

David Drummond
Vice President, Corporate
Development and General Counsel

Andrew McLaughlin
Senior Policy Counsel

Alexander Macgillivray
Senior Product and
Intellectual Property Counsel

on behalf of Google Inc.
1600 Amphitheatre Parkway
Mountain View, California 94043
<<http://www.google.com/>>

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Jule L. Sigall
Associate Register for Policy & International Affairs
U.S. Copyright Office
Copyright GC/I&R
P.O. Box 70400
Southwest Station
Washington, D.C. 20024

Re: *Google's Response to Notice of Inquiry Regarding Orphan Works*

Dear Mr. Sigall:

Google appreciates the opportunity to respond to the Copyright Office's Notice of Inquiry regarding orphan works. In this letter, we describe Google and the services it offers, outline how Google is directly impacted by the problems presented by orphan works and propose a resolution to the orphan works problem that serves the interests of both the public and copyright holders.

About Google and Google Print

Google's mission is to organize the world's information and make it universally accessible and useful. We work to fulfill that mission by providing innovative search technology to people all over the world for free. Our web search service is one well-known example: users can instantly find web sites relevant to their queries from the more than eight billion we have cataloged and indexed. Whether users are looking for a specific section of the Copyright Act or the derivation of the phrase "needle in a haystack," we point users to the web sites that will help them.

We now seek to apply our search and presentation technologies to books. Google Print is a new Google service that aims to make searching for books, and the information contained in them, as easy as searching for web sites. At its core, Google Print is a giant, lightning-fast card catalog that knows not only the title, author, publisher and subject of a book, but also its contents. Thanks to Google Print, a search for “wherefore art thou Romeo” will return pointers to countless editions of Shakespeare’s “Romeo and Juliet,” as well as the location of every quotation of that phrase in any book, ranging from a hundred-year-old work of literary criticism to a more recent appearance in a teen romance.¹

What we display as a Google Print “search result” varies greatly based on how we have received the relevant book. At present, we receive books from two sources: publishers and libraries.

A large number of the books indexed and searchable on Google Print have been licensed to Google by publishers hoping to sell more of their books by making them easier to find. Our agreements for those books allow us to display the page containing the searched-for term and a few surrounding pages. We also show links to enable readers to buy the book and we may show advertising related to the content of the pages, from which the publisher can receive additional revenue.

Other books come to us as part of our project to index the collections of the world’s great libraries.² For these books, what we display to users in response to a search depends on the copyright status of the book. If a library book is in the public domain, we make the full text of that book available online, and also provide links to web sites where users can buy a hard copy of the book or borrow it from a local library. If the book is still covered by copyright, we make its bibliographic information available and may display short snippets of text relevant to the search terms to help people decide whether to buy the book or look for it in the library.

Google Print and Orphan Works

Orphan works represent an untapped wealth of information that can and should be made accessible to the public. These works include those for which the author or assignee of a work – the work’s “parent” – can no longer be determined, usually because the contact information included on the copyright registration is out of date. They may also include works that have been, for all intents and purposes, “disowned,” either because any potential monetary value of the works has expired or because their authors simply are not interested in enforcing the copyrights on their works.³ Orphan

¹ More information about Google Print is available at <http://print.google.com/>.

² We have announced partnerships with the University of Michigan, Harvard University, Stanford University, Oxford University and the New York Public Library.

³ There is ample evidence that, given the opportunity, many authors would allow their works to enter the public domain well before the statutory time limit for copyright protection has been reached. *See, e.g.,* William M. Landes and Richard A. Posner, Indefinitely Renewable Copyright, 70 U. Chi. L. Rev. 471, 473-474 (Spring 2003) (“[F]ewer than 11 percent of the copyrights registered between 1883 and 1964 were renewed at the end of their twenty-eight-year term, even though the

works therefore exist in a sort of purgatory – the entity holding the copyright over the work has no interest or desire to limit public use of the work, yet the work cannot be licensed by someone who would want to use it, as the holder of the copyright cannot be reached to secure a license. As a result, millions of works, representing hundreds of years of study and experience remain forgotten and unused, gathering dust on library shelves. Google believes that these works should instead serve as a foundation of knowledge upon which future generations can build.⁴

As described above, Google is working to make even these orphaned works findable through Google Print. However, the experience of a Google Print user is best where the book either was received through a publisher agreement or is no longer subject to copyright. For other books, including orphaned works, we show much more limited information on the assumption that that is what the copyright holder would prefer. However, that assumption is often wrong — it is a conservative assumption that is effectively mandated by the current state of copyright law, and the difficulty of contacting copyright holders directly. When we know who owns the copyright, we can ask them. That is how we were able to secure the many books currently committed to Google Print by their publishers. When asked, those copyright owners concluded that it was in their best interest to show interested users a few pages around their search terms. For orphaned works, we don't know who to ask.⁵

We urge the Copyright Office to encourage copyright holders to maintain up-to-date ownership information and to allow greater use of those works whose copyright holders signal a lack

cost of renewal was small. And only a tiny fraction of the books ever published are still in print; for example, of 10,027 books published in the United States in 1930, only 174 were still in print in 2001 [1.7 percent].”) (citations omitted), available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=319321.

⁴ As Sir Isaac Newton put it, “[i]f I have seen further it is by standing on [the shoulders] of Giants” – a quotation which he apparently based upon previous authors’ statements along the same lines. *White v. Samsung Electronics America, Inc.*, 989 F.2d 1512, 1515 (9th Cir. 1993) (quoting Newton and stating “All creators draw in part on the work of those who came before, referring to it, building on it, poking fun at it; we call this creativity, not piracy.”); *see also Lotus Development Corp. v. Paperback Software Intern.*, 740 F.Supp. 37, 77 (D. Mass. 1990) (quoting Newton and stating “Defendants’ general contention—that ‘Progress of Science and useful Arts’ cannot occur unless authors and inventors are privileged to build upon earlier progress and earlier innovation—has long been a virtually unchallenged premise in all branches of the law of intellectual property.”).

⁵ Multiple researchers have summarized the time, expense and frustration even relatively small-scale attempts to locate and contact copyright holders require. *See* Carole A. George, Exploring the Feasibility of Seeking Copyright Permissions, Carnegie Mellon University Libraries, Jan. 31, 2002 (regarding a digitization project of holdings of Carnegie Mellon University’s libraries), summary available online at <http://www.library.cmu.edu/Libraries/FeasibilityStudy.ppt>; Lynn Pritcher, Ad*Access: Seeking Copyright Permissions for a Digital Age, D-Lib Magazine, Feb. 2000 (documenting attempts to secure permissions to reprint old advertisements online), available online at <http://www.dlib.org/dlib/february00/pritcher/02pritcher.html>.

of interest in enforcing their copyrights by not updating the records of their ownership. To best make use of the vast amount of valuable but orphaned works, we need a simple, accurate and reliable means for determining (a) who owns a work and how to contact the owner, or (b) that the work has been left available for more substantial use by others. If we have the former information, we can work to secure a license for the work and make it available as we do with other books under contract. If we have the latter information, we can post the work online in whichever manner the Copyright Act, as amended regarding orphaned works, allows. In both cases, people will benefit from greater access to useful information. For that reason, any rulemaking or amendment to the Copyright Act to deal with the problem of orphaned works should provide a means of quickly and accurately identifying the copyright status and/or authorship of a work.

Google's Proposal

We seek to make these abandoned works vital again, providing new generations an opportunity to see them, as well as potentially creating a new means for copyright holders who wish to do so to make money from the dissemination of their works.⁶ Two straightforward changes to the maintenance of copyright records and the Copyright Act would greatly help in achieving that goal. First, we advocate the creation of a simple, accurate and reliable means of determining either (a) the information necessary to contact the copyright holder of a work to attempt to secure a license, or (b) that a work has been “orphaned” and is available for use by others. Second, we support changing the Copyright Act to (a) preclude those who rely upon this information from infringement liability while (b) ensuring that no copyright holder loses her copyright due to her failure to adhere to a formality. These two steps would provide those who wish to publish or utilize certain works either the information necessary to attempt to secure a license, or the comfort that they can publish a work without fear of liability because it is in the public domain or is currently orphaned. At the same time, they create an incentive to maintain current ownership information for copyrights that the

⁶ For example, if these works were enrolled in our publisher program, their copyright holders could receive money from advertising revenue even if the books were not currently for sale. We also hope that Google Print will encourage the printing of new editions of once-forgotten books. An example of one such an online resuscitation is provided by Chris Anderson. See Chris Anderson, *The Long Tail*, Wired 12.10, October 2004, available online at <http://www.wired.com/wired/archive/12.10/tail.html>. Mr. Anderson notes that Random House decided to “rush out” a new version of Joe Simpson’s *Touching the Void* ten years after its last print run in response to serendipitous discovery of the book through Amazon.com’s recommendation system. When people searched for a then more popular book by Jon Krakauer they were also shown information about Mr. Simpson’s similar but much less popular book. Anderson writes:

Particularly notable is that when Krakauer's book hit shelves, Simpson's was nearly out of print. A few years ago, readers of Krakauer would never even have learned about Simpson's book - and if they had, they wouldn't have been able to find it. Amazon changed that. It created the *Touching the Void* phenomenon by combining infinite shelf space with real-time information about buying trends and public opinion. The result: rising demand for an obscure book.

Id., at ¶ 4.

copyright holder believes are valuable, together with the ability to reclaim a work from orphaned status if others have proved its value.

For the change in practice, we propose the creation of a searchable database of all the works registered with the Copyright Office. For each registered work, the database would:

- describe the work (*e.g.*, author, title, year of first publication, publisher, ISBN or other identifying number where available),
- identify the person or entity holding the copyright(s) to the work,
- provide current contact information for the holder or its agent, and
- include the date on which the contact information was last updated.

In addition to benefiting those trying to determine whether a work had been “orphaned,” such a database would benefit copyright holders by facilitating contact from potential licensees of their works. Indeed, many copyright holders might wish to include licensing offers or information within the database itself.

The Copyright Office currently maintains a database similar to the one contemplated here.⁷ However, its current database covers only those copyrighted works registered after 1978, does not provide contact information for copyright holders, and is not readily queried through automated means. This last problem is particularly difficult for archivists such as Google, as it necessitates a manual review of records to determine the status of a given work. For an archivist of Google’s scale, manually searching hundreds of thousands of records through any means but an automated search is practically impossible. For that reason, we suggest that the database be accessible and searchable by automated means as well as through a web browser or other methods.

A searchable and current database of copyrighted works would serve as a platform upon which to rest any number of legislative or regulatory improvements to the copyright system.⁸ With

⁷ The WATCH file, organized by the Harry Ransom Humanities Research Center at the University of Texas at Austin, is another example of such a database. However, the WATCH file includes updated information only for authors who agree that such information may be included in the file and is only searchable by authors’ names. For more information about the WATCH file, see <http://tyler.hrc.utexas.edu/>.

⁸ Any amendments to copyright-related laws or rules should apply to equally to works of domestic and international origin. As a result, those changes must comply with international law. The applicable international law in the case of orphan works is reflected in the Berne Convention and the Trade-Related Aspects of Intellectual Property Rights (“TRIPS”) accord. In June 2000, the World Trade Organization, which enforces the TRIPS accord, found that a three-step determination must be made when determining whether an exception to copyright protection created by United States law violates the TRIPS accord and Berne Convention; an exception to copyright protection must: (1) apply only to “certain special cases,” (2) not “conflict with a normal exploitation of the work,” and (3) “not unreasonably prejudice the legitimate interests of the right holder.” World Trade Organization, “Report of the Panel on *United States – Section 110(5) of the US Copyright*

respect to orphan works in particular, Congress could institute a requirement that every specified number of years after the first publication of a work, the work's copyright holder provide the Copyright Office with either (1) written affirmation that the claimant's contact information currently on file is accurate; or (2) the necessary update of such information.⁹ A failure to provide the required affirmation or update would result in the work being listed as "orphaned" in the database. The designation of a work as "orphaned" would not strip a work of its copyrighted status. It would, however, allow others to use the ostensibly abandoned work, in good faith, without risk of infringement liability.

It would not be difficult to protect those who rely upon the orphan status of copyrighted works while at the same time safeguarding the holders of the copyrights in those works. If a copyright holder wished to enforce the copyright on a work that had been designated "orphaned," it could return the work to "active" status simply by providing written notice to the Copyright Office that it is the holder of the copyright (with proof of ownership as necessary) along with up-to-date contact information.¹⁰ The orphan designation on the work would then promptly be withdrawn.

Act," WT/DS160/R, June 15, 2000; *see also* Jane Ginsburg, Toward Supranational Copyright Law? The WTO Panel Decision and the 'Three-Step Test' for Copyright Exceptions, *Revue Internationale du Droit d'Auteur*, January 2001, available online at http://papers.ssrn.com/paper.taf?abstract_id=253867.

⁹ In a paper that considers the idea of "indefinitely renewable" copyrights, Judges Landes and Posner suggest that:

Were a system of indefinitely renewable copyright to be instituted today but limited to works created after the system was in place, there need be no great difficulty in identifying copyright owners a century or for that matter a millennium hence if, for example, the law required copyright owners to reregister their copyrights every 10 or even 25 years in some central registry under the name of the copyright holder and to notify the registry in the event the copyright was transferred. The owner would be required to provide the registry with his address and notify it of any changes of address; a transferee would likewise be required to furnish this information to the registry. Then a search of the registry under the name of the original owner would reveal the address of the copyright holder from whom a license would have to be sought. The analogy is to the registries in which titles to real estate are recorded and to the Uniform Commercial Code registries in which security interests in personal property are recorded. A fee would be charged for renewing a copyright registration in recognition of the costs imposed on the registry itself and on the searchers. The fee could exceed those costs if it were desired to expand the public domain by discouraging renewals of works unlikely to have much commercial value.

Landes and Posner, *supra* n. 3, at 477.

¹⁰ Prior to the advent of computers, the internet and web services, the transaction costs associated with such updates and manual checks may have been prohibitive. Technology drastically lowered these costs by providing for the automated collection and updating of information. As with searches of the database, notices and updates of copyright ownership should be automated so that large copyright owners could effectively update their registrations.

Those having used a work in reliance on it having been deemed “orphaned” would need notice of the work’s change in status. Such notice could be sent automatically to those who registered their intent to use a particular work with the Copyright Office. Alternatively, the updated database entry with the Copyright Office could serve as constructive notice to the world. In either case, those who used an “orphaned work” would necessarily be entitled to a grace period in which to either halt their use and distribution of the work or negotiate with the copyright holder for a license permitting continued use. At the conclusion of that grace period, the copyright holder would be able to fully enforce its rights in the work.

Conclusion

We hope that the information Google makes accessible through Google Print will form a foundation upon which future innovations and great works will be based. Authors, scholars, researchers, scientists – indeed anyone – may now, at the touch of a few computer keys and clicks of a mouse, access directly relevant works of authorship, many of which have long been unfindable, inaccessible, or even forgotten by their copyright holders as well as by the world. We believe the proposals contained herein will help further our goal of making works of every age and every stripe accessible to as many people as possible while enhancing the justifiable rewards due copyright holders for their creative efforts.

We again thank you for the opportunity to provide our thoughts on untapped opportunity of orphaned works. We greatly appreciate the careful attention being devoted by the Copyright Office to this very important issue, and we look forward to further constructive dialogue and engagement in the coming months.