ORPHAN WORKS: HALF A LOAF

C|Net News, May 20, 2008.

By James V. DeLong, VP & Senior Analyst, Convergence Law Institute LLC, and Special Counsel, Kamlet Shepherd Reichert LLP.

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/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 "grey 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 catalogues, 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 pauce 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.

At some point, some kind of grand grandfathering proceeding will probably be required, a window in which holders of existing rights must reaffirm them or lose them. Otherwise, we will get the worst of all worlds; much material will lie fallow and neglected, while other works will simply be digitized regardless. The napsterization of the music industry that resulted from the slowness of the rights holders to get ahead of the curve of digital distribution should be a cautionary tale.

Finding a solution will not be easy, of course. There are problems with definitions, graphic works, audio works, visual works, the need to provide incentives for people to find gold in the dross of past 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.