

Orphan Works and Google's Global Library Project

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The draft article is ultimately about orphan works and their relationship to fair use, although I will get to these more general topics by means of an examination of the most important concrete policy settings in which the topics arise, and indeed come together-the Copyright's Office's Report on Orphan Works ("Report"), on the one hand, and the Google Print lawsuits, which turn on the defense of fair use on the other hand. I will first examine the Report on Orphan Works and then examine its important relation to the Google Print lawsuits that currently roil the copyright world. The parties to the Google Print lawsuits want all or nothing-plaintiffs want all of Google's uses to be declared infringements while Google wants all its uses to be declared fair. There is a third way, however, in which some uses are fair and others are not. The task then becomes drawing this line. Orphan works may present a logical place to draw the line between those works that should be a fair use and those works that should not. Despite the initial plausibility of this solution, I will reject it in favor of another one. I will argue that the Orphan Works Report may provide an alternative to fair use as a solution to the problem presented by the Google Print lawsuits; namely, instead of fair use, the treatment of orphan works should be determined by the proposal suggested in the Orphan Works Report in which there are limitations put on remedies for infringement when users of orphan works perform unsuccessful searches for the owners. The important question is not whether Google would prefer this solution. Clearly it would not. The important question is whether Google could live with this legal reform yet still find it worth while to go ahead with the Google Print Project or something functionally equivalent to it. I will argue that there is reason to think that Google could live with the limitation on remedies approach proffered by the Copyright Office. I will further argue that such a result would be preferable from the perspective of social welfare.