

## ORPHAN WORKS AND GOOGLE'S GLOBAL LIBRARY PROJECT

This article is about orphan works. I will get to this topic by means of an examination of two of the most important concrete policy settings in which it arises; the Copyright's Office's recently promulgated Report on Orphan Works ("Report"), and the Google Print lawsuits. It turns out that the Google Print project is an important and instructive example of the orphan works problem and in turn the solution to the orphan works problem proffered by the Copyright Office helps in the formation of an effective policy response to the challenge to traditional copyright law presented by the Google Print project.

The Orphan Works Report uses the term "orphan work" to describe a situation in which, "the owner of a copyrighted work cannot be identified and located by someone who wishes to make use of the work in a manner that requires permission of the copyright owner."<sup>1</sup> The orphan works problem, so-called, is the problem created for copyright law by such works. Copyright gives mini-monopolies so that people will be directly incentivized to create, such that indirectly the public may benefit from these

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<sup>1</sup> The Report encourages others to proffer definitions as well. *Id.* at 34. *See also*, Notice of Inquiry, 70 Fed. Reg. 3739, 3741 (Jan. 26, 2005). The metaphor of an orphan is somewhat inapt. Orphan children do not have parents anywhere. If you think you have no parents but you are wrong and unbeknownst to you, you do, you will think you are an orphan but you will be wrong. Orphan works on the other hand are not either orphans or not categorically, but rather it is almost always a question of transaction costs; if a high enough price were paid, ownership could be determined. There may be examples such as old photographs found in a bin in a second hand store, however, that carry no identifying marks and for which there would appear to be no means to track down the creator due to the generic nature of the composition and lack of identifying information. Here it may indeed be the case that no amount of expenditure would allow the users to be located.

creations, either through their direct consumption or through their use in the production of other creative works.<sup>2</sup> With orphan works, however, potential users who wish to be law abiding are halted in their tracks because they are unable to locate the owners in order to secure their permission to use the work, or part of the work, either by purchasing it, licensing it, or gaining free access. Thus, the larger, indirect purpose of copyright is ill-served, as potential users will fear the risk of infringement liability and be deterred from what might otherwise be a welfare-producing use of the work.<sup>3</sup>

The Orphan Works Report was drafted by the Copyright Office at the request of Congress.<sup>4</sup> In order to develop a Report that took account of the perspectives of various concerned parties, the Copyright Office gathered these perspectives by taking the topic on the road, as it were, to Berkeley and Columbia law schools.<sup>5</sup> In response to the Copyright Office's requests for feedback, it received over 850 comments from a wide variety of parties.<sup>6</sup> In fact, the list of contributors is a who's who list of stakeholders and NGOs, which is a testament to the centrality of the issue of orphan works to meaningful copyright reform.<sup>7</sup> The Report has its genesis in the ever widening acknowledgement of the pressures being put on traditional copyright law and practice by the digitization of nearly all forms of creative works.<sup>8</sup> The Report fairly sees orphan works as one of the central concerns of this larger debate. A high-ranking official of the Copyright Office

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<sup>2</sup> [cite/quote Posner on monopolies] As this statement indicates, American copyright is conventionally understood to adhere to an instrumentalist logic. Rights are created, maintained, or extinguished, depending on their causal impact in promoting the goals of copyright. [cite/quote Maser from Gordon] While the instrumentalist goals of copyright are often stated in abstract and formulaic terms, Landes and Posner note that a more detailed specification of these goals is more informative and accurate. [cite/quote] Whether copyright is at its core utilitarian, non-utilitarian, or a combination, is a matter of longstanding controversy. For purposes of this paper, I will assume it is the former.

<sup>3</sup> The Copyright Office puts it this way: "Even when the user has made a reasonably diligent effort to find the owner, if the owner is not found, the user faces uncertainty—she cannot determine whether or under what conditions the owner would permit use. Where the proposed use goes beyond an exemption or limitation to copyright, the user cannot reduce the risk of copyright liability for such use, because there is always a possibility, however remote, that a copyright owner could bring an infringement action after that use has begun." REPORT, at 1.

<sup>4</sup> REPORT, at 1.

<sup>5</sup> *Id.* at \_\_\_\_ The Copyright Office's pilgrimages outside the Beltway have come to be referred to as "roadshows."

<sup>6</sup> *Id.* at \_\_\_\_

<sup>7</sup> To name a few: Creative Commons, Electronic Frontier Foundation, Public Knowledge, RIAA, MPAA, PPA and the Authors' Guild.

<sup>8</sup> Given the prevalence of digitization, it is curious that some of those works most widely and critically thought to be masters—*The Mona Lisa*, *The David*, *The Sistine Chapel*, cannot be digitized, at least not yet (cite to NYT article on 3D printers).

has recently stated that the Report's proposal for specific legislative amendment is high on the Copyright Office's agenda as well as the agenda of the Judiciary Committee of the next Congress.<sup>9</sup> This makes the present an ideal time to critically evaluate the proposed legislation.

The Copyright Office has developed a thoughtful and well-crafted response to the orphan works problem. This response addresses the concern over lack of legal access to orphan works by potential users while also continuing to pay respect to the established rights of owners. Because the Copyright Office's proposed solution to the orphan works problem takes a middle road, it is of course open to criticism from parties on either side of the issue; at one extreme, some commentators have argued that orphan works should be in the public domain, while at the other extreme, commentators have argued that any special treatment for orphan works is contrary to fundamental principles of copyright law.<sup>10</sup> Despite these widely divergent first-order preferences, the Copyright Office proposal may, at the end of the day, be palatable to nearly all parties as a compromise solution to a problem that is recognized by all parties.<sup>11</sup> Thus, depending on one's view of the merits of the proposal, it has the virtue that it actually has a chance of becoming reality.

This article will examine the Report's proposed solution in one particularly crucial context—that of the lawsuits against Google that seek to stop it from developing what is arguably the most important, and is undoubtedly the most ambitious use of orphan works. This is the Google Print Project. Google plans to copy all the books in the world. It is currently doing so, and doing so without the permission of the owners of the copyrights to these works.<sup>12</sup> Google claims that under the circumstances such uses are fair.<sup>13</sup> Google's legal defense turns on an appeal to the fair use doctrine. Google is being sued over this project in two separate lawsuits by large collections of book publishers and

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<sup>9</sup> As stated by David Carson, General Counsel of the Copyright Office, at the Copyright Office road show in Nashville, April 20, 2007.

<sup>10</sup> REPORT, at 89.

<sup>11</sup> REPORT, at 2 (“Thus, there is good evidence that the orphan works problem is real and warrants attention, and none of the commentators made any serious argument questioning that conclusion.”).

<sup>12</sup> [recent cite, such as New Yorker article]

<sup>13</sup> [cite/quote in my article]

authors.<sup>14</sup> The position that Google takes represents a major challenge to the traditional conception of fair use. If what Google claims is fair is found to be fair—this will represent a huge growth in the sorts of activities that count as fair, due to the previously unequaled amount of copying Google plans on conducting. Some commentators have called for a fair use “search engine exception” to copyright law.<sup>15</sup> Such a judicial determination would matter not only to owners of copyrights in books—as an expanded fair use doctrine will apply more broadly. As we will see, the logic of Google’s argument is subject to easy generalization. Thus, in addition to the book industry, other content industries also have reason to be concerned about the outcome of the Google Print lawsuits in terms of their impact on fair use doctrine, as there is no reason in principle they could not as well be the victims of unauthorized snippet searches and the copying of whole texts needed to produce such snippets.<sup>16</sup>

The parties to the Google Print lawsuits want all or nothing—plaintiffs want all of Google’s uses to be declared infringements while Google wants all its uses to be declared fair. There is a third way, however, one in which some uses are fair and others are not. The task then becomes drawing this line. Orphan works may present a logical place to draw the line between those works that should be a fair use and those works that should not. Despite the initial plausibility of this solution, I will reject it in favor of another one. I will argue that the Orphan Works Report provides an alternative to fair use as a solution to the problem presented by the Google Print lawsuits; namely, instead of fair use, the treatment of orphan works should be determined by the proposal suggested in the Orphan

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<sup>14</sup> See *supra* note 1. Plaintiffs taken collectively represent a big swath of the publishing industry. Thus, the Google Print lawsuits are not unlike the series of lawsuits in which major sectors of the music and film industries, as represented by the RIAA and the MPAA, have brought actions against various putatively infringing companies such as Napster and Grokster. Nonetheless, there are fundamental differences as well, as will become apparent.

<sup>15</sup> [cite/quote]

<sup>16</sup> The Google Print Project is thus discernible from another of Google’s projects that is also of importance to copyright law—its acquisition of YouTube. Google has made audiovisual works searchable, through Google Video and YouTube, which each offer whole copies of unauthorized works available to internet users (along with user-generated content). Google does not claim that the appearance of unauthorized copyrighted works on its video sites is fair use, however. Instead, Google’s defense of such large scale unauthorized uses rests on the Digital Millennium Copyright Act’s notice and take-down provisions, under which Google is obligated to take down works once it is notified by their owners of the infringing uses. Google could, however, create a search engine that would produce snippets of audio works, visual works, or audiovisual works.<sup>16</sup> Presumably, Google would here claim fair use as opposed to protection from a DMCA safe harbor.

Works Report under which there are limitations put on remedies for infringement when users of orphan works perform searches of a diligent sort for the owners. The important question is not whether Google would prefer this solution. Clearly it would not, as is indicated by the fact that in the lawsuits, Google's defense relies on a fair use argument rather than an orphan works argument.<sup>17</sup> The important question then, given the evident welfare-generating potential of Google Print, is whether Google could live with the proposed orphan works legislation and yet still find it worth while to go ahead with the Google Print Project or something functionally equivalent to it. I will argue that there is reason to think that Google could live quite comfortably with the limitation on remedies approach proffered by the Copyright Office. I will further argue that such a result would be preferable from the perspective of social welfare.

Part I will discuss in more detail orphan works, the orphan works problem, and the Copyright's Office's attempt to solve this problem by means of its proposal for legislative change. Part II will briefly examine the Google Print lawsuits in order to better understand their connection to orphan works. Part III will then attempt to ask and answer the question as to which is the better solution to the problem for copyright presented by orphan works, that offered by the fair use alternative, that offered by the Orphan Works Report alternative, or that offered by the status quo.

Both the Orphan Works Report and some commentaries on it have noted that the orphan works issue is independent of the issue of fair use.<sup>18</sup> One of the interesting results of looking more closely at orphan works is that this claim is seen to be incorrect. I will argue that these issues are connected in an important manner. The connection is that one cannot normatively evaluate the fair use of orphan works apart from the availability of the remedial advantages of the proposed legislation.

## I. Orphan Works

The core problem of orphan works is that the works go unused despite the fact that had the owner and potential user been able to bargain, a mutually beneficial, as well

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<sup>17</sup> [cite Google answer from article]

<sup>18</sup> REPORT, at 4 ("For purposes of developing a legislative solution we have defined the "orphan works" situation to be one where the use goes beyond any limitation or exemption to copyright, such as fair use.").

as socially beneficial, use would have come about. The Copyright Office explicitly states that the orphan works problem is a threat to the public interest.

“Concerns have been raised that in such a situation, a productive and beneficial use of the work is forestalled – not because the copyright owner has asserted his exclusive rights in the work, or because the user and owner cannot agree on the terms of a license – but merely because the user cannot locate the owner. Many users of copyrighted works have indicated that the risk of liability for copyright infringement, however remote, is enough to prompt them not to make use of the work. Such an outcome is not in the public interest, particularly where the copyright owner is not locatable because he no longer exists or otherwise does not care to restrain the use of his work.”<sup>19</sup>

While not employing the terminology of economics, the Report is in this passage in effect characterizing the orphan works problem as in important part a problem of transactions costs—namely, the cost of the potential user locating the owner or owners. The last sentence of the quoted passage articulates those situations that are particularly recalcitrant, namely, those in which the owner does not exist or does not care if her work is used. These are situations in which the works in question would not be transacted over, even if transaction costs were not an impediment. Under conventional copyright economics, creative works are modeled as possessing a public goods structure.<sup>20</sup> The salient feature of public goods is the feature that once created, marginal copies can often be produced at nearly zero cost. Thus, other things equal, social welfare will be maximized when the number of consumed copies of a work is maximized. But such maximizing uses will not occur when there is no possibility of an agreement due to the inability of the owner and the potential user to interact.

From the perspective of rights under the Copyright Act, there are two major types of situation in which the orphan works problem arises. One is where the potential use is of the whole work. Such uses implicate the §106(1) right of reproduction. The other is using the work as a part of some larger derivative work. Such uses implicate the §106(2)

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<sup>19</sup> REPORT, at 1.

<sup>20</sup> [cite on public goods]

derivative works right.<sup>21</sup> The Orphan Works Report creates what is in effect a semi-safe harbor for both types of uses. If a potential user fulfills certain conditions, namely performs a “reasonably diligent search” for the owner,<sup>22</sup> and gives attribution when possible,<sup>23</sup> then if she uses the work and the owner later “surfaces” or “appears,” the user will only be subject to a limited remedy. This remedy is more limited for transformative uses and for noncommercial uses when the user ceases use upon notice by the surfacing owner.<sup>24</sup> The quoted passage states that the remedy will be “reasonable compensation.” Elsewhere, the Report gives further specification to this general term when it notes that the appropriate remedy is the amount the parties would have agreed to, had they actually bargained prior to the use.<sup>25</sup> Importantly, however, the copy is still an infringement. This is in contrast to the situation with Google’s argument for fair use under which the copying would be a fair use and so not an infringement. Thus, under the Orphan Works Report, if the owner once located does not want to bargain, she may refuse and the potential user will be out of luck. This is not true under fair use. If Google’s use of certain works is a fair use, then it will not matter if an owner opposes the use of the work.

The Orphan Works Report is clear in its statement in support of protection of author’s rights. It states that the hope is that the proposed rule change will lead to more transactions between owners and potential users.<sup>26</sup> This claim is an important part of the Copyright Office’s argument, as if this claim is true, then it may be the case that all

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<sup>21</sup> Other copyrights pertain to either whole copies or partial copies; that is, one can display, distribute, perform, or digitally transmit whole copies or parts of copies.

<sup>22</sup> *Id.* at 8.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 11 (“If a user meets his burden of demonstrating that he performed a reasonably diligent search and provided reasonable attribution to the author and copyright owner, then the recommended amendment would limit the remedies available in that infringement action in two primary ways: First, it would limit monetary relief to only reasonable compensation for the use, with an elimination of any monetary relief where the use was noncommercial and the user ceases the infringement expeditiously upon notice. Second, the proposal would limit the ability of the copyright owner to obtain full injunctive relief in cases where the user has transformed the orphan work into a derivative work like a motion picture or book, preserving the user’s ability to continue to exploit that derivative work. In all other cases, the court would be instructed to minimize the harm to the user that an injunction might impose, to protect the user’s interests in relying on the orphan works provision in making use of the work.”).

<sup>25</sup> [cite/quote Report]. Though the Report does not discuss it as such, this is plausibly seen as the Copyright Office’s attempt to implement Kaldor-Hicks efficiency. In the typical situation, it is the judge who decides what the Kaldor-Hicks outcome would be. LANDES & POSNER. As they candidly admit, this will typically involve a judge making an educated guess.

<sup>26</sup> REPORT, at 97. [Quote] The Orphan Works Report contends that it does not want the proposal to serve as a shield for those who seek to act in bad faith. [cite/quote]

parties benefit from the proposed legislation, both owners and users. Note that while this requirement need not be satisfied under an economic account, as overall welfare may be maximized in a situation in which one party gains at another party's expense, nevertheless, from a pragmatic perspective, it will be much easier to bring about legal change when the interests of all parties are served.<sup>27</sup> Accordingly, the Report's key proposal appears well constructed when viewed in a pragmatic light. The document should, if it is to be politically feasible, not be a huge departure from established rights, as otherwise, politically powerful stakeholders will strongly object because they will be made to suffer a grievous harm—when judged from the status quo ante--under the proposed rule change.<sup>28</sup>

The fact that the proposal may be politically feasible should not lead theorists to shun it, as this palatability should not cause us to lose sight of the fact that important change may come about if the Orphan Works Report is implemented. Most important, potential users will have less risk in using orphan works and so will use them more. This serves a public good because these works are currently going under-utilized because potential users cannot get to the owners to contract into what would otherwise be win-win situations. In the absence of such an agreement, many potential users may be deterred from using a work, even in instances in which an owner would be unlikely to become aware of the use, or object to the use were she to become aware, or be able to garner much in a transaction from such use were a transaction to occur.

As the Report notes repeatedly, in all practical reality, many owners will never surface.<sup>29</sup> This is for a few reasons. With some works, people may not even realize they own it, as the work, or a fractional interest in the work, may have been inherited.<sup>30</sup> Alternatively, the work may be owned by a defunct company. In addition, many uses will go unnoticed. This may be because the use is essentially private. Or a work may be used as part of a larger derivative work and uploaded, for example, to YouTube or some similar site but not readily recognized as in part constituted of the orphan work in

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<sup>27</sup> In a situation in which all parties benefited or were neutral, the conditions for Pareto optimality would be satisfied and there would be no need to resort to a Kaldor-Hicks efficiency criterion.

<sup>28</sup> REPORT, at 8. For reasons familiar from behavioral economics, we should expect established rights holders to feel a potential loss of some rights acutely, as generally people suffer more when they lose something than they would have suffered in never gaining it in the first place.

<sup>29</sup> [cite/quote]

<sup>30</sup> *Id.* at 28.

question. For many such works, there is a good chance that the owner will never come across the work or have the work called to her attention.

Arguably, then, the Copyright Office is promoting piracy in that it supports rule changes that will increase unauthorized uses. The term piracy is heavily loaded, however. The reality is more nuanced than that as the proposed rule change would also change the normative complexion of these unauthorized uses. First, while still an infringement, and indeed a willful one, the unauthorized use would nevertheless be in good faith in the sense that it came subsequent to a reasonable search for the owner by the user. In addition, the penalty for infringement would in most cases be dramatically less than under the present rules regime. The Report notes in passing that the amount of damages may sometimes be zero. Note the implication that the content industry will be less successful in threatening everyday consumers with lawsuits, as the smaller potential awards will change the calculus leading to settlements. It is a grundnorm of our legal system that lower penalties, other things equal, signify less wrongful acts. Thus while undoubtedly the content industry will continue to cry victim to pirates, everyday content users may well come to fear them about as much as Johnny Depp. Thus, while ostensibly defending established copyrights, the Orphan Works Report is subtly subversive if I am right that its implementation into law would bring about more private uses.

One of the refrains of the Report is that different solutions may be appropriate for different categories of works. For example, different sorts of databases and different sets of best practices may vary by industry. Accordingly, the Copyright Office notes that, “Our recommendation permits, and we encourage, interested parties to develop guidelines for searches in different industry sectors and for different types of works.”<sup>31</sup> The Report notes as well that the criterion for a reasonably diligent search will also vary according to the category of work and other factors.<sup>32</sup> The Report attempts to craft a solution that aims to meaningfully address these differences. For example, it rejects the call for a government-run registry of orphan works by arguing that the private sector is

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<sup>31</sup> REPORT, at 10.

<sup>32</sup> REPORT, at 9 (“It is not possible at this stage to craft a standard that can be specific to all or even many of these circumstances. Moreover, the resources, techniques and technologies used to investigate the status of a work also differ among industry sectors and change over time, making it hard to specify the steps a user must take with any particularity.”).

better equipped to develop registries or databases that are customized to the specific challenges presented by particular categories of works.<sup>33</sup>

The Orphan Works Report envisions a world in which there are less orphans due to mechanisms that allow owners and potential users to come together such as through these Registries.<sup>34</sup> Thus, this approach supports the established property rights regime. Nevertheless, many works will not be available in such registries. From the perspective of many potential users, this may be beneficial, as the existence of the Registry presumably will for most users create a duty to check this database as an element, perhaps the most important element of the user's reasonably diligent search. Thus, for the myriad works that are not put in such registries, the potential user may plausibly claim to have conducted a reasonably diligent search, based on evidence that the Registry was fruitlessly searched. The practical effect overall is to make uses of orphan works lower risk. Thus, a new option is added for putative users of orphan works. A user can hope for fair use or alternatively can perform a reasonably diligent search in order to fall within the orphan works safe harbor. This latter option may be attractive to some creators, as it will provide them with more certainty of outcome than will a claim to fair use which is notoriously open-ended and uncertain in its outcome.<sup>35</sup>

Some critics have contended that fair use is an inadequate option for unauthorized users of works, due to the uncertainty of outcome. Lessig makes this point forcefully and repeatedly. As he argues, the point is not academic as the unpredictability of the fair use analysis shows up in the marketplace. He gives the example of documentary filmmakers, who, he argues, are hamstrung in their uses of works, even though these uses are likely fair uses, due to the fact that potential programmers of such works require that the works be insured, and insurers are typically unwilling to take the risk of insuring works that contain unauthorized uses and thus would need to rely on a fair use defense in a lawsuit. I share this concern for the unpredictability of fair use analysis but draw a different lesson than does Lessig, who argues for a number of measures to shrink copyright.<sup>36</sup> There is

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<sup>33</sup> REPORT, at 75. [add quote] [add Posner, p9, n38, p10, n4]

<sup>34</sup> [cite/quote]

<sup>35</sup> [cite/ quote Lessig]

<sup>36</sup> Lessig argues for five year renewable copyright terms. [cite/quote] He also appears to argue for the abolition of the derivative works right. [cite/quote] Lessig notes that the framers would not have

another option to avoid the uncertainty of fair use analysis, which is to create safe harbors that potential users of creative works may sail into if they are willing to perform the requisite due diligence as set out in the Orphan Works Report. For example, the type of problem envisioned with Lessig's example of the documentary filmmaker is improved upon under the Orphan Works Report as the filmmaker can do a reasonably diligent search and then use the work if the search is unsuccessful, and if it is successful, the filmmaker can bargain for the use.

One of the striking features of the Orphan Works Report is that it says relatively little about uses of orphan works by private individuals. The focus is instead on public entities, particularly not-for-profit ones, such as museums and archives. From a policy perspective, this makes perfect sense as these types of entities are of special concern to copyright law. Yet, this focus is nevertheless striking as most policy proposals to bring copyright law up to speed with the digital revolution have concerned themselves with the main categories of mass consumer content such as music, film, software and computer games, or with the impact of new technologies and new laws on the rights or welfare of private individual users. The situations are different for private actors versus public entities. Private individuals generally will not know the law, and typically their copying will be limited to a small number of instances. For museums and archives, the situation is different, as they may hold large numbers of orphan works. In some of the instances discussed in the Report, thousands or millions of works are at issue.<sup>37</sup> These entities are in a better position to know the law. Their behavior can accordingly be expected to respond more readily to the changed incentives introduced by an altered legal, regulatory regime. In addition, the stakes will be dramatically higher for public entities, due to the potential liability for a large number of works.<sup>38</sup> These public, not-for-profit entities have some characteristic features that make them difficult orphan works situations. The

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recognized the derivative work right and that there would be an explosion of cut and paste creativity if this right were eschewed.

<sup>37</sup> *Id.* at 25, n. 32 (millions of works may be involved).

<sup>38</sup> When we consider this factor for the case of Google, we see how truly gargantuan the stakes are for it. Google could be potentially liable for the infringement of more works than even these major cultural institutions, for literally millions of books. And in addition, because it is a commercial entity, the requirements for getting into the safe harbor may be more onerous. REPORT, at 22, n. 27 (Carnegie Mellon University Libraries, Comment 537. This institution did a study of the feasibility of obtaining permission to digitize and provide web access for its collection. It discovered that for the works in the study, 22% of the publishers could not be found.).

reason is that for these sorts of entities, the desired works may be for example old family photographs or articles from old newspapers. The Orphan Works Report calls these “ephemera.”<sup>39</sup> These works are technically copyright protected, yet they are not works that are often even consciously owned or being attempted to be exploited. Nevertheless, archives and museums are still uneasy about using them, which may be prudent as an owner might surface and sue for infringement.<sup>40</sup> Owners surfacing to claim rights is of course more likely given the public character of these institutions.

The notion of ephemera is a little discussed concept in traditional copyright. The Orphan Works Report does not define the concept but instead provides examples.<sup>41</sup> Ephemera may have features of particular interest. They were often not created by artists and writers seeking monetary gain. Accordingly, a rule change that leads to less compensation in cases of infringement will not reduce the incentive to create. It has famously been said that only a blockhead would write for free. In fact, however, millions of people do precisely that. The most widely heralded contemporary examples are blogs. But it has always been true that people wrote for free. It was not always true, however, that the result of such writing was the grant of a federal copyright. This came about with the passage of the 1976 Copyright Act that grants copyright protection upon fixation rather than publication. This legislative change along with the development of the internet has dramatically increased the number of ephemera. What is different is that in an online world, the cost, not of writing, but of publishing one’s writing has been reduced drastically to practically nothing. As economics would predict, a lower cost for publication has increased the amount of publications.<sup>42</sup>

Notice the important role of such works in the production of knowledge. Copyright discussion often focuses on the creative aspects of works. But for museums and archives of certain sorts, it is often not the artiness or originality of the works, per se, that gives them their value. For example, photographs and letters from World War II are

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<sup>39</sup> REPORT at \_\_

<sup>40</sup> [cite/quote from REPORT]

<sup>41</sup> *Id.* at \_\_

<sup>42</sup> People write for free at a scale that has generally been a surprise to commentators. [cite Benkler] One would of course need to elaborate the notion of what it means to write for free in a world in which some people appear to write for non-pecuniary but nevertheless real benefits such as reputation or improved job prospects. [cite Benkler] Drawing on examples such as Wikipedia, Benkler provides solid arguments for supposing that the revolution in user-generated content is not merely a flash in the pan. *Id.* at \_\_

of value in significant part because of what they can teach us about the underlying events. Nevertheless, under copyright these works are protected because copyright law has a low bar for what is copyrightable. A low bar may make sense all things considered but still not maximize locally with regard to ephemera.

It will often be the case that the owners do not even know they are owners. Say for example a World War II veteran died and his children leave his war photos to the state historical society. Unless they were lawyers, they would not realize that when they gave the physical work away, unless acting explicitly to the contrary, they nevertheless retained the copyright in the work. If years later the archive wanted to use some of these works in an exhibit, for it to be law abiding, it would need to secure permission to display these works or to reproduce any of them, say for a catalogue, promotional materials, or even for postcards in the institution's gift shop. Here the worth of the works may be minimal in terms of market value, the owners hard or impossible to track down, and the owners not aware of their ownership, but nevertheless, copyright law may serve as a powerful disincentive for the use, due to the potential for large statutory damages. If authorization is required, most such works would never be used. This example demonstrates how distorted the copyright policy discussion has become when it focuses so heavily on unauthorized copying of works created and promulgated for commercial purposes.

The goal then would be to create one set of copyright rules that will protect explicitly commercial works but not overprotect ephemeral works. This means that copyright law must contain a rule that allows for drawing a distinction between these two types of works. Copyright law's traditional means to draw this distinction is with the fair use doctrine. The doctrine would indeed appear capable of distinguishing such cases by means of its multi-factored analysis. The complaint against the fair use test, however, is not that it might not work in this instance but that the outcome is sufficiently uncertain. Museums and archives claim that fair use is too shaky of a ground upon which to base their potentially large and very public uses of orphan works. An argument in favor of the Orphan Works Report is that it will provide greater certainty, which will work in favor of greater use. An interesting feature of the Orphan Works Report is that while it is a distinct proposal for dealing with orphan works than how they would be dealt with under

fair use doctrine and while the Orphan Works Report explicitly attempts to distinguish its role with regard to orphan works from that of fair use, nevertheless, the Orphan Works Report incorporates a few central elements from fair use analysis, either explicitly or implicitly. Three of the most important factors in fair use analysis are the consideration of superseding versus transformative uses, commercial versus non-commercial uses, and whether the works drawn from are factual versus creative in nature. Curiously, each of these key features of fair use analysis is touched upon in the Report but within an orphan works rubric.

The Report echoes fair use by giving favored treatment to transformative uses. Transformative works are given special treatment with regard to injunctive remedies and the reliance principle. The proposal would limit the ability of the copyright owner to obtain full injunctive relief in cases where the user has transformed the orphan work into a derivative work like a motion picture or book, preserving the user's ability to continue to exploit that derivative work.<sup>43</sup>

The Orphan Works report says little to distinguish creative from more factually based works. Presumably the distinction would count for something here as well. What is typically said in a fair use context is that factual works receive "thin" protection. Thus, a court is more likely to find fair use when such works are concerned. Conventional normative logic would seem to call for the principle of this protection to be generalized apart from a fair use context as the background First Amendment concerns that animate the distinction in the fair use context do not disappear once fair use is no longer an issue. In other words, works of a factual nature are perhaps less deserving in an orphan works context as well. How this would be operationalized in the orphan works context is that the requirement for a reasonably diligent search will be less stringent when the work is more factual in nature. This intuitively seems right as it for example would require less searching prior to use of a casually taken photograph by an everyday camera user as compared to the use of an artistic photograph taken by an established professional photographer such as Ansel Adams. The former is more factual and the latter is more aesthetic.

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<sup>43</sup> REPORT at 11.

The Orphan Works report says fairly little about the commercial use consideration but what it does say is important.<sup>44</sup> Some commentators had sought to restrict the treatment to non-commercial uses. The Copyright Office rejected this approach.<sup>45</sup> Google won a victory in its Orphan Works Report in that the Proposal is open to commercial entities for entry into the safe harbor. The not-for-profit libraries and archives fought for a rule that would have sharply divided commercial from non-commercial entities. It may be wise to do so as the brunt of owners' objections to unauthorized uses are largely aimed at for-profit uses of their works. Such commercial uses, if permitted under a permissive orphan works rule, would be likely to swamp the size of uses by museums, archives and the like. There are a relatively small number of such institutions and they must receive outside funding in order to operate. By contrast, if orphan works could be incorporated into for-profit business models, it would be reasonable to predict a growth in such uses until a market equilibrium is reached in which all economically viable free uses of such works have been exploited. Thus, commercial use poses a greater threat to owners. Another reason for the not-for-profits to fight for separate treatment is that they arguably have a better case within copyright tradition for claiming special treatment. Libraries get special treatment under sec. 108 of the Copyright Act. It is reasonable for museums and archives to argue that they are like libraries in that their mission is not to make money but to promote knowledge by serving as cultural repositories. It is of interest then that the Copyright Office resisted this invitation to draw a bright line rule in favor of a more nuanced approach in which the commercial/non-commercial distinction is relevant but not dispositive. This can be seen as tracking the approach developed in case law with respect to fair use, where the trend has been away from making commercial use a determining factor.

## II. GOOGLE'S GLOBAL SNIPPET SEARCH

Google plays down any distinction between orphan works and non-orphan works. This makes sense as drawing the distinction raises the issue of distinguishing the two

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<sup>44</sup> In fact, the Report's treatment of the issue is brief to the point where one of the few commentators on the topic thus far appears to have misread the Report on the issue. [cite/quote]

<sup>45</sup>The Copyright Office seems correct in refusing to draw a bright line as the commercial, non-commercial distinction can be uncertain. [cite to museums' desire to sell merchandise]

types of works in terms of their appropriate treatment under fair use doctrine. In terms of litigation strategy, Google would presumably like to avoid this issue as its position is that all works used in the Google Print project are fair uses, not merely those works that are orphans.

The Google Print Project represents what may be the most complex fair use fact pattern the world has ever seen, as Google makes three distinct types of unauthorized copies of owners' works.<sup>46</sup> Google plans to make three such copies for every book in the world, all thirty million or so of them. Google makes whole copies of works for its database, and from these, snippets of text are produced in response to user search requests.<sup>47</sup> The copying of full texts is necessary in order for Google to provide its users with a search engine that will produce "snippets" of text from various sections of these books. These texts will be searched millions of times.<sup>48</sup> Finally, Google produces digital copies that it gives to the libraries in return for the libraries letting Google copy their collections of books.<sup>49</sup>

Applying the doctrinal four-factor test to each of the three types of copying, one is led to the conclusion that Google's use of snippets has a strong claim to being a fair use because the uses would be transformative and not harmful to the owners' markets, as the owners are not, and cannot, readily market snippets.<sup>50</sup> But when it comes to the fair use analysis of the whole copies for use in Google's database or the copies that are created in order to give to the participating libraries. Google is likely to lose the fair use analysis because the whole copies are not transformative but rather "superseding" and there is a harm to owners' markets for licensing use of whole digital copies of their works.<sup>51</sup> While Google is likely to lose out in a court's application of the fair use test, when we consider the distinct policy question of whether Google should lose, when the issue is looked at from a normative, economic perspective, the answer is different. The economic

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<sup>46</sup> In a previous article, I performed an extended doctrinal examination of fair use as applied to Google's copying of books. See Steven Hetcher, *The Half-Fairness of Google's Plan to Make the World's Collection of Books Searchable*, 13 MICHIGAN TELECOMMUNICATIONS & TECHNOLOGY LAW REVIEW 1 (2006).

<sup>47</sup> *Id.* at \_\_\_

<sup>48</sup> *Id.* at \_\_\_

<sup>49</sup> *Id.* at \_\_\_

<sup>50</sup> *Id.* at 47.

<sup>51</sup> *Id.* at 58.

model of fair use sees fair use as appropriate in situations of market failure, where high transactions costs disable owners and potential users from bargaining.<sup>52</sup> When this test is applied to the facts of Google, there is a plausible argument for a finding of fair use. The reason is that Google may argue that due to the large number of books at issue, it is not possible, practically speaking, for it to bargain for the use of those works due to the high transactions costs of the overall amount of bargaining that would be required.<sup>53</sup>

Unfettered access to these works is needed so that Google can construct a complete, searchable database despite the practical impossibility of receiving express authorization from all the many millions of owners of copyrights in all the books.

Google makes what is in effect a transaction cost argument, when it argues for opt-out over opt-in. In other words, Google argues that it is more efficient for those who do not want to be part of the Google Print project to notify it such that Google can disable access rather than the other way around, in which those who want to take part take an affirmative action to opt-in. Google's argument for why this is more efficient is that it will lower transaction costs. Google compares the potential benefits to those that come from the regime of opt-out for its internet search engine.<sup>54</sup>

Plausible though this argument may seem, it is only the orphan works that are obvious candidates for the category of works for which such bargaining is not possible, as by definition orphan works are works for which the creator or owner is not known. In such situations, the transaction costs of reaching a deal are not only high but

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<sup>52</sup> Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600 (1982).

<sup>53</sup> See, e.g., WILLIAM LANDES & RICHARD POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW*, 12 (2003) ("Reducing transaction costs is the very *raison d'être* of property rights...."). [cite/find Google cite re transaction costs] One might initially speculate that digital technology would materially reduce transaction costs and thus the so-called orphan works problem by making information more available. Search technology in particular should be able to help make this information searchable. There is irony, then, in the fact that Google, the leader in online search, the company that holds the grand ambition to make all the world's information accessible, should base its argument for fair use on the claim that the company should have the works for free in part because ownership information is unavailable. Google opens itself to the embarrassing rejoinder that if it wants to collect the world's information, it should begin with information on the ownership of those works it copies without permission. This glib remark packs rhetorical punch but in the end is unfair because issues of ownership of copyrights will often be complex and contested, just as may be the case for a parcel of real estate. What is true is that when Google talks about making all the world's information available, it may implicitly be wedded to a simplistic conception of information. Legal information of various sorts, may often be essentially contested and not machine searchable.

<sup>54</sup> \*\*\*\*[cite/quote]

insurmountable. For non-orphan works, however, the situation is fundamentally different. Google's position that it is not possible to bargain with owners will not be plausible for works owned by extant publishers or available members of the Author's Guild who are not only locatable but in the business of transacting with regard to their works. Thus, if the lawsuit were settled by a court that applied transaction cost analysis, Google would lose in its dispute with the publishers and the authors who belong to the Author's Guild but may prevail with respect to orphan works.

### III. THE POLICY IMPLICATIONS OF THE ORPHAN WORKS PROPOSAL FOR THE GOOGLE PRINT PROJECT

The previous Part concluded that as a matter of black-letter law, law as a prediction of what a court will do; a court is likely to reject Google's fair use argument. Google, however, has a plausible response. Google can argue that a formalistic application of the fair use test does not capture the deeper structure of fair use analysis for two of the three types of copying necessary for the Google Print project and therefore for the project as a whole. Some commentators have referred to a fifth factor; that the test should seek to maximize social welfare, even if this means rejecting a doctrinal application of the four-factor test.<sup>55</sup> On this view, the four-factor test is fine as a prima facie analysis—a sort of rule utilitarian approach to promoting welfare. The idea is that in the general run of cases, the four-factor test will tend to promote social welfare. Indeed, an aspect of indirect utilitarian analysis is that it may make sense for certain institutional actors to follow the rules, while it may make sense for other actors to be in a position to abrogate them in the name of a more direct approach to welfare maximization. In the well-known example provided long ago by John Rawls, we may not want the police to try to go against the rules in the name of maximizing in individual instances.<sup>56</sup> This role may be better suited to other actors such as judges or legislators. Similarly, it might be sensible to argue that perhaps trial courts should not seek to abrogate established legal doctrine in an attempt to maximize welfare in individual instances. But it is plausible for Google to argue that this role is properly suited to appeals courts,

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<sup>55</sup> [cite/quote]

<sup>56</sup> John Rawls, *Two Concepts of Rules*, *Philosophical Review* (1958).

particularly in cases such as this that stand to impact utility greatly, both in terms of the impact of Google Print and in terms of the important precedent that is likely to be set. Google, then, will argue that the dispositive question is whether it can plausibly argue that social welfare would be increased in a world with Google Print in comparison to a world without Google Print.

Google can make a solid case that its snippet search engine is also an engine of social welfare. It is little exaggeration to say that for any internet user to have the ability to do electronic searches of all books for free is a revolutionary advance in making the tools of learning available that makes the Dewey decimal system look quaint by comparison.<sup>57</sup> Importantly, universal snippet searching is not a service that would be provided by any of the individual contributing libraries because no library has all the books that will go into the Google database. Second, it is Google's ability to create premier search algorithms that sets it apart from the other major search engines, despite the fact that those search engines are operated by companies with great technical expertise and resources, such as Microsoft, Yahoo and AOL. Nor is it likely that an under-funded library or governmental entity such as the Library of Congress could create anything comparable. In addition, given the background First Amendment concerns, nor is it likely to be politically desirable or palatable for the government to assume control of search algorithms.<sup>58</sup> Furthermore, with all due respect to music, movies, and the entertainment industry generally, the sorts of works of great learning copied into the Google Print Project database are at least as close to the core of what copyright law is about; its promotion of science and the arts.<sup>59</sup> Another utilitarian argument colorably offered by Google is that its project will not harm the established markets of copyright owners because unlike the situation in the file-sharing cases involving copying of CDs and DVDs, in which the market for the originals was superseded by the unauthorized copies, this was seen in the fair use analysis discussed in Part II to not be true for Google as it does not sell the whole copies it makes, and the book owners do not, and indeed

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<sup>57</sup> Indeed there is evidence that the Dewey Decimal System may be on its way out. [cite to NYT article on new Seattle public library]

<sup>58</sup> [cite/quote]

<sup>59</sup> While the can of worms opened here cannot be adequately explored in the present context, it is true that entertainment per se, is no longer slighted in the case law as it once was. Nevertheless, libraries and serious scholarship are at the least first among equals, as embodied in Sec. 108 of the Copyright Act, that gives libraries special use privileges.

cannot, sell comparable snippet searches.<sup>60</sup> Quite the opposite, Google can plausibly claim that book sales will be enhanced by searchers becoming aware of the existence and relevance of new works, due to learning about them by means of snippet searches.<sup>61</sup>

Google will point out that because it is willing to allow opt-out for those authors who do not want to participate, it is providing the most efficient mechanism for promoting the interests of the vast majority of parties—both owners and users—who want to participate while also providing a mechanism—opt-out—that serves to respect the wishes of the small minority who may wish not to participate.<sup>62</sup> While the norm of respect, as such, has no intrinsic value under the economic model, the issue of the relative efficiency of opt-out versus opt-in may indeed have material implications from a welfarist perspective.<sup>63</sup> In short, it is a transaction cost issue: if transaction costs aside, more people would want to participate in the Project than not, by setting the default where there is most participation means that less transaction costs would be needed to get to this outcome with this default as compared to the default of opt-out. Google can colorably argue that requiring it to get explicit permission, that is, opt-in, would in practical terms mean the project would never happen.

For all of the above reasons, Google can plausibly argue that the Google Print Project will in balance promote social welfare in comparison to the world without it. From the economic perspective, at the end of the day all plaintiffs in the Google case have to fall back on are their established rights, which they plausibly see as being turned upside down.<sup>64</sup> But these are not inalienable human rights but rather instrumentalist rights that are a means to an end.<sup>65</sup> The economic approach is a consequentialist approach in that rules are meant to be broken in the sense that a rule may generally serve the interests of social welfare but when it does not, then the rule must be discarded in favor of the welfare-maximizing act. Google's overall argument then, seen in its most favorable light, is that while as a general rule the four-factor test is welfare promoting, this will not always be the case, and there is good reason for thinking that the Google

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<sup>60</sup> [cite Grokster, Napster]

<sup>61</sup> [cite/quote Google saying this]

<sup>62</sup> [cite in Casey readings saying this feature may be dispositive]

<sup>63</sup> See, e.g., Hetcher \_\_\_\_\_ (opt-out versus opt-in in the context of website privacy policies).

<sup>64</sup> [cite]

<sup>65</sup> It goes without saying that to say that copyrights are instrumental is not to say anything one way or the other regarding the nature of other types of rights.

Print project is just such an exception to the rule. In other words, the so-called fifth factor supports Google in the fair use analysis.

As noted, the comparison usually done by Google and by its defenders is between the world without Google Print and the world with Google Print.<sup>66</sup> From this starting point, it is plausible to argue to the conclusion that, all things considered, the general public would be better off in a world with Google Print than in a world without it, because of the overwhelming amount of utility that would be provided to people. But this conclusion is not entailed. I would argue instead that the proper comparison is between Google Print and a functional equivalent or near equivalent, that has the benefits of Google Print but less of the downside. Here as well it is appropriate to apply transaction cost analysis, but whereas in the previous Part, where it was applied to fair use, here it can be applied to what may be a compelling alternative to fair use, which is a situation in which works with high transaction costs may enter the orphan works safe harbor from the more onerous remedies otherwise available to successful plaintiffs in copyright infringement suits. The key question then is whether treating orphan works to a less serious remedy may be equally or more efficient in promoting the use of works as compared with the situation in which they are given fair use status.

While Google prefers fair use, yet the orphan works regime as applied to commercial entities might not be unattractive overall. Google would have to pay reasonable fees to surfacing users. This is worse than not having to do so, but may not add up to much in the grander scheme, for as a practical matter there may be relatively few surfacing owners of orphan works. Thus, in a world in which the Copyright Office's proposal were enacted into law, it appears likely that Google would still have incentive to go forward with the Google Print project. If so, the question then is which treatment of orphan works is preferable. Either regime is a boon to Google because either way it gets to use millions of orphan works in a commercial enterprise and either pay out relatively little or nothing.<sup>67</sup> Thus, it is not the case that just because fair use is better than no fair use when these are the only two choices, that it is entailed that a court should find orphan works to be a fair use, because it can instead find them not to be a fair use and Google

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<sup>66</sup> \*\*\*[cite/quote]

<sup>67</sup>[get comment]

will still have the incentive to do the Google Print project and deal with the surfacing owners as the situation arises. Google's cost of doing so will be higher, but the fact that most owners would sell more books as a result suggests that Google's licensing costs for non-orphan works might be relatively modest.<sup>68</sup>

Note that the viability of Google's fair use defense may turn on this choice, as the fact that Google could get access to orphan works through the Orphan Works Project, if enacted, would be a reason for a court to reject the fair use claim as the transaction cost rationale no longer holds, given that access can be gained, through performing diligent searches. As I noted earlier, the Copyright Office made a point to note that its proposal was distinct from the consideration of fair use. We see that this is not the case.

This is comparable to the role of fair use in the formative cases, *Williams & Wilkins* and *Texaco v. American Geophysical*. In *Williams & Wilkins*, a high profile, hotly litigated case, the Second Circuit found a large-scale copying practice, albeit an unusual one, to be a fair use, for what appear to be fairly transparently economic reasons. In *Texaco v. American Geophysical*, defendants relied on *Williams & Wilkins* as precedent. This case involved the unauthorized copying of academic journals in the hard sciences by scientists within commercial corporations, such as the test case defendant, Texaco, Inc. The court rejected defendant Texaco's fair use argument on the basis that the cases were different, because on the facts of *Texaco*, the Copyright Clearance Corporation (CCC) had recently emerged and the court held that Texaco should use it rather than rely on fair use. The court distinguished *Williams & Wilkins* by noting that the CCC had not existed at that time.

Now apply the logic of these cases to the orphan works problem. The Copyright Office's orphan works solution may potentially serve a parallel role to the role of the CCC in *Texaco*.<sup>69</sup> There are important differences with the CCC, however. With the CCC, this organization was already in place, albeit newly formed. By contrast, the

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<sup>68</sup> [cite] Indeed, the fact that Google would have to license non-orphan works if they lose their fair use argument will establish a baseline with respect to the cost to license works.

<sup>69</sup> Owners of a work cannot readily negotiate with each user. Performing rights organizations such as ASCAP and BMI perform this function in the musical context. A potential user of other types of works may also find it easiest to deal with a PRO-type organization. The Copyright Office appears to think that such an organization might be suitable in the orphan works context. This seems to be just what the Copyright Office has in mind in encouraging Registries to form.

Orphan Works Report is a proposal not a reality. Economic logic forces the question: would it make sense for a judge in the Google case to refrain from finding fair use in order to give Congress time to enact the Orphan Works Report?

Given that the Orphan Works Report is on the table, legislatively speaking, it would seem that a welfare-maximizing court would not want to pass over the consideration as to whether the Report will become law, and if so what impact this will have on fair use. But in the end, a court may need to decide the Google Project lawsuits prior to potential legislative movement on the Orphan Works Report. In this situation, a court might well find use of orphan works by Google to be a fair use, even if the court thought that in a first-best world Congress would enact the proposal contained in the Orphan Works Report such that there would not be the need for fair use.

A court might follow the logic of *Williams & Wilkins* and *Texaco*: find fair use when no alternative is currently in place but not after an alternative means of lowering transactions costs has emerged that also allows owners to benefit from licensing their works. The implication of this is that if we are sufficiently convinced of the importance of snippet searching for the progress of knowledge, then, given the current unavailability of the limitation on remedies as found in the Orphan Works proposal, fair use may be the next best means to enhance the prospects that orphan works will be copied and made searchable.

I would argue that the Report's route is preferable. It lowers the risk of using orphan works, yet when authors do appear, they are entitled to compensation, thus maintaining the incentive to create. In terms of static analysis, it may be a wash as to whether fair use or the orphan works proposal is implemented, as either a post hoc transfer is made to the orphan works owner or it isn't, which just shifts money. But on a dynamic analysis, it will incentivize creators for the orphan works rule to win out, as it would provide greater incentives to create. The incentive to create is enhanced because creators will know that their creations will be able to support them and their successors even if their works should for a time become orphaned. Owners will lose the chance of a windfall gain from detecting an infringing use, but they will be compensated as more people will use the works due to less chance of being hit with a huge statutory penalty.

One of the supposed advantages of the proposal is that it provides more certainty.<sup>70</sup> The idea is that potential users will be able to take affirmative steps to come within the safe harbor rather than simply acting and then having to rely on the vagueness of fair use analysis later when one is being sued. In the case of the Google Print project, however, this certainly may be illusive. Google will want to avoid individual searches and so it will claim that under the circumstances, no search is reasonable. In its filing with the Copyright Office, Google says that any database should be machine searchable. Apparently, Google thinks that this is what it would need to perform reasonably diligent searches.<sup>71</sup> This may be a desirable goal but it does not describe the current situation, nor is it likely to any time soon, as the complex nature of property rights often leaves issues of ownership thorny. Thus, Google will not have much certainty ahead of time that its highly questionable uses will be likely to qualify for the safe harbor.

Importantly, however, Google appears to be an outlier here. The Proposal may be more effective in providing more certainty to non-commercial private users. While downplaying the issue, the Orphan Works Proposal would create a desirable situation for private non-commercial users. The Copyright Office slips a line into the Report to the effect that for unauthorized uses, the appropriate remedy may be zero dollars. So for uses of ephemera, for example, users will be more able to use these knowing that their potential liability under the Proposal is small. This addresses one of the main criticisms made of the Copyright Act, namely that it allowance for huge statutory damages even for private users, is a remedy completely out of proportion with the offence and thus inherently unjust.

Smaller commercial projects may also find it is their interest to seek to perform diligent searches for owners so as to be able to rely on a safe harbor. This will help for example the cut-and-paste creative types like the documentary filmmakers Lessig discusses. Google then is an outlier of sorts as it has the interest and wherewithal to practically function outside the reach of the law.

## CONCLUSION

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<sup>70</sup> [cite/quote Report]

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This article studied orphan works, the so-called orphan works problem, and the Copyright Office's proffered solution. This analysis was carried out in the concrete context of what is likely the largest and most significant unauthorized use of orphan works—the Google Print project. Part I examined the Orphan Works Report in detail and Part II looked at the Google Print lawsuits in order to set the stage for Part III, which considered the pertinent policy issues. Most important overall is the status of orphan works. We saw that they indeed present an important and under-studied problem for copyright. We saw that the treatment of orphan works proposed in the Orphan Works Report would be preferable as a means to deal with orphan books such as are at issue in Google. This is important in the particular context of the Google Print lawsuit but it carries a broader lesson as well. Despite what the Copyright Office says, you cannot hive off fair use analysis from other developments in copyright. The ostensible reason to try to do so is the oft-quoted language from the 1976 Act that this statute was not meant to change fair use doctrine.<sup>72</sup> But what we have seen is that this does not mean that changes in the statute will have no impact on fair use analysis. The reason is clear. It is entailed by economic analysis. If the rationale for fair use is based on transaction costs, then it may be the case that a legal change affects this transaction cost analysis. We saw that the Orphan Works Report, if enacted, promises to have just such an impact. We saw that the effect would be to encourage both more use of orphan works by in effect decriminalizing them and also promote more of a market for these works. This without relying on the mercurial fair use doctrine.

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<sup>72</sup> [cite/quote]