7. A central register of copyrightable works: a U.S. perspective

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1. INTRODUCTION: GENERAL ISSUES CONCERNING CENTRAL REGISTERS/ DATABASES

This chapter will provide a U.S. perspective on the issue of the feasibility of a central digital database or register of copyright works (hereinafter Central Register). The larger policy goal that serves as a backdrop is preservation and access to cultural heritage. While the U.S. copyright system has a number of distinctive features, the one of particular interest in the present context is the long experience in the U.S. with a formal system of copyright registration.1 This system has promoted access and preservation

* I would like to thank Pam Samuelson for her comments.

1 Although it will receive little attention here, the most atypical U.S. copyright doctrine is fair use. 17 U.S.C. sec. 107. Not only has fair use long been a greatly more expansive doctrine in the U.S. than similar sounding notions such as the doctrine of fair dealing in the UK but fair use is playing an increasingly important role in U.S. copyright law, perhaps best seen by the fact that Google has relied predominantly on this doctrine in its legal defense of the Google Book Project, which has digitized some 12 million books, mostly without authorization, as of late 2009. Steven Hetcher (2006), ‘The half-fairness of Google’s plan to make the world’s collection of books searchable’, 13 Michigan Telecommunications and Technology Law Review, 13 (1), 26, available at: http://www.mttlr.org/volthirteen/hetcher.pdf. Fair use doctrine considered as a potential solution to the problem of creating a central register was not within the purview of the conference out of which these chapters emerged and will not be considered here as a possible grounding or constitutive element of a central register. This is reasonable as the discussion is intended to be limited to pragmatic or feasible solutions and it is probably fair to say that it is not feasible to think that other countries that want to take part in building a central register are likely to adopt the fair use doctrine as a policy solution in the present context when they have adamantly refused to do so in the past. Google has invoked the fair use doctrine in other circumstances which have made it apparent that the doctrine will carry no water in a European context. See Ben Hall and David Gelles (2009), ‘French ruling raises resistance to Google’
of cultural heritage in the U.S. The central question, then, is whether this long experience may be used as a source of information or guidance in building a central register with a broader jurisdictional sweep than that of the U.S. First, consider some general thoughts regarding central registers or databases.

To equate ‘register’ with ‘database’ is to suggest that any register of works is likely to be digital; although databases are not by definition digital, it is digitization and its concomitant enhanced functionality that has raised databases generally to a new level of economic and social importance. In particular, one of the most important general features of digital databases is their powerfully enhanced search functionality. In the context of a copyright policy analysis, such functionality cannot be taken as an unqualified good, however, as it may only come at a cost of some unacceptable tradeoff. A real-world setting in which this issue is highly contentious is the Google Book Project, which is attacked by its critics in main part because its search functionality, even to provide ‘snippets’ of text, involves the copying of whole works and repeated and systematic use of these whole copies. Setting aside the question of the legality of Google Books, the important point for our purposes is that any nuanced discussion of a central register qua database must look to distinguish among the various features which may attach to particular databases. Another way of making this point is to note that the quest for an acceptable central register, qua database, is presumably a different quest from that of searching for an acceptable central register, qua, say, card catalog of the variety that has long existed in libraries across the world.

Another general point about registers is that it would seem reasonable...
to assume that other things equal, the larger the number of works in the central register, the better, as this will provide access and preservation to a larger amount of cultural heritage. Implicit in this fact then is the desiderata that the central register contains works in the public domain as well as works under copyright protection. And by further implication, if we take the notion of cultural heritage in a transnational sense, as it seems intuitive to do, then, other things being equal, the central register would contain copyright protected and public domain works from as many nations as possible.

Moreover, the goal is presumably not merely access and preservation as such, as each of these goals may be satisfied to a greater or lesser degree. Thus, other things being equal, the goal is ostensibly a central register that would maximize access to, and preservation of, all the included works. While this last implication may seem as straightforward as those previous, in fact it raises a fundamental ambiguity; what precisely does it mean for a central register to maximize access and preservation? Most salient, would the hypothetical ideal be one in which there was maximally functional access (such as by term searches, image searches, recommendation engines, and so on) to all works that together are constitutive of cultural heritage? If the answer is yes, then the hypothetical result would appear to be tantamount to that thing long pined for by many copyright theorists – the Library of Alexandria in cyberspace.

This implication is odd, however, in an important way. The project we began with was to better understand the pragmatics of a central register. It is not obvious that a register can be equated with a library. While the notion of a register is an ordinary language notion without a precise meaning, much less a precise legal definition, nevertheless, I think it fair to say that in ordinary language, it would not hurt to distinguish the central register to a library from the library itself. My point, of course, is not that substantive policy debate should be constrained by the ordinary language analysis of the constitutive terms of the debate. To do so would be to interject a subtle yet pernicious form of legal formalism. Rather, the point of ordinary language analysis is that we be as clear as possible on

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8 *Merriam-Webster’s Dictionary and Thesaurus* (2007), (defining register as a ‘[A] written record containing regular entries of items or details.’).
the terms we are using. This point might seem trivially true but this is not so, because the present policy discussion takes place against a background of big-time, high-stakes litigation. In an adversarial setting, terms will be defined for adversarial reasons, not public-regarding ones. For instance, if Google had its way, we would expand our ordinary language concepts so as to promote its private goals by linguistically equating ‘register’ qua ‘reference work’, with ‘register’ qua fully searchable database of full, digital copies of works. In this vein, Google has long equated Google Books Project with a ‘card catalog’ and more recently, under the terms of the proposed settlement, sought to create a ‘registry,’ when in fact it provides searchability and complete, unauthorized texts.9

The opponents to the Google Book Project argue that since the actual performance of snippet searches involves the use of unauthorized full copies, the comparison to a register is inappropriate.10 On this view, Google Books is not tantamount to a book registry but instead to a book library, as it provides unauthorized search functionality to whole works.11 Google’s opponents will claim that a register is a means to summarize, order or systematize some underlying collection. It is not the collection itself. For example, a register of historic homes is a compilation of information about these homes (detailed or not) but it is not the collection of homes themselves.

This argument may prove too much, however, as those seeking to construct a central register in other circumstances seek to include full searchable copies of works. For instance, Europeana seeks to provide searchable full digital copies.12 It would seem likely that the central register will want to include Europeana. Thus, the criticism of Google Books cannot be that it contains full digital copies, per se, but rather that Google came to possess these copies inappropriately, namely, by copying without authorization. Thus, when we consider the relevance of the U.S. experience, we must consider not only which works are contained but how they got there.

The word, ‘central’, in the term, ‘central register’, is also worth exploring.

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In the context of a register of copyrightable works, it is not obvious what would count as ‘central’. Given that we are talking about something that is presumably digital and aspires to be global, seemingly the term is not meant spatially or geographically as in the term Grand Central Station. The term, ‘central’ most interestingly would refer to the idea that the register would gather up cultural heritage from hither and yon and bring it together in some fashion, that is, centralize it. Alternatively, the register’s centrality might consist in its ability to link or bring together some number of satellite (non-central) registers of copyrightable works. This linguistic analysis lends itself to the same conclusion as above in that either of these two sorts of centrality would be well served by a register that brought together works from as many national copyright jurisdictions as possible.

Indeed, a spatial understanding of the term may not only be in apropos but normatively suspect. One could argue that a physically central register may be undesirable, if by physical we mean something like stored and operated from some physical location. One might plausibly argue that in a world of cloud computing, it is no longer necessary for the notion of central in ‘central register’ to have any meaningful physical referent. And if it is not necessary, then why have it? One’s democratic instincts may bristle a bit at the notion of physical centrality. The norms whereby capitals are chosen are plausibly seen as implicitly viewing physical centrality as a necessary evil, better than non-centrality, yet inherently imperfect in that complete centrality in the sense of equidistance is not in practice attainable. A physically central location is only relatively so. Thus, it is worth asking whether the term, ‘central’, as currently used in the term, ‘central register’, contains an implicit physical component, and if so, why.

If physical location is necessary for the central register (even if only for now), then what factors would be relevant in determining the most central location? The question has practical significance; if the Google Books Registry is legal in the U.S. but not, say, in France or Belgium, then whether the central register may contain the Google Books Registry may turn on where the servers that physically house the central register, or some subparts of it, are located. More generally, the issue arises as to whether the central register may differ for different people, depending on the location from which they are accessing the central register. Intuitively, this notion may seem contrary to the very notion of centrality meant to be captured by the word, ‘central’, in the term, ‘central register’. But perhaps our intuitions need to be adjusted when it comes to determining the best policy under new circumstances. If it is a probable fact that different national copyright regimes will continue to vary to some extent despite the Berne Convention, then perhaps it is a strength of such a register that
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it builds in this diversity by making access and use of the central register variable. The idea of one central register universally accessible by all is an attractive ideal on the surface. But just as Berne exists despite national differences, perhaps a central register can do so as well, and may need to do so, if it is to be programmatically possible.

Another fundamental issue to keep in mind as we discuss the possibility of applying a U.S. model to the central register is what, if any, normative constraints or goals apply to the project. To take a simple example, compare the European Union (EU) and U.S. approaches vis-à-vis the normative underpinnings of copyright policy. To speak in broad terms, the EU accepts moral rights of authors as having independent normative status, while the U.S. approach does not. Rightly or wrongly, there is a fairly wide consensus among U.S. copyright policy theorists that the economic approach is more liberal in that rights are only justified to the extent that these serve general social welfare. Continental copyright theorists need not cede the liberal ground, however, as they can reasonably view recognition of deontological rights as grounded in fundamental human rights theory and therefore liberal in that sense. Needless to say, it is beyond the scope of the present project to seek to determine who has the better position here. The important point is that there is indeed an issue; the issue being the normative underpinnings of the central register. One possibility is that a central register can somehow navigate this difficult issue. Perhaps the Berne Convention is the most sensible normative framework to apply in as much as both moral rights countries – the EU – and economic rights countries – the U.S. – are signatories. Are we then safe to assume that the ‘central register’ should be Berne compatible? And if not, then what are the normative underpinnings of the central register? This question is not academic. As discussed below, this is seen most clearly in the preference for opt-in versus opt-out when it comes to various issues regarding which works end up in the central register and by what means they do so, and how these questions will be importantly influenced by whether moral rights or economic rights are the dominant normative concern.

It is traditional to contend that it is completely contrary to the Berne

regime to adopt any form of formal registration regime. This book itself, however, bears witness to a potential shift in thinking on this issue. One can argue that while a complete lack of formalities may have once made sense, in a digital world in which powerful databases may be constituted that are capable of dramatically promoting the interests of authors, the better question may be, not whether but by which formalities, the moral rights of authors may best be promoted. Thus, looking at the U.S. experience with a registration system, the most practical question may be which features of this system are most compatible with a moral rights approach, so understood.

Realistically the only way to have a comprehensive database (at least for the millions of works already in existence) may be by allowing some sort of opt-out rule such that an automated process can copy whole collections of works or utilize pre-existing collections of works or pre-existing registers of works. For the millions of works already in existence that are orphan works, the core fact is starkly simple, either the rule allows opt-out or the register will not contain these works. By definition, the authors of orphan works are unavailable. Thus, if opt-in is required, the resulting databases will be bereft of these works and thus constitute incomplete collections.

It is not a matter of simply allowing or disallowing an opt-out regime. Other options are available and normatively relevant. For instance, the register could vary the flow of licensing fees in different ways within an opt-out regime. The first proposed Google Books settlement allowed the register to collect licensing fees based on the use of orphan works and distribute this money to known authors participating in the registry. This feature was heavily criticized by a number of commentators.

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16 See Berne Convention art. 5(2) (Paris text) (‘The enjoyment and the exercise of these rights shall not be subject to any formality’).
18 U.S. Copyright Office (2006), Report on Orphan Works, 1, available at http://www.copyright.gov/orphan/orphan-report-full.pdf (accessed on 2 June, 2010) (defining ‘orphan works’ as ‘[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.’).
solutions have been proposed that are likely more in line with moral rights concerns, such as distributing the money to a worthy cause or not collecting it at all.21

Another basic question to raise is what is the connection between a Central Register and the stated goals of preserving and accessing cultural knowledge. The connection between a Register and the enhancement of access is straightforward. A register, of whatever sort, unless inaccessible, will naturally promote access, as users will be able to use the Register to help locate cultural materials they are looking for. The connection between a Register and preservation is not so straightforward, however. One could be standing outside of the smoldering ruins of the original Library of Alexandria and yet hold a pristine copy of the card catalogue to said library in hand.

Indeed, Google has a strong argument that whatever else might be said to detract from the Google Book project, the fact is that a registry of works of the sort contemplated by Google promotes preservation in a direct manner because whole digital copies are produced when they did not exist before, and these copies are not only in the private hands of Google but in the public hands of the participating libraries. This means that if the rare book room of a participating library were to burn down, sole copies of works would not be lost to humanity. To the extent that Google Books promises not only universal access, but also universal preservation of complete works, it is undeniably attractive. Other things equal, more comprehensive databases are better. But incomplete databases may nevertheless be very valuable. The whole of recorded history is imperfect in ways small and large and yet very valuable. A searchable database of all Greek philosophical literature, for example, can be highly valuable despite large lacunae in the historical record. The better way to think about the issue, then, is that the more comprehensive the database, the better, but that one that is not completely comprehensive may still be highly valuable. Thus, the central register could essentially seek to be the public equivalent of Google Books, or it might choose to be something less. This is a choice of policy, not technology; Google Books shows what is already possible.

The next section will look in some detail at the U.S. experience with a formal registration regime so that the section after that can evaluate the worth of this experience in terms of a search for a central register that would be cognizant of the issues raised in the above discussion.

2. A BRIEF LOOK AT THE U.S. HISTORY WITH A COPYRIGHT REGISTER

The Copyright Office was created in 1897 to administer registrations and deposits. The chief officer is the ‘Register of Copyrights’. In addition to this principal administrative function, the Copyright Office promotes the overall policies of the Library of Congress. In order to perform its function as a register, the Copyright Office maintains voluminous records. Its card catalog contains records for over 20 million copyright registrations, which including renewals, results in more than 50 million catalog entries. An index of copyright registrations from 1870 to the present is contained both in the copyright card catalog and in automated files for works after 1977. The Copyright Office also keeps an index called, an ‘Assignment of Related Documents’, with records pertaining to assignments, licenses, and other ownership interests in a copyright. All of these records are open to the public. For a fee, the ‘Document’ section of the Copyright Office will search records and issue a report concerning the ownership status of a work. This elaborate registration system is unique in the world.

Generally, registration is permissive, voluntary and can be effected at any time during the term of the copyright. Permissive registration confers important advantages for the registrant. First, it establishes a public record of the claim of copyright. Second, it secures the right to file an infringement suit for works with the U.S. as their country of origin. Third, registration established prima facie validity of the copyright. Fourth, it makes...

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22 Supra note 2, at 266.
23 The Register of Copyrights is appointed by the Librarian of Congress and is the Assistant Librarian of Congress for Copyright Services. See U.S.C. sec. 701(a). Information about the Copyright Office such as the procedures for registration and the accompanying fees can be found at its website: http://www.loc.gov/copyright
24 Idem. It is an historical anomaly that the Copyright Office is under the Library of Congress and hence in the legislative branch of government. By contrast, the Patent and Trademark Offices are placed in the executive branch under the Department of Commerce. See Leaffer (1999), 266.
25 See Copyright Office Circular R23.
26 See Copyright Office Circular R22.
27 See Copyright Office Circular R22.
available a broader range of remedies – allowing for statutory damages and attorney’s fees. Finally, only if registration is made, will recordation with the Copyright Office give constructive notice of the facts stated in the recorded document. This set of advantages evidently provides an inducement to register for many creators of copyrightable works, particularly for commercial entities, as the Copyright Office has over 500 employees and processes in the proximity of 700,000 registrations annually. These advantages are enhanced by the fact that registration is relatively inexpensive and requires little examination for basic validity of the copyright.

Any copyright owner (including owners of exclusive licenses) can register a claim for a copyright. The actual process requires that the claimant send three items in the same envelope to the Register of Copyrights. These are (1) a completed application form, (2) a deposit of the work to be registered, and (3) a (non-refundable) fee. Copyright registration is effective on the date of receipt in the Copyright Office of these elements regardless of the duration of time that passes before an actual registration is issued by the Copyright Office. Registrants must use the specific forms printed by the Copyright Office. There are different forms for different types of works. For example, ‘SR’ is designated for published and unpublished sound recordings.

After examining these materials submitted by the applicant, the Register of Copyright will register a claim to copyright if, ‘the material deposited constitutes copyrightable subject matter and that the other legal and formal requirements . . . have been met’. The Register of Copyrights has authority to refuse to register a work as invalid. The examining division of the Copyright Office considers only the material deposited and the application. Other than looking for obvious problems, the examiner does not look into the facts outside of the application. Nevertheless, courts typically defer to the Register’s decision to reject a claim.

The 1976 Copyright Act originally required registration of a claim for copyright as a prerequisite for bringing a suit for infringement. As of 1 March 1989, however, registration as a prerequisite for an infringement suit is only required for works whose country of origin is the United

28 Open Book Alliance, supra note 10.
29 See 37 C.F.R. sec. 409.
31 Other forms include VA, for pictorial, graphic and sculptural works; PA, for the performing arts; SE, for serials; TX, published and non-published non-dramatic literary works (books computer programs, etc.); GR/CP, for registrations covering a group of contributions to a periodical. See Copyright Office Circular Rlc.
States. This rule applies regardless of whether money damages, injunction or impoundment are sought as remedies in some particular action. The only exception to the registration requirement for works of U.S. origin applies to actions brought for a violation of the rights of attribution and integrity under 106(A) for works of the visual arts. This exception, 106(A), is explained by the U.S. Congress’s desire to promulgate rules to make the U.S. system more Berne compatible.

For a work whose country of origin is a Berne Convention country, registration is not required to bring a lawsuit. Though not required, even for Berne works, registration is strongly encouraged by the 1976 Copyright Act. For all works, regardless of their country of origin, registration within five years of its publication confers prima facie validity of originality and ownership. More important, registration is a prerequisite to receiving statutory damages and attorney’s fees. This may be a powerful incentive as in some circumstances, owners may be unable for practical reasons to prove actual damages or profits and thus statutory damages may be the only viable remedy. Another benefit is that recordation of a document in the Copyright Office gives all persons constructive notice of the facts stated in the recorded document. For lawsuits commenced after 1 March 1989, the Berne Convention Implementation Act 1988 (BCIA), amendments have abrogated the recordation of a transfer of copyright ownership as a requirement to bring a suit for infringement. Recordation is still required under section 205(c) to give constructive notice of the facts stated in the recorded document, however.

Finally, the requirement of deposit of works with the Copyright Office must also be mentioned. One goal is to provide copies of the work for the

33 See 17 U.S.C. sec. 411(a). In general, a work that is first published in the United States is considered a work whose origin is the United States.
35 17 USC sec. 411(a).
37 The important consideration for determining what counts as a Berne Convention work is the location of the publication and not the nationality of the author.
38 See 17 USC sec. 412.
39 See 17 USC sec. 205(c).
40 See 17 USC 205(c). Thus, registration may be important in a situation in which a conflict in claims arises between two claims of transfer of ownership. Priority will be given to the transfer executed first, but only if it is recorded within one month of this execution in the United States (two months in a foreign country), and recordation is made in the manner required to give constructive notice. Otherwise the latter transfer will prevail if it is the first properly recorded and the transfer was taken in good faith. See 17 USC sec 411(a).
collections of the Library of Congress. This provision has been in place since 1790. The second goal is to identify the work in relation to the registration of the work. These two deposit requirements overlap because since 1870 a single deposit has been accepted for both Library of Congress and registration purposes. Failure to comply with the deposit requirements will not cause a copyright to be forfeited, however. Requirements are enforced, when they are, by a graduated series of fines. Copies of deposit copies may be obtained for a fee when requested by the claimant, by an attorney for litigation purposes, or when ordered by a court in the course of litigation. They are not, however, available to be digitally searched. Thus, if the hope was to look to the U.S. system as a guide to achieving a searchable database of works, the key point is that this has not even been available in the U.S. itself. Perhaps more promising, then, is not the U.S. history with registration, but instead the hope expressed by the Copyright Office for private development of registers for orphan works. One response by theorists from a moral rights background might be to reject this possibility out of hand, as private domain solutions are not part of the solution set, as it were, for the central database. This adds nuance to the definition of ‘central’ discussed earlier. Here, ‘central’ means something like, ‘centralized administration’ of a publically provided good, that is, a governmental solution, or better, intergovernmental solution, as opposed to a private solution.

3. IS THE U.S. EXPERIENCE OF ANY INTEREST?

After the previous brief survey of the long U.S. history with a copyright registration system, the next question to consider is whether, and if so, how, this experience has anything to teach when it comes to the issue of a Central Register or database. For purposes of answering the

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41 See secs 7.10–7.15.
42 See Dunne, Deposit of Copyrighted Works, Copyright Office Study No. 20 (1960). The requirements are not identical, however. One copy of an individual contribution to a collective work must be deposited for registration, but is not mandatory with the Library of Congress. In addition, registration requires deposit of one complete copy of phonorecord of any unpublished work, whereas unpublished works are completely exempt from deposit with the Library of Congress. Finally, works published outside the United States are exempt from the mandatory deposit, but not deposit for registration purposes.
43 See 17 USC sec. 407(d)(3).
44 See 37 C.F.R. sec. 201.2(d) (1987).
45 See supra, note 18.
question, the U.S. history is usefully divided into two periods – pre and post its entrance into the Berne Convention, effective in 1989. Under the 1909 Act, publication without notice could cause a work to slip into the public domain.\textsuperscript{46} The 1909 Act also led to more works entering the public domain more quickly, due to the requirement of registration in order to receive a second term. The first term was for 28 years. In not formally renewing prior to expiration of this time, the work entered the public domain.\textsuperscript{47} This meant many works entered the public domain very quickly. This was a double-edged sword. A great number of works that had no real market value were made publically available, a social good, but on the other hand, the formalities also came as an unpleasant surprise to others.\textsuperscript{48} Numerous commentators perceived this as an unfair result.\textsuperscript{49}

Due to these two mechanisms, the 1909 Act furthered the goal of a more thorough register. Creators would likely respond to a strong incentive to register (and provide notice), namely, potential loss of copyright. This likely led to more people registering and thus a more comprehensive register. In general terms, the registration system has been defended as producing a ‘more efficient, readier market for copyrighted works. It facilitates transfers, assignments and licenses of copyrighted works because potential transactors will have greater confidence in the validity of the work and will also be able to glean a better sense of what is available on the market’.\textsuperscript{50}

Based on these features, the 1909 Act registration system was anathema to a traditional moral rights approach, in that failure of adherence to a formality might cause loss of copyright.\textsuperscript{51} Seemingly, then, a central register with the 1909 features would be one in which a core principle of a moral rights approach was given up – copyright without formalities. Things are not quite so simple, however, because while whole works could indeed unwittingly fall into the public domain, it was also true that works that were never published in the first place were permanently protected

\textsuperscript{46} See \textit{Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.}, 194 F.3d 1211 (11th Cir. 1999).
\textsuperscript{47} See generally Nimmer and Nimmer, \textit{supra} note 14, §9.05.
\textsuperscript{48} Idem.
\textsuperscript{49} Idem, §9.02.
\textsuperscript{50} Leaffer (1999), \textit{supra} note 2, at 268. See also Arthur Levine and Jeffrey L. Squires (1977), ‘Notice, deposit and registration: the importance of being formal’, \textit{UCLA Law Review}, 24, 1232, 1254.
\textsuperscript{51} See Nimmer and Nimmer, \textit{supra} note 14, §8D.04.
under common law copyright. Thus, common law copyright can be seen as promoting moral rights.

Nevertheless, if we think it pragmatic that the central register be Berne compatible, a solution would try to avoid the situation in which works may unwittingly fall into the public domain. As discussed in the previous section, in the post-Berne experience of the U.S., the formalities are not mandatory and yet strong incentives are provided to register. While this presumably would not be completely satisfactory to all moral rights theorists, it may be viewed as a tolerable compromise that is justified overall in as much as it allows for the creation of a U.S.-style register.

Assuming that incentivizing participation in a formal central register is tolerable to its prospective participants who are moral rights proponents, the next question is, are there any other significant problems with this register. Unfortunately, there are. The main problem is lack of breadth of works registered. The fundamental problem is the incompleteness of the database or register. A search of Copyright Office records thus may be misleading because the absence of some particular work does not mean that it is not protected. This is a necessary implication of the fact that registration is essentially voluntary and many copyright owners choose not to register. Another problem with the register is due to the manner in which its database is created. As noted in the previous section, aside from any obvious problem with an application, the Copyright Office accepts as true all information as provided by an applicant for registration and does not make any factual findings. In particular, the Copyright Office will record any instrument purporting to involve a copyright interest without evaluating its legal sufficiency. This may lead to claims of ownership and the attachment of a copyright notice on physical copies, and so on, when in fact the work could not plausibly be copyright protected, were the claim actually challenged. The first problem mentioned – lack of breadth of the Register – is closely related to what has come to be known as the ‘orphan works problem’. As noted earlier, an orphan work is one for which the


54 U.S. Copyright Office (2009), How to Investigate the Copyright Status of a Work, 3 (‘The absence of a notice in works published on or after March 1, 1989, does not necessarily indicate that the work is in the public domain’), available at: http://www.copyright.gov/circs/circ22.pdf (accessed on 2 June, 2010).

55 See Compendium II of Copyright Office Practices sec. 1603.01.
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The author is not available to be contacted. This may be because the information in the register is not up to date or because the work was never registered in the first place. A registration system that creates incentives but is not mandatory leads to a larger number of the latter sort of orphan works.

The inadequacy of its current approach to deal with orphan works is admitted by the Copyright Office which has promulgated an Orphan Works Report. This report is of great interest for what it says about the topic of this chapter. In as much as we are looking to the U.S. registration system for what it might have to say regarding a central register, the important point is that even by the lights of the Copyright Office, the current U.S. regime does not adequately address the problems presented by orphan works.

Nevertheless, what the Orphan Works Report has to say regarding registration is of great interest. The most important point is that according to the Copyright Office, new legislation is in order to deal with the orphan works problem. Especially important for our purposes is that the Copyright Office calls for the formation of a registry of orphan works. The Copyright Office clearly expresses a dis-preference to be saddled with operating a registry for orphan works, however. In fact, the report expresses a preference that private actors come in to assume the role of registry builders. Such a private register would likely be anathema to a traditional moral rights approach for the same sorts of reasons that Google Books is.

The notion that a Central Register be public not private appears to be an implied assumption in the present project. Thus, it is worth noting that there is nothing in the Orphan Works Report that would appear to preclude a publically created register of orphan works. The obvious implication is that while the U.S. Copyright Office may not want to create an orphan works registry, some other entity, such as an intergovernmental organization or a group of nations by means of a treaty could do so. Under U.S. law, legal change would be necessary. The Orphan Works Report recommends disallowing statutory damages when usage of an orphan work is preceded by a reasonable search for the owner. Once the usage occurs, under these conditions, even if the owner did emerge,

56 See supra note 18.
57 U.S. Copyright Office, supra note 18, at 1–3.
58 Idem.
59 Idem, at 106.
60 Idem, at 109–10.
she would only be entitled to real damages, which as the report notes, will often be little or nothing. By iteration of works being added, a database would build up over time.

It is noteworthy, however, that even with the sort of register that would result from the combination of a U.S.-style registry with the sort of private registry suggested by the Copyright Office for orphan works, much ‘cultural heritage’ will still go unregistered. This is true in significant part due to the explosion of user-generated content. It does not appear that the orphan works registry envisioned by the Copyright Office would have a means to effectively include the vast gamut of user-generated content, yet this content is undeniably ‘cultural heritage’ of growing significance. There may be no simple solution that does not involve a painful trade-off; either we accept opt-out in some form, or we learn to live with an incomplete central register. The type of registry of orphan works foreseen by the Copyright Office would be built over time and hence would always be behind the curve in terms of tracking content emerging through non-traditional, non-commercial channels, such as is often true for user-generated content.

From the above discussion, we see that the U.S. experience with a formal registration system is instructive. What we learn, however, does not present an overly rosy picture. In line with the U.S. model, there could be a register of works and it would be useful. Nevertheless, its lack of completeness, especially with regard to orphan works and user-generated content would be a serious drawback.

A general lesson we learn is that the sort of register we end up with is importantly a function of the tradeoffs we are willing to make. The issue of tradeoffs was seen in most detail above in the context of Google Books. It is one thing to say that Google Books and fair use will not be considered as part of the solution, as I did at the outset, and quite another to say that it will not be considered at all. It would be to hide one’s head in the sand to act as if Google Books does not exist, given the important role it is already playing. One reason to nevertheless give Google Books short shrift might be that Google Books was seen as an actual contradiction to a central register of the sort contemplated in the present project. These entities are not logically inconsistent, however. It could be the case that Google Books existed in its

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62 See generally U.S. Copyright Office, supra note 18.
domain and that a central register existed in its domain. In fact this seems to be the direction we are headed. For like it or not, Google Books is likely to prevail legally, in the sense that some version similar to one envisioned in the current settlement talks will come to pass. Under the revised settlement, Google will not be able to access EU works. Thus, if there is success in building a central register of the sort under discussion here, we will be in a circumstance in which both it and Google Books exist and each is distinctive in their content and mode of functioning.

Would this mean that a person would have access to both registers when searching for something? This would be true for a searcher in the U.S. I will leave it to others to say whether a person in France would violate the moral rights of an American author by searching her book using Google Books. Indeed, one could perhaps characterize Google Books as an element of the central register – a sub-part for which particular rules apply to a particular set of works and perhaps for a particular set of users. The notion that different categories of works should have a different status in a central register might seem odd at first. But on further examination, this notion is to be expected and indeed may be desirable. Consider Europeana in this respect. Europeana has thus far made full digital copies of public domain works. In a central register, presumably these full copies of the works would be available for searches. Thus, we see here particular rules applied to a particular category of works found in the central register.

The chapters assembled here are meant to engage the issue of a pragmatic approach to building a central register. One pragmatic consideration not discussed in the present chapter thus far is that of cost. A comprehensive pragmatic examination cannot avoid the issue of cost, however, as it may be pragmatically possible to build a central register from a legal perspective, but if the actual process of doing so were to be so costly as to be prohibitive, then the central register is not pragmatically possible after all. If one is tempted to see Europeana as the kernel of a central register, it would be of interest to note in this regard that Europeana has thus far received scant funding. Once cost is taken into consideration, a particularly inexpensive source of raw data comes to mind – the original Google Books database. The obvious question is, assuming that Google Books,

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A central register of copyrightable works is not acceptable for the purposes of the central register, is it nevertheless permissible to make use in some manner of the fruits of Google’s impermissible efforts? Before considering this question in the context of the central register, it would seem a simpler question to ask this in the context of U.S. law.

The question would be whether a U.S. central register could draw from Google Books in some way. One might think the answer was obviously yes, for if it is determined by a court that Google can provide snippet access to full digital copies, then surely it would be legal for others to create a register that does the same, and even less problematic for uses less promiscuous than that of Google Books. But surprisingly, this is not clearly the case. This is true for two reasons. First is that the Google Books settlement, should it be approved, would be a private settlement between private parties. Indeed, one of the complaints by other U.S. parties is that the settlement would create a de facto monopoly for Google with regard to access to the books.68 It is uncertain, for example, whether a potential competitor such as Microsoft or Amazon would be free to conduct its own parallel digitization project. Arguably, they would not. Seemingly, they would need to do what Google did – copy millions of books without authorization, wait to get sued by the Authors’ Guild and the American Publishers Association, and then come to a settlement on terms parallel to the terms reached between Google and these parties.

Under the terms of the current proposed settlement, those who would control the register that would be created would be free to license the works.69 As Pam Samuelson has observed, however, those who control the register would have an incentive not to make it more freely available, because they too would stand to benefit from their share of the monopolistic structure of the settlement.70 As Samuelson has argued, the true danger of the settlement is that in the long run, it will inexorably lead to monopolistic practices.71 This is simply the nature of the beast given that Google is a private company with a goal to maximize profits.72

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68 Open Book Alliance, supra note 10.
71 Idem.
There is another option, however. Could the actual digital files created by Google be used without Google’s permission or the permission of the Google Books Registry? The answer is not obvious and would appear to depend on a number of factors. For example, if the process would involve the third party making full digital copies of the works subsequent to getting access via the digital copies possessed by the participating libraries, such as the University of Michigan, then this third party would be open to a claim of infringement based on the making of these full copies. The outcome might be different, however, in a situation in which the third party used these full copies as the grist to pare them down to a database of information that was something less than full copies. Importantly, once this was accomplished, the third party could discard the full copies rather than keep and continually use them as Google Books does. Under current U.S. law, this would give the third party a colorable fair use defense by arguing that the full copying created mere ‘intermediate copies’, that were necessary in order to get to the unprotected information about the works.73 Alternatively, the third party might devise a means to collect the unprotected data without the necessity of making whole copies. Under this scenario, it would appear that the third party could indeed construct the database without violating the rights of the owners. The fact that Google may have violated the owner’s copyrights in making the full copies does not preclude others from thereby gaining access to unprotected elements via the infringing whole copies.74

A related question is whether some libraries in the U.S. might be better placed legally to create such databases by means of using the digital copies that they already possess, due to the fact that Google gave digital copies of the books it copied to those libraries that provided the actual physical books. This comes down to the question of whether libraries have any special privileges that are not held by private actors. The relevant place to look in the Copyright Act is sec. 108.75

Yet another possibility to ponder is whether a private yet not-for-profit entity might be in a better position to create a database of full digital copies; a wiki central register, as it were. At a practical level, such a database would avoid one of the fundamental problems faced by Google.

73 See generally Sony Computer Entertainment, Inc. v. Connectix Corp., 203 F.3d 596, 603–04 (9th Cir. 2000); Sega Enterprises Ltd. v. Accolade, Inc., 977 F.2d 1510, 1518–19 (9th Cir. 1992).
Because Google is a for-profit company, its activities are especially subject to criticism by owners who complain that Google is profiting at their expense. This claim is contained in both the lawsuits against Google in the U.S. and the EU. In addition, in the U.S., the fair use claim is strengthened for not-for-profits that would copy Google’s copies.

Google does not have copyright protection in these works so it has no grounds to complain. The only way it could stop third parties from making copies would be to deny access. But third parties could copy library copies or hack Google’s copies from Google Books. Or perhaps the libraries could give copies to third parties to copy. This last option is impractical, however, as the lawyers for these libraries would surely warn their clients against creating liability exposure in this manner.

4. CONCLUSION

As a result of the above discussion, we can conclude that, practically speaking, the simplest means for a central register to be created is by creating the database out of the copies already made by Google. Google has copies of 12 million works. Going through the tremendous expense of digitizing those books again is prohibitively expensive and unnecessary. The problem is that the digital books do not exist, nor that the technology does not exist to create a central register. What appears not to exist is a legal route to this outcome. As the above discussion indicated, the U.S. history with a registration system does not provide such a route. The U.S. experience is not very revealing in the sense that we cannot produce a central register merely by following the U.S. example. If anything, the U.S. experience shows how daunting it is to build one. The core issue is that a central register would ideally allow access to all works by the most efficient means possible. This was never the goal of the U.S. registration system. It did require deposit of copies but these were not made readily available. By the standards of the day, access was promoted by the simple act of putting a copy in the Library of Congress. An important reason that this experience seems of limited application is that the availability of new technologies changes user expectations and preferences. Once Google Books is available and people use it, it will be natural for them to expect

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that accessing material in books should always be this easy. Thus, it will seem increasingly natural to view Google Books as a baseline.

United States law could change so that in order to receive a copyright, one had to submit a digital copy for use in the Library of Congress’s searchable digital database. This would take a change in U.S. law that is possible but that would be fought tooth and nail by the commercial content industries that would argue that this would promote piracy. There might be a workable solution if copying from the site was restricted by encryption. Even this solution involves a significant tradeoff. The tradeoff for requiring registration in order to get digital copies of the works is of course that this will deter people from registering. On some views, this is not bad as the vast majority of works that have no real commercial value would not be copyrighted and so would be available in the public domain. This single change would at once make registered works more accessible, and increase accessibility in another way, by creating an alternative in which less works were protected in the first place. This would allow for a database to build up over time with new registered works. But it would not provide the ready access to 12 million books that copying Google Books’ database would. Thus, if all obstacles could be overcome, this seems like the best means to go about producing a Central Register.