for myself, not my employer.
3. By training, I am a computer scientist, and hold a PhD in this field from Carnegie Mellon University. Although I have a general familiarity with copyright law of the US and other countries, and suggest some changes to it here, I am not a lawyer or a legal expert.
4. In accordance with copyright laws, listings on The Online Books Page are limited to books that are in the public domain or otherwise permissible under copyright law to go online, and books that are online with the permission of the copyright holders.
5. I regularly receive requests from users of the site for books that they wish to read, but are out of print and not easily obtainable, and are still under copyright. I have to tell them that I cannot list such books. As copyrights terms have lengthened, the set of books in this class have grown. I have posted instructions for contacting copyright holders in these cases, but have been informed in a number of cases that the copyright holders were not reachable. Sometimes their addresses could not be found; sometimes author's heirs could not be determined, let alone found; sometimes publishers who asserted copyright over works were no longer in existence.
6. As we shift to a regime in which copyright terms last for a certain time period past the death of an author, and where notices are no longer required on copyrighted works, it may grow increasingly difficult to tell whether or not a work is under copyright at all, particularly if the author is obscure or the date of publication indefinite.
7. I am occasionally informed of sites that have put copyrighted but out of print books online without permission, with a note to copyright holders to contact them if there are any problems. I do not list such books on my site. If I did, and in fact a copyright holder complained, the potential penalties for copyright infringement, including contributory infringement, are so large as to put myself and my university at unacceptable risk. This is the case even for works no longer under commercial exploitation.
8. However, I am told that these books are useful to many of their readers, and I am aware of very few cases where a copyright holder has actually contacted the owner of one of these sites, when their book has been out of print. In most of these cases of which I have heard, the author has been happy to have the book stay online, as long as proper copyright and permission acknowledgement is made.

9. In my experience maintaining the Online Books Page, I have seen many valuable uses of books online besides mere copying. People have often prepared derivative works, such as updates of older works to present-day circumstances, or adaptations for pedagogy, juvenile audiences, or performances. Excerpts from works I list have been reproduced in new books, or displayed in exhibits. Performing companies have used copies of dramatic works that I list for live productions.

10. All of these uses are legally permitted for public domain works, and have enriched our common culture. However, they are not permitted for copyrighted works, even those that are out of print and no longer of interest to the current copyright holders, whoever and wherever they may be.

11. I am also aware of interest in these sorts of uses for such out of print copyrighted works. Such use seems to threaten little if any harm for unreachable copyright holders of works no longer under commercial exploitation. The prevention of such use does, however, impair the growth and health of our common culture.

12. The lost opportunities of orphan works-- works that are no longer commercially exploited by their rightsholders, and for which rightsholders cannot be contacted with reasonable effort-- are not limited to books, but apply to other sorts of works as well. One case which I am painfully aware of as a computer scientist is the problem of orphan software. Organizations not uncommonly depend on software for years after the company that makes and sells the software goes out of business. Often it is difficult to find anyone who will support the software after the demise of the original company, or even in some cases to find out who controls the rights. In the present environment, software and formats can become obsolete and unsupported alarmingly quickly, and the term of copyright for software is effectively perpetual for most practical purposes.

13. Yet software that organizations depend on must be regularly copied and often adapted for new operating systems and environments. Copyright law only offers limited rights to do such things. Fair use is often understood to allow internal copying and reuse of previously purchase software, though the legal risks are sometimes murky. Moreover, it is generally understood that distributing or adapting such software *outside* the bounds of an internal organization is much riskier legally. Thus, many opportunities are lost to more efficiently maintain and improve software through collaboration.

14. The decay in software support that results from this situation has potentially disastrous effects for preserving culture in the digital age. The cultural and scientific record of this country is increasingly in digital form. Works in digital form typically require a particular software environment in order to be used or even deciphered. Copyright restrictions that lead to the loss of support for these environments can lead to effective loss of the works as well, and thus loss of large and valuable corpuses of information.

15. The US Constitution authorizes Congress to create copyright laws "to promote the progress of science and useful arts". This purpose

has generally been understood to be the proper basis for copyright law in this country.

16. Numerous exceptions to the general exclusive rights have been granted to serve this purpose. These exceptions include immunities from infringement under some circumstances, and compulsory licenses under other circumstances.

17. The Berne Convention also allows the use of copyrighted works under cases that "[do] not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author." The Berne Convention is the basis for much existing international copyright law.

18. Many of the uses of copyrighted works referred to above do not interfere with the normal exploitation of the works, or unreasonably prejudice the legitimate interests of the author. Furthermore, they promote the progress of science and the useful arts. In particular, this is frequently the case for orphan works, which have fallen into disuse but can once again enrich culture and knowledge with new use. Thus, expanding and clarifying the rights to use orphan works fulfills the intent of the Constitution, and accords with generally accepted bases of international law.

Part II: Recommendations

19. I recommend that Congress and the Copyright Office take steps to make it easier for interested parties to use works that are no longer being commercially exploited, and where the copyright holder cannot be easily reached.

A: General requirements

20. The desired outcomes of these efforts should be to:

- (a) open up a wide array of obscure and largely unused works to be freely copied, adapted or otherwise used by the general public
- (b) promote the preservation of works at risk of being lost through disuse and obsolescence (including technological obsolescence)
- (c) make it easier for interested users to locate the copyright holders of works, or to establish their orphan status if the copyright holders cannot be found and the works are no longer being commercially exploited.
- (d) allow interested users to make use of an orphan work once they have made a good-faith effort to determine its status
- (e) give interested rightsholders opportunities to assert control over, and reap benefits from, use of their formerly "orphan" works.
- (f) not unduly burden users with legal uncertainty and risk in determining the status and proper use of an orphan work
- (g) encourage the avoidance of disputes, and amicable settlement of disputes that do arise, between a rightsholder and a user of a claimed orphan work
- (h) minimize bureaucratic overhead, cost, and time commitment to all parties, including users, rightsholders, and the Copyright Office.

B: Suggested actions

21. Specifically, I recommend the following actions:

- (a) To make it easier for users to find rightsholders, the Copyright Office, or its designated agents, should make all registrations and other filings related to copyrights that may still be in force viewable and searchable online. This should include retrospective digitization where necessary.
- (b) To establish a clear right to use orphan works, Congress should pass laws granting new exemptions from copyright infringement for the use of such works, if the proper procedures are followed in establishing their status and using them. These exemptions would not replace, eliminate, or reduce any other rights of users of works in existing copyright law.
- (c) To help prevent and resolve disputes over orphan works, the Copyright Office, or its designated agents, should allow the registration of notices of intents to use, or to reserve use of, works claimed to be orphan. This would be a last resort for users after good-faith attempts to locate a copyright holder had failed. Notices should be viewable and searchable online. Registration of intent to use would be required to be eligible for the special exemptions against copyright infringement of orphan works.
- (d) To support this system, and to protect users and rightsholders, Congress and the Copyright Office should determine any appropriate fees, waiting periods, and escrow requirements for users of orphan works.
- (e) To promote preservation in the digital age, Congress and the Copyright Office should consider whether additional special exemptions might be appropriate for "orphan" software, or digital works that depend on "orphan" software environments.

C: Discussion points for implementation

22. Whether or not these actions would succeed in achieving the goals above can depend greatly on the details of their implementation. The following suggestions are not intended to give a complete or fixed specification of the ideas proposed above, which would be inappropriate at this time, but hopefully prompt useful discussion of how the actions above could be undertaken.

23. The Copyright Office should not itself be in the position of certifying whether a work is orphan. Such certification is likely to be costly and time-intensive, and severely limit the supply of usable orphan works.

24. Instead, Congress and the Copyright Office should draw up and promulgate reasonable rules for good-faith efforts for users to determine that a work is orphan. These would include checks for current publication or other commercial exploitation, and attempts to find and contact rightsholders. A notice of intent to use would include an attestation by the filer that a good-faith effort had been made in accordance with the stated rules.

25. To protect authors of new works, and to prevent abuse of the system, there should be some initial time period in which a work cannot be considered orphan. For published works this could

be a few years after publication. For unpublished works, this could be the lifetime of the author. It is possible that international treaty obligations would require longer protected periods in some cases.

26. Notices should include information sufficient to clearly determine the work being used or reserved. This should at least include the title, the authors if specified in the work, and the applicable copyright registration identifiers, if any exist at the time of filing a notice.

27. Notices should also include contact information for the user or rightsholder, as applicable, so that rightsholders and users can easily contact each other concerning use of copyrighted materials. Users should also check periodically for notices of intent to reserve use. (But they should not be liable for failure to check, if they have not been contacted and still have good contact information recorded, if a notice of intent to reserve use has only recently been filed.)

28. Users should be immune from infringement if they have made a good faith effort as described above, filed a notice of intent to use, keep their contact information current, have not received contact from rightsholders or a notice of intent to reserve use, have waited any required waiting period, and have paid any required fees or escrows.

29. If users are contacted by rightsholders or receive notice of intent to reserve use later on, they should have a reasonable interval to cease their use of the work.

30. The notice of intent to reserve use is arguably **not** a formality required to enjoy the essential benefits of copyright, if orphan works do not confer substantial benefits on the creator in the first place. Someone who wishes to use an orphan work must first verify that the work is not under licensed commercial exploitation, and have made a good-faith attempt to contact the copyright holder. Only then can the user file a notice and use the work, and he must cease if so directed by the copyright holder. The notice of intent to reserve use is essentially a convenient way to publish this direction for all concerned parties, but is not actually required to stop unauthorized use.

31. Rights of use should include not only mere copying and distribution, but other rights under copyright law, including performance, display, and production of derivative works.

32. The requirement used in certain other exemptions of copies not being available at a reasonable price should not be a general requirement for the use of orphan works. A few copies of a work on the used market does not substitute for uses such as posting a work online for public access, or performance of a work, or creation of derivative works.

33. To avoid rightsholders having to pay to maintain their rights, there should be no fees for filing notices of intent to reserve use. Fees for filing notices of intent to use should be set at cost recovery levels (including the cost of subsidizing notices

of intent to reserve use), or below if other subsidies are available.

34. Notices of intent to reserve use can expire if the contact information in them can no longer be used to reach the rightsholder, and sufficient time (no more than a few years) has passed since they were last filed or updated.

35. Rightsholders should be able to update their contact information either in notices of intent to reserve use, or in normal copyright registrations or transfer notices, at any time. Users should be able to update their contact information in notices of intent to use as well.

36. Waiting periods, where appropriate, should be set such that users do not have to wait unreasonably long to start using an orphan work. Rightsholders should not be required to keep a constant close eye on notices to prevent the unwanted exploitation of their work, though. However, since users would already be required to certify that they had made a good-faith effort to contact the rightsholder, waiting periods might not be necessary, or might be reasonably limited to short periods such as a year or less.

37. I do not take a position on whether the registry of notices of intent to use or reserve use should be run by the Copyright Office, or by agents of the office, or by a competitive marketplace of registrants. However, whatever system is adopted must make it easy to reliably find applicable notices of intent to use or reserve use, or to determine that no applicable notices exist, wherever they are maintained. Cost minimization is important as well, but secondary to that requirement.

38. Allowing online automated filing and updating of notices may reduce the costs of running a registry, as well as increasing the efficiency and ease of filing notices.

39. In order to ensure that rightsholders can share in the revenue gained from new exploitation of an orphan work, it might be appropriate for royalty fees to be escrowed for a time for commercial uses. These would then be given to the rightsholder if located at a later date, or returned to the user after a time. The rates could be set by statute or regulation. It might also be appropriate to restrict or prohibit some forms of commercial use without permission, such as advertising and publicity.

40. Noncommercial use, however, should be, to the greatest practical and just extent, free from escrow requirements or restrictions on the scope of rights of use. There is a huge wellspring of creative and productive force online and in local communities that can benefit from the free use and reuse of orphan works, where no money is received, and for practical purposes no money is lost by the rightsholder.

41. Some special exemptions for use have been made in the past for libraries and archives. However, on the Net and in local communities, just about anyone who wishes can act as an informal library or archive for their readers and neighbors, and produce

new creations and performances based on existing works. For orphan works, rights of use should not be limited to officially incorporated libraries and archives, but be available to a wider community.

42. To ensure these new provisions meet the needs of their constituents their details should be subject to review and revision at some well-defined point(s) after adoption. If Congress can delegate less important implementation details to the Copyright Office, the Copyright Office can make appropriate improvements to such rules without requiring further time and attention of Congress.

43. I thank the Copyright Office and Congress for giving me, and the rest of the general public, the opportunity to make suggestions on the issues raised by orphan works. I hope that they take appropriate action on them, to enrich and empower our shared culture and creative efforts.