

Orphan Works Challenges for the Use of Recorded Sound Collections

ARSC Copyright Workshop

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Orphan Works

“For as I passed along and observed the objects of your worship, I found also an altar with this inscription: ‘To the unknown god.’ What therefore you worship as unknown I proclaim to you.”

– *The Apostle Paul, delivering an address from the Areopagus, Acts 17:23 (ESV).*

Orphan Works

Works whose owners cannot be located, and therefore cannot be asked for permission.

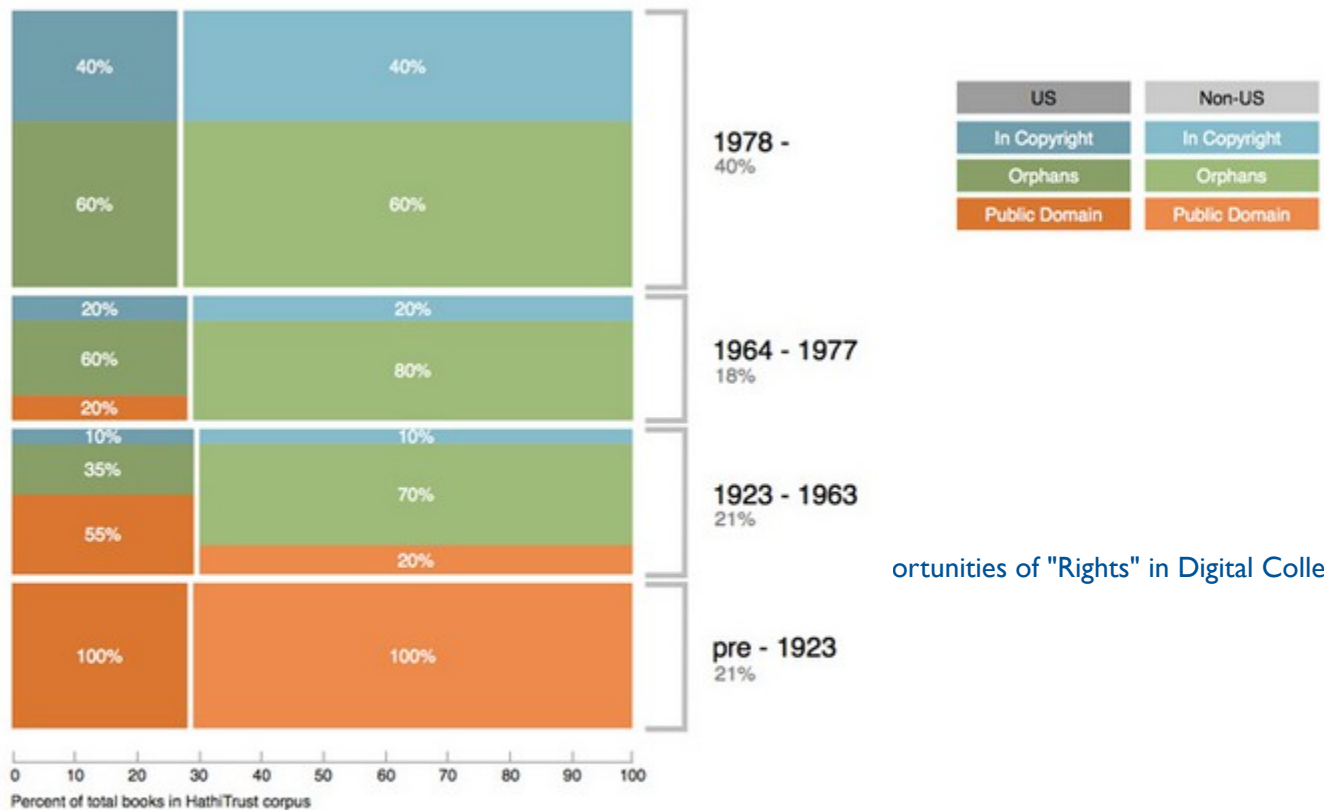
How many orphans?

Lots.

Orphan Works

HathiTrust ~ 10 million volumes

Fig. 7: HathiTrust book corpus: Breakdown by US/non-US and rights status for all periods



opportunities of "Rights" in Digital Collection Building,

Causes of the Orphan Works Problem

- **Legal**
 - Elimination of formalities
 - Extension of terms
 - Divisibility of copyright ownership (“atomism”)
 - Layered copyright interests (“thicket” problem)
- **Practical**
 - Need to shift works to new formats (i.e., copy)
 - Enhanced preservation means more works survive

Orphan Works Solutions

Report on Orphan Works

A Report of the Register of Copyrights • January 2006

Orphan Works Solutions

Limiting Remedies After a Reasonably Diligent Search

US Legislation (2005-2008)

- Copyright Office Report on Orphan Works
- Proposed legislation to limit remedies available against good faith orphan work reusers.
 - Required reusers to first conduct a reasonably diligent search for rights holders
- Never enacted, but the Copyright Office has expressed renewed interest in pursuing this type of legislation

Orphan Works Solutions

Limiting Remedies After a Reasonably Diligent Search

EU Orphan Works Proposal

- Similar to US approach, but applies only to educational institutions, libraries, archives, museums, public broadcasters, and film heritage institutions
- Limited to published textual material from libraries and archives, cinematic and audiovisual materials in film heritage institutions, and cinematic, audio, or audiovisual works produced by public broadcast organizations
- These institutions would have right to reproduce, but right ceases if rightsholder comes forward
- Also allows secondary, commercial uses

Orphan Works Solutions

Centrally Administered Licenses for Specific Uses

Canadian Orphan Works System

- Authorizes Copyright Board to certify reuses of works upon petition of user
- Requires reasonable, but unsuccessful, effort to locate owners
- Low risk for reusers, but high up front costs (must petition copyright board, muster evidence, license fees to owners that may never collection).

Orphan Works Solutions

Extended Collective Licensing

- Extends authority of collecting societies to issue licenses on behalf of non-members
- Useful for mass digitization
- Not really an orphan works solution; must look to out-of-print, not-commercially exploited materials.

Orphan Works Solutions

Technological Solutions: Registries and Metadata

- Accessible Registries of Rights Information and Orphan Works (“ARROW”)
- Avoiding future orphan works through application of alternative license schemes (e.g., Creative Commons)

Risk
&
Uncertainty

Fair Use: Risk Reduction

§ 107 – “Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”

Fair Use

§ 107 – “In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

An Orphan Works Digitization/Access Strategy

- Will anyone object?
- What happens if they do object?