



copyright alliance

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**BEFORE THE
U.S. COPYRIGHT OFFICE**

**Orphan Works & Mass Digitization:
Request for Additional Comments**

Docket No. 2014-12

COMMENTS OF THE COPYRIGHT ALLIANCE

The Copyright Alliance welcomes the opportunity to submit comments in response to some of the issues raised during the public roundtable meetings on March 10-11, 2014 regarding orphan works and mass digitization. The Copyright Alliance is a non-profit public interest and educational organization that is supported by nearly forty entities comprised of individual artists and creators, as well as the associations, guilds, and corporations that invest in and support them. Besides these institutional members, we represent more than 13,000 individual artists. The Copyright Alliance is committed to promoting the cultural and economic benefits of copyright, providing information and resources on the contributions of copyright, and upholding the contributions of copyright to the fiscal health of the nation and for the good of creators, owners, and consumers around the world. Among other principles, we seek to promote appropriate copyright protection and enforcement to encourage the creation and lawful distribution of works, with fair compensation to the authors of creative works. While many of the entities we represent are small businesses and individual creators, all who participate in the copyright ecosystem have an interest in effective mechanisms for registering and licensing copyrights.

Introduction

As we mentioned in our reply comments, throughout the course of the orphan works process, we have observed that some advocates have used this issue as a stalking horse for a regressive copyright agenda, intended to strip authors of their rights and advance legal positions that are not supported by current case law or statutes. We commented to this effect in our reply comments, and we observed similar issues at the orphan works roundtables. We file these additional comments to address two concerns.

First, we wish to reiterate our view that any solution to the orphan works issue needs to be tailored to solving the purported problem of how to find and appropriately license works from their legitimate owners. In other words, any solution to the orphan works issue must be targeted toward maximizing the chances of identifying authors rather than creating a list of orphaned works that can be used without paying royalties. For instance, we believe the Copyright Office could first investigate how it might improve the current registration system to make it more effective and more useable – including by making it searchable for works like photographs and other works of visual art. We would also be prepared to support appropriately scoped, constructive orphan works solutions, managed by the Copyright Office, focused primarily on: (1) the establishment of officially recognized registries for various types of works; and (2) defining standards for conducting a reasonably diligent search for the author of a work. We refer the Copyright Office to our comments filed in 2012 for further detail on our views on the other topics enumerated in the Notice of Inquiry.

Second, we would like to correct the record on several points of law raised during the roundtables, especially pertaining to the scope of the fair use defense in the context of mass digitization. As we have mentioned in our prior submissions, while identifying rights holders may be an issue in both mass digitization projects and orphan works legislation, the two challenges are motivated by distinctly different goals, and they do not share sufficient common issues to warrant similar treatment or consideration in the same proceeding. During the roundtables, Creative Commons USA made the statement that format-shifting is *per se* fair use, with mass digitization being an example of format-

shifting.¹ Case law and the legal nature of the fair use doctrine, however, do not support this claim.

Fair Use Cannot Appropriately Address Copyright Issues Arising from the Use Of Orphan Works or from Mass Digitization Projects

As we explained in our reply comments, the fair use defense is a long-standing aspect of copyright law that many of our members regularly rely on. Nevertheless, fair use is a limitation on a copyright owner's exclusive rights that applies only in certain circumstances. As a result, claims that digitization is fair use without further qualifiers are inaccurate.

Some of the core advantages of the equitable doctrine of fair use are that it is both flexible and case-specific.² Blanket statements on the applicability of fair use to all forms of format-shifting deprive the doctrine of some of its key assets. Decisions that have addressed the issue of whether specific instances of format and space-shifting qualify for a fair use defense have taken into account different factors. For instance, past decisions have looked at whether

- The format or time-shifting is done by a product or a service (*Sony Corp. of America v. Universal Studios*, 464 U.S. 417, 456 (1984));
- The format or time-shifting product or service is capable of both infringing and non infringing uses (*Sony Corp. of America v. Universal Studios*, 464 U.S. 417, 456 (1984));
- The format or time-shifting product or service has actually been used for non

¹ Orphan Works And Mass Digitization Roundtables Before the Library of Congress 340-342 (Mar 10, 2014) (Session 5: The Types of Users and Uses Subject to any Orphan Works Legislation) (Prof. Michael Carroll explained, “certainly, just the act of digitization is reformatting -- it's save-as. It's no different from taking a WordStar file and turning it into a .doc and taking an analog file and turning it into a .doc. You're just reformatting the document. That doesn't need a license. That's a fair use. Text mining and doing computational research on that data doesn't --that's a fair use -- doesn't exercise the exclusive rights because it's not even reproducing the work in copies. But it's when you make it public that we have the fair use conversation.”).

² See *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 581 (1994); *Infinity Broadcast Corp. v. Kirkwood*, 150 F.3d 104, 107 (2d Cir. 1998); *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F.Supp.2d 349, 351 (S.D.N.Y. 2000).

- infringing purposes in specific instances (*Sony Corp. of America v. Universal Studios*, 464 U.S. 417, 456 (1984));
- The copyright owner is likely to suffer harm in the future (*Sony Corp. of America v. Universal Studios*, 464 U.S. 417, 456 (1984));
 - The format-shifting is a simple repackaging of the protected work without any transformative qualities (*Infinity Broadcast Corp. v. Kirkwood*, 150 F.3d 104, 108 (2d Cir. 1998); *Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc.*, 150 F.3d 132, 142 (2d Cir., 1998); *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F.Supp.2d 349, 351 (S.D.N.Y., 2000);
 - The time or space-shifting of copyrighted material exposes the material only to the original user or to other millions of individuals (*A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1019 (9th Cir. 2001)); or,
 - The format-shift seeks to exploit the work’s expressive value for commercial gain (*Bill Graham Archives v. Dorling Kindersley Ltd*, 448 F.3d 605, 612 (2d Cir. 2006)).

Taking some of these factors into account to analyze specific situations, courts have held that only specific forms of format or time-shifting in certain circumstances have qualified as fair uses.³ Mass digitization typically encompasses a process involving

³ See *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 612 (2d Cir. 2006) (holding that using reduced images of concert posters in a biography of the Grateful Dead was a fair use because the images were used for a purpose other than the images’ original expressive purpose); *Sony Computer Entertainment, Inc. v. Connectix Corp.*, 203 F.3d 596, 602 (9th Cir. 2000) (holding that copying a software program to design a product compatible with a copyrighted product is fair use because software contains protected expression as well as unprotected ideas and functions that cannot be read by humans without copying); *Recording Ind. Ass’n of America v. Diamond Multimedia Systems, Inc.*, 180 F.3d 1072, 1078 (9th Cir. 1999) (holding computers (and their hard drives) are not digital audio recording devices because their ‘primary purpose’ is not to make digital audio copied recordings); *Sega Enterprises Ltd. v. Accolade, Inc.* 977 F.2d 1510, 1527-28 (9th Cir. 1992) (holding that disassembling and copying software code for purposes of reverse engineering a program qualifies as fair use because software contains ideas and functional elements that are unprotected); *American Institute of Physics and John Wiley & Sons, Inc. v. Schwegman, Lundberg & Woessner, P.A.*, Civ. No. 12-528 (D. Minn., Jul. 30, 2013) (holding that “because Schwegman’s use of the Articles does not supersede the Publisher’s intended use and has a new and different evidentiary character,

more than one step: the digitization of a number of works along with making them available online. Even if the ultimate result of an instance of digitization is non-infringing, intermediate steps may have involved copying that may or may not qualify for the fair use defense. The courts should look at each of these steps separately, taking into account the goals of copyright. For instance, in *Authors Guild v. Google*, the district court's ruling in favor of fair use heavily based on mass digitization's "significant public benefits" failed to take into account the impact of digitization on creators and distributors of copyrighted works.⁴ Congress drafted the Copyright Act with the intent of promoting "the Progress of the Sciences useful Arts." As a result, in copyright cases, any analysis of

Schwegman's commercial use of the Articles does not unfairly exploit copyrighted material." *But see* *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1019 (9th Cir. 2001) (holding that space-shifting is not fair use when a user lists a copy of music he already owns on the Napster system in order to access the music from another location because the song becomes "available to millions of other individuals"); *Infinity Broadcast Corp. v. Kirkwood*, 150 F.3d 104, 108 (2d Cir. 1998) (stating that a "difference in purpose is not quite the same thing as transformation... Defendant argues that Defendant's users transform the broadcasts by using them for their factual, not entertainment, content. However, it is Defendant's own retransmissions of the broadcasts, not the acts of his end users, that is at issue here and all Defendant does is sell access to unaltered radio broadcasts."); *Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc.*, 150 F.3d 132, 142 (2d Cir. 1998) (holding "Since *The SAT* has transformed *Seinfeld*'s expression into trivia quiz book form with little, if any transformative purpose, the first fair use factor weighs against defendants."); *American Geophysical Union v. Texaco*, 60 F.3d 913, 924 (2d Cir. 1994) (holding that the photocopying of subscription based scientific articles for research purposes is not fair use because "the purposes illustrated by the categories listed in section 107 refer primarily to the work of authorship alleged to be a fair use, not to the activity in which the alleged infringer is engaged" and "whatever independent value derives from the more usable format of the photocopy does not mean that every instance of photocopying wins on the first [fair use] factor"); *Capitol Records, LLC v. ReDIGI, Inc.*, 934 F.Supp.2d 640, 653 (S.D.N.Y. 2013) (holding that a website for users to sell their legally acquired digital music files, and buy used digital music from others at a fraction of the price currently available on iTunes is not fair use because the website does nothing to add something new, with a further purpose or different character to the copyrighted works); *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F.Supp.2d 349, 351 (S.D.N.Y. 2000) (holding that "although defendant recites that MP3.com provides a transformative "space shift" by which subscribers can enjoy the sound recordings contained on their CDs without lugging around the physical discs themselves, this is simply another way of saying that the unauthorized copies are being retransmitted in another medium – an insufficient basis for any legitimate claim of transformation).

⁴ *Authors Guild, Inc. v. Google, Inc.*, No. 05-8136 (S.D.N.Y. 2013).

public benefits “must look at the impact on the incentives of *creators*, not just users, of copyrighted works.”⁵ Mass digitization policy must remain consistent with copyright’s principles and goals and work for all stakeholders: creators, libraries and archives, and the public.

Respectfully submitted,

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⁵ Brief for the Copyright Alliance as Amicus Curiae Supporting Plaintiff-Appellants at 12, *Authors Guild v. Google Inc.*, No. 13-4829-cv (2nd Cir. 2013).