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ORPHAN WORKS AND MASS DIGITIZATION – ADDITIONAL COMMENTS

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The Center for Democracy & Technology appreciates the opportunity to submit these brief comments as the Copyright Office continues its consideration of orphan works and mass digitization. CDT is a non-profit public-policy organization dedicated to keeping the Internet innovative, open, and free. CDT works with a broad range of stakeholders to ensure that Internet policy continues to develop in ways that reflect core civil liberties values and promote innovation. On copyright matters, CDT seeks balanced policies that respect the rights of content creators without curtailing the Internet's tremendous potential for fostering free expression and innovation. CDT submitted reply comments in this proceeding in March 2013 (<https://cdt.org/insight/orphan-works-and-mass-digitization-reply-comments/>), and Senior Policy Analyst Andrew McDiarmid participated in the March 2014 roundtables.

I. Isolating the Issues

We appreciate the moderators' efforts to consider the issues of orphan works and mass digitization separately throughout the series of roundtables. As we noted in our reply comments, the challenges raised by each issue are quite distinct and require different solutions. While some mass-digitization projects may focus on orphan works (such as the New York Public Library's project to digitize its collection of 1939 World's Fair photographs) and thus be in a position to avail themselves of an orphan works solution, many others – including the Google Books and HathiTrust projects that dominated discussion at the roundtables – include a mix of orphans and non-orphans alike and would not be fully covered. Moreover, the scale of *mass* digitization makes the diligent-search approach unworkable (should that again be the path the Office recommends). Given the range of issues involved and the wide diversity of perspectives offered at the roundtables, we believe any single approach that attempted to address both orphan works and mass digitization is unlikely to be beneficial or satisfactory for either issue.

Keeping the issues separate will require diligence. Despite the moderators' efforts to maintain clear distinctions, participants at the roundtables consistently blurred the issues together. To note perhaps the most prevalent example: Day One was focused on orphan works generally, but two of the most frequent examples raised were Google Books and HathiTrust, both of which are mass-digitization projects that cover far more than orphan works. HathiTrust, moreover, suspended its effort to identify and make true orphan works available, so the legal developments in that case have little bearing on uses of orphan works unconnected to mass digitization. To be sure, the findings of fair use in both the Google Books and HathiTrust cases are important positive developments for mass digitization, but it will be important not to overestimate their implications for the orphan works problem generally.

II. Possible Approaches to Mass Digitization

At the roundtables, it was clear that both the diversity of purposes for digitizing collections and the wide range of available copyrighted works make it a significant challenge to develop a single solution to apply in all cases of mass digitization. The best approach may therefore be to think in terms of multiple solutions instead of a single comprehensive system.

1. *Limitations and Exceptions*

For some purposes, fair use is likely sufficient and no legislation is needed. CDT agrees with the holdings of the Google Books and HathiTrust courts that scanning books for purposes such as indexing, text search, and the display of snippets is a fair use, as such purposes are sufficiently transformative of books' original purpose (to be read) and ultimately enhance rather than undercut readership and the market for books. Libraries, including in comments in the present inquiry, have understandably hailed these decisions as a victory that lessens the need for legislation to protect their characteristic activities. Should these decisions be upheld on appeal, they will offer great certainty to digitizers with respect to some, but not all, of the issues raised by mass-digitization projects. This reasoning (additionally guided by the *Kelly v. Arriba Soft* and *Perfect 10 v. Amazon* decisions) would also likely apply to the creation of indices and databases of scanned images solely for similar purposes. And while the fair-use case law is less developed in the areas of preservation and improving accessibility, the HathiTrust decision is clear that fair use can apply for those purposes as well.

But fair use is fact-dependent, and even in cases where it would likely apply it may not give some potential digitizers the legal certainty they need to take up mass-digitization projects. Some may feel comfortable relying on fair use in light of the HathiTrust and Google Books decisions. Others may still be chilled by the risk of liability and the size of potential damages, and thus forego socially beneficial digitization activity. For some purposes, then, it may be helpful to provide additional certainty in the form of specific exceptions to copyright. Adding or expanding concrete exceptions – for example, by expanding Section 108 to allow for more preservation copies and to cover museums or even some commercial actors – may open the door to more socially and culturally beneficial mass-digitization projects than fair use alone.

2. *Licensing for Mass Digitization Where Exceptions Do Not Apply*

CDT does not believe that licensing is an appropriate solution to the general orphan works problem, nor that all mass-digitization projects should require licensing. But some form of collective licensing may nonetheless be the best way to facilitate mass-digitization projects that seek to go beyond what fair use or other exceptions likely allow, and where direct licensing is too costly or otherwise unworkable.

We agree with the many commenters who expressed the view that centralized or collective licensing is inappropriate as a *general* solution to the orphan works problem. By definition, rightholders of orphan works are difficult if not impossible to identify or locate, and in the case of true orphans they would never come forward to collect payment. It makes little sense to construct a system by which users of works pay licensing fees that rarely if ever reach their rightful recipient. A possible exception may be a sort of insurance-like system in which very small payments are collected from users of orphan works in order to fund payment of the occasional larger license fee when a rightholder does emerge. But the goal should be to design a diligent-search standard that incentivizes actually finding rightholders so that works will only

rarely be mistaken as orphans, while remaining practical and not unduly burdensome for users. If this can be achieved, collectivizing payments to cover the costs of mistakes would not seem to be worth the administrative cost. We believe a system in which the occasional emerging rightholder collects a reasonable license fee directly from the user (as was proposed in the prior legislation) is likely to be more efficient than a collective solution.

Extended collective licensing in particular did not appear to have much support from roundtable participants – in either the orphan works or the mass-digitization context. Comments from participants of all stripes tended to favor limitations and exceptions on one hand or direct licensing on the other. With respect to mass digitization, however, CDT believes there may be useful progress to be made in the space between these options.

For mass-digitization projects that seek to go beyond what fair use or other exceptions likely allow, the scale-related obstacles to direct licensing resemble the type of market failure often associated with collective licensing solutions. Yet these uses may offer significant societal benefits and therefore be worth permitting. One example is the re-sale of commercially unavailable works – useful for facilitating access to information, but very likely not a fair use and hard to license individually since rightholders have ceased commercial exploitation. To facilitate the development of such projects, we would support the Copyright Office’s exploring ECL as a possibility, provided the scope and purpose of any such license remain narrow and specific.

We would caution the Copyright Office to move narrowly and carefully in recommending any collective-licensing approach for several reasons. First, as other advocates have noted, collective licensing systems can present significant challenges with respect to management, accounting, and the efficiency with which payments actually reach rightsholders, and the US lacks infrastructure and experience with extended collective licensing. Governance and accountability procedures would therefore need to be carefully devised, and informed by the lessons of collective licensing’s potential pitfalls, if such an approach is taken. In addition, we share the concern of some library associations and other advocates that a licensing system for mass digitization should not unduly constrain the application of fair use. Any licensing approach should therefore be narrowly crafted to focus specifically on those uses where there is strong consensus that fair use would not apply.

In sum, while CDT does not support the view that licensing is an appropriate solution for all orphan-works and mass-digitization issues, we would support the Copyright Office in exploring narrow licensing solutions for particular mass-digitization purposes, provided the focus remains those projects that expand the range of uses for digitized works beyond what limitations and exceptions allow.

3. Starting With Books

To the extent that the Copyright Office elects to pursue a licensing solution to facilitate some mass-digitization uses, we would urge starting with a particular class of works rather than attempting to pursue a comprehensive solution from the outset. As the history of the US inquiry into orphan works has shown, the differences in the issues raised by, for example, the use of books and the use photographs can become an obstacle to progress on a comprehensive approach.

For several reasons, books may be the most fruitful starting point. First, as the centerpiece of many cultural collections, books are relevant to many – perhaps the majority of – large-scale scanning initiatives. In addition, as compared to other media, the in-print/out-of-print distinction

for commercial books offers a straightforward potential criterion for determining which works would be eligible for the license. And in contrast to sound recordings, where direct-licensed services for digital music have flourished in recent years, there is currently no widespread marketplace solution for facilitating digital access to out-of-print books. Lastly, the various high-profile projects already well underway and extensively commented-upon can offer lessons for crafting policy.

Respectfully submitted,

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