

Attn:

U.S. Copyright Office, Library of Congress

101 Independence Avenue, SE, Washington, DC 20559

RE: **Orphan Works and Mass Digitization: Request for Additional Comments**

**Massachusetts Institute of Technology (MIT) Libraries' comments on Federal Register Document
2014-02830**

Massachusetts Institute of Technology Libraries

Massachusetts Institute of Technology

Cambridge, MA

The Massachusetts Institute of Technology (MIT) Libraries appreciate the opportunity to comment in response to the Copyright Office's February 10, 2014 Notice of Inquiry concerning additional comments on potential legislative solutions for orphan works and mass digitization under US copyright law. While our comment to the previous Notice of Inquiry concerning Orphan Works and Mass Digitization (October 22, 2012) is applicable to the current Notice, we appreciate the additional opportunity to highlight some key points in response to several of the Office's areas of inquiry.

The Need for Legislation in Light of Recent Legal and Technological Developments; Defining the Good Faith "Reasonably Diligent Search" Standard

The MIT Libraries are not in favor of legislation to address the concerns of stakeholders regarding uses of orphan works and particular mass digitization. Recent history has demonstrated that bills can be framed so narrowly – particularly in the current congressional climate -- that they do not solve the problems they are intended to solve, and indeed have

negative unintended consequences. A recent example of this was the Unlocking Consumer Choice and Wireless Competition Act (H.R. 1123), which “has been so neutered by special interests that consumers would probably be better off if it had not passed at all.”ⁱ The Act would have corrected the language of the Digital Millennium Copyright act to legalize unlocking of tablets, cellphones, and all wireless devices under US copyright law, and had wide support by both parties and consumer groups. It was, however, ultimately undermined by large corporate interests so that in its final form it “legalizes the act of unlocking without actually making it possible because the tools and services necessary to unlock a phone remain illegal.”

In this kind of climate, a bill that will be workable for libraries is unlikely to succeed. In particular, the thorny issue of what would constitute a ‘reasonably diligent search’ could readily be defined in a manner that makes any orphan works exception useless for libraries in practice. As we noted in our October 2012 comment, the “reasonably diligent search,” as it was outlined in the 2008 legislative framework, is simply not a workable solution for libraries, given limited resources and the scale of mass digitization programs. The MIT Libraries recommend that if Congress and the Copyright Office do seek a legislative solution, that they consider the approach suggested by the Library Copyright Alliance: a one-sentence amendment to 17 U.S.C. § 504(c)2 that grants courts the discretion to limit statutory damages if the user performed a diligent search, as well as the discretion to determine what constitutes a reasonably diligent search. Due to the immense variety of possible works, uses, and users, decisions as to what constitutes a reasonably diligent search in a given context should be left to the courts rather than specified in complex and highly technical legislation.

At the same time, the judicial context has evolved in such a way that legislation seems less essential for clarifying uses of orphan works. In particular, recent court decisions have clarified the scope of fair use in contexts that are relevant to libraries, including the court's decision in *Authors' Guild, Inc. v. HathiTrust*, supporting mass digitization for the purposes of search, preservation, and accessibility constitutes a fair use, and in *A.V. v. iParadigm*, the court's decision that use of an entire work is fair when the purpose of the use is sufficiently transformative.

The recent publication of the community consensus document, the Association of Research Libraries' *Code of Best Practices in Fair Use for Academic and Research Libraries*ⁱⁱ, has also provided clarification for libraries. The *Code* addresses orphan works, indicating "the fair use case will be even stronger where items to be digitized consist largely of works, such as personal photographs, correspondence, or ephemera, whose owners are not exploiting the material commercially and likely could not be located to seek permission for new uses" (p. 20). Community-based consensus documents like this ARL Code, as a useful expression of evolving norms, are a critical component of the environment and provide an effective means of working within the existing statute.

Types of Works Subject to Orphan Works Legislation, Including Issues Related Specifically to Photographs; Types of users and uses subject to orphan works legislation

Other perils exist on the legislation path. Suggestions that different formats, such as photographs, could be treated differently under a new legislative approach work against the express need for this kind of collection to be made available through libraries. Any concerns

about use of photographs could be handled through a voluntary registry that would make it simple for rights holders wishing to continue to exploit their works to make themselves known.

A proposed distinction between commercial and noncommercial uses will inevitably founder given the difficulties of defining these boundaries, and would run counter to the purpose of copyright law, which is intended to encourage innovation from all sectors.

The Structure and Mechanics of a Possible Extended Collective Licensing System in the United States

We also do not believe collective agencies would offer an effective solution to managing orphan works. Because there is no copyright holder to pay if the work is truly an orphan, funds would not be fairly allocated. Indeed, the funds put forward would consist, essentially, of a “tax on socially beneficial uses,” as Melissa Levine, copyright officer at the University of Michigan, has commented. In addition, experience with collective agencies in Europe suggests that such a body may not be motivated to try sufficiently hard to find the copyright holder—so establishing this kind of model is likely to simply create a new stakeholder to monitor. In short, collective rights agencies are in our view not likely to result in the stated goal of direct compensation for copyright holders, as Jonathan Band demonstrated in his recent examination of licensing societies.ⁱⁱⁱ

The Role of Private and Public Registries

While legislation does not seem likely to afford a solution for libraries, we do believe there is need for a registration system that will make it easier to contact copyright owners. Despite some technical advancement, it still needs to be easier to verify copyright ownership. We suggest that incentives be created to encourage registration, by providing benefits to those

who do register. Requiring or encouraging use of ORCID's (author identifiers) or the equivalent when registering would improve discovery.

As Congress has extended copyright terms, libraries need the flexibility of fair use to continue to provide access to and preserve our cultural heritage and scholarly record, while also supporting appropriate and workable mechanisms for creators and copyright holders to be properly credited and compensated. Courts have supported interpretations that align with libraries' goals of making transformative use of works for the public good. Such use supports MIT's commitment to "generating, disseminating, and preserving knowledge, and to working with others to bring this knowledge to bear on the worlds' great challenges."^{iv} Our review of the current complex and evolving environment leads us to conclude that legislation is not the answer, but encouraging registration and improving discovery of rights holder information would be significant improvements for all stakeholders.

ⁱ <http://www.wired.com/opinion/2014/03/cellphone-unlocking-bill-passed-good-thing/>

ⁱⁱ <http://www.arl.org/focus-areas/copyright-ip/fair-use/code-of-best-practices>

ⁱⁱⁱ Jonathan Band, "Cautionary Tales about Collective Rights Organizations" (September 19, 2012). Available at SSRN: <http://ssrn.com/abstract=2149036> or <http://dx.doi.org/10.2139/ssrn.2149036>

^{iv} MIT mission: <http://web.mit.edu/facts/mission.html>