

PRIVATE DIGITAL LIBRARIES AND ORPHAN WORKS

Randal C. Picker[†]

TABLE OF CONTENTS

I.	INTRODUCTION	1259
II.	THE EMERGING PRIVATE DIGITAL LIBRARIES	1262
	A. COMPETITION BETWEEN PUBLIC AND PRIVATE DIGITAL LIBRARIES	1263
	B. THE NEW PRIVATE LIBRARIES.....	1265
	1. <i>Google Book Search</i>	1266
	2. <i>The Amazon Library</i>	1268
	3. <i>Other Libraries</i>	1271
III.	COPYRIGHT RULES FOR LIBRARIES	1272
IV.	STRUCTURING THE USE OF ORPHAN WORKS	1275
	A. SELECTION EFFECTS, THE POOL OF ORPHAN WORKS, AND SECONDARY PROPERTY RIGHTS	1277
	B. SETTING A ROYALTY RATE: INCREMENTAL CREATION INCENTIVES AND ORPHAN WORKS RULES SALIENCE.....	1280
V.	CONCLUSION	1283

I. INTRODUCTION

We are in the midst of a transition to digital libraries. This process is in its earliest stages, but it is at a point where we face key structural choices that can have dramatic long-term consequences. Those choices will influence the types of libraries that will emerge and the extent of competition that we will see in the digital library space. As we build and populate digital libraries, we face critical questions about how those libraries will acquire rights to content. For current purposes, it is useful to have three types of content in mind: (1) the public domain; (2) so-called orphan works, meaning works in copyright where the copyright holder is unidentifiable; and (3) in-copyright

© 2012 Randal C. Picker. All Rights Reserved.

[†] James Parker Hall Distinguished Service Professor of Law, The University of Chicago Law School and Senior Fellow, The Computation Institute of the University of Chicago and Argonne National Laboratory. I thank the Burton and Adrienne Glazov Faculty Fund and the Microsoft Fund for their generous research support.

works where the copyright holder is known. Each of these classes poses challenges. There are no copyright limits on the use of public domain works, but there are substantial access issues nonetheless. I address those issues in a separate work.¹

Libraries face challenges in gaining access to front-list, in-copyright works—the works that populate *The New York Times* bestseller lists and the like—as the Big Six publishers assess how potential lending of library ebooks could impact sales of those works.² The problem is friction, or more precisely, the absence thereof. If library patrons can just as easily download ebooks to readers as they can purchase books, readers may abandon buying books entirely, or at least so the publishers fear. Libraries believe, of course, that they build readers and encourage reading.

This Article, however, focuses on orphan works. The problem with orphan works is well known, as is the most obvious solution: new legislation.³ Absent legislation, we are left with a world of uncertain rights and the resulting litigation, as we have seen in the Google Book Search and HathiTrust cases. But whatever mechanism emerges that allows progress on orphan works, we must attend to the opportunities available in the new landscape of digital private libraries. Current U.S. copyright law contains a number of special provisions applicable to libraries and archives and many of these rules are limited to nonprofit libraries or are limited to noncommercial activities.⁴

We would make a serious mistake if we replicate those rules for orphan works. As Part II below makes clear, we have a new emerging class of private digital libraries. This, it turns out, is an old model—dating back in the United States to Benjamin Franklin and the Library Company of Philadelphia—as private libraries were an important part of the library landscape in the eighteenth and nineteenth centuries in the United States and Great Britain. The new private digital library is therefore the return of an old business

1. Randal C. Picker, *Access and the Public Domain*, 49 SAN DIEGO L. REV. (forthcoming 2012).

2. See EBOOKS FOR LIBRARIES, <http://ebooksforlibraries.com/> (last visited Oct. 7, 2012) (demonstrating one way libraries are addressing difficulties in acquiring ebooks).

3. Some countries, such as France, are moving forward on this new legislation, often facing criticism from authors. See Gillian Spraggs, *France Guillotines Copyright*, ACTION ON AUTHORS' RIGHTS BLOG (Feb. 28, 2012), <http://blog.authorsrights.org.uk/2012/02/28/france-guillotines-copyright/>.

4. See, e.g., 17 U.S.C. § 108 (2010) (regarding limitations on exclusive rights for reproduction by libraries and archives); 17 U.S.C. § 109(b)(1)(A) (2010) (regarding rental, lease, or lending of phonorecords for nonprofit purposes by nonprofit libraries); 17 U.S.C. § 109(b)(2) (regarding lending of computer programs for nonprofit purposes by nonprofit libraries).

model that squarely offers the possibility of competition between public and private libraries and among private libraries. My central point is simple: we should not distort emerging competition by handing over special rights to orphan works to public and nonprofit libraries.

When considering orphan works, we must do so with two principles in mind. First, we need to enable broadly competing uses of the orphan works while, to the greatest extent possible, respecting the rights of the orphan works holders. Private libraries should be able to compete with each other and with public libraries in using orphan works. Of course, use of orphan works may require changes to U.S. copyright law, so it is the scope of those changes that are at stake. Second, we should not tilt the table in favor of digital library monopoly, either public or private.

The first and most critical issue for the use of the orphan works is a regime that sidesteps the current statutory damages scheme of U.S. copyright law under 17 U.S.C. § 504(c). Anyone currently contemplating using an orphan work must consider statutory damages as the great risk of that use. Actual damages are likely to be quite low, especially once we account for the selection effect at work with orphan works. Orphans, after all, are orphans for a reason. Works that are important or economically successful are not likely to take on orphan status. To revive orphan works, both public and private users must be insulated from statutory damages. And doing that will preserve competition between public and private digital libraries.

The second piece of the puzzle is, then, how we determine how much libraries should pay to use orphan works, and whether those fees should be identical for public and private libraries. Of course, if those fees are not equal, we distort the competition between the libraries. Some might favor a free-use regime or low fees for public libraries. According to this view, public libraries make works available to the public and should be supported in that mission. Free access to orphan works would do just that. The response, however, notes that a free-use regime for orphan works for public libraries imposes the cost of use on a narrow class—namely, the copyright holders for the orphan works. We could impose a good chunk of the costs of running public libraries on copyright holders, but we have refused to do that and instead generally insist that taxpayers bear those costs.

This Article is divided into three substantive parts. In Part II, this Article considers some of the characteristics that will matter for the competition between public and private digital libraries and offer a brief discussion of the emerging private digital libraries. Google's Book Search project is probably the most prominent example, but Amazon has an important initiative as well and there are many smaller examples. In Part III, this Article considers the current library exemptions in U.S. copyright law, with particular emphasis on

§ 108. Existing statutory safe harbors for libraries favor noncommercial libraries and archives. The emergence of new for-profit private digital libraries suggests that existing safe harbors reflect too narrow a conception of what libraries can be in the digital age, and we need a statutory scheme that supports the possibility of for-profit libraries. We could carry those exemptions over to private libraries quite easily and should do so to foster a rich digital library ecosystem. The possibility of large-scale private digital libraries is an important development and one we should seek to enable. If we create use rights for copyrighted works for digital libraries, we should be sure to make those privileges available to both public digital libraries and private digital libraries.

In Part IV, this Article turns to the shape of a potential statutory licensing regime for orphan works. There are good reasons to think that such a regime, whatever its setting, would play only a small role in authors' decisions on whether or not to create works. Authors will expect their works to succeed, and successful works almost never become orphans. It will be the rare potential author who will confront the possibility of orphanage for her work and then will take the next steps of assessing the likelihood that her orphan work will be restored to meaningful economic value. All of that suggests that the orphan-works licensing regime will not be particularly salient for potential authors. Even a regime that allows subsequent use at very low prices is not likely to influence the creation of very many works. Instead, we need to focus on how the licensing rules influence subsequent use of those works. In doing so, we need to account for how the performance of the orphan work will affect whether it will be claimed. Repurposed orphans that fail will find few claimants, but orphans that succeed will be claimed. This scenario is very much a heads-I-win, tails-you-lose proposition, so we will need to figure out a way to incentivize the use of the abandoned orphan works by new users.

II. THE EMERGING PRIVATE DIGITAL LIBRARIES

Access to libraries is unevenly distributed. This unequal distribution is both a product of the nature of physical libraries—tied to a particular location—and the tools we use for organizing libraries. Many of the world's great libraries are based in academic institutions. Members of those institutions often enjoy superior access to the libraries than outsiders. As for public libraries—meaning those financed predominantly through taxes—in 2011 the Public Library Association counted 9,214 public libraries in the United States, but more than forty percent of those are in towns with

populations under 5,000.⁵ These public libraries are undoubtedly important to their local communities, but the works available are of quite different scope and scale than the materials available at large metropolitan libraries, like the New York Public Library.

We are starting the transition to digital libraries, and that creates a number of opportunities. Geography instantly becomes less important, or at least can be if we make the right organizational choices. The move to digital means that new types of entities, especially private entities, may become an important part of our library ecosystem, and will likely alter the competitive balance between private and public libraries in important ways.

A. COMPETITION BETWEEN PUBLIC AND PRIVATE DIGITAL LIBRARIES

Start with public libraries and the natural question: why not move the public library online? If we finance physical libraries through general tax dollars and keep such libraries free to the public, why can we not do the same thing with online digital libraries? Some are calling this proposition the Digital Public Library of America (DPLA),⁶ but even independent of new initiatives, we are seeing our existing libraries go digital. The American Library Association (“ALA”) issues an annual report entitled “The State of America’s Libraries.” In its 2011 report, the ALA noted that ninety-four percent of all academic libraries are offering some ebooks, as are seventy-two percent of public libraries.⁷

Books are circulated as downloads or preloaded on reading devices. Actual ebook circulation is still relatively low, but is growing. The Chicago Public Library reported ebook circulation of 17,000 in 2009 and more than 36,000 in 2010.⁸ These ebooks are direct substitutes for physical books, and have not required any change in the way that libraries purchase books. The mechanics on lending and check out are a little different, but the core idea is straightforward: the library buys a certain number of digital copies, and a patron can check out the book if one of those copies is available on the virtual shelf. Again, this process assumes access to those books, and, as noted above, public libraries are facing resistance from publishers in selling ebooks.

5. PUBLIC LIBRARY ASSOCIATION, 2011 PLDS STATISTICAL REPORT 1 (2011).

6. See Robert Darnton, *Google’s Loss: The Public’s Gain*, N.Y. REV. BOOKS, Apr. 28, 2011.

7. THE AMERICAN LIBRARY ASSOCIATION, THE STATE OF AMERICA’S LIBRARIES 36 (2011), available at http://www.ala.org/news/sites/ala.org.news/files/content/mediapress_center/americaslibraries/state_of_americas_libraries_report_2011.pdf.

8. *Id.* at 37.

Digital libraries may be at an inflection point. One path is that digital libraries will have ebooks, but the underlying information in those books will not be directly searchable. Instead, the only searchable information would be just the information card catalogues have always given us, such as author name, title, subject matter descriptors, and the like. The librarians call this “metadata.” The other path is quite different, in that libraries would act more like databases of searchable content.

For most of their lives, libraries have acted essentially as book warehouses—often very nice ones to be sure—coupled only with limited metadata designed to help users find the right books. The card catalogue was the traditional way in which this metadata was presented to library users. For libraries, the initial move to digital was “retrospective conversion,” which describes the process for taking card catalogue metadata online, allowing patrons to search metadata directly. But truly digital libraries offer so much more: the ability to perform full-text searches on the entire corpus of their content, just as we do with Google and Bing and other search engines every day.

Return to the three types of works classified above—the public domain, orphan works, and active in-copyright works—and consider competition between public and private libraries. The public domain is open to all, though this public availability presents issues more interesting than that simple formulation suggests.⁹ This Article is focused on orphan works and their influence on the digital library market, but in-copyright works, or commercial works, will also play an important role in the development of digital libraries.

Our online public libraries may struggle to get access to these commercial works. Copyright holders will be nervous that ease of use of a digital public library will cause consumers to purchase fewer books. Although public library ebooks are still at an early stage, publishers are already adjusting how they approach ebook sales to libraries. In a move that generated widespread discussion in February of 2011, HarperCollins announced that, going forward, its library ebooks would expire after twenty-six check outs.¹⁰

After all, physical books degrade, but digital books have a much longer natural lifespan, so although publishers might avoid the costs of producing physical copies by transitioning to digital, they may also lose revenue from re-sales. The Google Book Search settlement called for a split of the revenues that the project would create—roughly thirty-seven percent to Google and

9. That was cryptic and, I hope, a teaser. For more, see Picker, *supra* note 1.

10. See Calvin Read, *Librarian Unhappiness Over New Harper e-Book Lending Policy Grows*, PUBLISHERS WKLY., Mar. 2, 2011.

sixty-three percent to rights holders.¹¹ A free online public library version of a book database would not generate revenues of this sort. It seems unlikely that copyright holders would be satisfied selling one never-checked-out, searchable copy of a digital book to the public digital library for \$14.99, or whatever ebooks go for these days, if that book would then be provided free of charge digitally.

As the above example suggests, the contracting process for in-copyright works with active rights holders will not be simple. Copyright holders will be looking for revenue streams and will have the full right to prefer revenue-generating private digital libraries over a free online public library. Many electronic databases are sold today with lump-sum payments, but that was not the GBS model, and we should be skeptical that copyright holders will accept a one-time, lump-sum access fee model.

Instead, it is more likely that digital public libraries will track the GBS deal by paying on a usage basis. The 37/63 revenue split in the Google settlement was a usage deal tied to revenues. We could imagine public libraries that charged for the use of books—financed through user fees (including the possibility of price discrimination) rather than through general tax revenues—but that would be controversial and, in any event, the public library would probably be operated on a non-profit basis. Revenues are not likely to be the basis for usage fees paid by public libraries to copyright holders. Instead, we might expect deals that tracked use, though of course such tracking will require us to quantify use and to deal with the equivalent of click fraud.

We are likely to see competing approaches to financing, privacy, scanning, metadata, and search. Public libraries may face restrictions on their ability to track users, though these restrictions will also serve as a competitive benefit as public libraries can promise greater privacy to their users. At the same time, as discussed below, private libraries may be able to draw on new revenue streams unavailable to public libraries.

B. THE NEW PRIVATE LIBRARIES

As detailed below, we are seeing the emergence of a new class of private digital libraries that hold, perhaps ironically, the promise of greater equality in access. Access to physical public libraries is limited by distance. Online private libraries may be accessible anywhere there is an Internet connection and a device, such as a smartphone. To be sure, these private digital libraries

11. See Isabel Howe, *How the Settlement Will Work*, THE AUTHOR'S GUILD, <http://www.authorsguild.org/advocacy/articles/settlement-resources.attachment/how-the-settlement-will/How%20the%20Settlement%20Will%20Work.pdf>.

will be tied to a digital infrastructure, which does bring its own limits, though linking these libraries with our physical public libraries can help to overcome some of those limitations. Furthermore, digital access costs have dropped rapidly over time, consistent with Moore's law,¹² while the costs of paper, brick, and mortar are not changing rapidly.

These private libraries also represent a return to an older library model. There is a substantial history of private libraries in the United States and the United Kingdom. Unsurprisingly, there is an extensive nomenclature for classifying libraries,¹³ but my focus here is on libraries neither affiliated with universities or churches, nor funded by the government. These encompass social libraries, as they are known, where members band together to fund access to books made available to the membership or even to the public. In the United States, Benjamin Franklin is credited with launching the first library of this sort in 1731,¹⁴ and there were corresponding and perhaps even slightly earlier developments in the U.K.¹⁵

1. *Google Book Search*

At the 2004 Frankfurt book fair, Google announced its new Google Print service, called Google Book Search ("GBS").¹⁶ Consistent with its corporate mission statement—"to organize the world's information and make it universally accessible and useful"¹⁷—Google turned its attention to the great treasure trove, the information collected by the world's great libraries. This was a bold and complicated undertaking,¹⁸ but the short version of the story is that when Google set out to digitize the contents of these libraries, it stepped into copyright quicksand. Google almost certainly knew what it was doing, so it was not likely surprised by the resulting lawsuits, litigation, and

12. Moore's law describes the long-term trend that the number of transistors that can be placed inexpensively on an integrated circuit doubles approximately every two years, resulting in a roughly exponential increase in the capabilities of many digital devices. Gordon E. Moore, *Cramming More Components onto Integrated Circuits*, 38 *ELECTRONICS*, no. 8, Apr. 19, 1965, available at http://download.intel.com/museum/Moores_Law/Articles-Press_releases/Gordon_Moore_1965_Article.pdf.

13. See, e.g., HAYNES McMULLEN, *AMERICAN LIBRARIES BEFORE 1876* (2000).

14. *Id.* at 22.

15. See Richard Roehl & Hal R. Varian, *Circulating Libraries and Video Rental Stores*, *FIRST MONDAY.ORG* (May 7, 2001), <http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/854/763>.

16. See Edward Wyatt, *New Google Service May Strain Old Ties in Bookselling*, *N.Y. TIMES*, Oct. 8, 2004, available at <http://www.nytimes.com/2004/10/08/technology/08book.html>.

17. ABOUT GOOGLE, <http://www.google.com/about/company/> (last visited Oct. 7, 2012).

18. I describe Google's effort in detail in Randal C. Picker, *The Google Book Search Settlement: A New Orphan-Works Monopoly?*, 5 *J. COMPETITION LAW & ECON.* 383 (2009).

eventual settlement. Whether it also anticipated the rejection of that settlement is another question, and the litigation is ongoing.¹⁹

It is hard to know how Google believed its library would operate. As launched, the project was a standard—for Google at least—two-sided undertaking: content was free to consumers but advertisers would pay to reach those consumers. That arrangement is a striking departure from the way in which libraries have been financed traditionally. Think of this as library-as-loss-leader or as commercially-subsidized reading. Google was providing books to consumers below the cost of creating the service, but was relying on advertisers to pay the bills. And the fact that Google's library was situated as part of its overall business meant that the GBS's economics were fundamentally different than those typically associated with libraries. Google clearly hoped that the book digitization would reverberate to the benefit of their other businesses, such as search and its translation service.²⁰ By operating in multiple lines of businesses, Google can take advantage of scale and scope economies. Google's search tools improve as they are used in each of their business lines and, GBS readers would get the advantage of Google's general search improvements, plus their access would be subsidized by the advertisers eager to reach them.

The original version of the service offered general access to the digital public independent of location. The world of physical libraries is unevenly distributed, but GBS would be available to anyone with a digital device and a broadband connection. Individuals without those tools would be able to participate through physical public libraries with access to the service.

19. *Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011). While the lawsuit with the authors continued, Google and the publishers took another stab at a settlement in early October 2012. See Claire Cain Miller, *Google Deal Gives Publishers a Choice: Digitize or Not*, N.Y. TIMES, Oct. 4, 2012, available at <http://www.nytimes.com/2012/10/05/technology/google-and-publishers-settle-over-digital-books.html>.

20. See GoogleTechTalks, 2011 Frontiers of Engineering: Research at Google Lightning Talks, YOUTUBE (Sept. 28, 2011), <http://www.youtube.com/watch?v=YGBZGhzLL14> (presenting National Academy of Engineering, U.S. Frontiers of Engineering Symposium, September 19–21, 2011) (see the discussion at 3–6 minutes); see also *Objection of Yahoo! Inc. to Final Approval of the Proposed Class Action Settlement at 25, Authors Guild, Inc. v. Google Inc.*, No. 05 CV 8136 (DC), 2009 WL 2980749 (S.D.N.Y. Sept. 8, 2009) (stating that Google Book Search will secure for Google “access to a database capable of vastly improving Google’s central product, Google Search”); Jeffrey Toobin, *Google’s Moon Shot*, NEW YORKER (Feb. 5, 2007) http://www.newyorker.com/reporting/2007/02/05/070205fa_fact_toobin?currentPage=4 (explaining that the database includes a primitive translation feature that “may someday be enhanced to allow books to be rendered in another language at the touch of a button”).

And this would be broad access. Most public libraries outside of large cities in the United States offer only limited access compared to what Google would offer through GBS. Google stocked its library by entering into partnership agreements with many of the world's great libraries. Google could digitize the public domain at will and put those books online and into the hands of readers everywhere. The genius of the proposed settlement to the Author Guild's class action litigation against Google was that it promised to enable wide access to the orphan works. And Google would get whatever rights to actively-managed in-copyright works that it could obtain through negotiation with rights holders.

With the rejection of the proposed settlement, the GBS project faces an uncertain future. There are the usual possible damages issues for alleged past acts of copyright infringement, although Google, of course, will assert fair use and other possible defenses. As for the service itself, Google can move forward on offering access to works for which it has negotiated the rights to, and for public domain works. It is only the orphans that may be left out.

2. *The Amazon Library*

On November 2, 2011, Amazon announced a new Kindle Owners' Lending Library, drawing a number of trends sharply into focus. Like GBS, this was another private effort by a key player in the digital space. Unlike GBS, this effort offered immediate zero (marginal) cost full-text access to in-copyright works to many Amazon customers. Prior to the launch of Amazon's library, it was rumored that Amazon would launch a Netflix for books.²¹ The original Netflix model was to provide a fixed number of DVDs to customers at a time, with a new DVD mailed out as soon as another was returned. But Amazon's library is actually much more limited than that: you can check out no more than one book at a time and only one book each month. Yes, twelve books for an entire year. But the service would be free to Amazon Prime customers.

That seems like a library that only readers who linger over their books could love, so why does Amazon impose such severe borrowing limits? To answer this question, we need to look at how Amazon gets books into its library and how it pays for those books. A library, of course, needs books. Amazon had approached the Big Six publishers—Random House, Simon & Schuster, HarperCollins, Macmillan, Penguin, and Hachette—to try to reach

21. Matthew Ingram, *Why the Idea of a Netflix for E-books Makes Sense*, GIGAOM (Sept. 12, 2011, 3:04 PM), <http://gigaom.com/2011/09/12/why-the-idea-of-a-netflix-for-e-books-makes-sense/>.

a deal with each to include books they published in the library, but each declined to participate.²²

Book publishers have long been skeptical about libraries, so it is hardly surprising that they would feel especially so about a new library type. The basic fear, as articulated by Houghton Mifflin Harcourt regarding Amazon, is that “we do not want lending to replace selling.”²³ If books are sold for a set price to all purchasers, efficient sharing of books could lead to reduced sales. Books can be shared by making used book markets efficient, and book industry insiders have long been unhappy with Amazon for facilitating used book sales.²⁴ But book sharing is exactly why libraries exist, and a library run by a for-profit entity like Amazon might lead to especially efficient book-sharing.

But shuffling around lots of physical books would be expensive. Not even Netflix really wants to be Netflix anymore, as its aborted plan to hive off its DVD business as Qwikster made clear.²⁵ Amazon is driving the transition to ebooks with its Kindle platform, so an Amazon library would be digital from birth, making content acquisition much more complex. You buy physical books and can do with them as you please, but Amazon has contracts to get ebooks, and those contracts might impose limits on which books Amazon could add to its library. That seems to be the case, though it is hotly contested as to what exactly the contracts permit as between Amazon and the publishers and between publishers and authors.²⁶

Amazon announced its new program as having “thousands” of books to borrow, including more than one hundred current and former New York

22. Calvin Reid, *Amazon Launches Lending Library without the Big Six*, PUBLISHERS WKLY., Nov. 2 2011, available at <http://www.publishersweekly.com/pw/by-topic/digital/content-and-e-books/article/49374-amazon-launches-lending-library-without-the-big-six.html>.

23. *Id.*

24. David D. Kirkpatrick, *Online Sales of Used Books Draw Protest*, N.Y. TIMES, Apr. 10, 2002, available at <http://www.nytimes.com/2002/04/10/technology/10BOOK.html>.

25. Peter Kafka, *Qwikster is Gonester: Netflix Kills Its DVD-Only Business Before Launch*, ALL THINGS D (Oct. 10, 2011, 5:01 AM), <http://allthingsd.com/20111010/qwikster-is-gonester-netflix-kills-its-dvd-only-business-before-launch/>.

26. See *Contracts on Fire: Amazon's Lending Library Mess*, AUTHORS GUILD BLOG (Nov. 14, 2011), <http://blog.authorsguild.org/2011/11/14/contracts-on-fire-amazons-lending-library-mess-2/>; Simon Lipskar, *Author Contracts and Subscription Models*, AARDVARK (Nov. 4, 2011), <http://aardvarknow.us/2011/11/04/author-contracts-and-subscription-models/>; Jennifer Wertz, *The Biggest Unasked Question With the New Kindle Lending Library—How are Authors Paid*, AARDVARK (Nov. 4, 2011), <http://aardvarknow.us/2011/11/04/the-biggest-unasked-question-with-the-new-kindle-lending-library-how-are-authors-paid/>.

Times bestsellers.²⁷ Amazon's press release indicated that for "the vast majority" of titles, Amazon had reached a deal with publishers to include their books for a fixed fee.²⁸ In other cases, Amazon was buying a copy of the ebook at a wholesale price each time the book was borrowed. This practice is the opposite of efficient book sharing. In an effort to demonstrate the value of the library, Amazon was buying books at wholesale and giving them away to Amazon Prime customers. Even in doing this, some publishers contended that Amazon had overstepped the publisher contracts with Amazon, while authors claimed the same about publishers.²⁹

Given the chilly reception from the Big Six publishers and leading organizations of authors, Amazon found friendlier territory with its Kindle Direct Publishing ("KDP") authors. On December 8, 2011, Amazon announced a new KDP Select program to add books to the Kindle Library.³⁰ KDP authors would agree to commit their books to Amazon exclusively for at least ninety days. Amazon, in turn, would include those authors' books in the Amazon library. To induce authors, Amazon offered a \$6 million carrot to be split by authors based upon library downloads. Authors would split the fund based on their pro rata share of library downloads.

Just to frame the \$6 million using a parochial example, I grew up in Akron, Ohio and currently live in Chicago. Akron is now the 110th largest city in the country and the entire acquisition budget for the Akron-Summit County Public Library was just about \$3 million in 2010 and \$3.4 million in 2011.³¹ For Chicago—the third largest city in the United States—the 2010 acquisition budget for books and materials was \$17.8 million.³² And the \$6 million from Amazon is just for the KDP Select program; it does not include what Amazon is spending on non-Amazon-based authors.

27. Press Release, Amazon.com, Introducing the Kindle Owners' Lending Library (Nov. 2, 2011), *available at* <http://phx.corporate-ir.net/phoenix.zhtml?c=176060&p=irol-newsArticle&ID=1625426>.

28. *Id.*

29. *See Contracts on Fire*, *supra* note 26 (stating that Amazon got away with including books in the program by "giving its boilerplate contract with these publishers a tortured reading").

30. Press Release, Amazon.com, Introducing "KDP Select"—A \$6 Million Fund for Kindle Direct Publishing Authors and Publishers (Dec. 8, 2011), *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=176060&p=irol-newsArticle_Print&ID=1637803&highlight=.

31. AKRON-SUMMIT COUNTY PUBLIC LIBRARY, 2011 PERMANENT BUDGET: GENERAL FUND (2011), *available at* <http://www.akronlibrary.org/2011Budget.pdf>.

32. CHICAGO PUBLIC LIBRARY & CHICAGO PUBLIC LIBRARY FOUNDATION, 2010 ANNUAL REPORT 12 (2010), *available at* http://www.chipublib.org/dir_documents/ar_2010.pdf.

How is Amazon making money from this? Amazon's business ecosystem is linked together tightly. The Kindle library program is limited to actual Kindles, that is, Kindle devices sold by Amazon. The Kindle platform is broader than that with apps for Apple's iOS, for Android, and for computers. But those Amazon users are not eligible to borrow books from Amazon's library. And the library is part of Amazon's Prime program. The Amazon prime program started as a shipping program—pay a \$79 annual fee and receive “free” two-day shipping on your Amazon purchases—but now has expanded into a bundle of shipping, video access, and the Kindle library.

3. *Other Libraries*

The Google and Amazon projects are the most visible of the new private digital libraries, but we are likely to see more modest efforts as well. Take just one example: on March 29, 2012, F+W Media announced what it described as the first in a planned series of ebook subscriptions.³³ The first site offered more than one hundred full-color art instruction titles for an annual subscription fee of \$199. Artists are not able to download the books, but can instead access the books as needed so long as their subscriptions are active.³⁴

The Artist's Networks eBooks Art Book Club performs one of the services we expect from libraries. Book ownership entails instant and unlimited access to a book. Typically, you own books when you do not want to share them with others. But there are some books where occasional access suffices. You do not need exclusive access; you just want to consult these books as needed. This is the exact scenario the Art Book Club seeks to address by providing a vertical library organized around a particular subject area.

We can see the advantages of the digital age for this type of content sharing. Physical libraries must be reasonably close to their users. We may be able to share pieces of plastic at a distance—this type of sharing is what Netflix does after all, though, as noted, even Netflix wants to drop physical media for digital distribution—but the bigger and heavier the media, the less feasible sharing by mail becomes. Vertical, specialized libraries will face natural limits when they are dealing in atoms, but switch to bits, and assuming that the works can be shared securely, you have a business like the Art Book Club.

33. See Press Release, F+W Media, Inc., F+W Media Releases First eBook Subscription Site for Enthusiasts (Mar. 29, 2012), available at <http://www.fwmedia.com/press-room/fw-media-releases-first-ebook-subscription-site-for-enthusiasts>.

34. See *Frequently Asked Questions*, ARTISTSNETWORK: EBOOKS, <http://ebooks.artistsnetwork.com/faqs> (last visited Oct. 9, 2012).

These are exciting developments in new libraries. The emergence of new libraries that are open to the public at large and not tied to the happenstance of location or university affiliation is fundamentally democratic. To be sure, you need money to participate in Amazon, but it allows you cross the digital divide at a reasonable price. For \$149, a user may purchase a Kindle Touch 3G and receive access to the Kindle library, plus large numbers of public domain works for no additional price. Vertical libraries will require money as well, but one can imagine libraries financed through advertising, as Google planned, in part, with Google Book Search.³⁵

III. COPYRIGHT RULES FOR LIBRARIES

Libraries could change rapidly, but copyright law could either slow down or accelerate the pace of change. Both public and private digital libraries can offer the public domain, though I do think that distributing the public domain is more complex than often recognized.³⁶ For active works in copyright, libraries will need to acquire rights to those works via direct consent, absent some sort of statutory compulsory license. But my interest here is in the orphan works where we could imagine special copyright legislation that would facilitate certain uses. Indeed, in January of 2006 the U.S. Copyright Office issued an extensive report suggesting how to modify copyright law to thus enable wide use of orphan works.³⁷ In 2008, proposed legislation made it through the Senate, but the legislation died in the House.³⁸

With the reports and proposed legislation in mind, we should assess how U.S. copyright law approaches libraries and archives. I am never quite sure whether U.S. copyright law is a general framework with many situation-specific special rules and cases or whether it is really just all special rules. Perhaps that exaggerates slightly, but there is no question that while you need to have a good sense of the overall approach of copyright law, you also need to pay attention to exactly where your case is situated. When looking at libraries and archives, we should consider why we might have special rules for those institutions and what these rules might look like. Libraries are an exercise in sharing; public libraries are an exercise in ensuring widespread and democratic access to works. Libraries and archives are also the institutions

35. See Wyatt, *supra* note 16.

36. See Picker, *supra* note 1.

37. See U.S. REGISTER OF COPYRIGHTS, REPORT ON ORPHAN WORKS (2006), available at <http://www.copyright.gov/orphan/orphan-report.pdf>.

38. See *Bill Summary & Status for S.2913, the Shawn Bentley Orphan Works Act of 2008, 110th Cong.*, LIBRARY OF CONGRESS, <http://www.thomas.gov/cgi-bin/bdquery/z?d110:SN02913:@@R> (last visited Oct. 9, 2012).

we count on to preserve works and ensure continuity over time in the objects in which the works are embodied. The organization of this sharing turns on the needs of users, the costs of the objects being shared, and the costs of sharing.

We could imagine how these roles for libraries might show up in exemptions from the core rights of copyright holders set forth in § 106.³⁹ If we allowed public libraries to copy books fully without fear of liability for copyright infringement, we would maximize widespread access. We could also imagine that a regime of free copying would ensure preservation of works, as libraries would copy works and disseminate them to other libraries.

Of course, a regime where a copyright holder could only count on *one* sale to libraries, as a group, would require that the sale be made at a very high price, or that authors allow their books to be widely available with very little revenue in return. That is not the world that we live in, at least in the United States. Although there are many special provisions for libraries and archives in U.S. copyright law, I can best frame the discussion by focusing on § 108. Section 108 addresses a number of particularized situations, but what I think we will see is that we do not use these rules to subsidize libraries. We, of course, subsidize public libraries in the most basic sense possible—tax revenues—but we have on the whole avoided creating special within-copyright subsidies that would be borne by only a narrow slice of the population, namely, copyright holders. We subsidize public libraries with general taxes rather than narrow taxes targeting copyright owners.

For example, consider the rules for preserving unpublished works in § 108(b).⁴⁰ A library or archive holds an unpublished, deteriorating work. Since the work is unpublished, you cannot go into the market to buy a replacement copy. Given that a buyer cannot buy a replacement copy of an unpublished work, we should not fear that copying will substitute for a potential purchase. Moreover, absent the copying, this particular library or archive will lose ready access to the work and such a loss may reduce overall access as well, as would be the case if there were few copies of the unpublished work or this particular copy was the last one. This seems like socially beneficial copying.

Nothing in the analysis turns on how the library is financed. The library could be a public library, financed primarily through taxes. It could be a nonprofit library such as a college or university library. But it could also be a for-profit library organized by Google, Amazon, or some new entrant. The

39. 17 U.S.C. § 106 (2010).

40. *Id.* § 108.

point of the preservation exemption is just that—preservation—and it is hard to see how the social interest in preservation drops merely because there might be money on the table somewhere.

Section 108(b) sets out a rule for unpublished works. There is a corresponding rule for published works in § 108(c). A key aspect of this rule requires that the library or archive be unable to obtain an “unused replacement” at a “fair price.” Again, this rule reflects the core substitution idea that drives copyright: we try to control users’ efforts to substitute out of purchases of new copies of a work. If you operate a library and destroy a new physical copy of the latest bestseller in a vat of preservation glue, you need to go buy another copy of the book. There is no general built-in insurance scheme against this kind of destruction. But there is a more limited type of insurance made available: if you cannot buy a new copy readily—and the fair price provision is clearly intended to limit unusual situations of market power—the library or archive can make a copy, subject to a few more restrictions.

Again, the point of § 108(c) is to preserve works in circumstances where normal sales are not displaced and nothing seems to turn on the financing or profit status of the library. A library can either buy the book at a fair price or it cannot. Copyright holders do not want libraries exiting purchases in circumstances where they can buy on standard market-place terms and the statute does not allow libraries to do that.

There are a couple of possible, subtle responses to this issue. One response is that we should limit these preservation exemptions to public and nonprofit libraries in an effort to drive rare works into public hands. The notion is that a private library holding a deteriorating work would recognize that it could preserve it only by giving it up to a public institution. If you love it, let it go. But this idea seems optimistic and puts works at risk if private owners hold onto works for a little too long.

Another possible response is that libraries underinvest on the front end in multiple copies of a work given that they recognize that they can just make more money at the back end. That idea probably matters most for published works as the unpublished works probably have never been available for per-copy purchase. Of course, the most successful works will have remained in commercial exploitation and, if their current copies wither, libraries will have to buy replacement copies of those works. For works that the library expects to succeed and that actually turn out to be successful, libraries cannot opportunistically under buy. Whatever we think of this idea—and it seems a little speculative—there does not seem to be any obvious reason why we should allow public libraries to under buy while denying the same right to private library competitors.

Recall what we are doing here: we are looking at § 108 to see what we can glean regarding how U.S. law approaches permitted copying by libraries. The two § 108 exemptions considered are tied to preservation. Two other exemptions contemplate a different situation, namely ones where users of libraries or archives seek copies for “private study, scholarship or research.”⁴¹ These exemptions focus on what the recipient will do with the copy. Section 108(d) addresses copying from periodicals and similar works, while § 108(e) addresses copying an entire copyrighted work. The entire-work exemption is again limited by the condition that “a copy or phonorecord cannot be obtained at a fair price.”⁴²

This high-level summary of § 108 emphasizes that the basic frame of § 108 is not about subsidizing libraries. To be sure, the conversation about subsidizing libraries turns a little on how you see the over-time substitution questions, meaning the extent to which the § 108 exemptions enable libraries to buy less upfront given that they know that they can engage in some ex post copying. Do not buy two copies of a work now given that you can make another copy later if the book is no longer commercially available or do not subscribe to a journal given that you know that your patrons will be able to get copies made from other libraries.

Obviously, we do subsidize public libraries when we pay for library operations through general tax revenues, but, as the discussion of § 108 demonstrates, we do not subsidize public libraries through some sort of special within-copyright, in-kind subsidies. It would be easier to run public libraries if they received free paper and pens, yet we do not require Office Depot to ship supplies to the libraries for free. It would also be easier to have public libraries if they received free books, which we have not done, or if we granted public and noncommercial libraries free access to the orphan works. That means that, as we consider an orphan works licensing regime, we should focus on the extent to which we should depart from that basic framework in constructing an orphan works licensing regime for both public and private libraries.

IV. STRUCTURING THE USE OF ORPHAN WORKS

We can leave the orphan works outside of our new digital libraries, but that would be a substantial social loss and almost certainly a loss to the missing copyright holders who hold the copyright to those works. The core premise of the activity surrounding orphan works is that we should put them

41. *Id.* § 108(d)–(e).

42. *Id.* § 108(e).

to use if we can come up with a sensible structure for doing so. The animating principle of such legislation should try to replicate what we think orphan rights holders would do were they actually present. Legislation that captured this idea would exhibit the greatest fidelity to the existing copyright system. Orphan-works legislation should not be seen as an opportunity for giving orphan holders weaker rights merely because they are not present and are unrepresented. For example, copyright holders do not typically give books for free to public libraries. That said, we do need to take into account the selection effects associated with orphan works—more on that momentarily—when framing possible royalty rates for orphans. If the royalty rate was set at rates similar to those for comparable present rights holders, there are good reasons to think that we would be overpaying. Should orphan holders never come forward, those payments might be escrowed pending identification of owners of the orphan works and those escrow payments might escheat back to the government under normal rules.

We are clearly at an early stage in our transition to digital libraries. All of that suggests that we should expand our conception of what a library is and that we should not tilt the legal tables in favor of public or private libraries. Only the government can create a license for the orphan works and I am hard-pressed as a matter of first principles to understand why that license should be limited. Such a license should not run in favor of one party nor should it be limited, as suggested by Robert Darnton, to entities that wish to make noncommercial uses of those works.⁴³ New orphan-works legislation should enable broad competing uses of the orphan works, by both commercial entities and non-profits.

This concept should be explored in greater detail. There seem to be four natural rules regarding the use of orphan works, what I will refer to as the orphan works licensing regime: (1) create no special rules regarding exempted uses; (2) allow use for free, which is to treat the orphan works as if they have entered the public domain; (3) allow use and insist that all users pay for that use on the same scale; and (4) allow uses and create a payments menu where commercial and non-commercial users pay different amounts (and where non-commercial users might pay nothing). It is important to keep in mind that the orphan works regime will probably operate within the broader set of rules for exempted uses, including fair use. As such, the design question for orphan works is also very much a rules/standards question.

43. Robert Darnton, *A Digital Library Better than Google's*, N.Y. TIMES, Mar. 24, 2011, at A31, available at http://www.nytimes.com/2011/03/24/opinion/24darnton.html?_r=0.

Fair use has the great virtue of flexibility and that means fair use can evolve as circumstances warrant without the need for further legislation. The flip side of this outcome, of course, is that fair use is also subject to litigation risk. Exempt uses, such as those set forth for libraries in § 108, are classic rules: reasonably well-defined inflexible straightjackets with minimal risk. Part of what we need to consider when designing an orphan works regime is how much of the framework should be driven into a rules-like system and how much of it can be left to more open-ended standards.

Much of the actual complexity that we see in proposed orphan works rules arises from the classification question of how we identify an orphan work, or, same point put differently, the entry and exit rules for orphan works. How is a particular user supposed to establish whether a particular work is actually an orphan? What happens if they get this determination wrong? What happens if something changes and a work that was once an orphan ceases to be orphaned? The answers to these questions are obviously important in defining how an orphans works regime will work in practice, but such questions are not the focus of this Article. Instead, I want to focus on the royalty rate questions and the issue of whether we need some form of secondary right property regime for subsequent users of the orphan works.

A. SELECTION EFFECTS, THE POOL OF ORPHAN WORKS, AND
SECONDARY PROPERTY RIGHTS

Consider the first possible rule, which is basically current law: no special exemptions tied to orphan status.⁴⁴ This rule means that using an orphan work brings with it the risk of statutory penalties. Obviously, the statutory penalties regime applies to all works in copyright, so the natural question is whether a different rule should be created for the orphan works. Part of this has to be driven by a sense of the social waste that arises when orphans are excluded from use because of that status. Note, however, that this is not a general statement about non-use. We know that there are some copyright holders who want to restrict distribution of at least some of their works, such as their private letters. J.D. Salinger comes to mind.⁴⁵ For these authors, the best way to control their works is to manage them quite carefully, and therefore those works are unlikely to become orphans.

44. In the current statute, 17 U.S.C. § 108(h) is described as a limited orphan works right in that it creates a special distribution right for libraries and archives during the last twenty years of any term of copyright, but not if the work is subject to commercial exploitation or the copyright owner certifies that it is being so exploited.

45. *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987) (deciding that J.D. Salinger could prohibit both the quoting and paraphrasing of his unpublished letters).

Instead, orphans arise when the expected benefits of controlling copyright to a work are exceeded by the costs of maintaining a title system to the work. There is a strong selection effect at work as to the works that become orphans. Works that are making money year-by-year should not become orphans as there are good incentives for maintaining the chain of title. We should expect chain of title weaknesses— orphan status—to arise for the books that have not sustained themselves economically or in cases where copyright holders are otherwise uninterested in controlling their works.

In the past, books have exited commercial status because of distribution costs associated with physical books. Books were not sold through a central point, such as Amazon.com, but instead were sold through distributed bookstores. Shelf space in those stores is finite, so we would expect low-selling books to be crowded out by books selling more copies. A book that fell beneath the shelf-space cutoff would exit distribution and then, subsequently, exit print. Contracts between authors and publishers typically provided for copyright to revert to the author at some point when the book exited print.

We do not live in that world today. Instead, we live in a world of eBooks and the possibility of print-on-demand and centralized distribution. That possibility means that fewer books will leave print and presumably we will see fewer orphans arise. Orphans have arisen because of the death of authors and the death of publishers. Fewer reversion means that author death will become less important as a source of orphan works. Contracts between authors and publishers are changing to reflect this situation, with many contracts giving authors weaker reversion rights.⁴⁶

All of that suggests that the pool of orphan works will grow more slowly going forward. But, at present, we have a stock of existing orphan works and we need to figure how to manage those works. Today, our orphan works are very much the abandoned, broken toys at the back of the closet in the *Toy Story* movies. We want to create incentives for people to find those toys, pick them up, and polish them. Indeed, we might want to create a regime to incentivize discovery and use of abandoned works. Suppose that a publisher discovers an out-of-print work that could be revived given recent trends in book readership. This is happening today as we are seeing out-of-print books

46. Hillel Italie, *In print forever? Sometimes, authors would rather go out of print*, SEATTLE TIMES, May 21 2007, available at http://seattletimes.nwsourc.com/html/entertainment/2003714078_webprint21.html.

revived as eBooks and then also in print as print-on-demand books.⁴⁷ Assume that the publisher conducts an appropriate rights search to determine who holds copyright to the work but is unable to track down the owner.

In that scenario, we should fear that the book will sit dormant. Absent an orphan works regime, the publisher could face substantial penalties for copyright infringement. A use regime for orphan works would control this exposure. But there is another issue as well. Users who seek to revive orphan works face the reality that they will be stuck with the failures while market success will be sure to attract attention and likely claims of ownership. We do not really have a copyright doctrine of abandonment or an IP analog to adverse possession, such that we create a regime of secondary or follow-on rights in the reviver of a particular orphan work.

If we were to embrace a quasi-abandonment posture for the orphan works, we could imagine a number of possible results. Some might favor treating the orphans as if they had entered the public domain, meaning, operationally, no monetary remedies for the use of the orphaned work. Recall that the 2006 report of the U.S. Copyright office favored exactly that result, at least for noncommercial users.⁴⁸ A preference for a public domain approach to abandoned orphans turns somewhat on whether you think that more limited property rights are required to get orphans put back to use in the first place. We have done something like that in the Hatch-Waxman scheme for encouraging entry by generic drug manufacturers at the expiration of a prior patent.⁴⁹ Allowing a reviver to continue to use the work in the face of a competing claim by a now-appearing parent would undercut a key part of copyright, but we might need to accept that sort of change to help restore orphans to use.

47. Alison Flood, *New Bloomsbury digital imprint revives hundreds of neglected classics*, GUARDIAN, Sept. 28, 2011, <http://www.guardian.co.uk/books/2011/sep/28/new-bloomsbury-digital-imprint>.

48. *See supra* note 37.

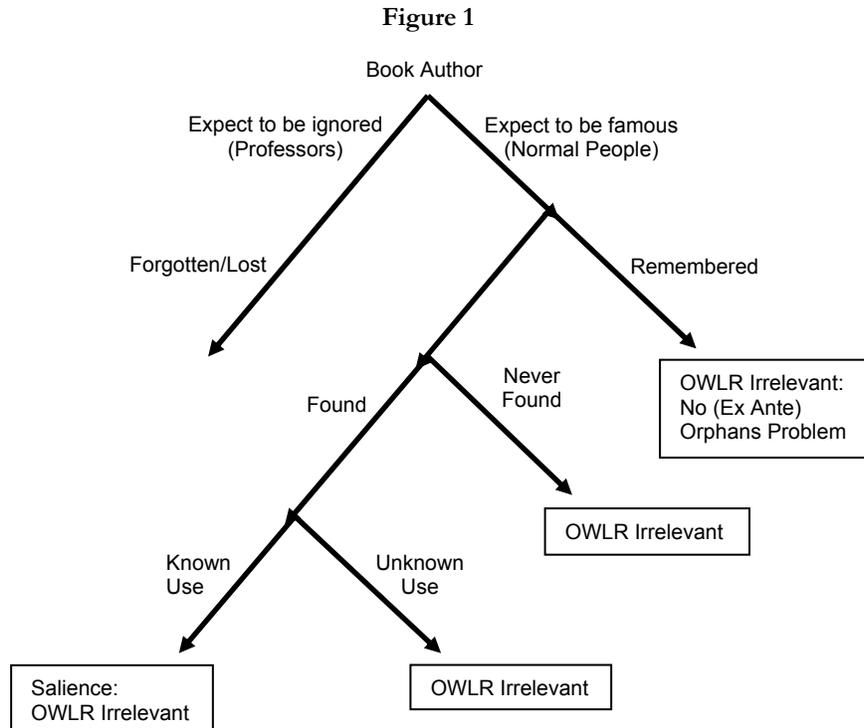
49. The Hatch-Waxman scheme comes from the Drug Price Competition and Patent Term Restoration Act of 1984 Pub. L. No. 98-417. At the conference associated with this paper, Lydia Loren offered another approach to reclaiming abandoned works—hostage works in her terms. *See* Lydia Loren, *Abandoning the Orphans: An Open Access Approach to Hostage Works*, 27 BERKELEY TECH. L.J. 1431 (2012).

B. SETTING A ROYALTY RATE: INCREMENTAL CREATION INCENTIVES
AND ORPHAN WORKS RULES SALIENCE

If we move forward with special use rules for orphans, as has occurred in France⁵⁰ already and is being considered more generally in the European Union, we will have to confront the critical question of royalty rates. I suggested three possibilities in the earlier discussion: (1) free access via the public domain; (2) paid access with the same royalty rate for all users; and (3) paid access with rates tracking status. As I have suggested, we do not generally expect copyright holders to subsidize libraries, and a regime of free use of orphan works seems to be exactly that sort of subsidy. This reality obviously reveals a broad social question about the interaction of general taxes, the public interest, copyright, libraries and the scope of the public domain and I will not take it on here in this Article.⁵¹ Instead, I will assume a positive rate and turn to considering the question of how we should think about royalty rates for the use of orphan works.

50. See Assemblée Nationale, Texte Adopté No. 862 (Feb. 22, 2012), available at <http://www.assemblee-nationale.fr/13/ta/ta0865.asp>; Spraggs, *supra* note 3.

51. The U.S. Copyright Office's Report on Orphan Works proposed that noncommercial libraries face no monetary penalties for the use of orphan works. See REPORT ON ORPHAN WORKS, *supra* note 37, at 127 (proposing a new § 514 creating limitations on remedies in connection with the use of an orphan work).



I want to start by focusing on the role that an orphan works licensing regime would likely play in inducing the creation in the first place of copyrighted works. Consider a stylized decision tree for considering the issues at stake. A potential book author is considering whether to write a book. The possible returns to our author-to-be turn on any number of outcomes that may be difficult to evaluate at the time when the author's fingers first touch the keyboard. One initial question: how successful will the work be? I have captured this question above—somewhat cheekily I confess—in the initial paths in the decision tree: expect to be ignored (professors) and expect to be famous (normal people). I do mean to suggest that I suspect that potential authors suffer from an optimism bias—they believe that they are writing the Great American Novel—though I am not sure that much in my analysis turns on this.

The next step in the tree addresses whether the work will become an orphan. Works that are “remembered” have a good chain of title and there is never doubt as to who owns the copyright. Works that are “forgotten/lost” are the works that become orphans. You can see quickly how the probabilities link up across the events. If you expect your work to succeed, you do not then expect it to be lost. For potential authors who expect their works to succeed, they then, of course, expect title to be tracked carefully, imagining that they think of future title issues at all.

For this group of authors, the orphan works licensing regime is unlikely to play much, if any, of an ex ante role in inducing the creation of works. Putting the same point differently, if there were an ex ante market for orphan works rights, we should expect those rights to go for very little. Of course, if we are dabbling in the behavioral dark arts, then we should also note that the experiments suggest that once you hand people a piece of property—coffee mugs in the experiments and, here, control over subsequent orphan works—status quo bias kicks in and all of a sudden they want a nice chunk of change for the right. But the status quo bias is very much a here-and-now phenomenon—someone standing in front of you offering cash for something you have in your hand—while the orphan works licensing regime is two steps in the tree down the road. Imagining someone demanding meaningful money for the ex ante orphan works right is quite different than imagining that the down-the-road potential licensing rules matter ex ante for our prospective authors.

There are more nodes in our tree and more probabilities to assess. The orphan work needs to be found for it to return to economic significance. It is not fully clear what “found” means. The mass digitization projects will scoop up many orphans but most of them, presumably, will continue to be ignored. The rare use of these orphans might be a technical copyright violation though one could imagine that these uses substitute for uses of the existing physical copies of those works. Those uses—reading and analysis—would, of course, be noninfringing. It is for the orphan works that are meaningfully revived as individual works where we can imagine meaningful disputes over the new economic streams. That takes us to our final event: whether the orphan copyright owner discovers that use.

We can see how distant the orphan works licensing regime is likely to be for our prospective author. You might imagine that not every feature of the copyright law is equally salient at the point that a work was being created. Non-salient features would then be, by definition really, not pivotal or marginal in the creation of works. A designer of a copyright regime would then have free reign in the setting of that particular feature of the copyright rules.

What does that mean for the prospective author? At the time that an author puts fingers to keyboard, how salient should we think the orphan works rules are? Consider the free-use rule and note the attenuated chain of reasoning that seems to matter here. “I won’t write this book now because when my successor copyright holders discover that a book once lost to them is at that point being used by others my successors won’t have a remedy against those users.” To put it mildly, that seems like a big stretch. To some

extent, copyright holders can control whether an orphan works problem arises in the first place through careful management of the copyright.

Presumably, works that turn out to be more valuable are more carefully tracked than less successful works. So as noted earlier, the class of works that we are imagining are works that are insufficiently successful to be worth tracking. Indeed, it is the works that authors imagine at the time of writing to be not worth tracking. If authors have biases that cause them to overestimate the likely success of the work, they will not be concerned about the orphan works rules at all. These authors will expect their books to be successful and will therefore anticipate that they and their successors will manage the work carefully to avoid orphan status.

We could imagine that prospective authors see an option value from their consent right. In that framework, the broader the set of rights given to the author, the more they expect to be able to cash in on undefined and unexpected uses. Those opportunities would be the uses beyond the limits of salience at the time of creating the original work. To take these rights seriously, we would need to get some sense of how the option value of the un-salient is formed and how it changes as we tinker with the scope of exempt uses. One would expect this sort of option value to be quite crude and to be mostly unchanged by changes in the scope of these non-salient rights.

All of that suggests that basing the royalty on the price that is being paid to non-orphan works or that would have been paid in a hypothetical negotiation between the entrant and the copyright holder almost certainly results in a royalty that is too high, as measured by what we want socially. We should expect royalty rates for orphan use to be modest.

V. CONCLUSION

This is a fascinating time in libraries and we are at a key point of institutional design as we transition to digital libraries. We should not want to leave the orphan works outside of this process. At least after the bold failure of the Google Book Search settlement to bring orphan works into wide use,⁵² we seem to need federal legislation to enable full use of the orphans, though we can imagine that fair use may take us part of the way forward.

If we move forward on legislation, we should be sure to take into account recent developments in competition among libraries. We are seeing

52. The settlement was rejected by Judge Chin. *See* http://scholar.google.com/scholar_case?case=11449470169883565960&q=chin+google+book+search+settlement&hl=en&as_sdt=2,14. The merits are now moving to trial.

private digital entrants. These entrants bring with them different business models and they are in many ways more universal and democratic institutions than the world of physical public and nonprofit libraries that have come before them. Online public libraries may face challenges, especially in acquiring new works, and so we should be sure to hedge our bets and make sure that both private and public libraries gain access to the orphan works.

There will be many issues that will arise in creating such legislation and I have focused here on some of the royalty rate issues. The orphan works licensing regime is likely to play very little role in incentivizing the creation of works upfront and that suggests that royalty rates should be low. We need to ensure that orphan works are returned to meaningful use and that may require the creation of a secondary rights regime for the orphans.