

May 20, 2008 2:44 PM PDT

Orphan Works: Half a loaf

Posted by [Charles Cooper](#)

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Editor's note: We're opening up our pages today to a guest post from James V. DeLong from the Convergence Law Institute. He is also special counsel at Kamlet Shepherd and Reichert.

Both houses of Congress are now considering legislation to ease access to "orphan works"-- material under copyright for which an owner either cannot be identified or cannot be found (HR5889 & S2913).

The bills are good, but they solve only part of the problem: they help users who already knows what material they lust after. They do not help users search through the vast existing archives to find material worthy of such lust, and more legal tinkering is going to be needed.

Both bills are based on the Copyright Office proceeding of a couple of years ago, and their basic structures embody the CO-recommended solution. If someone wants to use a work, he/she must conduct a diligent search for an owner. If no owner can be found, then the work can be used. If an owner turns up later, a reasonable fee will be paid, based on a "willing buyer, willing seller" standard. The CO gets to define standards for reasonable searches, relying on best practices developed by the relevant communities.

In addition, there are special and vexing problems surrounding visual works, such as photos, and the CO is charged with establishing an electronic database to help here, a responsibility that it does not want.

These are good proposals. Not problem-free, but good, and long overdue, so one should wish them bon voyage. One can argue that they are unnecessary because any use that follows a vain search for a copyright owner should be automatically protected as "fair," but commercial organizations, looking down the barrel of heavy statutory damages, do not want to test this proposition.

But what if a user does not know what he or she wants to use, and needs to search to find out? This is the need addressed by Google and other companies that want to shovel whole libraries through the maws of the scanners, making them available for search and retrieval.

These efforts raise some legal problems. Publishers object on the grounds that making a digital copy is itself an infringement, especially if the copy is then shared with a library that may have expansive ideas of its rights to disseminate it further. They suggest that digitizers must get the copyright owner's permission first, and they may well be right to claim this is legally necessary. Google is temporizing by continuing the scanning program while being careful to limit public access to anything under copyright, but lawsuits against even this are pending.

As a practical matter, requiring advance permission is a deal killer as far as orphan works go. Publishers can go out of business, so even the title page may not tell someone where to go for permission. Then there are tons of "gray literature" materials that may be under copyright, since everything is under copyright, but that were not produced for direct commercial purposes and are sometimes of uncertain provenance. (For example, a collection of old theater programs, or auction house catalogs, or corporation annual reports.) There are also zillions of works with no serious commercial value for which an owner might be delighted simply to see them returned to the light of day, or for which the value is too paltry to be worth the transaction costs of negotiating a fee.

These possibly-orphan, sort-of-orphan, and gray literature works simply cannot be made available if the digitizers are required to make one-by-one judgments and seek permission before copying. If they are to be retrieved in useful form, then sooner or later Google, Amazon, Microsoft, and some others must be permitted to digitize on a massive scale.

On the other hand (and one needs a lot of hands to really discuss this issue), it is important that digitization not deprive intellectual property owners of legitimate rights, and how one writes a law that allows digitization by the reputable without also enabling Piracy, Inc., or Carelessness Corp. is a tough question.

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Charles Cooper has covered technology and business for over 25 years. A graduate of Queens College and Columbia University, Cooper began his career in journalism at the Associated Press before moving to technology coverage. Over the years, he has worked at Computer & Software News, Computer Shopper, PC Week, ZDNet News and now, CNET News.com. He received the Excellence in Journalism award from the Northern California branch of the Society for Professional Journalists for column writing.



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materials, and more.

There is also a need to allow digital access as well as search. As an Amazon Kindle user-tending-toward-addict, I find Google Book Search a bit irritating. I do not want to know where to buy a hard copy of the book; I want it now. Or, even better for research purposes, I want to buy a copy of a few selected pages online, not the whole work.

This is where the technology is going, and the law will have to adapt. It is a truism of history that protecting property rights is crucial, but the exact forms they take are malleable, according to the technological and economic realities of the time. Today is no different.

So the orphan works bills are a good start, Congress, but we should already be working on the next round.

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by [m2mc](#) May 20, 2008 3:28 PM PDT

For another perspective on this issue, Prof. Lessig, NYT, today:
http://www.nytimes.com/2008/05/20/opinion/20lessig.html?_r=1&ref=opinion&oref=slogin

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by [Travis Ernst](#) May 20, 2008 5:13 PM PDT

No standards have been setup in the bill/s for how "exhaustive" of a search a person must attempt to do in order to find the owner of, for example, a photograph. It could be as simple as posting a message on craigs list or on a local paper never reaching the person who owns the picture. Secondly, the database talked about in the bill does not even exist yet. Nor do the "standards" for what the values that would be paid back for songs or pictures used in marketing for example. What would be the value of a independent song? If we go by RIAA's standards it's in the tens of thousands. In other eyes is may only be a few hundred dollars. Same for photographs. What would you value one? Now consider the value of an Ansel Adams photo. What's the difference. The court has no standard or guide to go by. Artists need PROTECTION with a bill like this.

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by [artkaf](#) May 20, 2008 10:20 PM PDT

Dear Charles, Your comments about the Orphan Works Act of 2008 were wonderfully written to expand upon non-commercial use of orphaned works. However, as a professional fine arts artist that licenses my paintings of childhood, your article does not address commercial infringements; ? so called? orphaned works being used for profit. I would like to share with you my concerns about the current Orphan Works Act of 2008 which is on the floor of the Senate, without debate, and on the floor of the of the House? Charles, I'll be gentle. As part of the creative community, we would also enjoy an extensive view of new works from the archives of a library. History is wonderful and revealing. I enjoy donating and sharing my work with non-for-profit organizations and institutions. It is an honor to grant permission for the use of my paintings to those organizations in which I have a common interest. However, this bill makes it easier for those organizations in which I do not agree to use my artwork without my knowledge. On one occasion, my painting of children

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infringed a ?fair? royalty or fee. As a professional licensee, I contract legitimate royalty?s for my paintings activity. Let?s be honest, this particular royalty or fee is called punishment. (I?m trying my best to have a sense of humor.) From my perspective, this bill allows the courts to place me in a working relationship with someone in which I do not wish to work. Conditions that I include in my contracts, i.e. quality standards, material quality, approvals, etc. are overlooked and not addressed in this bill. When the judge offers the verdict, which law does the judge use; the Copyright law of 1976 or the more recent Orphaned Works Act? One law protects the infringed (that?s me!), the other law is lenient to the infringer? For each painting completed in the past (many hundreds of fine arts paintings, thousands of sketches and designs, many thousands of photographs), I am forced to participate in a registry, or registries that do not exist. Rules for this registry or these registries have not been established. Can I register collections of art rather than a fee for each individual image? How do I find the right registry? Don?t I need to be careful of those that see the financial rewards and create registries that aren?t legitimate? It says there would be a description, a legal description? Would my painting of children with the flag, that was presented to President Bush in the Oval Office, be described as ?pastel painting, 30? x 40?, 7 children painting a flag on the wall with their hands, different ethnic backgrounds, window on side with light coming through, paint on the floor, a ladder, one girl wearing a head scarf, banner with God Bless America?..?? If a digital image is required, must artists learn to upload, download, scan, etc? Why is this bill creating more questions than answers????? To protect my work, I am very confused as to what I am to do in the future. Do I still use the Copyright Office? It?s a government agency but I hear that these registries are not. My images that are currently copyrighted?are they orphans until I register again? Of course I could go on and on, but I would prefer to leave the rest of this letter for you to complete? Please let American painters of every medium, photographers, sculptors?let tiny hands, students hands, or professional hands know why we are better off with this new bill? Before you start, please don?t repeat two things? ? ?This is a great marketing tool and way for people to find artist and their works!? Personal and group websites are for marketing. People that find it actually see my painting of the children and the flag ?The Dream Keepers? along with my entire gallery of children. As a professional, it?s in every book and on every product. ? ?When you find someone using your work?you get paid fairly!? This is a back door approach to business, not very ethical. Charles as you write about how exciting this bill is, please take time to read it all the way through, look for balance. Read it as someone who creates or has a talented child. Most people that enjoy art today are unaware that a burden has been placed upon them?today?they don?t need to know. Brilliant works are created each and every moment by creators that will never know about registering their work. Proud artist maybe unaware that someone is photographing their work at a county fair, a local art competition, downloaded from the internet?How can you find these proud owners from a ?reasonable diligent? search? As a demonstration, I received an email from a proud mother showing off her sons work. I created a beautiful mug in less than 30 minutes by extracting the artwork. This is how easy it is to steal artwork and use it for commerce. (I did not know the young artists or his mother, but I asked for permission. This student, his mother, his art class and teacher are all actively fighting this bill now.) For when a creation is completed, it is loved by its owner. It is NOT an orphan. Charles, if you?ve read this far?thank you! Blessings, Kathy Fincher www.kathyfincher.com About the artists: As a designer, writer, and owner of the popular Mama says?® products and paintings, Kathy Fincher?s livelihood is in licensing. As one of the most licensed inspirational artists in the country, Kathy?s is considered a ?feminine Rockwell? for her expressive paintings of children. Kathy?s work helps to bring attention to the needs of today?s children during a time in which the American family is challenged. Many charitable non-for-profit organizations such as World Vision, The American Cancer Society, The National Mentoring Partnership, The World Children?s Organization, the Hospital Foundation, schools, institutions and more are beneficiaries of Kathy?s prints and gifts portraying children.

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by [artkaf](#) May 20, 2008 10:24 PM PDT

This is my response to the article from Charles Cooper title Half a Loaf : Orphan Works thank you, Kathy Fincher

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