Chapter 6
Copyright Concerns Confronting Grey Literature

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This Chapter reviews 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 the impediments copyright law presents to these uses are discussed. Recent threats to the availability of government-generated public domain content are assessed in light of the impact on grey literatures derived from similar public sources. 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.

Current law and developments 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 that are part of the community of copyright nations when contemplating issues related to preservation and use of grey literature.

6.1 Information Policy Related to Copyright in a “Grey” Context

This chapter 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of technical reports, working papers, business documents, and conference proceedings”¹ or the “quasi-printed reports, unpublished but circulated papers, unpublished proceedings of conferences, printed programs from conferences, and the other non-unique material which seems to constitute the bulk of our modern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.\footnote{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 The dominant theme of these conceptualizations is the unpublished nature of the literature, but is this true in every case?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explores the issue of publication status and asks whether in the eyes of the U.S. copyright law these works are indeed unpublished, with the impact of that publication status on use and legal risk discussed.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 Union\footnote{3} and world-wide.\footnote{4}

There are two options pursued in the United States when crafting legislative or regulatory “solutions” to impediments that the copyright poses to the reproduction (collection, preservation, etc.), public distribution (circulation) and perhaps public display or transmission and performance (dissemination online)—the exclusive rights of the copyright owner—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 works in all circumstances, such as fair use under section 107)\footnote{5} and specific (limited to the particulars of the circumstance. The statute or regulation may limit the exemption by type of work, sort of use (which exclusive rights of the copyright owner are impacted), and type of user. An example is 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 monetary\footnote{6} and in some cases injunctive remedies\footnote{7} available to copyright owners. In rare

\footnotesize{\begin{center}
\begin{itemize}
\item Unless otherwise noted, all section references in the test are to Title 17 of the United States Code, the codified copyright law.
\item See, e.g. 17 U.S.C. § 504(c)(2).
\item See, e.g., 17 U.S.C. § 512(j).
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instance immunity from liability may be granted.\(^8\) This chapter assesses 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 chapter 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. Finally, new threats to the continued availability of some grey literatures from copyright restoration (unique to U.S. environment) and other attempts to decrease the “size” of the public domain, including licensing, are evaluated.

6.2 Section 108 Library and Archive Reproduction and Distribution

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 phonorecords\(^9\) of the collection of a qualifying library and archive for preservation and security of unpublished materials or of published materials in cases of damage, deterioration, loss, or theft, or if the existing format in which the work is stored has become obsolete.

In cases of preservation and security under section 108(b), the copy or phonorecord (or copies or phonorecords, as up to three copies or phonorecords may be

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\(^9\) 17 U.S.C. § 101 defines a phonorecord as “material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term ‘phonorecords’ includes the material object in which the sounds are first fixed.”
made) must be from a work in the current collections of the library or archive.\textsuperscript{10} If a copy or phonorecord is made in a digital format it must not be made available to the public in that format outside the premises of the library or archives. Remote access to the material via the library or archive website is not allowed. A copy made under subsection (b) for deposit in another library or archive may be transferred to that library or archive in digital format but the receiving library or archive must not distribute the material in that.\textsuperscript{11} This would allow a qualifying library or archive with a collection of unpublished grey report or proceeding literature of the ABC Association or the XYZ Corporation to make a copy of the collection for preservation or security purposes or even to make a complete copy of the collection for another qualifying library or archive. The library or archive could digitize these collections as well in order to increase searching capabilities of users (staff or patrons) in accessing the content. However, the digital copies may not be made available outside the premises of the library or archive, but relegated to in-house use alone.\textsuperscript{12}

In cases of damage, deterioration, loss, or theft, or if the existing format in which the work is stored has become obsolete under section 108(c), the copy or copies made (up to three copies may be made) are subject to the same limitation on digital distribution, i.e., remote access to the material is not allowed, and the library or archive must first make a reasonable effort to obtain an unused replacement of the published work at a fair price,\textsuperscript{13} a so-called market check. A “reasonable effort” “will vary according to the circumstances of a particular situation. It will always require recourse to commonly-known trade sources in the United States, and in the normal situation also to the publisher or other copyright owner (if such owner can be located at the address listed in the copyright registration), or an authorized reproducing service.”\textsuperscript{14} Subsection (c) applies to published works. Less allowance is offered for published works under the statute as it is more likely for a replacement to be available. As a result, a qualifying work must be in some state of decreased availability, e.g., damage, deterioration, loss, or stolen, or if the existing format in which the work is stored has become obsolete. However, once recourse to the marketplace has failed, reproduction and distribution may occur, but again subject to the same space limitations for distribution of digital formats, i.e., in-house use alone.\textsuperscript{15} Why this significant limitation on web-based access to grey literature or other collections?

\textsuperscript{10} 17 U.S.C. § 108(b)(1).
\textsuperscript{11} 17 U.S.C. § 108(b)(2): “any such copy or phonorecord that is reproduced in digital format is \textit{not otherwise distributed in that format}.” (Emphasis added.)
\textsuperscript{12} 17 U.S.C. § 108(b)(2): “any such copy or phonorecord that is reproduced in digital format is …not made available to the public in that format outside the premises of the library or archives.”
\textsuperscript{13} 17 U.S.C. § 108(c)(1).
\textsuperscript{15} 17 U.S.C. § 108(c)(2).
The legislative history of the digital copying provision of section 108, added by the Digital Millennium Copyright Act, indicates that Congress was concerned with infringement vis-à-vis the proliferation of digital libraries: “Although online interactive digital networks have since given birth to online digital ‘libraries’ and ‘archives’ that exist only in the virtual (rather than physical) sense on Web sites, bulletin boards and home pages across the Internet, it is not the Committee’s intent that section 108 as revised apply to such collections of information...The extension of the application of Section 108 to all such sites is tantamount to creating an exception to the exclusive rights of copyright holders that would permit any person who has an online Web site, bulletin boards, or a home page to freely reproduce and distribute copyrighted works. Such an exemption would swallow the general rule and severely impair the copyright owner’s right and ability to commercially exploit their copyrighted works.” Thus, an on-premises library or archive use of a section 108(b) or (c) digital copy is the rule.

6.3 Solving the Problem of Orphan Works

It may be that archiving and digitization, i.e., reproduction and public distribution of a work of grey literature in its entirety may be impeded by concerns of copyright infringement because, depending on the circumstances, use of the work in its entirety may be beyond fair use or otherwise not authorized by another section of the copyright law.

6.3.1 The Problem and the Public Interest

It may be that the institutional collectors of grey literature like other users of copyrighted content would be willing to contact the owner and secure permission to use the work, even if compensation of the owner is involved. However, the owner cannot be identified or located. Given the nature of the provenance of grey literature such content may be particularly susceptible to the problem of orphan works. An “orphan work” is “a term used to describe the situation where the owner of a copyrighted work cannot be identified and located by someone who wishes to make use of the work in a manner that requires permission of the copyright owner.” Who is the owner of reports or position papers issued by a professional or trade association, learned or scientific society? Where such reports were com-

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posed by employees of the association or society the “work made for hire” \textsuperscript{19} rules an employer would be the copyright owner. \textsuperscript{20} However, if an outside consultant was contracted to compose the report, the consultant would as an independent contractor, retain the copyright unless the formalities of transfer of copyright to the association were followed and executed. If a learned society published the reports as part of conference proceedings then individual contributors may have retained their copyrightable interest but the society might possess a collective copyright in the annual proceedings. \textsuperscript{21} Lines of ownership can become easily confused. Users that desire to make use of these works but under circumstances of no legal risk will forego use in the fear that the owner could one day surface and sue for copyright infringement. As copyright law is a law of strict liability, these good faith attempts do not impact liability though general efforts of good faith may impact damages. \textsuperscript{22} “Such an outcome is not in the public interest, particularly where the copyright owner is not locatable because he no longer exists or otherwise does not care to restrain the use of his work.” \textsuperscript{23}

### 6.3.2 The Solution: Damage Remission but not Immunity (nor Exemption)

While \textsuperscript{24} the Shawn Bentley Orphan Works Act of 2008 passed in the Senate, and though engrossed in the House on September 27, the bill failed to pass in the final days of the 110th Congress. The bill would create new section 514 of the copyright law (title 17 of the United States Code). It is likely to be re-introduced

\textsuperscript{19} 17 U.S.C. § 101 indicates that a work made for hire” is either “a work prepared by an employee within the scope of his or her employment” or by designation if the work is “specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.”

\textsuperscript{20} Under 17 U.S.C. § 201(b): “In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.”

\textsuperscript{21} A “collective work” is a “is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.” 17 U.S.C. § 101.

\textsuperscript{22} See, e.g., Lowry’s Reports, Inc. v. Legg Mason, Inc., 271 F. Supp. 2d 737, 746 (D. Md. 2003) (“The fact that Legg Mason’s employees infringed Lowry’s copyrights in contravention of policy or order bears not on Legg Mason’s liability, but rather on the amount of statutory and punitive damages and the award of attorneys’ fees.” (emphasis added).)

\textsuperscript{23} U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS 15 (2006) (emphasis added)

\textsuperscript{24} S. 2913, 110th Congress, 2d Session (April 24, 2008) (Shawn Bentley Orphan Works Act of 2008).
during the 111th Congress and pass in some form. Proposed section 514 is an example of the second form of policy “solution” to a copyright “problem” as the proposed legislation addresses the problem not by creating an exemption but in limiting the so-called bottom line or damages the user-defendant faces should the owner-plaintiff surface at some later date, decide to pursue litigation, and is successful in that litigation. If the user meets the “safe harbor” requirements of the provision then the only monetary relief the plaintiff can claim is for reasonable compensation for the infringing use made of the work. Damages (actual or statutory including damage enhancement for willful violations) as well as costs and attorney fees are not available. In some circumstances no monetary relief whatsoever is available. In the instance of derivative uses injunctive relief is also limited to an order requiring attribution for continued use and reasonable compensation for past and future uses. The derivative use cannot be suspended by the court. The question is whether or not limiting monetary liability to reasonable compensation is still too much for some would-be users to afford, i.e., this user would nonetheless in spite of the possible limitation of damages still forego use of the orphan work. Thus the impact of this “solution” would not be in the “public interest,” to use the language of the Report.

Reasonable compensation is defined under proposed section 514(A)(3) as “the amount on which a willing buyer and willing seller in the positions of the infringer and the owner of the infringed copyright would have agreed with respect to the infringing use of the work immediately before the infringement began.” The impact should be obvious. Users of orphan works will need to obtain some evidence or documentation of what that amount might be before use of the work commences and keep that evidence or documentation should the orphan owner ever appear one day and the user need to prove qualification under the safe harbor. The user would in theory keep the evidence or documentation of the reasonable compensation for as long as the work is being used, e.g., making a public distribution of the work by having the item in the collection of the library or archive, plus three years.

It is also a requirement of qualification that should the owner appear the user must bargain in good faith, offering to pay reasonable compensation. So again having documentation of what this amount might be is useful especially in cases where the owner appears years after the initial infringement and there is a difference of opinion regarding what amount the owner believes is reasonable compensation. Human nature might naturally complicate this process as the owner likely was unaware (being the “parent” of an orphan work) and now discovering that

25  Hotaling v. Church of Latter Day Saints, 118 F.3d 199, 203 (4th Cir. 1997) (When a public library adds a work to its collection, lists the work in its index or catalog system, and makes the work available to the borrowing or browsing public, it has completed all the steps necessary for distribution to the public.”).

26  The statute of limitations for copyright infringement is three years for civil actions. 17 U.S.C. § 507. Once infringing use ceases the user-defendant could still be sued for the past infringement for up to three years, i.e., until the statute tolls.
someone was infringing their work (or to carry the analogy further, the parent is reunited with their long lost child only to discover that someone has been taking advantage of them). Considering the duration of copyright in the United States there may be a lengthy period during which this information may be relevant. So for a work for which the copyright does not expire until say 2045, where the infringing use commences in 2010, lasts until 2035 when the work is deaccessioned from the library or archive collection, the user would need to keep records of what reasonable compensation would have been in 2010 for 28 years: 25 years of use plus the three years to cover the tolling of the statute of limitations. Where the use is continuous, i.e., the work remains a permanent part of a library or archive collection such as making the work accessible to the public on a website, this period would be for as long as the copyright lasts or until the work is deaccessioned, plus three years!

Under proposed section 514(c)(1)(B), a nonprofit educational institution, museum, library, archives, or a public broadcasting entity (or employees of such entity acting within the scope of their employment) can reduce the monetary amount to zero if three conditions are met. First, the infringement was performed without any purpose of direct or indirect commercial advantage. This is different than a situation where the use results in a direct or indirect commercial advantage, only the “purpose” must be so. In other words the use could have that effect even though that was not the intent. Second, the infringement was primarily educational, religious, or charitable in nature. This is not the same as a “solely” standard though it must be the primary character of the use. It could be argued that this standard looks to the character of the entity as the categorizations being those employed under the federal tax code to indicate those organizations capable of acquiring not-for-profit status, however the proposed statutory phrasing suggests the nature of “the infringement” is the classification or status of the infringer. Third, after receiving a notice of claim of infringement and having an opportunity to conduct an expeditious good faith investigation of the claim by undertaking some legal assessment of its merits the infringer must promptly cease use (infringement) of the work.

The condition to cease use upon receipt of a notice of claim might dissuade some entities from undertaking digitization or making other investment associated with the use, e.g., the cost of recording-keeping as discussed above for example. If there is a possibility that a return on that investment in the work will not be realized or halted should the owner later appear and use need to cease in order to qualify for the zero compensation provision this possibility may be sufficient to dissuade potential users of orphan works. The “notice of claim of infringement” does not require that a lawsuit be filed rather it is akin to the notice under section 512(c)(3) that triggers an expeditious take-down or restriction of access to con-

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27 For works created after the effective date of the 1976 Copyright Act (January 1, 1978), the duration of the copyright is for author’s life plus 70 years, or if corporate, anonymous, pseudonymous, the lesser of 95 years from publication or 120 from creation. 17 U.S.C. § 302.
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As required under proposed section 514(a)(1) the notice would be made in writing and include the name of the owner and title of the infringed copyright as well as sufficient information regarding the owner or their representative and the location of the infringing content.

Finally in the case of derivative works or to be more precise under proposed section 514(c)(2)(B), where the infringer has “prepared or commenced preparation of a new work of authorship that recasts, transforms, adapts, or integrates the infringed work with a significant amount of original expression,” the court may not enjoin the defendant’s continued use. The concept of “integration” offers a somewhat broader scope of uses than contemplated by the existing statutory definition of derivative work. Moreover, the inability to enjoin continued preparation or use in essence creates a statutory license to use the work as long as the “infringer pays reasonable compensation in a reasonably timely manner after the amount of such compensation has been agreed upon with the owner of the infringed copyright or determined by the court.” If the owner refuses to agree during good faith attempts at negotiation, the court may order the owner to accept the reasonable compensation and allow the use to continue. The court must also require the user to provide attribution “in a manner that is reasonable under the circumstances to the legal owner of the infringed copyright.” However attribution is only required “if requested by such owner.” It could be argued that inclusion of an option for court-ordered attribution for further use is superfluous as an initial condition of section 514 qualification is to provide attribution, as discussed below. It would be odd indeed for the user of an orphan work indeed to include attribution upon initial preparation of the derivative work in order to qualify for protection under section 514 but upon surfacing of the owner and failed discussions over payment for past and future use decide to no longer provide that attribution.

6.3.3 Developments in the European Union

The approach in the European Union (EU) in the words of the Commission of the European Communities is somewhat different and tending to be more receptive of what in the U.S. would be viewed as statutory or compulsory licensing, viewing the “issue of orphan works [a]s mainly a rights clearance issue.”30 Admitting a similar policy problem, i.e., how to construct a solution that includes successful

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28 17 U.S.C. § 512(c)(1)(A) (“upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity”).
29 17 U.S.C. § 101 defines a derivative work as “a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.”
incentives to use the orphan work while recognizing the copyright owner’s interests, the Commission observed: “Apart from liability concerns, the cost and time needed to locate or identify the rightsholders, especially in the case of works of multiple authorship, can prove to be too great to justify the effort.” The Green Paper reviewed a number of problem areas relating to copyright and digitization, including exceptions for libraries and archives and classroom/teaching. The Green Paper proposes a series of questions regarding possible future directive on the orphan works problem and solution, such amendment of the existing Directive on Copyright or other harmonization of cross-border use of orphan works.

Also issued in 2008, the i2010: Digital Libraries, High Level Expert Group—Copyright Subgroup, Final Report on Digital Preservation, Orphan Works and Out-Of Print Works attempts to offer general principles of the diligent search but cautions that “regulatory initiative should refrain from prescribing minimum search steps or information sources to be consulted, due to rapidly changing information sources and search techniques.” The Final Report indicates that any legislative “solution” to the orphan works problem should be crafted to apply to all categories of works, but in effect different sectors may need different guidelines or best practices, require a thorough search in good faith, and be flexible. The i2010: Digital Libraries, High Level Expert Group—Copyright Subgroup recommends that any solution, in addition to diligent search criteria, include databases (“a registry of metadata rather than a works database”) and increased use of rights clearance centers which would include “licensing conditions of the work if it remains orphan following a diligent search for the rightholder.” This is far

more ambitious than the U.S. approach, though the European Union solution does not appear to be an exemption either, but may make it more likely that users and owners will find each other through identification strategies such as increased use of metadata, and in the unsuccessful instance allow for use to continue but not with out cost, i.e., through licensing. There is recommendation that the cultural, non-profit establishments receive special treatment. Whether this will include allowance for use without specific monetary outlay—in addition to the general outlay of undertaking a diligent search—is unclear. Moreover, as in the U.S. it is unclear whether these or other measures will provide the “legal certainty [] so important for cultural institutions” before an embrace of the orphan work is undertaken.

A proposed (Memorandum of Understanding on Diligent Search Guidelines for Orphan Works (hereinafter, MOA) indicates that a work “can only be considered orphan if the relevant criteria, including the documentation of the process, have been followed without finding the rightsholders.” The MOA does not offer any concrete or discrete steps, factors or criteria, but instead offers principles to guide the development of actual guidelines or best practices, e.g., tools to identify and mechanisms to facilitate use of orphan works, initiatives to prevent the problem in the future, and annual review. Under the U.S. approach where the emphasis appears on identifying the current rightsholder even if the communication is never established, such a copyright owner would still be considered found. Moreover, under the U.S. approach if the author or owner cannot be located but a literary agent is nonetheless identified or the address of a publishing house’s new corporate parent is known, the work is no longer orphan. ‘Locate’ is not the same as ‘success’ in contact, which may be suggested in the European concept of having found or “finding” the rightsholder. The (U.S.) Report makes clear that once an owner is locatable, the work ceases to be an orphan regardless of the ultimate resolution of the situation, e.g., author refuses permission or never even responds at all. “This area touches upon some fundamental principles of copyright, namely, the right of an author or owner to say no to a particular permission request” or the right to say nothing at all “including the right to ignore permission requests.”

40 U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS 97 (2006) (“For example, if it is clear from a reasonable search that an author has a literary agent to whom permission requests can be sent, the fact that the user cannot specifically locate the author (perhaps because the author is doing research in Antarctica) does not mean that the search could not ‘locate’ the author”).
41 U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS 97 (2006) (“[O]nce an owner is located, the orphan works provision becomes inapplicable.”).
practice the U.S. and EU would be in accord: “Not included are works whose rightsholders refuse to authorize a use or who do not reply to a request for permission.” A lack of response to a permission request from a user that contains words to the effect that “unless you indicate intention to the contrary we assume your lack of response is agreement with the use we propose” is generally not a circumstance under which an implied license would exist or form the basis for any defensible right of use under the copyright law. As the (U.S.) Report indicates owners might choose not to respond for a number of reasons: insufficient time or resources to respond, or an incredulous offer. There is no requirement in either the (U.S.) Report or H.R. 2913 to contact the owner because once located the scenario ceases to qualify as one of orphan works. Likewise under the EU approach, an orphan work is that which is still under copyright protection and “can either not be identified, or located based on a diligent search on the basis of due diligence guidelines.” The evaluation of the search includes both a subjective (applied to good faith) and objective, i.e., reasonable in terms of the rightsholder (applied to the search components or guidelines or best practices).

In June of 2009 the i2010: Digital Libraries, High Level Expert Group—Copyright Subgroup met and discussed the progress of the European Digital Library, Europeana, including the preparation of a final report of the High Level Expert Group on the topic of Digital Libraries: Recommendations and Challenges for the Future. This report may also address orphan works as the “[c]larification


44 Lowry’s Reports, Inc. v. Legg Mason, Inc., 271 F. Supp. 2d 737, 750 (D. Md. 2003) (“Mr. Thayer did not request permission to make any copies of the issue Lowry's sent him. Nor did he request more than a single copy of a single issue. He asked only that Lowry's make good its alleged subscription agreement with Ms. Olszewski, who, he indicated, had not received her due copy. Moreover, the copy Lowry's sent him, like every copy it sent Ms. Olszewski herself, contained clear notice of copyright. Neither from this isolated telephone call, nor from the occasional provision of historical data, could Lowry's have known that Ms. Olszewski or Mr. Thayer routinely made and distributed copies of the Reports to every member of the research department. Therefore, no rational factfinder could conclude that Lowry's and Legg Mason had mutually assented to such a licensing arrangement.”).

45 U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS 97 (2006) (“an individual author might not have the resources to respond to every request; a large corporate owner might receive thousands of such requests and it would be unduly burdensome to respond to all of them; the request may be outlandish, in that it seeks to use a valuable work for no payment or in a way clearly at odds with the manner in which the owner is exploiting the work.”).

and transparency in the copyright statute of a work is an essential element in the European Digital Library initiative.47

6.4 Threats to the Public Domain: Possible Impact on Grey Literature

It may also be true that the character of the grey literature the library, archive or other entity desires to harvest, organize and accession, migrate through digitization or other measures, disseminate, etc. is not protected by copyright in the first instance. Some jurisdictions such as the U.S. dedicate works of the federal government to be in the public domain.48 The decision whether to protect state publications is left to each state legislature with understandable inconsistency in the execution of that choice.49 It may also be that the content of the grey literature is not protected by copyright because the work does not meet the “originality” requirement.50 In other words the work is a work of fact, such as a statistical report of a government agency or similar data such as tolerances, standards, etc. It may also be that the work simply does not contain any creativity (in the “eyes” of the copyright law). For example, a series of photographs of art, sculpture, etc., of works in the public domain where the photographs attempt to offer a precise representation of the public domain work would not be protected by copyright in the first instance.51 Some photographs can of course be protected by copyright.52

48 17 U.S.C. § 105 (“Copyright protection under this title is not available for any work of the United States Government.”).
49 Microdecisions, Inc. v. Skinner, 889 So.2d 871, 874-875 (2004) (Florida law authorized “certain agencies to obtain copyrights” and “permitted certain categories of public records to be copyrighted,” but it gave county property appraisers “no authority to assert copyright protection in the GIS maps, which are public records”); and County of Suffolk, New York v. First American Real Estate Solutions, 261 F.3d 179, 189 (2d Cir. 2001) (New York public record law “did not specifically address the impact on a state agency's copyright”).
50 17 U.S.C. § 102(a) provides that “[c]opyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”
51 See, Bridgeman Art Library, Ltd. v. Corel Corp., 36 F.Supp.2d 191, 197 (S.D.N.Y. 1999): “In this case, plaintiff by its own admission has labored to create ‘slavish copies’ of public domain works of art. While it may be assumed that this required both skill and effort, there was no spark of originality—indeed, the point of the exercise was to reproduce the underlying works with absolute fidelity. Copyright is not available in these circumstances.”
52 Courts have developed factors to use in assessing the creative (original, thus protected) elements in a photograph. See, Mannion v. Coors Brewing Co., 377 F.Supp.2d 444, 450 (S.D.N.Y. 2005): Rendition (“copyright protects not what is depicted, but rather how it is
A series of recent cases involving government information related to land and real estate demonstrate the potential threat to continued access to public domain literature of this nature and has implications for the continued access of all public domain literature. The threats come from several strategies. First, in terms of government action, from attempts by public entities to protect by copyright what was heretofore in the public domain. Second from private entities that have access to the original sources data, e.g., the entity might have been outsourced to collect or maintain the data, and attempt to exert ownership in that public domain data. Third, a public or private entity may condition access to the public domain content through a restrictive agreement such as a license. The following two disputes demonstrate these three strategies.

In Assessment Technologies of WI, LLC. v. Wiredata, Inc., a private entity was contracted by a public agency (county level) to “create[] only an empty database, a bin that the tax assessors filled with the data. It created the compartments in the bin and the instructions for sorting the data to those compartments, but those were its only innovations and their protection by copyright law is complete.” A competing company desired to access the data to create a competing database of the content. The Seventh Circuit indicated that the competitor would be free to do so and the content of the both databases would be public domain material, which both entities were free to use. The court anticipated the first entities next move: “To try by contract or otherwise to prevent the municipalities from revealing their own data, especially when, as we have seen, the complete data are unavailable anywhere else, might constitute copyright misuse.” This is an important concept and dangerous trend. Attempts to control public domain content through license when access to that content is limited to single or unique source—in Assessment Technologies of WI, LLC. v. Wiredata, Inc., the only collected source of the assessor information was in the database that the outsourced entity created—be thwarted by a from of estoppel known as copyright misuse.

Id. at 452 (both emphasis original, footnote omitted). Example: “lighting selection, angle of the camera, lens and filter selection.” Id. quoting, SHL Imaging, Inc. v. Artisan House, Inc., 117 F.Supp.2d 301, 311 (S.D.N.Y. 2000). Timing (right place, right time). Example: famous Catch of the Day photograph of an Alaskan brown bear catching a salmon in mid-air as the fish attempted to jump up a waterfall during spawning run. Id. at 453. Creation of the Subject. Example, famous String of Puppies photograph of a couple holding a brood of puppies on their laps while seated on a sofa. Id. at 454. Photographers have sued to enforce their rights. See, e.g., Leibovitz v. Paramount Pictures Corp., 137 F.3d 109 (2d Cir. 1998) (parody of Vanity Fair cover shot to promote Naked Gun motion picture fair use).

53 Assessment Technologies of WI, LLC. v. Wiredata, Inc., 350 F.3d 640 (7th Cir. 2003).
54 Assessment Technologies of WI, LLC. v. Wiredata, Inc., 350 F.3d 640, 646 (7th Cir. 2003).
56 Black’s Law Dictionary (8th ed. 2004), defines estoppel as a “bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true.”
The doctrine of copyright misuse is adopted from similar principles in patent law relating to anti-trust. The concept of misuse relates to circumstance where a valid intellectual property right exists, but the owner of the right attempts to use that right to leverage some other benefit. The gravamen of the misuse claim whether the plaintiff, against whom the defense is charged, is engaging in activity that undermines the public policy inherent in the copyright law, the Constitutional goal of promoting creative expression. This often occurs when the plaintiff is using the copyright law to leverage an advantage in another area. The resulting anti-competitive advantage is deemed a misuse of the copyright. However, there must be “sufficient nexus between the alleged anti-competitive leveraging and the policy of the copyright laws.” In Assessment Technologies of WI, LLC v. Wiredata, Inc., this might be the valid copyright in the database structure itself but does not extend to the public domain content that the databases were designed and employed to collect. The doctrine operates to bar the copyright owner as plaintiff from suing for copyright infringement, i.e., the owner’s right to enforce the right is suspended during the course of the misuse. The problem is that not all appellate

57 For a thorough discussion of anti-trust applied to intellectual property and licensing see, RAYMOND T. NIMMER, 2 INFORMATION LAW §§ 11.15 – 11.35 (2007).
58 See, Lateef Mtima, Protecting and Licensing Software: Copyright and Common Law Contract Considerations, INTELLECTUAL PROPERTY LICENSING TODAY, American Law Institute - American Bar Association Continuing Legal Education ALI-ABA Course of Study (SM049 ALI-ABA 81, 92 October 5 - 6, 2006) (“Finally, an infringing party who cannot claim the benefit of Fair Use may argue that the copyright holder should not be allowed to recover because she has misused or abused her copyright to obtain benefits not intended by the copyright law. The defense of copyright misuse bars a culpable plaintiff from prevailing on an action for the infringement of the misused copyright. The copyright law provides only specific property rights to the copyright holder, and competitors and the general public retain the right to challenge any over-reaching in connection with those rights. Thus the copyright law forbids the use of the copyright law to secure an exclusive right or limited monopoly not granted by the Copyright Office and which is contrary to public policy to grant.” Internal quotations to Lasercomb American Inc. v. Reynolds, 911 F.2d 970, 972 and 977 omitted.).
59 Lasercomb America, Inc. v. Reynolds, 911 F.2d 970, 978 (4th Cir. 1990). (“So while it is true that the attempted use of a copyright to violate antitrust law probably would give rise to a misuse of copyright defense, the converse is not necessarily true—a misuse need not be a violation of antitrust law in order to comprise an equitable defense to an infringement action. The question is not whether the copyright is being used in a manner violative of antitrust law (such as whether the licensing agreement is “reasonable”), but whether the copyright is being used in a manner violative of the public policy embodied in the grant of a copyright.”).
60 MGM Studios, Inc. v. Grokster, Ltd., 454 F.Supp. 2d 966, 995 (C.D. Cal. 2006) (“StreamCast primarily alleges that Plaintiffs have restrained competition in the market for digital distribution of music and movies by collectively refusing to deal with StreamCast and other file-sharing services. … StreamCast’s argument is unpersuasive. Concerted boycotts may violate the antitrust laws, but the existence of an antitrust violation is a separate question from the applicability of the copyright misuse defense. Even if Plaintiffs did act in concert to refuse licenses to StreamCast and restrict competition in the market for digital media distribution, that would not have extended Plaintiffs’ copyrights into ideas or expressions over which they have no legal monopoly.” Id. at 997.).
courts in the United States have adopted the concept of misuse into their copyright jurisprudence. The benefit of the misuse defense is not available only to those who are a party to the offending activity, in this case the licensee of the “egregious” license terms, but to non-parties or third parties as well. Patrons of a library, archive, etc., i.e. the citizenry, would be a third party as far as the entity-licensor and the library-licensee are concerned. When misuse applies, it prevents or “estops” the plaintiff from asserting a claim of copyright infringement for the duration of the copyright, but it does not necessarily prevent future attempts to do so. Once the misuse ceases the copyright owner is free to pursue legal remedy.

In a case involving public access to geographical information another court discussed copyright protection for access to and license restrictions placed upon public domain content in the context of open records laws. In *County of Santa Clara v. Superior Court*, access to public domain content was curtailed as a result of increased attention to national security in light of the events of the World Trade Center terrorist attacks: “The County also asserts a public safety interest in guarding against terrorist threats, based on its contention that the GIS basemap contains sensitive information that is not publicly available, such as the exact location of Hetch Hetchy reservoir components.” The court concluded that the public interest in disclosure outweighed this concern. As a second rationale for not allowing access the county asserted a copyright interest in the “compilation of data”, i.e., a database, in this case the “GIS basemap” and that it could therefore employ a restrictive agreement on the use of the content. The court rejected the notion that state law allowed the county to protect the public domain information through use of the federal copyright law: “The CPRA [California Public Records Act] contains no provisions either for copyrighting the GIS basemap or for conditioning its release on an end user or licensing agreement by the requester. The record thus must be disclosed as provided in the CPRA, without any such conditions or limitations.” Both the *Assessment Technologies of WI, LLC. v. Wiredata, Inc.* and *County of Santa Clara v. Superior Court* cases demonstrate both the merit of continued access to public domain nature and the increasing control that some

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61 *Lasercomb America, Inc. v. Reynolds*, 911 F.2d 970, 979 (4th Cir. 1990) (“Therefore, the fact that appellants here were not parties to one of Lasercomb’s standard license agreements is inapposite to their copyright misuse defense. The question is whether Lasercomb is using its copyright in a manner contrary to public policy, which question we have answered in the affirmative.”).

62 Lectric Law Library provides the following comment on the concept of estoppel in law: “An estopple [sic] arises when someone has done some act which the policy of the law will not permit her to deny.” Available at http://www.lectlaw.com/def/e040.htm

63 *County of Santa Clara v. Superior Court*, 89 Cal.Rptr.3d 374 (Cal. App. Dist. 6, 2009).

64 *County of Santa Clara v. Superior Court*, 89 Cal.Rptr.3d 374, 393 (Cal. App. Dist. 6, 2009).

65 *County of Santa Clara v. Superior Court*, 89 Cal.Rptr.3d 374, 395 (Cal. App. Dist. 6, 2009) (Independently weighing the competing interests in light of the trial court’s factual findings, we conclude that the public interest in disclosure outweighs the public interest in nondisclosure.”).

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private and public entities attempt to assert over such content. As both public and private entities search for ways to maximize return in a challenging environment (economic, political, etc.), such sources of information will continue to offer attractive options for leverage, often at the expense of the public interest. It is hoped that courts continue to thwart these efforts.

6.5 Web Archiving and Fair Use

Several recent cases in the past two years have suggested that initiatives to engage in systematic archiving of content can be a fair use. In Perfect 10 v. Amazon.com, Inc., the Ninth Circuit concluded that Google’s creation of its thumbnail index of images was fair use, commenting that “the significantly transformative nature of Google’s search engine, particularly in light of its public benefit, outweighs Google’s superseding and commercial uses of the thumbnails in this case.” However, as the index allows users of the Google search engine to be led to infringing sources of the content, Google could be found contributorily liable: “Applying our test, Google could be held contributorily liable if it had knowledge that infringing Perfect 10 images were available using its search engine, could take simple measures to prevent further damage to Perfect 10’s copyrighted works, and failed to take such steps.”

A conclusion of fair use was also found in another case involving Google, this time its practice of automatically archiving websites unless the owner opted out. In Field v. Google, Inc., a district court again identified the social good that such preservation projects can achieve: “The fact that the owners of billions of Web pages choose to permit these links to remain is further evidence that they do not view Google’s cache as a substitute for their own pages. Because Google serves different and socially important purposes in offering access to copyrighted works through ‘Cached’ links and does not merely supersede the objectives of the original creations, the Court concludes that Google’s alleged copying and distribution of Field’s Web pages containing copyrighted works was transformative.”

Finally, the impact of the recent settlement by publishers and authors against Google also suggests that such archiving projects will continue to present legal challenge but through decision or settlement will be allowed to continue. These developments lend support for similar efforts by institutions provid-

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67 Perfect 10 v. Amazon.com, Inc., 487 F.3d 701, *13 (9th Cir. 2007).
68 Perfect 10 v. Amazon.com, Inc., 487 F.3d 701, *19 (9th Cir. 2007).
ing similar social good by preservation of the cultural record. It may be that the same argument could be made in the case of preservation of grey literature when that collection is unique and does not exist elsewhere and the institutions serves as the sole source of the content. A final archive decision not involving Google also stands for the proposition that such initiatives offer a beneficial societal purpose and can likewise be a fair use.

In *A.V. v. iParadigms, Ltd.*, the court observed that as in the case involving indexing and archiving of websites and web content, the “use of Plaintiffs’ written works [is] highly transformative. Plaintiffs originally created and produced their works for the purpose of education and creative expression. iParadigms, through Turnitin, uses the papers for an entirely different purpose, namely, to prevent plagiarism and protect the students’ written works from plagiarism… makes no use of any work’s particular expressive or creative content beyond the limited use of comparison with other works… provides a substantial public benefit through the network of educational institutions using Turnitin. Thus, in this case, the first factor favors a finding of fair use.” As a result the use of the student-plaintiff’s papers in the Turnitin databases was a fair use. In each of the case the use was deemed transformative and even though the entire work was taken in the instance of images in the Google cases or student papers in the *iParadigms* case the complete taking was necessary to accomplish the good purpose.

In 2009 the Fourth Circuit on appeal affirmed the fair use of student papers in the Turnitin database. In discussing the first fair use factor the court indicated that transforming uses need not alter the content in some way, but need simply put the content to a different and transforming purpose: “Plaintiffs also argue that iParadigms’ use of their works cannot be transformative because the archiving process does not add anything to the work-Turnitin merely stores the work unaltered and in its entirety. This argument is clearly misguided. The use of a copyrighted work need not alter or augment the work to be transformative in nature. Rather, it can be transformative in function or purpose without altering or actually adding to the original work.”

Recognizing the overlap and interconnection between the first and third and first and fourth factors the court concluded that the district court did not err in finding the use of the student papers to thwart plagiarism a fair use.

Again a transformative use is less likely to impact the market but only if the amount taken is no more than is necessary. This is in contrast to the recent case involving the Harry Potter Lexicon. While the nature of encyclopedias and reference guides such as the Lexicon is in general transformative, under the particular circumstances the publisher of The Lexicon: An Unauthorized Guide to Harry

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74 *A.V. v. iParadigms, Ltd.*, 562 F.3d 630, 639 (4th Cir. 2009).
75 *A.V. v. iParadigms, Ltd.*, 562 F.3d 630, 642-645 (4th Cir. 2009). “In sum, we conclude, viewing the evidence in the light most favorable to the plaintiffs, that iParadigms’ use of the student works was ‘fair use’ under the Copyright Act and that iParadigms was therefore entitled to summary judgment on the copyright infringement claim” Id. at 645.
Potter Fiction and Related Material took more than was necessary to accomplish its good purpose.76

6.6 The Unknown Variable of Licensing

Licensing may impact access to grey literature (and other content for that matter) in two ways, one positive and the other negative. It may be that the grey literature is available through an online subscription to a database, posted on or via download from a website or in hard but digital format such as a CD-ROM or other disk. Each of these mechanisms might be subject to a license agreement. While librarians, archivists and other users are familiar with the concept of licensing and database the terms of use accompanying disk-based content is also subject to license. These agreements are often known as a shrink wrap agreement where the CD-ROM or other item is packaged in a box or some sort of container. The box or container is literally wrapped by a thin plastic covering that is shrunk tight to fit snuggly around the box or container.77 Thus the term shrink-wrap is used. The significant characteristic is that the licensee does not see the terms until the package is opened.78 Of course if the would-be licensee does not desire the product (or

76 Warner Brothers Entertainment, Inc. v. RDR Books, 575 F.Supp.2d 513 (S.D.N.Y. 2008). Regarding the books in the Harry Potter series: “Other times, however, the Lexicon disturbs the balance and takes more than is reasonably necessary to create a reference guide. In these instances, the Lexicon appears to retell parts of the storyline rather than report fictional facts and where to find them.” Id. 548. Regarding the companion books to the series the use is less transformative: “The Lexicon’s use of copyrighted expression from Rowling’s two companion books presents an easier determination. The Lexicon takes wholesale from these short books. Depending on the purpose, using a substantial portion of a work, or even the whole thing, may be permissible... In this case, however, the Lexicon’s purpose is only slightly transformative of the companion books’ original purpose. As a result, the amount and substantiality of the portion copied from the companion books weighs more heavily against a finding of fair use.” Id. at 548-549.

77 Jonathan D. Robbins, Advising e Businesses, § 8-2.40. Acceptances on the Internet: Clickwrap, shrink-wrap and browse-wrap agreements (2006) (Shrinkwrap “Software is commonly packaged in a container or wrapper that advises the purchaser that the use of the software is subject to the terms of the license agreement contained inside the package. The license agreement generally explains that, if the purchaser does not wish to enter into a contract, he must return the product for a refund. Failure to return the product within a certain period constitutes assent to the license terms.”). See also, Robert Lee Dickens, Finding Common Ground in the World of Electronic Contracts: The Consistency of Legal Reasoning in Clickwrap Cases, 11 MARQUETTE INTELLECTUAL PROPERTY LAW REVIEW 379, 381 (2007) (“The term ‘clickwrap’ evolved from the use of ‘shrinkwrap’ agreements, which are agreements wrapped in shrinkwrap cellophane within computer software packaging, and that, by their terms, become effective following the expiration of a predefined return period for the software (typically thirty days).” Footnote omitted.).

78 Arizona Cartridge Remanufacturers Association v. Lexmark International,Inc., 421 F.3d 981, 987, at n. 6 (9th Cir. 2005) (emphasis original) (“Another variant involves ‘shrinkwrap licenses’ on software, which impose restrictions that a consumer may discover only after opening and installing the software.”).
service) under these terms the item may be returned. These were the circumstances of the license in numerous cases involving the purchase of computers from Gateway, Inc.\(^{79}\) where the terms found inside the box upon arrival at the purchaser’s home indicated that keeping the item beyond a certain time period or making a particular use of the item constitutes acceptance of the terms.\(^{80}\) The cases suggest that unreasonable terms may be challenged on public policy or unconscionability grounds.\(^{81}\) A variation on shrink-wrap is a scenario where rather than viewing the terms upon opening of the box or container, the terms appear upon installation (of software for example). This was the case in *ProCD, Inc. v. Zeidenberg*, the first decision to enforce a shrink-wrap agreement.\(^{82}\) Although this might more accurately be called a click-wrap,\(^{83}\) some courts and commentators reserve that phrase for online contracting. Courts Previous to *ProCD, Inc. v. Zeidenberg* had refused to enforce shrink-wrap licenses.\(^{84}\) However, since *ProCD, Inc. v. Zeidenberg* many courts have ruled shrink-wrap licenses enforceable.\(^{85}\)


80  *Licitra v. Gateway 2000, Inc.*, 734 N.Y.S. 2d 389, 390-391 (N.Y. Civ. Ct. 2001) (“A contract results when the package is opened and the consumer uses the equipment for a specified period of time which is set forth in the written agreement. Courts have held that such a practice results in a binding contract between the parties.”).

81  Robert W. Gomulkiewicz and Mary L. Williamson, A Brief Defense of Mass Market Software License Agreements, 22 Rutgers Computer & Technology Law Journal 335, 345 (1996) (“Rather than relying on their own negotiating skills or knowledge of the relevant law, most users are better served by relying on the contract doctrine of unconscionability, the contract principle that agreements should be construed against the drafter, the copyright doctrine of misuse, consumer protection laws, and the intense competition within the software market to obtain advantageous terms in acquiring software.”).

82  *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996) (“Shrinkwrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general (for example, if they violate a rule of positive law, or if they are unconscionable).”).

83  See, e.g., *i.Lan Systems, Inc. v. Netscout Services Level Corp.*, 183 F.Supp.2d 328, 329 (D.Mass.2002) (“You plunk down a pretty penny for the latest and greatest software, speed back to your computer, tear open the box, shove the CD-ROM into the computer, click on ‘install’ and, after scrolling past a license agreement which would take at least fifteen minutes to read, find yourself staring at the following dialog box: ‘I agree.’ Do you click on the box? … Is that ‘clickwrap’ license agreement enforceable? Yes, at least in the case described below.”).


Less awareness may be present when using content available from a website. As transactions moved online, so did licensing where terms may appear during completion of the transaction or as the product or service is obtained such as through download. Prompts appear that allow the licensee to view the terms of the agreement and to assent to those terms by clicking “I agree” or some other prompt. Thus the term click-wrap is used to describe agreements where as with shrink-wrap, the licensee is without opportunity to bargain and finds the transaction wrapped solely in the terms offered by the licensor. The legal analysis used in the shrink-wrap scenarios is applied by the court in assessing click-wrap as well. Various courts have also upheld click-wrap agreements as valid. A key...
component in an enforceable click-wrap agreement is the availability of the terms prior to the click and a specific indication that clicking equals assent, i.e., “I agree”, to those terms. If the user is required to “click” to enter it is very likely that an enforceable agreement governs the use of the content found on that website, a website that might include content in the category of grey literature.

If a party is not aware of a term or had no opportunity to become aware of the term then does not undertake any act of assent there is no contract. “As we have seen, standards for forming a contract concentrate on whether there are objective indicia (manifestations) of assent. In the typical online environment, assent to a contract entails assent to terms of a standard form set out by the site owner or product vendor. The assent issue involves whether the site user or product purchaser assented to the terms.” Where there is no manifestation of assent, courts will not hold the party to a term to which it did not agree. In A.V. v. iParadigms, Ltd., the court commented: “the Usage Policy is not binding on Plaintiffs as an independent contract because Plaintiffs did not assent to the Usage Policy… In this case, there is no evidence that Plaintiffs assented to the terms of the Usage Policy. There is no evidence that Plaintiffs viewed or read the Usage Policy and there is no evidence that Plaintiffs ever clicked on the link or were ever directed by the Turnitin system to view the Usage Policy. There is no evidence to impute knowledge of the terms of the Usage Policy to Plaintiffs.”

A similar result was reached in Williams v. America Online, Inc. where the terms could not be viewed until after the “click” and the court concluded that meaningful assent could not be

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89 Compare, In re RealNetworks Privacy Litigation, 2000 U.S. Dist. LEXIS 6584, *6 (N.D. Ill. 2000) (“The user can then click on the License Agreement, listed separately as either ‘RealJukeBox License Agreement’ or ‘RealPlayer License Agreement,’ depending on the product, and easily print out either agreement from the file pull down menu.”); with Comb v. PayPal, Inc., 2002 U.D. Dist. LEXIS 16364 (N.D. Cal. 2002) (arbitration clause found “procedurally unconscionable”: freeze funds, prohibition of consolidation, $5,000 cost of arbitration, venue unreasonable). See also, DeJohn v. The .TV Corporation International, 245 F.Supp.2d 913, 915-916 (N.D.III.2003) (“The electronic format of the contract required DeJohn to click on a box indicating that he had read, understood, and agreed to the terms of the contract in order to accept its provisions and obtain the registration or reject the provisions and cancel the application. This type of online contract is known as a click-wrap.”); Koresko v. RealNetworks, Inc., 291 F.Supp.2d 1157, 1163 (E.D.Cal.2003) (“Plaintiff accepted the terms by clicking ‘I agree’ to the terms and conditions of the contract including the forum selection clause.”); Stomp, Inc. v. NeatO, LLC, 61 F.Supp.2d 1074, 1081 (C.D.Cal.1999); and Regency Photo & Video, Inc. v. American Online, Inc., 214 F.Supp.2d 568, 573 (E.D.Va.2002).


give to terms that could not be viewed.\textsuperscript{92} Sounds logical, but some licensors have attempted to push the envelope of the concept of meeting of the minds.\textsuperscript{93}

One characteristic of a so-called browse-wrap agreement is its occurrence exclusively in web-site settings. More important browse-wraps are characterized by obscurity regarding the terms of the agreement. Obscurity is present both in the appearance of the terms and in the mechanism of assent.\textsuperscript{94} Often the terms do not appear in conjunction with the assent mechanism (“click here to see the terms” together with “click here to agree to the terms”) but rather transport the licensee to some other portion of the website (“to view the terms click here”) or appear only

\textsuperscript{92} Williams v. America Online, Inc., 2001 WL 135825, *3 (Mass. Super. 2001) (unpublished) (AOL motion to dismiss denied) (“Cass, who has more than 20 years experience with main-frame and personal computers, owns and operates Cass, Inc., a provider of database and computer support services. In his affidavit, Cass describes in detail the AOL 5.0 installation process. He states that the alleged harm occurs before the user clicks “I agree”. He describes a complicated process by which subscribers “agree” to the TOS after configuration of the computer has been altered. AOL sets the default for reviewing the TOS to “I agree.” A customer who merely clicks “I agree” is instantly bound by the terms of a TOS she has never seen. The customer's only other option is to click off the default and select “Read Now.” That option also fails to provide a customer with an opportunity to read the TOS. A customer who selects “Read Now” is presented with another choice between the default “OK, I agree” and “Read Now”. Thus, the actual language of the TOS agreement is not presented on the computer screen unless the customer specifically requests it by twice overriding the default...Therefore, the fact that plaintiffs may have agreed to an earlier TOS or the fact that every AOL member enters into a form of TOS agreement does not persuade me that plaintiffs and other members of the class they seek to represent had notice of the forum selection clause in the new TOS before reconfiguration of their computers.”).

\textsuperscript{93} Viewable terms that require the licensee to undertake efforts to determine when changes or up dates to the terms occur are also suspect. See, Douglas v. Talk America, Inc., 495 F.3d 1062, 1065 (9th Cir. 2007). Facts: “Joe Douglas contracted for long distance telephone service with America Online. Talk America subsequently acquired this business from AOL and continued to provide telephone service to AOL’s former customers. Talk America then added four provisions to the service contract: (1) additional service charges; (2) a class action waiver; (3) an arbitration clause; and (4) a choice-of-law provision pointing to New York law. Talk America posted the revised contract on its website but, according to Douglas, it never notified him that the contract had changed. Unaware of the new terms, Douglas continued using Talk America's services for four years.” New terms are not part of the agreement: “Even if Douglas had visited the website, he would have had no reason to look at the contract posted there. Parties to a contract have no obligation to check the terms on a periodic basis to learn whether they have been changed by the other side. [footnote 1]” Id. at 1066. Footnote 1: “Nor would a party know when to check the website for possible changes to the contract terms without being notified that the contract has been changed and how. Douglas would have had to check the contract every day for possible changes. Without notice, an examination would be fairly cumbersome, as Douglas would have had to compare every word of the posted contract with his existing contract in order to detect whether it had changed.” Id.

\textsuperscript{94} See, Rachel S. Conklin, Be Careful What You Click For: An Analysis of Online Contracting, 20 Loyola Consumer Law Review 325, 327 (2008) (“On the other hand, the terms of a browsewrap contract are often inconspicuous or even unavailable to a consumer online; a contract is accepted by performance as the consumer continues to navigate the website or uses a product or service found on the site.”).
after the user scrolls several screens forward. Second, the assent mechanism itself is obscure. Rather than a precise pronouncement of assent (“to agree to these terms, click here”) the licensor conditions assent so some other conduct such as use of website services (“by submitting a query you agree to be bound by the terms”) such as submitting a price-quote or ticket availability query. It should be obvious that the validity of browse-wrap agreements is met with far more scrutiny by the courts.

This is the negative aspect of licenses. Terms of the license may restrict use of the content by limiting reproduction of the content to the specific user, curtailing further distribution of the content beyond the specific user or dictating how the content may be used, i.e., limiting the ability to make a public display or public performance of the content or prohibit making derivative use of the work. While it is beyond the scope of this chapter to discuss in detail the “law” of licensing one recent trend of significance is that website terms of use or so-called End User License Agreements (EULAs) are enforceable including those circumstances where use of the website can constitute assent to those terms.95

The Creative Commons license is likewise enforceable.96 This is the positive side of licensing. Release of grey literature from its source (e.g., trade association, learned society or professional organization, etc.) or re-distribution of grey literature by a library, archive, etc. may be made pursuant to a Creative Commons or other license structure. Such license prohibits commercial or derivative use and in addition condition use by others on a similar commitment of open access, so-called serial licensing or in the terms familiar to Creative Commons users “share-alike” where the subsequent user (the second user) must also accept conditions similar to those regulating the first user. In this way the dissemination chain of grey literature is maintained by all uses in an open access environment and under similar rules. The extent to which grey literature is available subject to license is unknown but as with TPM use of licensing by content providers is increasing. Use of license terms can prohibit certain anti-access conduct from occurring. For example, grey literature could be made available to the public subject to license term that prohibits the placement of TPM on further uses of the content in addition to the “no commercial” use of the existing and familiar Creative Commons schema.

95 See, *Ticketmaster L.L.C. v. RMG Technologies, Inc.*, 507 F.Supp.2d 1096 (C.D. Cal. 2007) (automated extraction by brokers of ticket information from website): “Thus, by the Terms of Use, Plaintiff grants a nonexclusive license to consumers to copy pages from the website in compliance with those Terms. Inasmuch as Defendant used the website, Defendant assented to the terms.” Id. at 1108.

96 See, *Jacobson v. Katzer*, 2008 WL 3395772 (Fed. Cir. 2008) (“We consider here the ability of a copyright holder to dedicate certain work to free public use and yet enforce an ‘open source’ copyright license to control the future distribution and modification of that work.” Id. at *1. The court concluded that Creative Commons type licenses are enforceable under the copyright law (“the terms of the Artistic [Creative Commons] License are enforceable copyright conditions.” Id. at *8.). See also, Lydia Pallas Loren, Building a Reliable Semi-commons of Creative Works: Enforcement of Creative Commons Licenses and Limited Abandonment of Copyright, 14 *George Mason Law Review* 271 (2007).
In light of recent case law in the United States these limitations, in this instance to the benefit of the public, would be enforceable.

6.7 Conclusion

The expanded collection and dissemination of grey literature (as well as other works protected by copyright) through archiving and digitization is bolstered by recent case law establishing the circumstances under which such initiatives can be a fair use under U.S. copyright law. In addition legislative reform is under way to increase range of use rights available to institutions regarding protected content including grey literature. Moreover, the particulars of copyright enforcement may also work to minimize the legal risk in remaining circumstances. Finally, licensing may prove to be a bane as well as a boom to the continued access, preservation and use of grey literatures as more and more content generation is moved online and providers adopt a method of distribution based on licensing models.
Part I, Section Three

Channels for Access and Distribution of Grey Literature

The U.S. Government’s Interagency Gray Literature Working Group (IGLWG)\(^1\) defined grey literature in 1995 as "foreign or domestic open source material that usually is available through specialized channels and may not enter normal channels or systems of publication, distribution, bibliographic control, or acquisition by booksellers or subscription agents".

The goal of this section is to provide insight in the distribution channels of grey literature, especially in the field of academic publishing. The focus rests on digital information and open access.

In the introductory chapter to this monograph, we stated that the proportion of grey documents in relation to commercially published documents on the Web continues to increase. This development seems closely linked to the production of grey literature in digital environments, as well as to retrospective activities commensurate to republication.

We further purport that open archives will provide more tailored services and functionality for at least some segments of grey literature namely preprints, doctoral theses, and reports. We mention these three types of grey documents, because they have come to form special collections more visible than ever in repositories.

The first chapter in this section presents an overview of production and dissemination channels for Ph.D. theses. Stock and Paillassard’s work is primarily based on the situation in France, however, their study also explores several national and international projects and initiatives on electronic theses and dissertations (ETDs) in Europe and the United States. The authors ascertain that while “technical developments have greatly facilitated the dissemination of ETDs, (...) legal issues (...) became an obstacle.” And, they conclude that “the growing complexity of the ETD landscape calls for explicit policies in the future to inform the user of a given repository on deposit, validation, access and reuse of a thesis.”

The second chapter in this section rest assures that “there is no doubt (...) GL is at home in open archives”. Luzi sets out a comprehensive and well-documented

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\(^1\) This working group became dormant in early 2000. However, a new working group is currently in the process of being launched under the name Grey Matters USA. A leadership group was formed during the Eleventh International Conference on Grey Literature held in the Library of Congress on 14-15 December 2009.
overview on the evolution of grey literature during the past two decades moving
from print to digital formats and from library holdings to open repositories. Luzi’s
study helps in understanding the recent history of scientific information. Coverage
of the preprint culture, scientific artifacts, institutional repositories, and intercon-
nected knowledge networks are primary features in her line of discourse. In con-
clusion, Luzi examines the relationship between grey and conventional literature
in an open environment. She remarks, “the coexistence of GL with conventional
literature actually provides an ideal, complete coverage of the research results of
any given scientific institution or disciplinary community. (...) The distinction
between GL and conventional literature is becoming increasingly blurred (...) the
main difference vis-à-vis conventional literature is inherent mainly in the fact that
GL is not subjected to any formal peer-review process.”

For nearly a quarter century, a number of national libraries and research cen-
tres in Europe maintained a network for the collection and dissemination of grey
literature built around the SIGLE (System for Information on Grey Literature in
Europe) database. Our final chapter in this section describes the integration of the
former SIGLE records into a new open access project called OpenSIGLE². The
authors discuss the roles of the service provider and data provider, present exam-
ple s of usage statistics, and conclude with a research proposal that would explore
the creation of an e-infrastructure in order to serve the OpenSIGLE Repository.
“The outcome of this project would support and strengthen policy development
for infrastructures in the field of grey literature, where open access to their collec-
tions and other knowledge based resources stand central.”

Five years ago, Willinsky stated that open access to information is a common
good³. And for a couple of reasons, this principle appears to apply more to grey
items than to journals and books. First of all, because a significant percentage of
grey items are produced by public bodies, and secondly because they are already
“off-commerce” i.e. not controlled by commercial suppliers. For this kind of pub-
lisher, the economic challenge or risk of “going OA” seems rather minimal. And,
the studies in this section seem to corroborate that public scientific information
centres are already more or less involved in open access projects with grey litera-
ture.⁴

With this in mind, we urge that the readers consider the following three ques-
tions as they proceed through the chapters in this section:

What is (could be) the impact of open repositories on grey collections? Does
the open access movement improve the search and retrieval of grey documents?

² http://en.wikipedia.org/wiki/OpenSIGLE
international survey on grey literature’. Interlending & Document Supply 34(3):96-104.
And finally, how can one improve the referencing and access to grey documents deposited in open repositories?