

Orphan Works – Issues and Solutions?

(Working paper – For comment)

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INTRODUCTION	1
ISSUES AND INTERESTS TO BE CONSIDERED	1
1. What is an ‘Orphan Work’? What should be considered in this group?	1
1.1 What should be included in the definition of an ‘orphan work’? Should both published and unpublished works fall into this category?	1
1.1.1 Unpublished works?.....	1
1.1.2 Are abandoned works in a different category?.....	2
1.1.3 Out of print	2
2. What forces are driving the search for solutions?	2
2.1 Digitisation, especially by cultural institutions	2
2.2 Changes in various publishing business models leading to more works going out of production, off list and abandoned	3
2.3 Google Book Search Settlement	3
2.4 Extension of term of copyright	3
3. Scale: How many works may be involved?.....	3
3.1 Estimates	3
3.2 Implications	4
4. Who should benefit from orphan works provisions?.....	4
4.1 Should the provisions be limited to educational institutions such as libraries and archives, or apply to all?.....	4
4.2 Commercial users	4
4.2.1 Can a scheme to support commercial use be the same as one for individuals and for cultural or non-profit use?	4
4.2.2 Are commercial users all essentially similar, or different, for the purposes of orphan works?	5
5. What sorts of uses should be allowed?.....	5
5.1 Should provisions be limited to cultural or non-commercial uses?.....	5
5.2 Commercial uses.....	5
6. What form should an Orphan Works system take?	5
6.1 Use, extend or bypass existing exceptions?	5
6.2 What should be the aim of a system for dealing with Orphan Works?.....	6
6.3 <i>Proposal</i> : Collective licensing schemes.....	6
6.3.1 Google Books Settlement and EU responses	6
6.3.2 Denmark.....	6
6.4 Other supportive measures? Helping diligent search.....	6
6.4.1 Risk assessment tools.....	6
6.4.2 Industry agreement on principles for diligent search in common scenarios, suitable for rendering as metrics	7
6.4.3 Research into legal factors affecting risk of exemplary damages	7
6.4.4 Industry cooperation on bottlenecks, black holes and disconnects	7
6.4.5 Registration tools	7
6.4.6 Search tools.....	7
6.4.7 Other measures to assist and lower barriers to diligent search	7

7.	How to ensure any scheme only applies to works for which the copyright owner genuinely cannot be found?	8
7.1	How to avoid misuse by those seeking merely to avoid paying licence fees.....	8
7.2	<i>Proposal: 'Diligent search'</i>	8
7.2.1	Time limits.....	8
7.2.2	Attribution.....	8
7.3	<i>Proposal: 'Reduced risk'</i>	9
7.4	<i>Proposal: Registries</i>	9
8.	If the lost 'parent' appears, what then?.....	10
9.	Interaction with international obligations?.....	11
THE LEGISLATIVE PATH: NOT ENCOURAGING?.....		11
10.	Canada: legislation and a scheme, but not able to scale?.....	11
11.	US: repeated attempts	12
12.	UK: Photographers push orphans into the <i>Digital Economy Act 2010</i> too hard basket.....	13
13.	EU: regional solution for a global problem?.....	13
13.1	The 2011 MoU	14
13.1.1	'Out-of-commerce' works	14
13.2	Other European initiatives	14
CONSTRAINTS ON AN AUSTRALIAN RESPONSE.....		14
14.	Prerequisites for legislative reform	14
14.1	Sterling's conditions?.....	15
14.2	Consensus	15
14.3	Evidence that existing law cannot be made to work	15
14.4	Compelling case for priority.....	16
14.5	Economic benefit as well as tidier copyright law.....	16
15.	Non-legislative options.....	16
PROMISING OPTIONS?		16
16.	Minimisation of litigation risk through best practices.....	16
17.	Support for more robust use of s. 200AB Copyright Act 1968	17
18.	Development of codes and standards.....	17
19.	Development of risk assessment and mitigation tools	17
20.	Ways to reduce creation of orphans.....	17
21.	Better use of identification tools and data.....	18
22.	Clearinghouse for information on international developments	18
RECOMMENDATIONS.....		18
23.	Legislation?.....	18
24.	Best practices	18
25.	Codes.....	18
26.	Identification tools and data	19
27.	De facto registration tools, integration and federation	19
28.	Pilot of Australian risk assessment and ranking tool.....	19
29.	Education materials and programs	19
CONCLUSION.....		19

Introduction

An 'orphan work' is a work that is protected by copyright but whose owner cannot be identified and/or located.¹ There is wide (although not universal) recognition in Australia and many other countries that orphan works are not satisfactorily dealt with under existing copyright law; but in the past there has been little consensus about preferred methods of balancing the needs of competing stakeholders.² There is clear potential for conflict between potential users and the owners of copyright about any expansion of entitlements to use such works.

The recent moves to digitisation of large collections of cultural works³ and books orphan works has led to the development of quite different schemes to those suggested by the industry at large.

This working discussion paper arises from a UNSW project supported by CAL to investigate current issues for viable solutions to problems raised by Orphan Works in Australia. It aims to identify some of the issues raised by orphan works, reviews drivers bringing discussions to a head, and after considering legislative options, a final version is likely to suggest immediate cooperative alternatives as a more promising near term approach for Australia.

(Parallel UTS investigations conducted with the support of Screenrights for their stakeholders may play a useful part in proposing solutions for certain aspects of the problems, though the scope and aims are not identical.)

Issues and interests to be considered

1. What is an 'Orphan Work'? What should be considered in this group?

1.1 What should be included in the definition of an 'orphan work'? Should both published and unpublished works fall into this category?

The scope of works which are called 'orphan' is not clear cut. They may include variations of those categories below, and others.

1.1.1 Unpublished works?

The ADA supports the inclusion of unpublished works where the author cannot be found in the category of orphaned works.

Orphaned works should in their view also include unpublished works where the author is known but has died.

¹ Australian Copyright Council, *Orphan Works*, 18 December 2008, at: http://www.copyright.org.au/admin/cms-acc1/_images/4754894014d0014914d3ab.pdf

² For references to commentary, proposals, and other material see the companion paper, 'Resources on Orphan Works', March 2011, at: http://www.cyberlawcentre.org/orphan/OW_Resource_List.pdf

³ In particular, see the Europeana project in the EU. See European Parliament, Resolution of the European Parliament on 'Europeana – next steps' (May 2010), p. 8. Available at: http://ec.europa.eu/information_society/activities/digital_libraries/doc/parliament/resolution_europeana.pdf

1.1.2 Are abandoned works in a different category?

The notion of deliberate abandonment, as distinguished from the loss of information about the association between a work and its creator through the effluxion of time, may be considered a separate category.

However, given the importance and deleterious effects of uncertainty in dealing with other orphan works, the certainty that an unequivocal abandonment offers should be considered as a positive basis for inclusion in the class.

1.1.3 Out of print

While not strictly an orphan work, some of the same issues of lack of practical access to works of cultural significance are raised by out of print works.

“An orphan work is a copyrighted work for which is difficult or impossible to contact the copyright holder. The out-of-print works are copyrighted works not commercially available, as declared by the appropriate right holders, regardless of the existence of tangible copies of the work as normally understood.

Both of the categories pose a number of problems related to the balance between the protection of the rights of the authors (or in general the copyright owners) and the access of public to original creations (as landmark of all copyright law).”⁴

It may be that similar options may offer some assistance in dealing with out of print works, although the differences need to be given due weight.

Note also the recent EU MoU use of the concept of ‘out of commerce’ works. See ‘the 2011 MoU’ under the EU legislative discussion below.

2. What forces are driving the search for solutions?

The push to address the problem of Orphan Works has increased, here and elsewhere, under a number of forces.

2.1 Digitisation, especially by cultural institutions

The mass digitisation of the contents and collections of cultural institutions, galleries, museums and libraries is a significant factor. Items whose status is unknown may have lain undisturbed for decades or more in closed collections, and suddenly when the complex array of copyright issues is posed by the transformation into a different medium, typically one intended to be made available on the Internet, the unanswered questions of provenance, ownership and permitted uses come to the fore.

It is no surprise that the National Film and Sound Archive was one the pioneers in developing policy for the new uses. “The extension of the copyright term in Australia following the *Australia-United States Free Trade Agreement* and the fact Australia does not have a system of copyright registration has further exacerbated the orphan work problem. Works are in copyright for longer and, as a result, there is greater opportunity for them to become orphaned.”

As well as other considerations, the deteriorating film stock gives a more urgent dimension to the plans to convert to digital – it is essential preservation as well as preparation for online access.⁵

⁴ Remus, Titiriga. ‘Digital (on Line) Libraries: Problems with Orphan Works and Works Out of Print – Possible Solutions,’ (12 January 12 2011). Available at SSRN: <http://ssrn.com/abstract=1739298>

2.2 Changes in various publishing business models leading to more works going out of production, off list and abandoned

Epstein notes a dramatic reduction in bookstore, then publisher, backlists in the 1980s US caused by demographic shifts from cities to suburbs, with large urban bookstores replaced by small chain shops in malls. Publishers responded by dropping backlist.⁶ This resulted in large numbers of books going out of print, and many being abandoned by publishers. Such forces have continued, especially with the failure of the Borders model to take root out of niche markets.

2.3 Google Book Search Settlement

The typically adventurous approach of Google in attempting to bypass or sidestep many of the recognised problems and approaches has spurred renewed consideration of robust and entity-neutral solution for orphan works, particularly in Europe, where antitrust concerns with US global IT companies has a long history.⁷ Google has scanned over 15 million books, and since 2005 has been involved in litigation and negotiation with interested parties worldwide.

As of September 2011 lead negotiations in the US between lawyers for authors, publishers and Google were still continuing with a timetable into 2012, under the oversight of Judge Denny Chin in Manhattan who rejected a \$125 million agreement put before him in March which had been anticipated to resolve the matter. 'That agreement drew hundreds of objections from Google rivals, consumer watchdogs, academic experts, literary agents and even foreign governments.'⁸

2.4 Extension of term of copyright

20 years of old works which would have come into the public domain 2005–2025 are now back in copyright in Australia as a result of the A-US *Free Trade Agreement* 2005, which extended the term of copyright by 20 years to life of author plus 70.

This has contributed to the exacerbation of orphan works issues in Australia, since many of these works will be out of print, orphaned or abandoned. This has raised the stakes by enlarging the pool of works potentially affected.

3. Scale: How many works may be involved?

3.1 Estimates

A study noted in a British Library paper estimates a considerable proportion of all works it knows about are orphans. For instance, it estimated in excess of 50 million orphan works across the public sector.⁹ This also reminds us that the majority of orphan works may well

⁵ National Film and Sound Archive (NFSA). *Statement on Orphan Works* (June 2010), p.1. Available from: <http://www.nfsa.gov.au/collection/collection-enquiries/copyright/> or at:

http://www.nfsa.gov.au/site_media/uploads/file/2011/02/03/Statement_on_Orphan_Works.pdf

⁶ Epstein, Jason, 'Books: Onward to the Digital Revolution' [review of Thompson, J, *Merchants of Culture*, Polity 2011], *New York Times Review of Books* (10 February 2011). Available at:

<http://www.nybooks.com/articles/archives/2011/feb/10/books-onward-digital-revolution/> (subscription required)

⁷ de la Durantaye, Katharina, 'H Is for Harmonization: The Google Book Search Settlement and Orphan Works Legislation in the European Union', *New York Law School Law Review*, Volume 55, Number 1, (2010/11). Available at:

http://www.nyls.edu/user_files/1/3/4/17/49/1080/55-1%20Final%20de%20la%20Durantaye%2011.30.10.pdf

⁸ AP, 'NY judge gives Google, lawyers more time to talk', *Bloomberg Businessweek*, 15 September 2011. At:

<http://www.businessweek.com/ap/financialnews/D9PP265G2.htm>

⁹ British Library/various authors. 'Driving UK Research? Is Copyright a help or a hindrance? A perspective from the research community', essays and submissions collated by British Library (July 2010). Available at:

<http://pressandpolicy.bl.uk/imagelibrary/downloadMedia.ashx?MediaDetailsID=628>

not have come from the commercial publishing sector but from others such as government or education.

3.2 Implications

A very large volume of Orphan works has implications for schemes designed to administer, identify or use them. The larger the number the more unsuitable court based individual determinations looks as a solution, due to time, cost and resource implications.

Such costs exert a downward pressure on use of potential orphan works. It is not clear that maintaining a high cost of processing is a desirable way of managing the use and recognition of orphan works.

There is potentially a conflict between those keen to have a simple streamlined mechanism offering a routine process for re-using works for which permission cannot be sought, and those keen to avoid the risk of inadvertently categorising works of limited provenance in case an owner appears.

4. Who should benefit from orphan works provisions?

4.1 Should the provisions be limited to educational institutions such as libraries and archives, or apply to all?

A significant reason that orphan works have come into the spotlight in recent years is as a result of difficulties encountered in digitising archives.¹⁰

Groups such as the Australian Libraries Copyright Committee have been active in making submissions on this issue.

Proposed criteria: any package of solutions should be well suited to the needs of cultural institutions, but should also offer options which are viable and suited to smaller organisations and individuals.

4.2 Commercial users

As noted below, commercial users of orphan works should also fall within the scope of those assisted by solutions to orphan works dilemmas.

Many initiatives propose better identification of works and creators. These could increase the level of remuneration from commercial users by lowering search barriers and making more works accessible, many still with identifiable owners, while permitting exploitation of orphans where due diligence reveals no available creator.

What is the impact of the greater resource capacity of commercial users in terms of search and administration? Solutions which assume commercial scale search capacity may not work for non-profit or individual use.

4.2.1 Can a scheme to support commercial use be the same as one for individuals and for cultural or non-profit use?

The working assumption is that similar principles should apply, but procedures may be different.

¹⁰ See Barton T, 'Saving Texts From Oblivion: Oxford U. Press on the Google Book Settlement', *The Chronicle of Higher Education*, 29 June 2009, <<http://chronicle.com/article/Saving-Texts-From-Oblivion-/46966/>> viewed 14 September 2009.

4.2.2 Are commercial users all essentially similar, or different, for the purposes of orphan works?

This is a key question to resolve, since the fewer different approaches that are required to do justice to the details of specific practices, the more consistent and simple will be the ultimate solution.

While arguments can be made to create many multiple categories, our preference for the simplest and most consistent solution encourages exploration of the common elements of commercial users and their grouping into as few as possible separate cases.

5. What sorts of uses should be allowed?

5.1 Should provisions be limited to cultural or non-commercial uses?

There are already certain fair dealing provisions (for example see *Copyright Act 1968* (Cth) Pt III, Div 3).

Cultural or non-commercial uses are in some ways the easiest to deal with, and this is where the EU model has focused.

However there are a much wider range of potential orphan works users and re-users than those able to benefit from these provisions. They do not form the basis of a comprehensive solution.

5.2 Commercial uses

A key threshold for a universal solution to orphan works (assuming such a thing was possible and desirable, which we do) would be to permit commercial uses safe from fear of exemplary or punitive damages should a missing 'parent' appear to claim infringement.

Some of the public interest reasons for enabling easy and cheap use of orphan works may be reduced where there is commercial gain contemplated, since the user may have greater incentive to do as some creators fear, and claim the benefit of orphan works rules, if they exist, to hide lack of due diligence or intent to evade paying.

For this reason, any effective commercial solution may hold the best prospects for principles which can apply more universally, although the increased capacity of commercial users to pay for more diligent search and other steps may distract from solutions that would work for low cost/un-financial users.

The SBS 2011 Guidelines are a useful attempt to set out the basis for reasonable commercial decision making about orphan works.¹¹ In the absence of other models, these could be the starting point for discussions about commercial use.

6. What form should an Orphan Works system take?

6.1 Use, extend or bypass existing exceptions?

Should the scheme be an independent of, but work in conjunction with existing exceptions to copyright, should the existing exceptions be extended to include orphan works, or could the scheme be outside the existing framework like the Google Books Settlement?

¹¹ SBS. *SBS Statement On Orphan Works [Version 1.0 February 2011]* (2011). Available at: <http://www.sbs.com.au/aboutus/corporate/view/id/541/h/SBS-Statement-on-Orphan-Works-1.0-February-2011>

6.2 What should be the aim of a system for dealing with Orphan Works?

Is it to encourage users to seek out authors and negotiate their own arrangements for use, or to allow for almost universal access, subject to an owner's ability to exempt their work from the scheme?

6.3 Proposal: Collective licensing schemes

Licences are given to classes or categories of work, so they can be used without authorisation. These sorts of schemes reverse the focus of copyright, seeming to favour access over protection.

6.3.1 Google Books Settlement and EU responses

Copyright owners need to take positive action ('opt-out') to exclude their works from online searches and certain uses.¹²

- Waiting on a further Amended Settlement.
- At present, only affects Google.

This initiative has increased the urgency of EU Orphan Works activity.¹³ (See below for the 2011 MoU in the EU.)

6.3.2 Denmark

Utilises collective licensing in other areas as well, and supports a model for extended collective licensing which intends to both guarantee access to works, but also to provide reasonable payment to owners if they are found.

- Like the Google Books Settlement, individual owners will have the option of preventing their work from being covered by a collective agreement if they choose.¹⁴
- The ADA considers this sort of system to be unworkable in Australia given the low threshold for originality in copyright here.¹⁵

6.4 Other supportive measures? Helping diligent search

A central problem for intending users, and creators seeking to deter abuse, is working out and conducting an appropriate due diligence search. The US Copyright Office in 2006 noted that there is no set formula for this.¹⁶

6.4.1 Risk assessment tools

Risk assessment tools may formalise assessment and decisions by searchers as to the required standard if metrics can be agreed. See UK tools for this purpose from Open

¹² S McCausland, "Googling the Archives: Ideas from the Google Books Settlement on Solving Orphan Works Issues in Digital Access Projects", (2009) 6:2 *SCRIPTed* 377, <<http://www.law.ed.ac.uk/ahrc/script-ed/vol6-2/mccausland.asp> > viewed 4 August 2010.

¹³ de la Durantaye, Katharina. 'H Is for Harmonization: The Google Book Search Settlement and Orphan Works Legislation in the European Union', *New York Law School Law Review*, Volume 55, Number 1, (2010/11). Available at:

http://www.nyls.edu/user_files/1/3/4/17/49/1080/55-1%20Final%20de%20la%20Durantaye%2011.30.10.pdf

¹⁴ http://ec.europa.eu/competition/consultations/2008_online_commerce/koda_contribution.pdf

¹⁵ Australian Digital Alliance, *Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the Digital Age*, Submission to the Attorney-General's Review of Fair Use and Other Copyright Exceptions, May 2005, <<http://www.digital.org.au/submission/FairDealingReview05.rtf>> viewed 14 September 2009, p. 11.

¹⁶ Peters/US Copyright Office. *Report on orphan works: A report of the Register of Copyrights* (2006), Library of Congress, Washington DC, 2006. Available at: <http://www.copyright.gov/orphan/orphan-report-full.pdf>

Educational Resources IPR Support.¹⁷ This could be the basis of an Australian tool, ideally not very industry specific unless essential.

Proposal: A prototype is recommended as a next step in this area.

6.4.2 Industry agreement on principles for diligent search in common scenarios, suitable for rendering as metrics

An ideal environment for resolving the appropriate level of search in a particular case would be one where there was industry consensus on some of the core factors and weightings which would push the presumption in favour of greater or lesser efforts. This would not be conclusive but could serve to provide a basis for later assessment of whether a particular search is adequate.

Proposal: discussions should be undertaken, in conjunction with other efforts to address orphan works issues, to establish a basis for negotiating rules of thumb for good practice in search.

6.4.3 Research into legal factors affecting risk of exemplary damages

A significant source of risk for would-be users of orphan works without legislative protection (for reasons discussed elsewhere) is that of being liable for damages in excess of ordinary royalty or licence fees in the event a 'parent' appears and claims improper dealing with their now non-orphan work.

Work needs to be done to illuminate the extent and nature of these risks, either to inform the development of industry understandings about eg diligent search that could be taken into account to mitigate this litigation risk, or if this is unrealistic, to request specific legislative support for amendments to recognise such diligence as such a relevant factor.

6.4.4 Industry cooperation on bottlenecks, black holes and disconnects

There are numerous inefficiencies in current tools to assist diligent search. These could be the subject of industry negotiation and cooperation, with a view to identifying key changes which could, with limited resource impact, significantly improve the findability of creators and identification of works and thus simplify clearance and licencing.

6.4.5 Registration tools

Without necessarily requiring legislative changes, options for encouraging registration, particularly online digital metadata based systems, should be explored. Legal impediments should be closely examined and if necessary noted for possible law reform removal.

6.4.6 Search tools

Related to the previous two issues, much better search and meta search tools could be developed, cooperatively to enable users and creators of works to better find each other and conduct licence discussions.

6.4.7 Other measures to assist and lower barriers to diligent search

Other such measures could be explored.

The benefit for creators is greater remuneration as more remunerable uses arise.

¹⁷ Open Educational Resources IPR Support. *Risk Management Calculator*, interactive online risk assessment tool for works including orphan works (January 2011). Available at: <http://www.web2rights.com/OERIPRSupport/risk-management-calculator/>; see also media release, at: <http://www.jisc.ac.uk/news/stories/2011/01/calculator.aspx>

The benefit for users is reduction in costs and uncertainty of diligent search, and greater comfort in assessing diligent search as complete and assessment of a work as an orphan as defensible.

7. How to ensure any scheme only applies to works for which the copyright owner genuinely cannot be found?

7.1 How to avoid misuse by those seeking merely to avoid paying licence fees¹⁸.

What steps should the user have to take to rely on any orphan works scheme?¹⁹ The fear among some creators and owners is that lazy or greedy potential users will jump at the chance to say 'I've had a quick look' as the basis for claiming there is no remunerable person.

The solution proposed below is to base 'reasonableness' on accepted best practice models, supported in a Code for a particular industry, based on existing and new examples.

7.2 Proposal: 'Diligent search'

Requires the would-be user to attempt to locate a copyright owner by carrying out prescribed or 'reasonable' activities.

The Australian Digital Alliance supports a non-remunerable, free use exception where the user has made 'reasonable efforts' to locate and notify the copyright owner.²⁰

Reasonable search variants:²¹

- Case by case standard – where the adequacy of the search is considered with references to circumstances prevailing at the time of the search.
- Formal standard – there is a pre-set list of required searches, and once the user performs them without success, the work is deemed orphaned.

'Piggybacking' – should a subsequent user be able to rely on a previous search?²²

7.2.1 Time limits

Should the search have time limits? E.g. should a user be required to search again after 5 years?

7.2.2 Attribution

The user of an orphan work should be obliged to include information saying that the work is an orphan work. There are variations of this, for example:

- That users are required to file some sort of notice with US Copyright Office or other authority to signal that they have conducted a reasonable search, and that they intend to use an orphan work.²³ (See also Proposal 4 – Registries)

¹⁸ Australian Copyright Council, *Orphan Works*, 18 December 2008, Australian Copyright Council, <<http://www.copyright.org.au/information/cit031/wp0130>>

¹⁹ Ibid (copyright council)

²⁰ Australian Digital Alliance, *Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the Digital Age*, Submission to the Attorney-General's Review of Fair Use and Other Copyright Exceptions, May 2005, <<http://www.digital.org.au/submission/FairDealingReview05.rtf>> viewed 14 September 2009, p. 9.

²¹ Peters, Marybeth, Register of Copyrights, US Copyright Office, *Report on Orphan Works*, Library of Congress, Washington DC, 2006 <<http://www.copyright.gov/orphan/orphan-report-full.pdf>> viewed 14 September 2009.

²² Peters, Marybeth, *ibid*, at 78.

Canada introduced a scheme in 1988 under which people can apply to the Copyright Board for a licence to use works whose owner they cannot find.²⁴ The search therefore has to be authorised in some sense.

- Whilst the Canadian model is not supported by the ADA, which claims that the cost of such a scheme would outweigh the benefits, they do support the use of a 'prescribed notice' on any derivative works after publication, such that a copyright owner who later appears is able to seek payment of royalties or removal of the material.²⁵

7.3 Proposal: 'Reduced risk'

A variant on 'diligent search' exempts or protects orphaned works-users from copyright infringement provisions so long as appropriate steps are undertaken to identify the author.

Two bills were introduced into the US Congress, the underlying idea being that once a user has performed a 'reasonable' or 'diligent' search, legislation would limit the remedies that could be used against that user should the copyright owner surface at a later date.

In particular, the owner's ability to receive monetary relief and injunctive relief would be limited.²⁶

These bills have, as yet, not gained support, and the movement seems to have stagnated.

However the push to reduce risk by establishing a model for reasonable and diligent search can potentially be adapted for Australian needs, and integrated into other viable options.

7.4 Proposal: Registries

This section outlines some of the features of proposals involving registries, particularly the US models.

A register of copyright owners (or users, or both) should be kept. This needs to be considered against the 'formality' constraints of the Berne Convention, but there may be avenues for implementing a voluntary partial registry without breaching these constraints.

Register of owners

- Users only need search this for 'reasonable' or 'diligent' search, and if a work is not listed, they may assume that it is orphan work.
- If mandatory, potential breach of art 5(2) of the *Berne Convention*.²⁷

Register of users

- Attempt to reduce abuse of the system
- Owners would have to monitor it constantly

For example, various US proposals involving a greater role for the Copyright Office.²⁸ This was a relatively resource intensive proposal, which would have added ongoing cost and resource demand which might be avoided by other options.

²³ Peters, Marybeth, *ibid*.

²⁴ Australian Copyright Council, *Orphan Works*, 18 December 2008, Australian Copyright Council, <<http://www.copyright.org.au/information/cit031/wp0130>>

²⁵ Australian Digital Alliance, *Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the Digital Age*, Submission to the Attorney-General's Review of Fair Use and Other Copyright Exceptions, May 2005, <<http://www.digital.org.au/submission/FairDealingReview05.rtf>> viewed 14 September 2009, p. 11.

²⁶ Peters, Marybeth, *op. cit*.

²⁷ Peters, *ibid*, at 74.

²⁸ Peters, *ibid*

All copyright records should be available online. This idea is one of the potentially more valuable insights in relation to registries

In addition to this, that:

- For visual works, records be completely digitised and images (perhaps with some limitations) be made available online.
- Lineage or provenance be provided for each copyright work.
- A database of corporate mergers should be established, so works made for hire can be traced more easily.

The Copyright Office should change its regulations/procedures, including:

- Giving more guidance to those people who wish to reduce their rights/donate their work to the public domain
- Establish a system of unique identifiers for all written and visual works (similar to ISBN numbers)

Broader databases, not necessarily involving the Copyright Office:

- Publication of lists of all works about to fall into the public domain
- Publication of the entire public domain

The idea of a public registry is not supported by the US Copyright Office on the basis that the resources which would need to go into an initiative like this have not yet been justified by the scale of the problem, though this position may change with experience. However, the Copyright Office does support the development of registries by the private sector.

In Australia, the equivalent may be to improve the accessibility and attractiveness of existing registers, to federate and link them together to improve searchability ('a one stop shop'), and to tie convenient benefits for owner, creator and user alike to use of the register.

8. If the lost 'parent' appears, what then?

As intimate above this is a critical question. What should happen if a copyright owner becomes aware of the way his or her material has been used, and wants exercise rights including to stop its use, or be remunerated for it?²⁹

What should happen when the owner reappears?

- What happens to any derivative work?
- Should new uses be prohibited but existing uses be allowed (perhaps subject to an attribution requirement)?
- What damages/compensation, if any, should the owner receive for the prior use?

Users may be in some schemes required to pay a sum of money before commencing use (most likely to be used towards a fund for compensation if owners should surface).³⁰

- Fixed statutory fee, market price or 'reasonable licence' fee?
- Given there is by definition no known owner entitled to a fee at the time such a fee is levied, is this approach justifiable?

²⁹ Ibid (copyright council)

³⁰ Peters, op. cit.

- What options could constrain the potential conflict of interest for a collecting society, and reduce incentives to seek fees where no owner is expected to appear?
- Are there alternate mechanisms or approaches that would meet the desire to remunerate known authors without creating a massive fund without beneficiaries entitled to its contents?

9. Interaction with international obligations?

How would any proposed legislative scheme interact with international obligations, for example, those under the Berne Convention?³¹

How will the new EU MoU or Single Market legislation affect options for Australia?

What other treaty or international constraints will apply to restrain or guide developments in Australia?

Are non-legislative means more or less transferable than legal principles?

Can any local orphan works solution focus on Australian works, or must foreign works be a core part of the solutions?

THE LEGISLATIVE PATH: NOT ENCOURAGING?

While legislative reform and systematic treatment of Orphan Works issues has occurred in some jurisdictions and had been touted in many others, and offers the promise of definitive national resolution of those issues, in reality there are reasons to be cautious about assuming legislation is a possible, necessary and sufficient answer, to be pursued to the exclusion of other options.

10. Canada: legislation and a scheme, but not able to scale?

The Canadian scheme³² is viewed by some as a model of straightforward application of traditional practice. It offers “a mechanism which allows a person to make an application to the Canadian Copyright Board, and seek a licence from the Board for the use of the material in Canada. Provided the Copyright Board is satisfied the copyright owner cannot be found, it sets a licence fee, which is paid to the collecting society representing that class of works (with an undertaking from the collecting society to pay the copyright owner), or which the licensee undertakes to pay if the copyright owner emerges in the next 5 years.”³³

A key problem with the tribunal-based determination of orphan status, apart from the payment for which there is no known beneficiary, is that it does not scale up to the level of the problem: there have been a mere several hundred cases in over a decade, while there are potentially in the order of millions of works which might be orphan.³⁴

³¹ See Greenleaf, G "National and International Dimensions of Copyright's Public Domain (An Australian Case Study)", (2009) 6:2 *SCRIPTed* 259, [Unlocking IP 2009 special edition] <<http://www.law.ed.ac.uk/ahrc/script-ed/vol6-2/greenleaf.asp>> viewed 14 September 2009, p. 270.

³² Parliament of Canada, Copyright Act R.S., 1985, c. C-42. See Section 77: 'Owners who cannot be located' for the licensing regime. Available at: <http://laws.justice.gc.ca/eng/C-42/FullText.html> and <http://laws.justice.gc.ca/en/showtdm/cs/C-42/> (See also the Copyright Board Brochure, in Reports).

³³ Australian Copyright Council. *Response to the issues paper on Fair Use* (June 2005). See pp. 7–8, para 34–38, supporting Canadian model. Available at: http://www.copyright.org.au/admin/cms-acc1/_images/18679514704c97fbf05eb70.pdf

³⁴ “We estimate that over 40% of in-copyright works are orphan works”: British Library, 'Press and Policy: Intellectual Property' web site section (undated, accessed January 2011). Available at: <http://pressandpolicy.bl.uk/content/default.aspx?NewsAreaId=316> .

Some commentators at the February 2011 forum at UNSW³⁵ suggested the low number of these cases, and the fact that most result in a finding of orphanhood, should be interpreted as a mark of success of the scheme. However one of the broadcasters present noted that the turn-around time, even in a tribunal as relatively informal and flexible as the Canadian Copyright Board in this function, is in the 4-6 weeks range, while documentary TV makers are looking at the days to two weeks range for decisions on use of materials. This would support an interpretation that the tribunal model is unwieldy for potentially high volume, low value, possibly un-owned materials.

The Canadian model has received some support in Australia, and a recent survey of the caseload indicates a diligent and impressive effort to address issues raised in applications robustly

11. US: repeated attempts

There is a long recent history³⁶ in the US of attempted Orphan Works legislation, largely³⁷ frustrated by failure to address stakeholder concerns well enough to deter effective campaigns against the proposals.

In particular there has been in the US very effective opposition by photographers, who feel themselves most exposed to the changing business model pressures arising from technological change (consumer level creation tools offering professional results), the spread of 'open content' and user-generated content practices, and the erosion of formerly stable commercial arrangements.

³⁵ Cyberspace Law and Policy Centre workshop on Orphan Works, 8 February 2011. Available at <http://cyberlawcentre.org/orphan/workshop110208.htm>

³⁶ *Shawn Bentley Orphan Works Act of 2008*, 'A bill to provide a limitation on judicial remedies in copyright infringement cases involving orphan works', S.2913, 110th US Congress, referred from Senate to House, 24 April 2008, passed Senate amended 26 September 2008. Available at: <http://www.opencongress.org/bill/110-s2913/show> , <http://www.thomas.gov/cgi-bin/bdquery/z?d110:s.02913;> <http://www.govtrack.us/congress/bill.xpd?bill=s110-2913> or <http://copywrite.org/2008/05/16/s2913-shawn-bentley-orphan-works-act-of-2008/> Commentary: <http://www.lexology.com/library/detail.aspx?g=ce714b3f-5050-43b4-a7af-743ad47d647a> *Orphan Works Act of 2008*, 'A bill to provide a limitation on judicial remedies in copyright infringement cases involving orphan works', H.R.5889, bill of 110th US Congress, introduced to House 24 April 2008. Available at: <http://www.opencongress.org/bill/110-h5889/show>. *Copyright Modernisation Act of 2006*, 'To amend title 17, *United States Code*, to provide for licensing of digital delivery of musical works and to provide for limitation of remedies in cases in which the copyright owner cannot be located, and for other purpose,' H.R.6052, bill introduced to 109th Congress, Title II (2006). Available at: <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:h.r.06052;> or <http://www.govtrack.us/congress/bill.xpd?bill=h109-6052> Previously introduced as H.R.5439, below. *Orphan Works Act of 2006*, 'To amend title 17, *United States Code*, to provide for limitation of remedies in cases in which the copyright owner cannot be located, and for other purpose,' H.R.5439, bill introduced to 109th US Congress (22 May 2006). Available at: <http://www.govtrack.us/congress/bill.xpd?bill=h109-5439> or <http://thomas.loc.gov/cgi-bin/query/z?c109:H.R.5439>: *Preservation of Orphan Works Act of 2004*, 'To amend section 108 of title 17, *United States Code*, relating to reproduction of works by libraries and archives,' H.R. 5136, bill introduced to 108th Congress (23 September 2004). Available at: <http://www.govtrack.us/congress/bill.xpd?bill=h108-5136> *Public Domain Enhancement Act of 2003*, 'To amend title 17, *United States Code*, to allow abandoned copyrighted works to enter the public domain after 50 years,' H.R. 2601, bill introduced to 108th US Congress in 2003. Available at: <http://www.govtrack.us/congress/bill.xpd?bill=h108-2601> or <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:H.R.2601;> Reintroduced as H.R.2408 for the 109th Congress, 17 May 2005. Available at:

<http://www.govtrack.us/congress/bill.xpd?bill=h109-2408> or <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:H.R.2408>:

³⁷ The most notable exception being the *Preservation of Orphan Works Act*, Title IV of the *Family Entertainment and Copyright Act of 2005*, 'to provide for the protection of intellectual property rights, and for other purposes,' Pub. L. No. 109-9, s. 202, 119 Stat. 218, 226, 227 enacted April 27, 2005. Available at: <http://www.copyright.gov/title17/92chap1.html#108> or <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:s167>:. See Bill S.167 of 109th Congress, at: <http://www.govtrack.us/congress/bill.xpd?bill=s109-167> This amends section 108(i), title 17, USC to add orphan works to the list of works that are exempt from certain limitations on uses by libraries and archives.

12. UK: Photographers push orphans into the *Digital Economy Act 2010* too hard basket

The *Digital Economy Bill 2010* had its otherwise well-supported orphan works provisions removed unceremoniously in the dying hours of the Labour Government due also to opposition by photographers.³⁸

Clause 43 would have inserted a heading 'Additional licensing and regulation' into the *Copyright, Designs and Patents Act 1988* (UK) with new sections 116A Licensing of orphan works, 116B Extended licensing schemes, 116C Meaning of "orphan work", 116D Orphan works: registration and compliance, 116E Regulation and enforcement, and 116F General (inter alia, omitting crown copyright from this scheme). Schedule 2 would have inserted into the *Copyright, Designs and Patents Act 1988* (UK) a new Schedule A1 'Regulation of Licensing Bodies', and amended Schedule 2A to insert further 'Additional licensing and regulation' provisions.

In their efforts to get through anything that could be passed without effective debate or dispute as their term ended, this provision was abandoned by the government to enable the larger Bill to proceed. Lack of consensus proved fatal for the ambitious scheme.

13. EU: regional solution for a global problem?

Europe appears to be moving towards a legislative solution (a Directive), most recently as an outcome of the *Single Market Act 2010*.³⁹ This seems to be driven by the cultural institutions' desire to support the *Europeana* initiative to network most major collections online. The Comité des Sages in January recommended 'a European legal instrument needs to be adopted as soon as possible to tackle the issue of orphan works', and proposes an 8 step test for adequacy of such a model.⁴⁰

But it potentially suffers from what Sterling describes as "of limited use to the prospective licensee seeking geographically unrestricted licences to be offered an EU-wide licence which does not cover access in, for example, the United States or other countries, in respect of which separate licences would have to be sought."⁴¹ It may also not support many commercial uses.

³⁸ *Digital Economy Bill* [HL] 2009-10, Bill 89. See the later excised clause 42 (cl 43 in later version) inserting s116A-E, and Schedule 2 inserting Schedule 1A 'Regulation of licensing bodies', into *Copyright, Designs and Patents Act 1988*. Available at: <http://www.publications.parliament.uk/pa/ld200910/ldbills/032/10032.i-ii.html> (as amended in committee 8 February 2010) or <http://www.publications.parliament.uk/pa/cm200910/cmbills/089/2010089.pdf>. (as sent 16 March 2010)

³⁹ European Commission. Draft *Single Market Act*, (27 October 2010). Open for consultation until Feb 2011. See Proposal 2 for an Orphan Works Directive. See also Single Market High Level Conference organised by the European Commission in Brussels, 8 February 2011. Available at: http://ec.europa.eu/internal_market/smact/index_en.htm, and related Communication at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0608:REV1:EN:PDF>. "Proposal No 2: In 2011 the Commission will submit a proposal for a framework Directive on the management of copyrights, with the aim of opening up access to online content by improving the governance, transparency and electronic management of copyright. The Commission will also be proposing a Directive on orphan works." See also *European Commission Recommendation 2006/585/EC of 24 August 2006 on the digitisation and online accessibility of cultural material and digital preservation*. (2006). Brussels: Commission of the European Communities, *Official Journal of the European Union (OJ)*, L 236, p. 28, 31 August 2006. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:236:0028:0030:EN:PDF> or <http://euwiki.org/2006/585/EC>. And Clifford Chance, 'The Single Market Act: 50 measures to boost the EU economy' (November 2010), briefing paper. Available at: http://www.cliffordchance.com/publicationviews/publications/2010/11/the_single_marketact50measurestoboostth0.html

⁴⁰ Comité des Sages. *The New Renaissance*, Report: Recommendations for Europeana (10 January 2011) Available at: http://ec.europa.eu/information_society/activities/digital_libraries/doc/reflection_group/final_report_%20cnds.pdf

⁴¹ Sterling, Adrian, 'The Future Of Copyright: Approaches For The New Era', address to British Literary and Artistic Copyright Association, London (12 March 2009), p.19. Available at: <http://www.blaca.org/BLACA%20Future%20of%20copyright%20120309.doc>

13.1 The 2011 MoU

Perhaps intended to leapfrog these legislative developments and influence them, in late September 2011 a Memorandum of Understanding for *Key Principles on the Digitisation and Making Available of Out-of-Commerce Works* was signed by a diverse range of bodies, including Association of European Research Libraries (LIBER), Conference of European National Librarians (CENL), European Bureau of Library, Information and Documentation Associations (EBLIDA), European Federation of Journalists (EFJ), European Publishers Council (EPC), European Writers' Council (EWC), European Visual Artists (EVA), Federation of European Publishers (FEP), International Association of Scientific, Technical & Medical Publishers (STM) and International Federation of Reprographic Rights Organisations.⁴²

The three principles are:

- Voluntary Agreements on Out-of-Commerce works
- Practical Implementation of Collective Agreements
- Cross Border Access to Digital Libraries'

The scope is "books and journals which have been published for the first time in the country where the Agreement is requested, and are to be digitised and made available by publicly accessible cultural institutions as contained within Art 5.2 (c) of the European Union Directive 2001/29/EC1", and also included images embedded.

This appears to exclude all other types of works. It can be seen as a direct response to Google Books, rather than a generic solution, although the principles may be of more general application.

13.1.1 'Out-of-commerce' works

The key definition is "a work is out of commerce when the whole work, in all its versions and manifestations is no longer commercially available in customary channels of commerce, regardless of the existence of tangible copies of the work in libraries and among the public (including through second hand bookshops or antiquarian bookshops)."

13.2 Other European initiatives

Brennan and Fraser⁴³ note other developments including moves to create a music repertoire database, query the bar on formalities in the Berne Convention, create a copyright registry and support a digital copyright exchange. These give encouragement to local interest in similar mechanisms to support more effective licensing and identification of works which would be needed under non-legislative and legislative approaches to deal with orphan works in Australia.

Constraints on an Australian response

14. Prerequisites for legislative reform

In the course of investigation for this project it has become apparent that there may be some *de facto* prerequisites for orphan works legislative reform proposals that have any prospect of success in the current climate in Australia.

⁴² At: http://ec.europa.eu/internal_market/copyright/docs/copyright-info/20110920-mou_en.pdf

⁴³ Brennan, David and Fraser, Michael. 'The Use of Subject Matter with Missing Owners – Australian Copyright Policy Options' (August 2011), discussion paper for workshop at UTS 22 September 2011.

14.1 Sterling's conditions?

Adrian Sterling suggested the conditions for a viable statutory response, and these constitute a useful starting point in considering the scope of such legislation. "Legitimation of online and offline use of orphan material should, it is submitted, be effected by legislative provisions giving the necessary coverage for intended use. It is submitted that eight essential conditions need to be fulfilled in order to provide effective and comprehensive coverage of licensing of use of orphan material, namely:

- Condition 1: Legislative solution
- Condition 2: Conformity to existing legislative structure
- Condition 3: Conformity to international and regional instruments
- Condition 4: Recognition of economic and moral rights
- Condition 5: Provision of remuneration
- Condition 6: Comprehensive coverage of rights
- Condition 7: Operational practicability
- Condition 8: Control of licence terms "⁴⁴

These are impeccable requirements, and in principle likely to result in viable legislation, but query whether together they may have the unwanted effect of raising the threshold of legislative action above what a cautious government is willing to enact in the near term? This proved to be the case in the UK, where the *Digital Economy Bill 2010* had its otherwise well supported orphan works provisions removed unceremoniously at the last minute.⁴⁵

Such a comprehensive list of conditions may pose a hurdle in Australia for a minority government carefully picking its battles and applications of effort.

14.2 Consensus

Advice from government officials involved in this area suggests that in practice, any proposal for Orphan Works legislation would need broad stakeholder consensus, and any sector specific or single stakeholder proposal would be unlikely to be pursued. While consensus is a generally desirable consideration for effective legislation, it appears to be more critical than at times in the recent past. This may have the effect of reducing the scope for controversial elements in any such legislation.

14.3 Evidence that existing law cannot be made to work

There are a small number of options within the existing law, some introduced relatively recently like s. 200AB, that aim to address some aspects of orphan works and related problems.

While these face teething problems, procedural limitations and relatively low take up, there remains some doubt as to whether full advantage has been taken of these options, and whether current limitations may be addressed in some way without further legislation.

⁴⁴ Sterling, Adrian, 'Australia and the Future of Copyright: proposals for new approaches', paper for Copyright Society of Australia seminar (3 June 2009), p.8. Available at: <http://www.copyright.asn.au/events/f09n03paper.pdf>

⁴⁵ Arthur, Charles, 'Digital economy bill rushed through wash-up in late night session: Government drops clause on orphan works but inserts amendment criticised as over-broad which could block sites based on 'intent'', *Guardian* online (8 April 2010). Available at: <http://www.guardian.co.uk/technology/2010/apr/08/digital-economy-bill-passes-third-reading>

14.4 Compelling case for priority

There have been suggestions that a reference on copyright and IP issues is likely to be made shortly.⁴⁶ This is a potential vehicle for considered legislative amendment in this area. However, such a reference is unlikely to be as comprehensive as, say, the recent Privacy review (report 108), and specific issues will face competition to get to the top of what may be quite a short list of demonstrably urgent and serious matters to be included in the reference. Orphan works proposals and issues might well have difficulty in such a priority contest, especially in the absence of consensus about the need for legislative attention.

14.5 Economic benefit as well as tidier copyright law

Equally clear is an indication that any Orphan Works legislative solution would need justification not within the domain of IP law and practice alone, but in terms of broader economic and systemic benefits. Recent financial and natural disasters have understandably constrained resources, and placed limitations on government efforts outside of those with clear benefits for the wider community and business.

15. Non-legislative options

One of the drivers for a legislative solution is the combination of the need for certainty on the part of the proposed using organisations and their lack of comfort as to the level of risk taken on by using orphan works, particularly against the outlying litigant keen to assert a case for exemplary or punitive damages (what some have called an opportunistic litigant, unwilling to accept ordinary damages related merely to benefits or profits forgone). Decisive legislative support for their position is an obvious response to make this problem 'go away'. However, for the reasons above, there appear to be significant doubts that any legislative proposal could meet all the theoretical and practical conditions for success in the near term.

For non-legislative solutions to have any prospect of success, whatever else they may need to achieve they will be assessed in part on their capacity to offer certainty. It may be necessary to develop a cooperative approach to determining appropriate standards, and accepting them as reasonable for the purposes of industry practice and evidence that can be relied on to limit the scope for opportunistic litigants.

Another issue is the perceived constraint posed by the prohibition on excessive 'formality', sometimes interpreted to deprecate registry type options. A compromise that avoids the most extreme concerns with 'formality' while offering some of the benefits of a registration-like scheme may be a useful challenge.

Promising options?

Below is a list of the more promising options for addressing orphan works issues for Australian conditions in the near term. Some have been flagged above.

The most promising should be the subject of further collaborative development.

16. Minimisation of litigation risk through best practices

It may be feasible to cooperatively develop standards and approaches for say 'diligent search' which a court will be likely to accept as reasonable efforts by a potential user to comply with obligations and expectations.

⁴⁶ Australian Copyright Council. 'The Attorney General and the greens put copyright reform on the agenda,' (29 October 2010) News and Policy blog post. Available at: <http://www.copyright.org.au/news-and-policy/details/id/1832/> Refers to report in *Australian Financial Review*, James Eyres, 24/9/10, p. 18; and *Australian Greens Policy Initiative*, August 2010; authorised by Senator Bob Brown Parliament House Canberra.

If widespread and implemented as a Code, below, this would give even more weight to a claim of representing best practice, and thus being reasonable, and thus minimising risk of outlier litigation seeking exemplary or punitive damages for reasonable but not legislatively supported behaviour by say cultural institutions or content creators and adaptors.

17. Support for more robust use of s. 200AB Copyright Act 1968

The section 200AB option has been criticised for potential complexity and uncertainty, perhaps due to the principles-based approach to compliance with international obligations including the 3 step test, somewhat unusual amongst the more stipulative provisions in other parts of the Act. The fact that only a limited range of potential users are entitled to its benefits also rankles with some, but supporting the more robust use of 200AB may play a part in a suite of solutions.

There is scope for development of an array of tools which could make its use more viable. These may include the active endorsement of best practice guidelines as proposed above, and educational or assessment materials or tools to assist in compliance and use.

18. Development of codes and standards

If there can be a reasonable degree of consensus between owner and user stakeholders, this agreement can be formalised into documents of the form of standards or codes.

While there may initially be no or limited statutory support for these codes, they may have greater weight, eg as persuasive to a judge determining whether an opportunist litigant is expecting unreasonable levels of diligence, if they are endorsed and supported by a wide range of stakeholders, and are explicitly developed to both aid the location of all reasonably locatable owners, and also to confirm reasonable efforts can be stopped when this is not feasible.

19. Development of risk assessment and mitigation tools

Online decision tools are already in limited use in the UK.⁴⁷

While they can offer some protection and guidance without explicit consensus about standards of diligence etc., they will have more weight if they are consistent and supportive of efforts to develop such standards and guidelines.

The UK models are obviously incomplete, but their inspiration and approach can offer a short path to a workable Australian set of tools.

20. Ways to reduce creation of orphans

All avenues for limiting the creation of new orphans should be assessed and the best widely promulgated and supported. This may include both better identification of works, licences and owners for remunerable uses, and the explicit licensing under eg., an open content style licence where works are anticipated to have limited or no commercial prospects, or the owner does not seek that form of return.

⁴⁷ Open Educational Resources IPR Support. *Risk Management Calculator*, interactive online risk assessment tool for works including orphan works (January 2011). Available at: <http://www.web2rights.com/OERIPRSupport/risk-management-calculator/>; see also media release, at: <http://www.jisc.ac.uk/news/stories/2011/01/calculator.aspx> This tool helps assess risk of breach and compliance enforcement by requiring answers to a series of questions which categorise the proposed activity, and in so doing assist the delivery of a numerical ranking or risk level.

21. Better use of identification tools and data

Metadata schemes to make tools like Digital Object Identifier more widely used and standardised may help in tracking down the missing parents.

Further inquiry should assess whether the existing tools are adequate, and need more sustained efforts to improve implementation and use, or whether further technical developments or integration work would be critically useful.

22. Clearinghouse for information on international developments

There are extensive and to some extent divergent developments in foreign and international jurisdictions, and while some (such as US and UK legislation) appear stalled, the impetus to continue efforts to resolve Orphan Works issues remains strong, and other jurisdictions like the EU appear heading for more concerted action. Without international agreement these initiatives will not resolve some of the key problems identified by Sterling and others

Recommendations

These recommendations are based on paths to implementing some of the above options.

23. Legislation?

Work should continue on possible legislative changes to support orphan works, either generically for certain industries. See Brennan and Fraser's discussion paper for example.

Given indications that immediate law reform prospects are limited, these legislative proposals as much as possible should be developed on the assumption of being compatible and supportive of the development of non-legislative solutions, so that these are encouraged in the short term, and will remain viable under any legislative change later on.

24. Best practices

Build upon existing initiatives to identify best practices for dealing with Orphan Works issues and procedures, such as by extending and generalising current organisation-, use- or sector-specific policies or guidelines. For instance, the SBS policy⁴⁸ and NFSA approach.

25. Codes

Based upon the above work in relation to best practices, certainty and wide implementation of those practices, and reliance on them as litigation defence, would be supported by their incorporation as a Code of Practice or similar. Without predetermining the scope and nature of such a Code, efforts should be directed to setting up the conditions for one or more codes to be created in promising sectors of the stakeholder community.

Seeking total consensus on one code, a one-size-fits-all model, is probably unnecessary and unwise. A number of related, complementary codes may be more achievable and just as useful, provided there is some consistency and coordination between them.

These Codes would have much more benefit if they were accepted by as many stakeholders as possible. This would require good will and effort to ensure that this acceptance was reasonably achievable.

⁴⁸ SBS. *SBS Statement On Orphan Works [Version 1.0 February 2011]* (2011). Available at: <http://www.sbs.com.au/aboutus/corporate/view/id/541/h/SBS-Statement-on-Orphan-Works-1.0-February-2011> See also *SBS Website User-Generated Content Guidelines* (January 2011), at: http://media.sbs.com.au/home/upload_media/site_20_rand_211190160_sbs_user_generated_content_guidelines_140111.pdf

26. Identification tools and data

Survey and rank options for better use of identification tools and data. Consult stakeholders to encourage consensus about the ranking, or identify problematic ranking issues that need specific attention. To the extent possible, publicise this ranking and develop tools and techniques for assisting awareness and adoption of the high ranking options.

In order to be able to offer all stakeholders consistent and complementary advice about where to focus efforts, this level of detailed assessment and review is warranted. Individual stakeholders are unlikely to be able to justify the detailed efforts required to do this ranking, and if it is not widely accepted the best options may not be widely pursued. If there is an agreed approach or list of best identification practices but inadequate wider awareness, training or support for their adoption, they will not reach critical mass needed to become common throughout the affected industries and user communities.

27. De facto registration tools, integration and federation

As noted above, there is scope for better cooperation between holders of existing registry databases, and improvements in access methods.

The aim would be a one stop shop where the widest possible set of searches on de facto registry records could be made. Further work needs to be done on the shape of such systems and improvements (which will also have the effect of increasing the effectiveness of identifying and thus remunerating, existing authors).

Inspiration might be drawn from the ambition behind the Europeana project, which aims to offer a one stop access point for a vast range of cultural material held by institutions and in process of being digitised.⁴⁹

28. Pilot of Australian risk assessment and ranking tool

The UK example offers a basis for immediate software/service development, using some of their approach but filling out the decision tree and list of parameters affecting the ranking.

In the short term this may be of most value to eg libraries with an ambitious digitisation program, but once it has stabilised it would be of wider interest.

29. Education materials and programs

Once agreed upon, most of the proposals here rely to some degree on awareness, implementation and enthusiastic use by various people in key locations. It would be critical to develop materials to support these options, in particular to document and explain best practice approaches, or the more streamlined use of s.200AB. Many other aspects would require such educational support.

This could include the establishment of one or more online information services, including for instance a central online point for material on or references to EU developments.

Conclusion

After many false starts there appears to be some prospect for relatively prompt and coordinated action to reduce the impact of the Orphan Works problem in Australia, and develop a base for cooperative best practice that will stand both creators and users in good stead when and if a viable global solution takes shape.

⁴⁹ See above.

The suggestions above do not in general rely on legislative support, at least in the near term, and do not rely on a registry system that would offend the Berne Convention.

International developments will continue to have major impact, in part because Internet publication is generally borderless, and national solutions of incomplete coverage.