

**Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.**

In the Matter of	Orphan Works and Mass Digitization))	Docket No. 2012-12	Submitted May 20, 2014
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**COMMENTS OF THE
MOTION PICTURE ASSOCIATION OF AMERICA, INC.**

I. PRELIMINARY COMMENTS

The Motion Picture Association of America, Inc. (“MPAA”) is pleased to provide these comments in response to the Request for Additional Comments regarding the Notice of Inquiry (“NOI”) on Orphan Works and Mass Digitization (Docket No. 2012–12) appearing at 79 Fed. Reg. 7,706 (Feb. 10, 2014).

The MPAA is a not-for-profit trade association founded in 1922 to address issues of concern to the motion picture industry. The MPAA’s member companies are: Paramount Pictures Corp., Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corp., Universal City Studios LLC, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc. These companies and their affiliates are the leading producers and distributors of filmed entertainment in the theatrical, television, and home-entertainment markets. The MPAA’s members are both major copyright owners and frequent users of third-party material that is

incorporated into their own works; thus the MPAA is well positioned to provide the Office with a unique and balanced perspective as to both the orphan works and mass digitization issues.

II. ORPHAN WORKS

As stated at the March 10-11 roundtables, the MPAA and its members welcome discussion of a legislative solution to the orphan works issue based upon what appears to a consensus framework: that prospective users of copyrighted works who, following an objectively reasonable, diligent search, are not able to locate or identify the relevant rights holder, would be subject only to limited remedies in a potential infringement lawsuit should the rights holder later surface. To be sure, there are many details to be ironed out within this general framework (*e.g.*, the requirements for a “diligent search,” the nature of the limitations on remedies, and the like). MPAA has set forth our position on these and many other issues in great detail in previous rounds of comments, and respectfully refers the Office to those previous submissions.¹ But there are a few bedrock principles that bear repeating:

- Orphan works legislation should not be an end in itself. Rather, it should be pursued only if policymakers conclude that there remain significant marketplace challenges to prospective users who wish to obtain a license, but cannot do so because of an inability to locate or identify the rights holder – and that such challenges are of such magnitude that they justify the erosion of copyright owners’ rights that such legislation would represent.

¹ See MPAA comments of March 25, 2005 (<http://www.copyright.gov/orphan/comments/OW0646-MPAA.pdf>); May 9, 2005 (<http://www.copyright.gov/orphan/comments/reply/OWR0125-MPAA.pdf>); Feb. 4, 2013 (http://www.copyright.gov/orphan/comments/loi_10222012/Motion-Picture-Association-America-Inc.pdf); and March 6, 2013 (http://www.copyright.gov/orphan/comments/loi_11302012/MPAA-IFTA.pdf).

- The overall goal should be to minimize the population of works whose “parent” cannot be located or identified – not to maximize the volume of uses undertaken without the knowledge or permission of the rights owner. The preference should always remain for voluntary licensing transactions between copyright owners and prospective users.
- To that end, the MPAA supports efforts to enhance the ability of prospective users to locate and identify the relevant rights holders to facilitate market-based transactions, including most prominently by modernizing the Office’s registration and recordation systems, and improving the searchability of the associated databases.
- To the extent that policymakers determine that a legislative solution is required to address lingering issues relating to orphan works, the diligent search requirement must include, at a minimum, an obligation that the prospective user conduct searches of relevant Copyright Office records; other requirements should be determined by what is objectively reasonable under the circumstances.
- Congress should proceed cautiously since a new orphan works process would deviate from the fundamental policy of respecting copyright holders’ right to control uses of their works, and it should legislate only if it determines, based on reliable, empirical evidence, including trends over time, that the scope of the problem merits statutory change.

III. MASS DIGITIZATION

“Mass Digitization” is a new and somewhat loosely-defined term that has gained prominence largely in the context of books, and specifically the Google Books Project: Google’s practice of “scanning” (*i.e.*, reproducing) millions of books electronically onto its servers and

then displaying excerpts of those books in response to search queries – all without permission from, or payment to, the owners of the copyright interests in those books. Although MPAA declines to focus here on the specifics of Google’s practices, which are the subject of ongoing litigation,² we do wish to set forth some fundamental principles that should inform debate on this important topic, which simultaneously presents the potential for both benefits and risks to society. Policymakers must carefully balance the benefits from increased access to copyrighted works with the risks that uncompensated and unauthorized uses of such works will undermine both the incentives to create such works in the first instance, and creators’ emerging market opportunities, ultimately harming the public at large. And, in so doing, they must also carefully examine the different implications of mass digitization for different copyright-intensive industries.

A. The Preference Should be for Voluntary Licensing

Mass digitization projects have the potential to benefit copyright owners and users alike. However, they also raise a host of complex concerns that are the subject of substantial controversy and ongoing study. MPAA commends the Copyright Office for its role in addressing these issues, including through this NOI and its 2011 report “Legal Issues in Mass Digitization: A Preliminary Analysis and Discussion Document” (hereinafter the “LIMD Report”). Mass digitization projects (like the Google Books Project) that copy and otherwise exploit copyrighted

² See *Authors Guild v. HathiTrust*, 902 F.Supp.2d 445 (S.D.N.Y. 2012) (appeal pending); *Authors Guild v. Google, Inc.*, 954 F.Supp.2d 282 (S.D.N.Y. 2013) (the “*Google Books*” case) (appeal pending). MPAA filed amicus briefs in the Second Circuit in support of the Authors Guild in both the *HathiTrust* and *Google Books* cases.

works without permission represent a fundamental departure from the usual copyright rule that it is up to the copyright owner “to do and to authorize” the acts listed in Section 106.³

The preferable means to undertake beneficial mass digitization projects is not by flouting copyright owners’ rights, but instead by supporting policies that encourage and facilitate voluntary licensing transactions between copyright owners and users. Such legitimate, market-based, mass-digitization solutions that respect copyright owners’ rights while providing compensation to creators already exist. For example, the MPAA’s members license their works to the services AnyClip.com and MovieClips.com, which provide searchable databases containing thousands of motion pictures. Consumers can search these services for specific portions of movies and then use the clips for various purposes, including for their own personal research or for posting on blogs or other sites. Similarly, in the stock photography industry, Getty Images and other stock photography agencies represent a form of licensed “mass digitization” that respects copyright owners’ rights and compensates creators. Getty’s web site features a robust search engine that permits users to search millions of photographs based on metadata; the search results include small versions of the photos, which can be licensed for various purposes.⁴ Another service called Foap lets users upload their smartphone photos, where they can be licensed by others for various uses.⁵ And Foap pays the photographer \$5 each time his or her

³ Noting the radical nature of Google actions and its interpretation of copyright law, one prominent commentator remarked, “The chutzpadik manner in which Google has gone about this is breathtaking, and indeed what they have done so far is, in my opinion, already infringing, that is the copying of the books even without making them available.... Telling publishers they can opt-out is not the way the Copyright Act works....” William F. Patry, “Scanning Documents,” *The Patry Copyright Blog*, Sept. 15, 2005 (available at <http://web.archive.org/web/20051214021801/http://williampatry.blogspot.com/2005/09/scanning-documents.html>). Mr. Patry wrote this post prior to joining Google as Senior Copyright Counsel.

⁴ See <http://www.gettyimages.com>.

⁵ See https://www.foap.com/pages/what_we_do.

photo is licensed.⁶ It is not difficult to imagine the harm that an overly-broad fair use rule as to mass-copying of photos would inflict upon an innovative, new, license-based model like Foap. Copyright policy should support – not undermine – business models like Getty Images and Foap, which facilitate the wide dissemination of copyrighted works while ensuring that creators are compensated for their work.

The LIMD Report discusses various other approaches to mass digitization, grouped under the umbrella term “collective licensing”: voluntary collective licensing, extended collective licensing, and statutory licensing. Voluntary collective licensing schemes (*e.g.*, the Copyright Clearance Center, ASCAP, and BMI) are a long-standing, market-based feature of certain segments of the U.S. copyright landscape, and are appropriate in narrow circumstances to facilitate the issuance of blanket licenses where the negotiation of individual, work-by-work, licenses would be impractical or cost-prohibitive.⁷ Indeed, the LIMD Report notes that the Motion Picture Licensing Corporation issues such blanket licenses for public performances of motion pictures, including those owned by the MPAA’s members.⁸

Other forms of collective licensing, including extended collective licensing, and statutory or compulsory licensing, are more problematic. The MPAA agrees with the Copyright Office that such approaches should be “measure[s] of last resort,” appropriate only where “there is a public need and that need is frustrated by market failure,” and that solution would be

⁶ See <https://www.foap.com/pages/faq>.

⁷ Such collective licensing schemes do, however, raise antitrust concerns, and thus may require government oversight. See generally *Broad. Music Inc., v. DMX Inc.*, 683 F.3d 32, 36 (2d Cir. 2012) (describing history of antitrust oversight of ASCAP and BMI); LIMD Report at 33. Thus, while such frameworks may facilitate voluntary licensing arrangements, they raise separate issues that may need to be addressed as appropriate.

⁸ LIMD Report at Appendix E, page 9.

“sufficiently narrow to comply with treaty obligations of the United States.”⁹ Such conditions are emphatically *not* present in the motion picture industry, where there is a robust licensing market, and licensing occurs through freely-negotiated agreements, not government mandate. The MPAA’s members voluntarily – indeed enthusiastically – license their works for distribution on a wide variety of platforms, ranging from traditional theaters, to DVD and Blu-ray discs, to television (including free over-the-air broadcasting, as well as various paid options), and now to over 100 online services in the U.S. (and over 400 worldwide), which offer movies for both streaming and download.¹⁰ And not only is there a robust market for the distribution of entire motion pictures; there is also one for small *portions* of movies – known in the industry as “clips.” All of the MPAA’s members have long operated clip-licensing services that offer licenses to those who wish to make use of short segments, and the new AnyClip.com and MovieClips.com services noted above provide more consumer-oriented options. In short, there is no reason to consider statutory or compulsory licensing schemes for motion pictures (or portions thereof), and the MPAA would vigorously resist subjecting their works to such mandates.

B. Mass Digitization is Worthy of Broad Public Policy Debate, Not Simply Individual Judicial Decisionmaking

The district courts in both the *HathiTrust* and *Google Books* cases found the mass digitization projects in those cases to be fair use – perfectly legal despite the lack of permission from, or payment to, the relevant rights holders. The MPAA is troubled by the fair use analysis in both cases, for similar reasons, and has urged the Second Circuit, via our recent *amicus* briefs filed in those cases, to correct the district courts’ errors. Without the input of the many global

⁹ *Id.* at 30.

¹⁰ See <http://www.wheretowatch.org/>.

stakeholders who could be affected by those district court decisions and analytical approaches, the courts authorized mass digitization on the basis of fair use, a doctrine that is expressly intended only for case-by-case consideration.¹¹ The dangers of the courts' approaches are evident in at least two respects.

First, by concluding that the defendants' unauthorized copying of the millions of books was fair use, both district courts made preemptive, categorical determinations that could have effects well beyond the parties and interests in those particular cases. Policymakers and stakeholders in the United States and abroad are actively considering the implications of mass digitization projects. Such discussion encompasses issues such as how best to balance the potential benefits of mass digitization against the appropriate degree of control for authors and other rights owners over uses of their works, and the rewards due to them, under the copyright system. In addition, businesses in the copyright and technology industries are fervently – and successfully – working to develop licensing models and distribution systems involving mass digitization that achieve the same desired societal benefits while allowing copyright owners their just rewards. The district courts' decisions in these two cases effectively preempted both such processes, purporting to establish precedent based on an incomplete view of the issues at stake.

The consideration of major copyright policy issues, including the creation of broad limitations and exceptions, should be, and typically is, a participative process in which the views of all interested stakeholders are properly considered. The ordinary operation of the copyright marketplace serves to enable desirable uses while permitting the relevant parties to negotiate protections for their respective interests. The fair use analysis in the context of these particular cases does not lend itself to this degree of nuance or thorough consideration of the issues at

¹¹ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (“The task [of fair use analysis] is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.”).

stake. When, as in *HathiTrust* and *Google Books*, a fair use defense is proposed to excuse mass copying of copyrighted works, there is great potential for upsetting the careful balance of interests reflected in the Copyright Act.

Second, as a substantive matter, the district courts in both cases misapplied the fair use test, most notably by misconstruing and over-emphasizing the “transformative use” aspect of the first factor.¹² In *Google Books*, the district court concluded that Google’s copying of books was “highly transformative” because it provides the societal “benefit” of “expand[ing] access to books.”¹³ However, a defendant’s copying is transformative only where it creates a new expressive work that “adds something new, with a further purpose or different character, altering the first [work] with new expression, meaning, or message.”¹⁴ The *Google Books* court’s holding that Google’s conduct was transformative because it increases access to books proves too much. Every instance of mass copyright infringement arguably increases access to the infringed works, thereby enabling members of the public to use those works for their own purposes. Yet, such conduct hardly makes the copying “fair.”¹⁵ While affording little or no copyright protection to

¹² The word “transformative,” of course, does not appear in Section 107. Rather, it is a term popularized by Judge Pierre Leval (then of the United States District Court for the Southern District of New York, now of the U.S. Court of Appeals for the Second Circuit) to describe the proper analysis of “the purpose and character of the use” in the first statutory factor. See Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1111 (1990) (framing inquiry as whether the use at issue “merely repackages or republishes the original,” or, rather, the defendant’s work “is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings”).

¹³ *Google Books*, 954 F. Supp. 2d at 287-88, 291.

¹⁴ *Campbell*, 510 U.S. at 579.

¹⁵ See *Am. Broad. Cos. v. Aereo, Inc.*, 874 F. Supp. 2d 373, 404 (S.D.N.Y. 2012) (“The same logic would support a finding that the public interest favors imposing no copyright restrictions on any form of redistribution of Plaintiffs’ [works], as unrestrained piracy of that content would also increase public access to content ...”), aff’d on different issue by 712 F.3d 676 (2d Cir. 2013) (*cert. granted on different issue*); *Sony BMG Music Entm’t v. Tenenbaum*, 672 F. Supp. 2d 217, 228 (D. Mass. 2009) (“Nearly every unauthorized reproduction or distribution increases access to some degree. ... In any case, the balance between unlimited public access and the desire to spur artistic creation is the very policy choice embodied by the provisions of the Copyright Act. Congress has purposefully restricted access by vesting an exclusive right in the copyright holder.”).

existing works might promote wider access in the short term, it would prove extremely harmful in the medium and long term, by destroying the incentive for creators to create *new* works.¹⁶ The district courts’ approach to fair use, if widely followed, could result in an unreasonably low level of protection of creative works and thereby threaten creative output.

C. The Need for Industry-by-Industry Specificity

It is crucial that policymakers analyze the impact of proposed mass-digitization practices and policies on individual copyright-intensive sectors, and take care not to over-generalize or make sweeping legal or economic pronouncements. The economics and business models of the various copyright industries – books, music, motion pictures, television, software, videogames, photographs, visual art, etc. – vary widely. Moreover, there are vast differences among different categories of works *within* particular sectors. For example, the investment of time and resources necessary to produce a college physics textbook is very different from that required to produce a romance novel – and these works are marketed and distributed in very different ways. Similarly, a major motion picture, with a budget of several hundred million dollars and a cast and crew of thousands, bears little resemblance economically to a student film or an animated short. It is thus imperative, in assessing the potential impact of mass digitization practices and policies, that each of these very different markets be evaluated based on their own particular economics, business models, and consumption patterns.

It bears noting that the discussion regarding mass digitization – in the district courts’ *HathiTrust* and *Google Books* decisions, at the recent Copyright Office roundtables, and in the

¹⁶ See *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 287 (2d Cir. 2012) (“[T]he public has a compelling interest in protecting copyright owners’ marketable rights to their work and the economic incentive to continue creating [them]. Inadequate protections for copyright owners can threaten the very store of knowledge to be accessed; encouraging the production of creative work thus ultimately serves the public’s interest in promoting the accessibility of such works.”); 1 Paul Goldstein, *GOLDSTEIN ON COPYRIGHT* § 1.14 (3d ed. 2014) (“To give fewer property rights than are needed to support this investment [in creative production] would give users freer access, but to a less than socially desirable number and quality of works.”).

LIMD Report (which announced in its very first sentence that it “addresses the issues raised by the intersection between copyright law and the mass digitization of books”) – has been almost entirely about *books*, not the motion pictures that comprise the MPAA members’ most valuable assets. To state the obvious: books are not movies. The economics of these businesses differ greatly (as do the economics of the software business, the videogame business, the photography business, the medical illustration business, etc.). The making and distribution of a major motion picture is a project of an entirely different financial scale from writing and distributing a book, sometimes involving the work of thousands of people and sometimes hundreds of millions of dollars. And movies and books are consumed in different ways. Even if a court may conclude, for example, that display of an excerpt from a book does not harm the market for an entire work,¹⁷ that conclusion would not necessarily apply to movies, where there are already established markets for clips. The MPAA’s members all have established businesses that license clips for use in various contexts,¹⁸ and they have licensed clips to the online services noted above. Indeed, courts have recognized that certain small portions of works have independent economic value that weighs against a finding of fair use. *See, e.g., Video Pipeline, Inc. v. Buena Vista Home Entm’t, Inc.*, 342 F.3d 191, 195 (3d Cir. 2003) (defendant’s online streaming of movie trailers not fair use); *Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d 537 (S.D.N.Y. 2013) (defendant’s indexing and online display of “snippets” of news articles not fair use). And the motion picture and television industries (like many other copyright industries) are rapidly evolving, as producers and distributors continually introduce new business models

¹⁷ *See Google Books*, 954 F. Supp. 2d at 292-93.

¹⁸ *See* <https://disneystudiolicensing.com>; <http://www.warnerbros.com/studio/services/clip-and-still-licensing.html>; <https://www.universalclips.com/>; <http://www.paramount.com/theatrical-library>; <http://www.sonypictures.com/corp/services.html>; foxclips@fox.com or (310) 369-3605.

that aim to satisfy consumer desire to watch their favorite movies and TV shows where and when they prefer, on the devices of their choice.

Thus even if it were determined by a court or Congress that a “mass digitization” project should be permitted without the copyright owner’s consent in one particular context, that says little about how the law should treat a separate set of facts. While a court or policymaker might, based on the evidence presented in a particular case, properly conclude that a project involving unpermitted copying and limited display of one particular category of works does not harm the market for the plaintiffs’ works, and thus (after taking into account all of the statutory factors) constitutes fair use, it does not necessarily follow that a mass digitization project involving a different category of works, especially one in an entirely different copyright sector, is fair use as well. As the Supreme Court has stated, “[I]t is not true that all copyrights are fungible. Some copyrights govern material with broad potential secondary markets. Such material may well have a broader claim to protection because of the greater potential for commercial harm.”¹⁹ As policymakers examine the mass digitization issue, they must account for the vast differences in the economics of different copyright-intensive industries, and not attempt to impose one-size-fits-all solutions that could result in serious harm to the incentive to create new works, and develop new business models, thereby undermining copyright’s very purpose.

¹⁹ See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 455 n.40 (1984).

IV. CONCLUSION

The MPAA appreciates this opportunity to provide our views in response to the NOI. We look forward to providing further input and working with the Copyright Office going forward as it continues to consider this important issue.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael O'Leary". The signature is stylized and cursive, with a long horizontal stroke at the end.

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