

## More on the 'Orphan Works' controversy in the U.S.

Thursday, 15 September 2011

Last week I wrote about the work of the HathiTrust Digital Library, a shared repository in the U.S. which is planning to make digital copies of selected Orphan Works available to library patrons at participating universities. On September 12th, the Authors Guild, other writers groups and several individual authors filed a suit in a U.S. Federal District Court against HathiTrust, the University of Michigan and other universities for copyright infringement.

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The Association of Research Libraries (ARL) has just released a Resource Packet explaining the issue in greater detail. According to ARL's announcement the Resource Packet on Orphan Works: Legal and Policy Issues for Research Libraries "provides general information on legal and policy issues concerning orphan works and the University of Michigan's Orphan Works Project, an FAQ, and a legal memorandum . . . which describes the legal issues associated with making orphan works digitally available."

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While the memo is based on U.S. Copyright Law, it is highly recommended reading for Canadians interested in providing broader digital access to works. Watch for a more detailed posting outlining the similarities and differences between Canadian and U.S. copyright laws in this area.

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Here are some further details about the lawsuit. . .

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The plaintiffs:

The Authors Guild, the Australian Society of Authors, Union des Ecrivain et des Ecrivaines de Quebecois (UNEQ) and several individual named authors. None of the named plaintiffs are authors of works which may be designated as Orphan Works.

The defendants:

The HathiTrust and the University of Michigan, University of California, Cornell University, University of Wisconsin, and Indiana University.

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The plaintiffs' position: While the universities claim they can proceed to make some of the orphan works in the HDL available relying on fair dealing, the plaintiffs claim that "section 108 of the Copyright Act explicitly regulates the extent to which libraries may lawfully reproduce copyrighted works without authorization, the circumstances under which digital copies may be created and displayed to library patrons and when copies of orphan works may be released to the public." (complaint, para 4)

The claim is based on the theory that the project exceeds the scope of section 108 and cannot be justified then by fair-use under section 107. The complaint also claims that the defendants' "actions not only violate the exclusive rights of copyright owners to authorize the reproduction and distribution of their works but, by creating at least two databases connected to the Internet that store millions of digital copies of copyrighted books, the Universities risk the widespread, unauthorized and irreparable dissemination of those works." (para 7).

What relief the plaintiffs are seeking:

- A declaration that the defendants' actions constitute copyright infringement under section 106 and 108; and that defendants' digitization and display under the HathiTrust Orphan Works project is also copyright infringement

- An injunction against: (1) reproducing/displaying/distributing works except as specifically permitted in section 108; (2) providing digitized works to Google; (3) proceeding with the HT OWP

- Impoundment of all unauthorized digital copies.

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The university libraries obtained the files from Google under agreement and they set up the HathiTrust, a partnership incl over 50 research universities, which operates the HathiTrust Digital Library, a shared digital repository.

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The HathiTrust has posted its first list of Orphan Works candidates on July 15th. To be placed on this list, the trust has ascertained that the work is not commercially available and that the owner cannot be ascertained. Then the work will be listed for a period of 90 days, if no owner comes forth, then the work will be made available in full view to authenticated users at UMich. (UW, UC and Cornell has also announced they will do likewise) The first group of proposed orphan works will reach their 90 day period on October 13th. Documentation of the workflow for this process has been posted by the University of Michigan library, it indicates a very detailed set of standards which must be met before a work becomes a candidate for Orphan Work status. This due diligence only bolsters the libraries' position that they can rely on fair-use to make these works available to their patrons.

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The plaintiffs claim that the project is an infringement because it goes beyond the limited exceptions contained in Section 108 of the U.S. Copyright Act (Limitations on Exclusive Rights: Reproduction by Libraries and Archives). But section 108(f) provides that:

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Nothing in this sectionâ€”

(4) in any way affects the right of fair use as provided by section 107. . .Â

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It is not clear then how the plaintiffs can claim that fair-use is not available.

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Some additional coverage and commentary is available from the Chronicle of Higher Education, Library Journal, Inside Higher Ed, Kenneth Crews , Cory Doctorow, James Grimmelman, and Karen Coyle.Â

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