



Public Hearing on Orphan Works

October 26, 2009, Brussels

European Commission

Panel : How to best recognize Orphan Status

Copyright's New Clothes

after H. C. Andersen

... or is it Old Clothes ?



Bernard Lang
INRIA – AFUL

INRIA : *Institut National de Recherche en Informatique et en Automatique*

AFUL : *Association Francophone des Utilisateurs de Logiciels Libres*

produced with the free software  **OpenOffice.org**



note

For clarity and simplicity

I will be talking primarily about printed works
and particularly about **text**

This can be extended to other kinds of works



Why do we have this Hearing ?

- Orphan works have existed for a long time
- No one really cared
- Specific laws (Japan, Canada) were seldom used

Why this sudden importance ?

Because of drastic technical and economic changes

**But shouldn't they impact the legal system
more deeply than via a few exceptions / limitations**
former solutions have become the problem



A **phase transition** in the culture ecology

- [Digitization + Internet]
changes its economic
and social laws
- This enables new
economic, social, and
legal engineering
- It also disables former
economic, social and
legal devices

copy + send = \$0



<http://www.istockphoto.com/>

Copyright Engineering must be consistent with
underlying technical, economic and social physics



Some facts about the digital world

- **Copying is a technical part of the medium**
including format shifting logic # implementation
- **Making copies is no longer an economic activity**
Though selling copies may still be
- **Open / free access is now another normal exploitation**
very relevant to research and teaching (green paper)
while commercial exploitation used to be the only way
- **Petabyte data bases**, freely accessible worldwide
at no cost to user, are now possible
==> **Berne 5(2) “no formalities” is obsolete** ... almost.
a problem rather than a solution (to a 19th century problem)



Indexation and Digital Access to **all** Books must and will happen

- it makes economic sense in a digital world
- it is desired by nearly all concerned
- The real **issue is modalities** : access, control, profit
- **Essential for academia & knowledge dissemination**

The problem: **Orphan Works** with **unlocatable owners**
any form of exploitation will be an infringement
==> requires a **new exception / limitation**

How should it be designed ?



Orphan issues

Can **Orphan status** be based on (failure of)
Search for the owner : reasonable ... diligent ?

Must make economic sense ==> **dependent on intended use**

- **Large scale** dissemination to **wide audience**
 - Extended search is economically not tractable
 - Must be based on an **international** (distributed) **registry**
 - **Compatible with the intent** (not the letter) **of Berne 5(2)**
- **Isolated exploitation** involving investment / profit
 - More diligent (?) search is economically tractable
 - Need to protect owner's interest
 - Need to protect user's investment



Designing the exception (1)



The **three-step test** is the **guiding principle**

1) special case:

changes should be **minimal** to achieve the stated policy purpose:

- Make orphan books widely accessible
- allow exploitation of specific works



Designing the exception (2)



2)no conflict with normal exploitation of works:

- Open Access is a normal mode of exploitation
- **Access control** and payment enforcement are exclusive rights and **conflict with open access**.
- Economic barriers are unwarranted further infringement (minimality principle) **without benefit to absent owners** and run against the stated purpose of exception.
- Privacy & true Open Access prevent differed payment.
- But requiring diligent search and advance price fixing for differed payment to resurfacing owner is not an obstacle for single commercial exploitation and is a security for both owner and user (cf U.S. Orphan Works Act)



Designing the exception (3)

What third step ?

3) no unreasonable prejudice to interests of . . .

- **authors** (Berne 1979, WCT 1996, DADVSI '06)
- access restrictions prejudice the only remaining interest of (unreachable ?) authors:
to be read and known
- **owners** (TRIPS 1994, EUCD 2001) - they are not exploiting the work ... and are often authors. It may better revive the work and create new revenue to be claimed.



The role of the Registry

- International Registry + standardized metadata:
 - formerly impossible technically
 - now possible in the digital / Internet world
 - i.e., the very world that is raising these issues
- **Copyright remains with rights holders as now, but not enforceable unless correctly registered.**
(e.g. U.S. Copyright Code § 411 and § 412)
- Possible modalities to be analyzed:
 - **Free access to registry** (advertising support ?)
 - registration delays
 - etc.



To summarize

- Owners can exercise their rights at any time
- Orphan works should be freely accessible by the public
 - Any obstacle (payment, DRM) is an unwarranted **infringement on the exclusive right to prohibit**
- Setting a price to be paid on request from resurfacing rights holders may be acceptable for those uses requiring a significant investment:
 - it will not then be a determinant factor in the decision to use the work.
 - it will secure both the owner's right and the user's investment



Conclusion

Authors / owners are entitled to their rights and to be provided easy means to assert them, but should no longer impose on society the burden of searching for them

Berne 5(2) “no formalities” rule was a convenience dictated by practical constraints not a natural right



In the copyright battlefield

"It is forbidden [...] to mutilate or steal from corpses"

The contemporary law of armed conflict

Leslie C. Green, page 144

do not rob dead authors of their public



Thank You

This presentation is available at

<http://www.datcha.net/ecrits/Exposes/orphan-eu/oeu-sld-091026.odp>

<http://www.datcha.net/ecrits/Exposes/orphan-eu/oeu-sld-091026.pdf>

or as a single page document at

<http://www.datcha.net/ecrits/Exposes/orphan-eu/oeu-txt-091026.odt>

<http://www.datcha.net/ecrits/Exposes/orphan-eu/oeu-txt-091026.pdf>

This presentation is based in part on:

Orphan Works and the Google Book Search Settlement – an International Perspective.

<http://www.datcha.net/ecrits/liste/orphan-gbs.pdf>

With my thanks to all the people who helped or supported this work

Public Hearing on Orphan works –

October 26, 2009, EU, Brussels – Panel 2: How to best recognize orphan status

slide: <http://www.datcha.net/ecrits/Exposes/orphan-eu/oeu-sld-091026.pdf>

text: <http://www.datcha.net/ecrits/Exposes/orphan-eu/oeu-txt-091026.pdf>

Copyright's New Clothes ... or is it Old Clothes

Bernard Lang – [INRIA](#), [AFUL](#)
Bernard.Lang@datcha.net
<http://www.datcha.net/>

Based in part on (still a draft):
Orphan Works and the Google Book Search
Settlement – an International Perspective.
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Why do we have this Hearing ?

Orphan works have existed for a long time: no one really cared and specific laws (Japan, Canada) were seldom used. Why this sudden importance ?

Because of **drastic technical and economic changes**.

But shouldn't they impact the legal system more deeply than via a few exceptions / limitations

And it seems that former solutions have become the problem.

A phase transition in the culture ecology : e. g. copy + send = \$0

(Digitization + Internet) changes the economic and social laws of the culture and copyright ecology.

This **enables new** economic, social, and legal engineering and devices and **disables former** ones.

Copyright Engineering must be consistent with underlying technical, economic and social physics

Some facts about the digital world

Copying (and format shifting) is a technical part of the medium [logic # implementation]

Making copies is no longer an economic activity – Though selling copies may still be

Open/free access is now another normal exploitation, *very important to research and teaching (green paper)* while commercial exploitation used to be the only way.

Petabyte data bases, freely accessible worldwide at no cost to user, are now possible

==> **Berne 5(2) “no formalities” is obsolete ... almost.**

It is now a problem rather than a solution (to a 19th century problem)

Indexation and Digital Access to all books will happen

- it makes economic sense in a digital world
- it is desired by nearly all concerned and *essential for academia & knowledge dissemination*

The real **issue is modalities** : access, control, profit – and the problem of **Orphan Works**.

Any form of **exploitation will be an infringement** ==> **requires a new exception / limitation**

How should such an exception / limitation be designed ?

Orphan issues

Can **Orphan status** be **based on** (failure of) **search for the owner** : reasonable ... diligent ?

It must make economic sense, thus is dependent on intended use.

- **Large scale** dissemination for access by a wide audience
 - Extended search is economically not tractable
 - Must be based on an **international** (distributed) **registry**
 - compatible with the intent (not the letter) of Berne 5(2)
- **Isolated exploitation** involving investment / profit
 - More diligent (?) search is economically tractable
 - Need to protect owner's interest
 - Need to protect user's investment

Designing the exception

The **three-step test** of exceptions and limitations is the **guiding principle**

- 1) special case: *changes should be minimal* to achieve the stated policy aim:
(1) make all books available to the public & (2) allow exploitation of specific works
- 2) no conflict with normal exploitation of works:
Open access is a normal mode of exploitation, increasingly used.
Access control and payment enforcement are exclusive rights and conflict with open access.
Economic barriers are unwarranted further infringement (*minimality principle*)
without benefit to absent owners & running against the stated purpose of exception.
Privacy concerns & true Open Access prevent organizing deferred payment to owner.
However, for commercial exploitation of specific work, requiring [*diligent search and*]
advance price fixing for deferred payment to resurfacing owner is not an obstacle and is a
security for both owner rights and user investment. (cf U.S. Orphan Works Act)
- 3) no unreasonable prejudice to legitimate interests of . . . ?
authors (Berne 1979, WCT 1996, France DADVSI 2006): access restrictions prejudice the
only remaining interest of (unreachable ?) authors: *to be read and known*
owners (TRIPS 1994, EUCD 2001): they are not exploiting the work ... & are often authors.
Actual access or use may better revive the work and create new revenue to be claimed.

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- compatible with the intent (not the letter) of Berne 5(2)

Copyright remains with rights holders as now, but not enforceable unless correctly registered.
(e.g. U.S. Copyright Code § 411 and § 412)

Modalities to be analyzed: Free access to registry (advertising support ?) – registration delays – etc.

To summarize

Owners can exercise their rights at any time. They only have to maintain up to date registration.

Orphan works should be freely accessible by the public

Any obstacle (payment, DRM) is an unwarranted **infringement on the exclusive right to prohibit**

Setting a price to be paid on request from resurfacing rights holders may be acceptable for those
uses requiring a significant investment:

- it will not then be a determinant factor in the decision to use the work.
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The contemporary law of armed conflict, Leslie C. Green, page 144
- **Do not rob dead authors of their public**