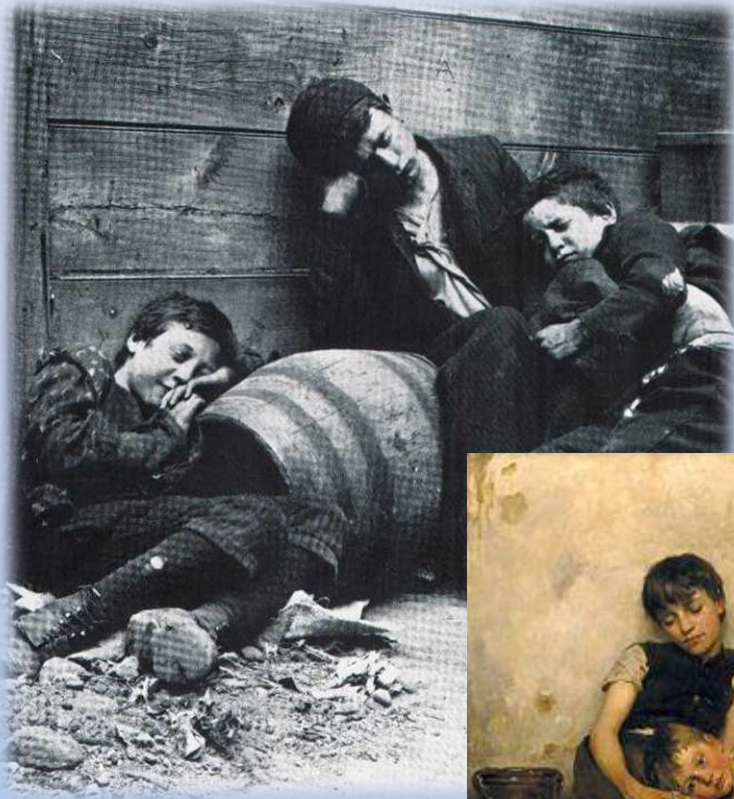


Abandoning the Orphans: An Open Access Approach to Hostage Works

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Orphan Metaphor



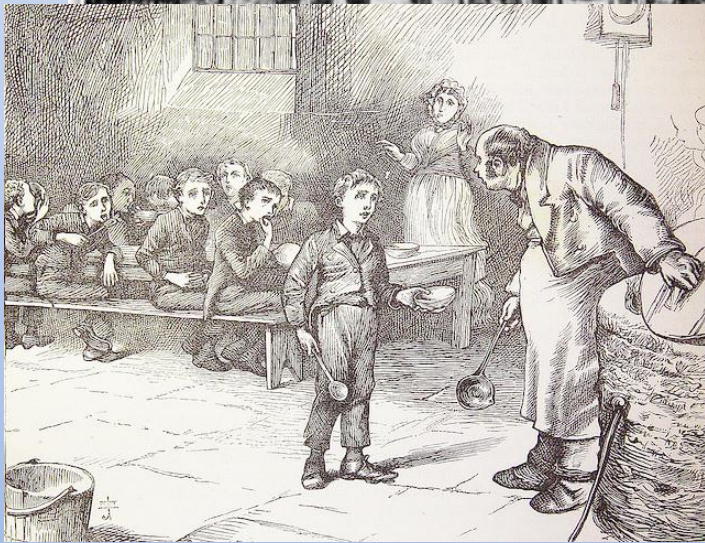
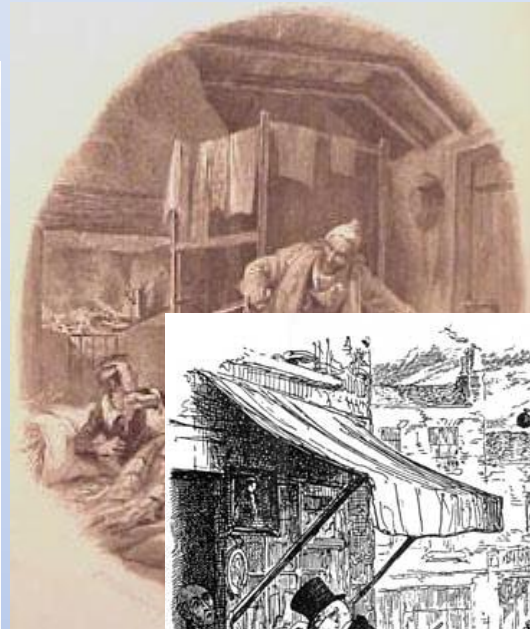
Orphans (1885)
by Thomas Kennington



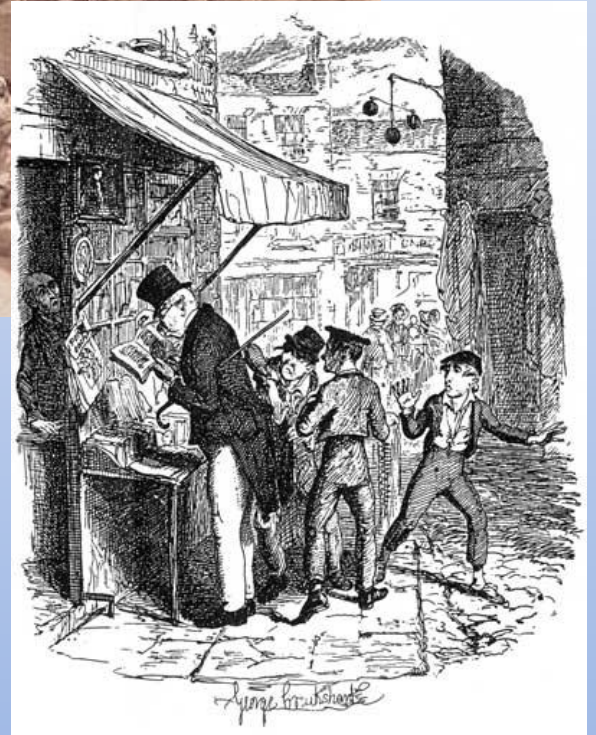
Caspar David Friedrich,
Wanderer Above the Sea of Fog 1818



Orphanages, Work Houses, or....



G.E.



A new metaphor



© Bettmann/Corbis

Hostage works

- Held hostage by the automatic and extensive nature of © rights (and the remedies) & the absentee owner

Solution needed:

Special Forces Operatives

- Activity and Actors applauded for their role in freeing hostages



Fundamentals of a new metaphor

- Copyright's utilitarian mission: provide an incentive to . . .
 - Create
 - Disseminate
- Hostage works:
 - The incentive worked for creation
 - NB: Care should be taken to design rules that will not harm incentive for future creation
 - The incentive is failing for a desired dissemination/exploitation
 - NB: Not because the © owner is making a strategic choice of non-exploitation

Reducing Waste

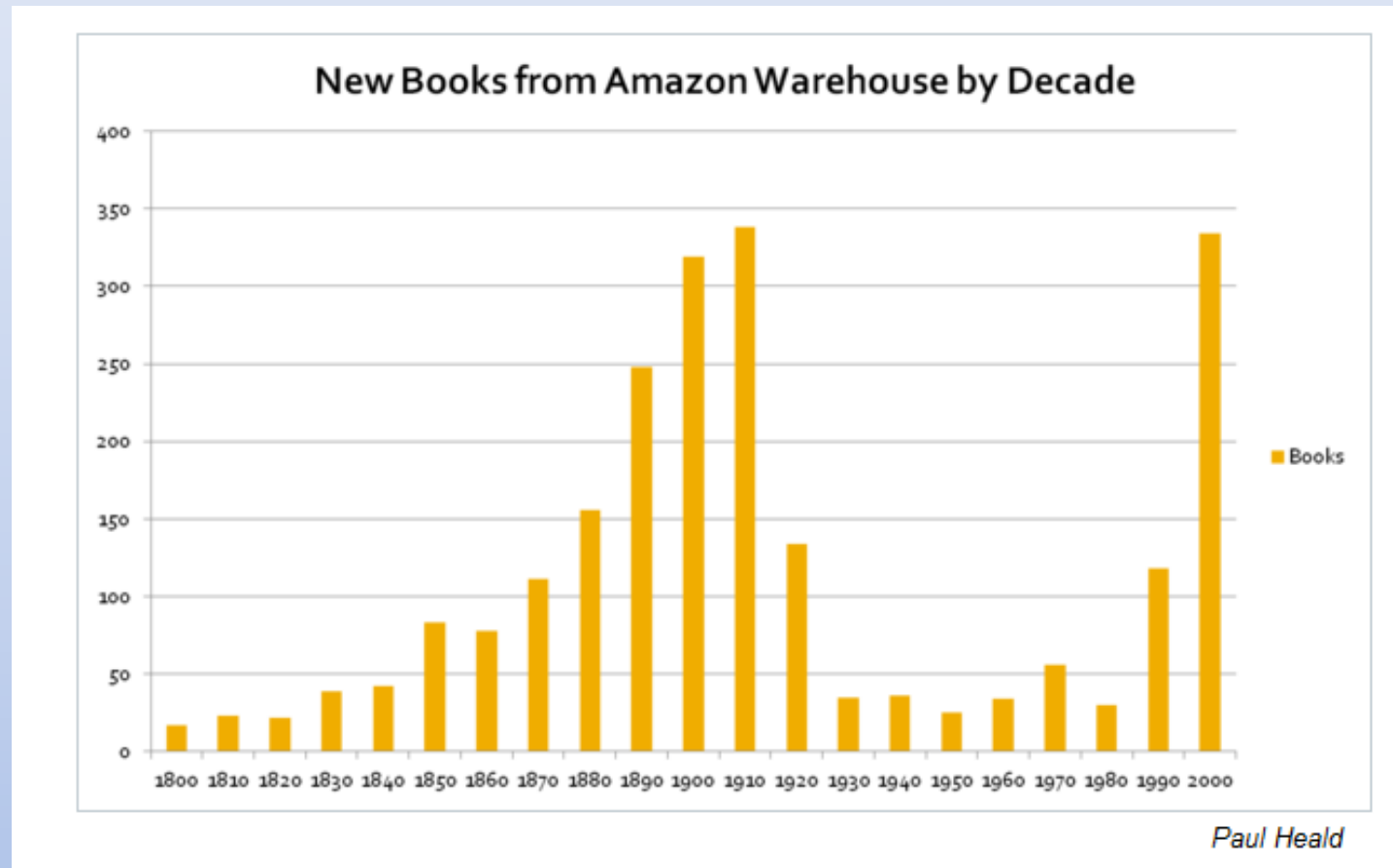
- The hostage work problem is a problem of a type of waste
- Neglected/abandoned property – another form of waste
 - Adverse possession of real property
 - Demerit theory
 - Merit theory
 - Transaction based theory
 - Abandoned tangible property
 - Positive value: Rules for designating new owners (rivalrous consumption)
 - Negative value: owner's responsibility to appropriately dispose of it (tangible = takes up space)



Doctrine of Waste

- When ownership is divided (e.g. life estate and remainder; tenant and owner) current owner may be liable to subsequent owner for “waste”
 - permissive, voluntary, and ameliorative waste
- No obligation to avoid waste if property is owned in fee simple
- Copyright has a “life estate” and a remainder: copyright owner & the public
 - Not being available to consider exploitation possibilities = waste (permissive waste?)
 - Public has an interest in minimizing waste and being compensated for it when it occurs

Preliminary Data: example of waste



Prof. Heald's talk: http://www.youtube.com/watch?feature=player_embedded&v=-DpfZcftI00#!

Rebecca J. Rosen, *The Missing 20th Century: How Copyright Protection Makes Books Vanish*
theatlantic.com March 30, 2012 (reporting on presentation of study by Prof. Paul Heald)

<http://www.theatlantic.com/technology/archive/2012/03/the-missing-20th-century-how-copyright-protection-makes-books-vanish/255282/>

Freeing the Hostages & the real “hostage work problem”

- Freedom comes from information
 - dissemination of *reliable* and *authoritative* info. concerning copyright status and copyright owner status
 - not costless to gather and disseminate
- **Hostage work problem:** Risk of underproduction of information concerning which works are hostage works
 - Option: grant a limited right (*a la* adverse possession or abandoned property)
 - E.g. generic drug challenges to patent validity – semi-exclusivity for a limited period

Better Option: Open access

Compensating for waste

- Proposal: eliminate monetary liability for an entity that
 - (1) Is not negligent in identifying which works are “hostage” works & in maintaining accessible records leading to that identification
 - negligence: duty of care will develop over time & with “best practices” models
 - duty to maintain and correct records (injunctive relief)

AND

- (1) Provides an open-access copy of the work with attached information concerning copyright and copyright owner status
 - compensates the public for the waste engaged in by the current absentee owner of the copyright

Open Access

- Open Access: Budapest, Bethesda, Berlin
 - free availability on the public internet
- Open Access: based on copyright owner consent
 - Open Access of Hostage works: based on attaching provenance information to digital copies, including the date and name of the entity making the determination
 - Human Readable & Machine Readable

Freeing the Hostages

- Incentive to act as “special forces”?
 - Elimination of liability for that entity
 - important for libraries & nonprofits
 - Permit identifying entity that meets the two requirements to make additional uses that are commercial in nature
 - important for commercial actors & deriv. work makers
- Third party uses once a hostage work has been identified?
 - Open access providers: should have similar protections from monetary liability
 - Other uses (commercial use, deriv. work, etc.): Reliance on laches/estoppel/statute of limitations
 - eliminate the “rolling” statute of limitations doctrine in this context

Open Access for Orphan Works



Photo credit: John Olson

Photo credit: Stuart Paul Mullenberg

Maturing Orphans?

- matured orphan = an emancipated adult in control of his or her life choices
- matured copyright = public domain
- Open Access as a step in the maturation process



Freeing the Hostages!

- Open Access as liberator of hostage works

