

Green Light for Grey Literature? Orphan Works, Web-Archiving and other Digitization Initiatives – Recent Developments in U.S. Copyright Law and Policy

Tomas A. Lipinski, School of Information Studies; University of Wisconsin, United States

Abstract

This paper reviews recent legislative and case developments in the area of copyright law affecting the collection, preservation including digitization and dissemination of grey literature. Alternative frameworks for crafting a legislative solution to impediments the copyright present to these uses are discussed. This includes review of pending legislation targeting the problem of so-called "orphan works" offering a limitation on the monetary damages or injunctive relief the copyright owner may be granted and another pending proposal aimed at relaxing the anti-circumvention prohibition of section 1201 that would allow access to compilations consisting primarily of public domain works that are protected by technical protection measures. The recent SECTION 108 STUDY GROUP REPORT also contain recommendations related to preservation (reproduction) and dissemination of both analog and borne-digital works, including a new provision for internet archiving. Finally, recent case law supporting the archiving of various online sub-literatures is reviewed, such as the disputes over caching and archiving by Google and the TurnItIn plagiarism combating service. Short of a legislative solution, the procedural elements affecting copyright enforcement are assessed to determine the legal risk in use of grey literature. These proposals and cases are analyzed and critiqued, with assessment towards solving the copyright issues related to the preservation and use of various grey literatures. Policy failures as well as successes in the United States can assist policy makers in other countries when contemplating copyright issues related to preservation and use of grey literature.

Introduction

This paper proceeds on the assumption grey literature refers to "any documentary material that is not commercially published and is typically composed of technical reports, working papers, business documents, and conference proceedings"¹ or the "quasi-printed reports, unpublished but circulated papers, unpublished proceedings of conferences, printed programs from conferences, and the other non-unique material which seems to constitute the bulk of our modern manuscript collections."² In the educational context it could also include recorded lectures and other course content, student papers, thesis' repositories, etc. The dominant theme of these conceptualizations is the unpublished nature of the literature, but is this true in every case? A later section of this paper explores the issue of publication status and asks whether in the eyes of the U.S. copyright law these works are indeed unpublished, with the impact of that publication status on use and legal risk discussed. Issues related to the institutional collection and dissemination of grey and other literatures protected by copyright is of increasing interest in the United States, the European Union³ and world-wide.⁴

There are two options pursued in the United States when of crafting legislative or regulatory "solutions" to impediments that the copyright poses to the reproduction (collection, preservation, etc.) and public distribution (circulation, dissemination online, etc.) of protected content. The first is to offer an exemption (or more precisely an affirmative defense) for what would otherwise be an infringing use. Exemptions come in two forms, general (those available to all, such as fair use under section 107) and specific (limited to the particulars of the circumstance, such as the exemption granted to libraries and archives for reproduction and distribution of certain works under section 108). The second option is to offer users some sort of safe harbor or protection from the impact of such infringement. This is typically crafted as a limitation on monetary⁵ and in some cases injunctive remedies⁶ available to copyright owners. In rare instance immunity from any liability whatsoever may be granted.⁷ This paper assess whether the existing and emerging legal climate is amenable to the use of grey literature in the ways that libraries, archives, and other institutional organizations might desire to obtain and make accessible grey literature, through archiving, digitization, etc. The paper explores the current and potential interplay of the two policy options in light of proposals for reform recent case developments and also the dynamics of copyright litigation.

Library And Archive Reproduction And Distribution Under Section 108

Other than fair use (discussed below) section 108 of the United States copyright law offers qualifying institutions specific reproduction and distribution rights that may be useful in obtaining and distributing collections of grey literature. Section 108 allows for the reproduction and public distribution (circulation for example) of copies or phonorecords⁸ of the collection of a qualifying library and archive for