

# Facts and Fallacies of "Orphan Works"

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*[Abstract: Proposals for dealing with the perceived problem of “orphan works” have been developed without the participation of one of the most important classes of stakeholders: the authors and other creators of the works that are, or might be determined to be, “orphaned”. Publishers have often been taken as proxies or spokespeople for authors (under the portmanteau of “rightsholders”) despite the conflicts between publishers' and authors' interests. As a result, much of the discussion of “orphan works” has become detached from the realities of writers' rights in our own work, the ways we earn a living from our writing in the digital age, and the impact that these “orphan works” proposals would have on our livelihoods as writers. This article discusses some of the fallacies underlying proposals for “orphan works”, and suggests the need for a new round of discussion between those who want to make use of “orphan works” and the writers and other creators – who are also often the rightsholders – of these works.]*

There has been a growing chorus of proposals for changes to copyright law, or for actions outside the law (or, arguably, within existing law), to deal with so-called "orphan works": written or other copyrighted works, the holder(s) of certain rights to which are unknown to (or cannot be found by) those who wish to exploit those rights by making new copies of all or part of the work.

None of these proposals, so far as I can tell, has originated with the creators of those works that are, or might be deemed to be, "orphaned."<sup>2</sup> Since "authors of orphan works" are, erroneously, presumed to be – by definition – unidentifiable, the views of such writers typically have not been solicited in the debate concerning "orphan works", and our interests have in some cases not been considered at all, and in other cases misrepresented (often by parties whose interests conflict with those of working writers, but who have claimed to speak for us).

Moreover, the interests of writers in general (and perhaps also those of other creators, although as a writer I will not presume to speak for other creators) have often been ignored in the formulation of proposals for dealing with "orphan works", or elided through explicit or implicit definitions and conceptualizations which too often have become detached from the fundamental underlying principles of copyright law that establish creators' rights to our work.

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1 Co-Chair, Book Division, National Writers Union (UAW Local 1981, AFL-CIO), <<http://www.nwubook.org>>. The NWU has not been able to evaluate individually each of the many proposals by government bodies, international organizations, non-governmental organizations, businesses, and individuals around the world for defining and dealing with "orphan works". However, the general principles expressed in this article have been approved by the NWU as elements which would need to be taken into consideration in any "orphan works" scheme in order for it to be potentially acceptable to the NWU.

2 No, this is not oxymoronic. As discussed further below, most genuinely "orphaned" works are works to which some rights were held by a *publisher* that has gone out of business, not works whose *author(s)* cannot be found. Nothing in the definition of an "orphan work" implies that the author(s) are unknown or cannot be found.

It's one thing to propose that laws or treaties be changed, or new practices be authorized, that adversely affect writers' economic and/or other interests. But it's another matter to make such proposals without clearly and explicitly acknowledging and evaluating the ways that those interests – our ability to make a living through our work as writers – would be affected.

In the interest of facilitating such an open and informed discussion, and of grounding it in a more accurate conceptualization of what "orphan works" are, and who holds what rights to them, the following are some fundamental principles to follow in developing and considering proposals related to "orphan works", and some fallacies to avoid in our thinking about them.

### **1. The fallacy of the "orphan author"**

People rarely disappear or become impossible to find. And because there are many reasons, both governmental and commercial, for wanting to find missing people, the people-finding industry and its tools are well-developed and generally highly effective. No new infrastructure need be developed specifically in the copyright context to locate "missing" authors.

Most of the cases where it is genuinely impossible to locate the holder(s) of digitization rights (or any other rights) are those where the publisher/assignee of those rights has ceased trading without leaving an explicit record of the assignment of those rights to a successor.

Authors who are unable legally to use, distribute, or license rights to our own work because of the disappearance of an erstwhile publisher to which some rights were assigned are the paradigmatic case of would-be users or exploiters of rights to "orphan works".

*The problem of "orphan works" should be recognized as largely (not entirely, but certainly predominantly) a problem of "orphan publishers", not "orphan authors".*

### **2. The consequences of an "orphan publisher"**

Most of the current proposals related to "orphan works" would provide that if after due diligence a work appears to be "out of print" or "out of commerce" and/or "the rightsholder" (typically meaning the one-time publisher of a particular print edition) can't be located, certain rights of reproduction and use (most often of digitization and certain uses of digital copies) should be granted by default to a certain class of third parties such as libraries.

But in the case of an "orphan publisher", where the holder of the relevant rights is not the author, should such a default grant of rights if that publisher/rightsholder can't be found (or, more often, no longer exists as a corporation or other legal entity) be to libraries or the public at large?

Or should the default re-assignment of rights held by "orphan publishers" be reversion of those rights to the author(s), who can then decide whether, to whom, and on what terms they do or don't want to assign or license some or all of those rights?

*If any "orphan works" scheme is to be adopted, the default in cases of orphan publishers must be reversion of the orphaned rights to the author(s). Only in cases where neither the current holder(s) of those rights nor the author(s) or their heirs can be found should the possibility of any default grant of rights to third parties even be considered.<sup>3</sup>*

I would argue for this on the grounds of fundamental fairness, and on the grounds that the inalienable "moral rights" of the author, as protected by the Berne Convention, should be deemed to include the right to reversion to the author(s) of any rights assigned to an "orphan publisher".

It is unreasonable to expect writers to support any proposal for default assignment to third parties of rights to "orphan works", unless that proposal would first provide for reversion to the author(s) of any rights assigned to an "orphan publisher".

### 3. The fallacy of "the rightsholder"

Many, perhaps most, "orphan works" proposals refer to "the" (singular) holder of "the" (singular) rights to a work, or simply to "the rightsholder" (again, in the singular). Any such reference is inherently inadequate to describe actual rightsholdings, in light of the infinite divisibility of copyright and the possibility for assignments of rights to be limited as to the time, place, media, format, purpose, etc. of permitted copying of all or part(s) of a work.

Few assignments of rights are entirely unlimited, and even purported assignments of rights to unknown future use may be (and, I and most authors would argue, should be) unconscionable and impermissible under the law in some jurisdictions. New technologies continue to create new rights which could not previously have been assigned to anyone. Rightsholdings in a work are rarely entirely undivided except in cases of single-author works to which the author has never assigned any rights, and therefore still holds all rights herself.

Few assignments of rights are unconditional. In addition to the obvious conditions of payments of royalties or other compensation, common conditions on licenses – such as those in the various forms of standard Creative Commons licenses – include requirements for attribution, inclusion of a particular hyperlink and/or notice in each copy, and so forth. The assignment of a conditional license implies reservation by the assignor of rights to all reproduction that doesn't satisfy those conditions, and thus leaves the holdership of rights to reproduce the work divided.

References to "the rightsholder" or "the holder of the rights to the work" should be changed to refer to, e.g., "the holder(s) of the rights to reproduction of the work in digital form", and/or an initial definition should be added, stating that "All references in this document to 'the rightsholder(s)' refer to the holder(s) of the specific rights defined as follows: [definition]."

3 This would be neither unprecedented nor extreme. Copyright law in some other countries, although not in the U.S., already provides for automatic reversion of rights to authors in a much wider class of circumstances. Article L132-17 of the French "Code de la propriété intellectuelle", for example, provides for the automatic termination of any publishing contract, and reversion to the author of all rights that had been assigned by that contract, if the publisher fails to keep copies of the work available.

Without knowing which rights an entity holds (or when they held those rights), merely knowing that an entity (perhaps among others) held, at some time, some rights to reproduce that work somewhere, in some form(s), for some purpose(s), provided that some unknown conditions are or were met, is of extremely little use in determining, and certainly not dispositive of, which entity or entities hold(s) any particular right(s) to that work today.

*To be of use or meaning, databases or registries of rightsholdings must be designed to include, and must be populated with valid data concerning, multiple holders of non-exclusive and/or exclusive but limited rights to any work, divided along dimensions including, but not limited to, the time(s), place(s), media, and purpose(s) of reproductions to which rights are held.*

#### **4. The fallacy of "the publisher"**

A "work" of text can be, and often is, published in any number of editions and formats by any number of publishers (and/or by the author as self-publisher) at different times and in different places and formats, and/or in editions differing only in the purposes for which they are licensed (as is common, for example, of software editions licensed solely for academic use).

A single "work" may have, or have had, no publisher, or many publishers.

References to "the publisher" are inappropriate except as they relate to a specific edition of a work in a particular format. Except as they relate to such a specific edition, references to "the publisher of a work" should be changed to "a publisher of an edition of a work".

Even assuming a particular edition to have been duly licensed from the creator (the original copyright holder) at the time it was produced, there should be no presumption, explicit or implicit, that a publisher (i.e. the holder of a license at some time, somewhere, to reproduce the work in a particular way) of any particular edition of a work, especially a work in print form, ever held the rights to digitization of the work, or that a one-time publisher still holds any rights. And that an edition of a work is out of print says nothing about whether the work is out of print.

*"A publisher" cannot be equated with "the holder of digitization rights". A publisher may never have held any digitization rights, and may no longer hold any rights to the work at all.*

#### **5. The fallacy of substituting a search for "the publisher" for a search for the current holder(s) of digitization or other particular rights**

Most of the proposals concerning "orphan works" are concerned primarily, or at least initially, with rights to digitization of works somehow determined to be "orphans".

Once the foregoing points are recognized, it becomes clear that a search for "the holder(s) of digitization rights" is necessarily something quite different from a search for "the publisher".

Finding a publisher (one of an unknown number of such publishers) of a work is useful only as a possible aid to identifying the current holder(s) of digitization rights to that work.

As with the chain of title to an item of tangible property such as a vehicle, which begins with the manufacturer and proceeds through a chain of transfers of title, a proper determination of current holdership of any particular rights to a copyrighted work, including digitization rights, necessarily begins with the creator (who by definition holds the original undivided copyright) and proceeds through a chain of assignments of the particular rights in question.

A proper search for the holder(s) of digitization rights (or any other particular rights) to a work thus necessarily begins with a search for the author(s) of the work (original holder(s) of all rights) and proceeds from there to determine if those rights are the subject of a currently valid assignment or chain(s) of assignments of those particular rights to another party or parties.

A subsidiary but nonetheless significant issue is what sort of documentation of a valid chain of assignment(s) of rights, tracing back to the creator as original copyright holder, should be required from someone other than the creator asserting holdings of such rights, e.g. a publisher claiming to hold rights to license an e-book to end users or e-book distributors.

*In the absence of evidence of a currently valid assignment or assignments of specific rights in a work, the author(s) are presumably the holders of all rights in the work. A search for "the rightsholders" should be conceived of first and foremost as a search for the author(s).*

A search for publisher(s) of the work is at most one of the possible components of due diligence in searching for the author(s), and can never be sufficient in itself to identify the current holder(s) of digitization or any other particular rights of interest.

*No search for the holder(s) of rights to a work should ever be considered "diligent" or adequate unless it includes a search for the author(s) of the work, independent of any search for any of the publisher(s) of the work and independent of any records of print publication.*

## **6. The fallacy of "bibliographic data", collecting society registries, or other databases as dispositive of the status of "commercial exploitation"**

Many of the proposals related to "orphan works" would make distinctions among works, or authorize, by default, certain sorts of copying and/or use (such as digitization and making available of digital copies under certain conditions by libraries or academic or nonprofit entities), on the basis of whether the works in question are listed in databases of works "in print", registered with collecting societies, or available through "customary channels of commerce".

These proposals reflect a fundamental and fundamentally fallacious assumption, central to many of these proposals, that all "publication" or other "exploitation" of a work – copying, distribution of copies from writers to readers, or licensing for other use – occurs through

something called a "publisher" or licensing or collecting society, and will "customarily" be reflected in some bibliographic database or licensing or collecting society registry.

This leads to two further erroneous assumptions. One, that a work that is "out of print" and/or unavailable for licensing through a collecting society is "unavailable" (except perhaps in libraries), when in fact many "out of print" works are available, for reading online and/or for free or paid download, through increasingly customary commercial distribution channels including authors' Web sites. Two, that if bibliographic databases show a work to be "out of print", then it must be the case that "nobody is earning any money from the work," and there is no revenue stream to be damaged by allowing the digitization or other use of the work.

Publishers wish that authors were unable to exploit our own work commercially without a publisher or other intermediary. Perhaps that was once true, to a degree, but it is no longer.

Many authors exploit the commercial potential of our works by direct distribution of digital copies. This includes, but is not limited to, works that were once published on paper, but that are no longer available from some or all of the original print publisher(s) in that format.

This can take the form of, for example, publication of all or part of the work on the author's Web site (generating revenue through advertising or through paid subscriptions to the Web site), or licensing of PDF or other e-book copies directly by the author or through distributors or other intermediaries who may, or may not, consider themselves to be "publishers".

Such digital "self-publication", including but not limited to Web publication:

- (a) Is, and must explicitly be recognized as, a "customary channel of commerce";<sup>4</sup>
- (b) Is unlikely to be reflected in any bibliographic database;
- (c) Is engaged in by authors who are located around the world, often in countries other than the country or countries where their works are or were published in print form;
- (d) Is engaged in by authors many of whom are not members of any organization(s) of writers or participants in any licensing society or societies, in their own or any other country. (This is true, in particular, for the overwhelming majority of U.S. authors.)

For all of these reasons the equation of "not shown in any current bibliographic database or collecting society registry" with "out of print", "out of commerce", "not available to readers", or "not generating any revenue for the rightsholder(s)" is clearly fallacious, and reflects a

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4 When I made this point on behalf of the NWU to members and staff of IFRRO and staff of the European Commission's ARROW project at the 2011 IFRRO World Congress, they were taken aback, and claimed that in years of work on this issue they had never before heard it suggested that self-publication or Web publication could be considered "customary channels of commerce".

complete disconnect between the drafters of such proposals and the increasingly digital and disintermediated customary business models of freelance writers in the digital age.

*Any "due diligence" search for whether a work is "in commerce" must explicitly be required to include, at an absolute minimum, a search for whether the work is being exploited commercially directly by the author, or under license from the author, including through inclusion in Web content, the distribution of digital copies, or other self-publication.*

The current EU and UK orphan works proposals, for example, make no mention of self-publication, leaving it unclear whether authors/self-publishers are to participate in the schemes as authors, publishers, or both, and if so how. IFRRO similarly has no clear path for participation by self-publishers. No scheme that presumes that every author and work has a "publisher" can easily be applied to disintermediated distribution of textual material directly from writers to readers, or to intermediaries who may be "distributors" but not clearly "publishers".

*It's also critical to recognize, in light of the above, that an author may suffer financial damages from a grant of licensing to digitize or reproduce a work deemed "out of commerce" that are many times greater than the revenue, if any, generated by those copies.*

For example, having a work digitized and made available by an academic library for the use of its students, for free, may completely destroy the revenue stream that the author was enjoying through the sale or licensing to such students, through the author's Web site, of PDF copies of the work. No scheme for distribution of any revenues for licensing of the library's copies will be adequate to compensate the author for the revenue loss that results from the availability of free or lower-priced digital copies resulting from the library's digitization.

Allowing only non-commercial digitization or use of works deemed "orphans", or holding revenues for presumptive licenses to use of such work (at default prices) in escrow and turning them over on demand to the holder(s) of the rights to those uses, is not sufficient to make up for the damage that may have been done to the rightsholder(s) other revenue stream(s) such as advertising on a Web site on which the author has placed all or part(s) of the work.

## **7. The fallacy of standardized or default pricing for licenses to use or copy written works**

Writing is a craft profession. Written works are not commodities. The publishing industry is a craft industry, not a production industry. There is no default price for any right to any particular written work. Every right to every use of every work is subject to new negotiation.

Neither writers nor publishers have default or standardized prices. Sometimes, a publishing entity or a department within an entity will have one or more standard offering prices, but those are only starting points for negotiation. A strong negotiating position – based on attributes of the writer or the work or the would-be licensee, including attributes that may change over time such as the writer's reputation or the level of current interest in the subject of the work – nearly always enables a rightsholder to negotiate changes to any "standard" price proposal.

Any assignment-by-default of certain rights to use of "orphan works" necessarily requires setting prices for those rights. This in turn requires either (1) a giveaway of those rights (which would be an unfair taking of rights from the rightsholders), (2) the delegation of *individualized* pricing power to some new or existing entity (which would require more work by that entity, and create more problems, than such a scheme could possibly solve), or most likely (3) the setting of default prices for standardized licenses for certain uses of *categories* of work that are assumed – on the basis of some attributes other than individualized appraisal – to be of similar value.

If default prices are contemplated, they will have to be imposed, either through the legislative process or, as in the some proposals, by a specially-created or specially-entitled government agency or by a licensing entity to which price-fixing authority is delegated by law.

Many "orphan works" proposals attempt to evade these problems by delegating pricing to some other entity or a "player to be named later". But delegation or postponement will not solve any of the pricing problems inherent in a scheme applicable to millions of works, each of which will need to be either individually priced, or individually assigned to a default pricing category – by someone and according to some substantive criteria and some decision-making process.

*Pricing decisions will eventually have to be made. The foreseeable pricing problems need to be acknowledged and confronted before any "orphan works" proposal is approved.*

## **8. The fallacy of administrative simplicity and efficiency of an "orphan works" scheme**

Proposals for "orphan works" schemes are typically based on the purported difficulty of "clearing" rights to large collections of works by individually identifying and obtaining licenses from the rightsholders for the desired uses of those works, especially for mass digitization.

But rarely have the difficulties of administrating and adjudicating disputes over rightsholdings *within* proposed "orphan rights" schemes been assessed or compared.

Disputes over rightsholdings, especially over holdership of digital rights, are the exception rather than the rule. Print publishers have claimed, and are likely to continue to claim, that they hold rights to reproduction in digital form of tens of millions of in-copyright books and articles which were published under contracts which include no explicit assignment of digital rights. Authors generally believe these claims to be specious, unsupported by law, and merely an attempt to legitimate a sweeping theft of digital rights to backlists by publishers from authors.

Whatever one's beliefs about the merits of these disputes – which rest in part on the individual language of tens of millions of individual contracts – there's no denying the fact that many, perhaps most, claims of rights made under any "orphan works" scheme will be disputed.

There will also be disputes about other issues including where a particular work was published or first published and how to categorize works for pricing and inclusion or exclusion.



Is this work a book, a monograph, a journal article, or a Web page, for example, especially if the same work has been published by different publishers (or no publisher) in each of these formats?

Enactment of an "orphan works" scheme will not make these and other longstanding, ongoing, and vigorously-contested disputes over holdship of rights, particularly digital rights, go away. Any "orphan rights" scheme, especially one that encompasses digitization rights, will either have to include a legislative disposition of these rights – a profoundly weighty legislative determination and assignment of billions or tens of billions of dollars in the value of these rights – or will have to include within the scheme mechanisms for adjudication of those disputes.

An "opt out" provision – even if it weren't a "formality" prohibited by the Berne Convention – would not solve this problem, since it would be necessary either to assign to e.g. publishers the "right" to opt out regardless of their actual rightholdings or lack thereof (thereby making a *de facto* determination and reallocation of their rights vis-a-vis authors), or to adjudicate which publishers or other third parties have been assigned rights, with respect to each claimed work, sufficient to meet legally valid criteria of eligibility to opt out for those works, much less to receive any share (and if so, what share) of any revenues for use of those works.

The task of assessing evidence presented by publisher or other third-party (non-author) claimants to rights, and adjudicating disputes over who holds which rights to individual works, will not necessarily be any different under an "orphan works" scheme than it is for courts today.

To be sure, current mechanisms for adjudicating disputes over rights are grossly inadequate to provide a meaningful possibility of redress for writers whose rights are infringed, particularly when the infringers are often – as is typical – large publishing corporations.<sup>5</sup>

But that doesn't mean things would be any better or fairer for writers under an "orphan works" scheme. On the contrary, the suggestion that administration of such a scheme will be "uncomplicated" suggests that it will be structured so as to sweep such disputes under the rug – and, in effect, decide them by default. Most likely, those defaults would implicitly resolve these disputes in favor of publishers as against writers by giving publishers "rights" without the need to provide any evidence of current holdings of rights (merely of past publication of those works), which appears to be publishers' real underlying goal in the formulation of these schemes.

Any "orphan works" proposal needs to spell out (1) who will adjudicate disputes including disputes over rightsholdings, eligibility to opt out or opt in, and classification of works, (2) the substantive standards for such determinations; (3) the procedures to be followed, (4) the standard of proof to be required of publishers or other third-party claimants to rights, and (5) the mechanisms for administrative and/or judicial review of such determinations.

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5 See "Comments of the National Writers Union on Coordination and Strategic Planning of the Federal Effort Against Intellectual Property Infringement," March 23, 2010, available at <<http://www.nwubook.org/NWU-ip-enforcement.pdf>>, and "Comments of the National Writers Union on Remedies for Small Copyright Claims," January 16, 2012, available at <<http://www.nwubook.org/NWU-copyright-small-claims.pdf>>.

Any delegation of such adjudicative authority with respect to rights under U.S. law would, of course, have to be reviewed for compliance with the Administrative Procedure Act as well as Constitutional entitlements regarding due process and takings of rights.

Mechanisms need to be provided both for recognizing the individuality of each work and each contract for the assignment of rights, but also for equitable collective adjudication of similar disputes such as those by groups of writers with similar contracts with a particular publisher for similar licensing of similar works, so that individual rightsholders are not deprived of the benefit of current provisions for collective bargaining and class action litigation of joined claims.

The defaults in any "orphan works" scheme must match the defaults in the law. Under both U.S. law and the Berne Convention, the author or other creator of a work holds, by default, all rights to that work except those she has expressly assigned to others.

*Any "orphan works" scheme must incorporate those same defaults: Authorship must constitute, by default, prima facie evidence of holdership of all rights to the work (including, of course, rights to reproduction or other use of the work in digital form). The burden of proof must be on any publisher or other third party claiming rights in a work (including the "right" to opt in or opt out of the scheme, assign the work to a particular pricing or distribution category, authorize digitization or use of the work in digital form, or receive any share of revenues for licensing or use of the work) to provide sufficient evidence of a currently valid assignment or chain of assignments from the author(s) or creator(s) of the particular rights claimed.*

*Evidence merely of having previously published the work should not be considered evidence of current rightsholdings, nor should evidence of print publication be considered evidence of assignment of rights to digitization or other digital copying or use of the work.*

Only after all this is spelled out could any real assessment be made as to whether such a scheme would be simpler, easier, or cheaper, or which parties to current disputes it would favor.

## **9. The fallacy of "the place of publication" or "the place of first publication"**

One of the fundamental rights guaranteed by the Berne Convention is the right to equal recognition and protection by and in any state that is a party to the Berne Convention, without "formalities", of creators' rights to work first published in any other Berne Convention party.

This means, for example, that although work first published in the U.S. must be registered with the U.S. Copyright Office (a requirement which I and the NWU believe should be repealed)<sup>6</sup> in order for rightsholders to exercise and/or enforce certain of their rights and remedies in the U.S., work first published in any other Berne Convention party is not, and cannot be, subject to that U.S. copyright registration requirement.

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6 See "Comments of the National Writers Union on Remedies for Small Copyright Claims," January 16, 2012, available at <<http://www.nwubook.org/NWU-copyright-small-claims.pdf>>.

(This, of course, gives even U.S.-based writers a strong incentive to make sure that our work is first published in any Berne party other than the U.S., such as by hosting of our Web sites on servers in Canada or further abroad, to avoid the burden of trying to ensure proper and timely ongoing registration of U.S. copyright in updates to dynamically-generated Web pages.)

The Berne Convention requirement for equal protection of copyright without formalities, regardless of the place of publication, has become more and more significant as publishing technology has transcended borders and rendered the concept of the "place" of publication increasingly obsolete.

Unfortunately, a patchwork of "orphan works" schemes have been proposed in individual countries or groups of countries (such as the European Union), disregarding the growing importance of common treatment worldwide of copyrighted work, based on the Berne Convention principles. Many, perhaps most, of these proposals to date reflect assumptions rooted in the obsolete notion that each work has a single "place" of publication or first publication, which "place" is known to the author and/or publisher and readily identifiable by inspection of any copy of the work. These assumptions are invalid, and doom any scheme based on them.

No law, at least in the U.S., requires even a paper copy of a book to contain any internal indication or claim with respect to the place(s) of publication or place of first publication of the work(s) included in the book. Many books do not, in fact, contain any such internal evidence of the place(s) of publication or first publication of the included works. And any requirement to include such a declaration in order to preserve rights would be, as applied to books first published in other countries, a "formality" prohibited by the Berne Convention.

It's common for books (and works published in other formats or media) to contain textual and other material that was first published in periodicals, ephemera, or online in another country or countries from that where the book is first published (for example, material first published on an author's blog hosted by a service in the U.S., and later included in a book published elsewhere), without that fact being discernible from the book itself or any bibliographic database.

Cloud Web hosting and other digital distribution services often deliberately have servers in multiple countries, and have as a design goal that the location(s) of the servers should be "transparent" to both customers and users. "Transparent" in this context is a term of art meaning that customers and users do not know, or need to know, where those servers are.

Depending on what, if any, server logs are created by the cloud service provider, and how long those logs are retained, it may not be possible even for the cloud service provider to determine, after the fact, from which servers copies of a work have been distributed and thus in what countries it has been published. It's especially unlikely that it will be possible to determine, perhaps long after a work was first published, where the server from which a work was first downloaded was located, and thus in what country the work was first published. (This includes work which is published in print form, but all or part of which was first published online.)

It's also unclear, in the common case where elements of the digital distribution chain are located in several countries, which step in the process constitutes "publication" and thus determines the "place(s)" of publication or first publication.

Nothing whatsoever about any "place of publication" can typically be determined from a digital copy of a work. And even paper copies of books are less and less likely to contain an unambiguous declaration of the country of publication or first publication. Publishing of printed books is increasingly dominated by transnational corporations. Typical books that might once have named a single city as their place of publication on the title or copyright page now routinely contain instead either a laundry list of a dozen or more of the locations of the publishing conglomerate's regional offices around the world, or a URL for the publisher's Web site.

Any "orphan works" scheme that depends on categorization of works on the basis of the country in which they were first published is based on out-of-date concepts of publishing. Any such scheme is likely to prove unworkable, and any such requirement for authors or other rightsholders to be able to specify in which Berne party a work was first published (in order, for example, to know which national or regional registry of potentially "orphaned" works to consult to "claim" their rights) would constitute a "formality" prohibited by the Berne Convention.

*Indeed, any requirement that authors or other rightsholders take affirmative action – such as to register themselves or their works with a collecting society or bibliographic database, to "claim" works to which they hold rights, or to "opt out" of an "orphan works" or other license-by-default scheme – to avoid having rights (including digitization rights) presumed to be "orphaned" or "not being exploited", and in consequence having rights assigned to third parties by action of law, would be "formalities" forbidden by the Berne Convention.*

And such requirements would be especially burdensome to authors or other rightsholders who have to join or check multiple "possibly orphaned" registries or lists for a work that may, in different people's judgments, have been published or first published in multiple countries, or any of multiple instantiations of which, at least arguably published in different countries, might be deemed to be "orphaned" despite the existence of other editions or differently-published copies.

Nor can the results of a search limited to editions published or first published within any one country or region be considered dispositive of whether a work is "in print". It is routine for an edition of a work published in one country to be out of print, while an edition in another country – not necessarily linked by internal evidence or in any database – remains in print. (This is, of course, especially likely where editions in different countries have different titles.)

Rather than being built around obsolete notions of geographically-defined publishing, any "orphan works" scheme should be designed as much as possible on the basis of the global nature of contemporary publishing, both in print and online. It may be difficult to do away with a complex legacy of laws that require the designation for certain limited purposes of at least a nominal place of publication for a particular copy of a work. *But any "orphan works" proposal must be tested against the case of works, including those first published online, whose country of*

*first publication is unknown and unknowable even to the publisher(s) and/or rightsholder(s), and must not be adopted unless it provides unambiguous procedures for dealing with such works.*

#### **10. The need for dialogue between authors and those who want to exploit our work**

Authors have a greater stake than anyone else in seeing that our work is available to readers, even when erstwhile publishers of our work have disappeared without a trace.

Authors have taken the lead in making our "out of print" personal backlists of books, articles, and other work available, commercially or otherwise. Authors have long had a much better sense than publishers of the value of the "long tail" of our backlist works, and have consistently been on the cutting edge of new ways to commercialize and distribute them, long before and often "under the radar" of slower-moving legacy print publishers.

Publishers may claim to have difficulty tracing authors of "out of print" books, but would-be readers routinely track down and contact authors of "out of print" books to find out how to obtain our works. Authors have, as would be expected, responded to such reader inquiries by finding ways to make our works, including our backlists, available to new readers. And a new industry of service providers has developed to facilitate these efforts by authors.

Yet much of the discussion about "orphan works" has been a discussion between those parties who want to exploit those works (libraries, publishers, etc.), *and not the creators of those works*. It's past time for dialogue between those parties who want to exploit "orphan works" and the authors of works which might be so classified.

As the foregoing analysis should make clear, many of the fundamental flaws in the "orphan works" proposals to date result from those proposals having been developed without consulting the authors of the works in question. The resulting proposals have, not surprisingly, been completely detached from the contemporary realities of working writers' business models.

*The necessary dialogue between writers and third-party would-be exploiters of our work can only be conducted on the basis of recognition of the principles discussed above.*

*Before that can happen, however, there's an even more basic precondition: Authors of works which are, or might be deemed to be, "orphan works", must be recognized as a class of stakeholders who can and must be included in any policy-development or decision-making process regarding "orphan works", especially if it is to be represented as a "multi-stakeholder" process or the outcome is to be represented as reflecting any "consensus" among stakeholders.*

Authors would welcome the opportunity, on the basis of these understandings, to enter into a dialogue with anyone interested in licensing and helping to distribute our works, including our "orphan works" – as long as they are interested in doing so on terms which respect our rights.

Let's talk with each other, rather than merely about each other.