



ADDITIONAL COMMENTS OF THE LIBRARY COPYRIGHT ALLIANCE TO THE COPYRIGHT OFFICE'S NOTICE OF INQUIRY CONCERNING ORPHAN WORKS AND MASS DIGITIZATION

The Library Copyright Alliance (LCA) submits these comments in response to the Copyright Office's request for additional comments that respond to issues raised during the March 10-11, 2014 public meeting. In these comments, LCA makes three points: 1) the discussions at the public meeting demonstrate that there is no consensus on a way forward on legislation concerning orphan works; 2) at the same time, the discussions reflect consensus that extended collective licensing will not be an effective solution for mass digitization, even just for books; and 3) the best practices for fair use developed by user communities are an appropriate approach for addressing issues relating to orphan works and mass digitization.

I. No Consensus on Orphan Works Legislation.

In reply comments filed last year in response to the first round of comments in this inquiry, LCA observed that “the significant diversity of opinion expressed in the initial comments submitted in the response to the Copyright Office’s Notice of Inquiry Concerning Orphan Works and Mass Digitization indicates that it will be extremely difficult to forge a consensus approach to these issues.” After surveying the wide range of views on the need for legislation and how such legislation would be structured, LCA concluded that “the comments are literally all over the map. There is less agreement now than six years ago both on the existence of a problem and the best approach to solve it.”

The public meeting indicated that nothing has changed over the past year. The divisions are just as profound now as they were in the initial round of comments.¹ Indeed, the divisions between different communities may be even deeper now than before. The public meeting revealed fundamental disagreement as to whether the Constitutional rationale of the copyright system is to promote public benefit. Likewise, the meeting exposed a basic divergence concerning the correctness of fair use decisions over the past decade. Indeed, one rights holder representative compared the recent fair use case law to *Plessy v. Ferguson*, suggesting that these fair use holdings were as legally and morally flawed as the Supreme Court's 1892 ruling upholding the "separate but equal" doctrine. The inflammatory nature of this analogy was exceeded only by another rights holder representative threatening three times during the course of one panel to sue libraries if they engaged in mass digitization activities that even slightly exceeded those found lawful in *Authors Guild v. HathiTrust*. The hostility exhibited by some rights holders to users in general and libraries in particular suggests that any legislative process concerning orphan works, mass digitization, or section 108 is bound to fail.

A. Need for legislation. The first point of disagreement at the public meeting centered around the issue of whether there is even a need for orphan works legislation. Most members of the library community, including the LCA and a representative of Harvard University, noted that they were satisfied with recent fair use jurisprudence which diminished the need for orphan works legislation. The Association of American Law Libraries stated their support for legislation in theory, but noted that there is a risk

¹ For a more detailed discussion of the different points of view expressed at the public meeting, see <http://policynotes.arl.org/post/79876737815/recap-of-the-copyright-offices-roundtables-on-orphan>

that legislation may not ultimately be a positive. The Computer & Communications Industry Association (CCIA) noted that the complexity and regulatory nature of past orphan works proposals have made some stakeholders oppose a legislative solution.

Others, including Association of American Publishers, Wikimedia, Authors Guild, and National Music Publishers' Association, argued that orphan works legislation is needed. Some of those supporting orphan works legislation pointed out that their members or stakeholders value certainty.

B. Reasonably Diligent Search. There was no consensus view as to how a reasonably diligent search should be defined in legislation and whether a flexible or rigid approach would better solve the orphan works issue. Representatives of the library community encouraged flexible standards due to the differences in users, uses and circumstances that could influence the reasonableness of a search. Additionally, a rigidly defined standard would result in the law being unable to evolve and adapt to new technologies. The American Library Association noted that the searches conducted by librarians reveal sincere efforts to find the rights holder. A representative of International Documentary Association and Film Independent pointed out that overly rigid guidelines could result in failure because the legislation would not be used. The Society of American Archivists noted that a high standard for reasonably diligent search could prove too costly and make digitization efforts unsustainable.

Others suggested that a reasonably diligent search standard must have minimum standards and encouraged a more rigid approach in order to provide more certainty. The Motion Picture Association of America and the National Portrait Gallery representatives pointed out that minimum standards could still be flexible.

Some participants offered the following considerations in defining a reasonably diligent search: cost, commercial versus non-commercial intent, free market solutions, type of the work, age of the work and the use of the Copyright Office records. Another issue was whether a reasonably diligent search was possible for mass uses. There was no consensus on any of these issues.

C. Registries. Some of the panelists argued for global registries, while others advocated for voluntary opt-in registries or private registries. Some suggested that there is a need for multiple registries and that users of orphan works must find a way to search all the existing registries.

D. Types of Works. Much of the discussion centered on whether photographs should be included in an orphan works solution. The Association of American Publishers supported the idea that all works should be subjected to orphan works legislation. Other rights holder groups specifically suggested a carveout for the interests they represented, such as for illustrators or musicians; others did not specifically advocate for a carveout but said that different works should be treated in a different manner. The Library of Congress pointed to the danger of excluding works such as photographs, because the same photographs are being used over and over again because of the fear in using orphaned works, skewing historical and cultural records.

The American Society of Media Photographers called artists “disenfranchised” and argued that creators would not be able to profit in an ongoing manner. The National Press Photographers Association said that there is a legitimate concern regarding finding the authors of older photographs, but noted that current photographs are instantly made orphans when they are uploaded to the Internet and stripped of their metadata.

The Digital Public Library of America advocated for “democratic access” to works, but the National Press Photographers Association opposed this idea.

E. Types of Uses and Users. While most panelists seemed to suggest that legislation should cover both commercial and non-commercial users and uses, there was disagreement as to whether they should be treated equally. Additionally, some panelists voiced disapproval for an orphan works solution that applied to commercial uses.

Several entities, including the Association of American Publishers, Association of Research Libraries, College Art Association, Writers Guild of America West, and Harvard University, noted that the line between commercial and non-commercial can be difficult to define. Some noted that some non-profit institutions have gift shops or can engage in for-profit activities in order to sustain their non-profit work. Additionally, some commercial entities can provide genuine not-for-profit uses. The Association of American Publishers suggested that commercial entities should be included because a legislative solution would likely be too complicated for individuals to take advantage of the legislation on their own, but individuals would be willing to pay for the value provided for by a commercial entity.

Some panelists felt the distinction should not be whether a user is commercial or non-commercial, but that consideration should be given to whether a use is commercial or non-commercial. A representative from the Graphic Artists Guild argued that illustrators can clearly explain what are commercial uses and what are non-commercial uses, asserting that their industry would be destroyed if it were possible to use orphaned works for free in the commercial market. The Graphic Artists Guild also noted that non-

commercial uses, such as for education and preservation, are already permitted under fair use.

F. Remedies. Most, but not all, participants supported limitations on injunctions because without such limits, no one would take advantage of a solution in which they must invest large amounts of money.

With respect to monetary damages, participants suggested the following: reducing or remitting statutory damages, remitting attorneys fees, and increasing damages for bad actors. Some felt that different standards for different works are appropriate, including the age of the work. A representative of the Digital Media Association opposed words like “reduce,” “remit,” or “increase,” arguing that the focus should be on reasonable compensation instead. At the same time, there seemed to be support for cultural heritage institutions not incurring damages if they stopped the use upon receiving a notice from the owner.

The National Press Photographers Association advocated heavily for a small claims court and stated that any orphan works solution should be tied to a willingness to participate in a small claims court.

The National Writers Union argued that the solutions being discussed resulted in blaming the victim and suggested that it is the users of orphan works that should be required to register and notify the public of the intent to use such works.

In sum, no consensus emerged concerning any aspect of the orphan works issue.

II. Consensus on Extended Collective Licensing

In contrast to the disagreement concerning orphan works legislation, there was general agreement at the public meeting that extended collective licensing (ECL) would

not be an effective solution to issues relating to mass digitization, even if limited only to books.

Some pointed to the problems of collecting societies, including that little money is actually distributed to the creators, there can be a lack of accountability, and they do not take into account the different interests of different authors. A couple of panelists also pointed out that ECL could come into tension with antitrust laws and that ultimately the states would end up with most fees due to unclaimed property laws.

Most panelists agreed that an individually negotiated license should be the first preference. Many panelists from rights holder communities stated that voluntary licensing has worked in their communities. Many also pointed out that the United States does not have much history, tradition or experience with ECL regimes.

One participant noted that ECL creates an unnecessary tax and can damage fair use; only where fair use does not apply should one seek a license. This participant also pointed to the great value-add that has resulted from mass digitization projects undertaken by libraries.

The National Federation of the Blind cautioned against ECL because of the huge benefits that mass digitization has provided for persons who are blind or print disabled. He noted that anything that had a chilling effect on mass digitization would likely limit access for persons who are visually impaired and noted concerns with economic disincentives to digitize works.

III. Best Practices

Throughout the meeting, numerous references were made to best practices. Representatives of libraries, archives, and documentary filmmakers noted that best

practices developed by their communities provided useful guidance concerning the application of fair use to activities relating orphan works and mass digitization. Rights holders argued that these best practices have no validity because they were developed without their consultation.

To the contrary, codes of fair use best practices developed by specific communities do have legal significance. Following a review of numerous fair use decisions, Professor Michael Madison recognized that the courts were

implicitly or explicitly, asking about habit, custom, and social context of the use, using what Madison termed a “pattern-oriented” approach to fair use reasoning. If the use was normal in a community, and you could understand how it was different from the original market use, then judges typically decided for fair use.

Patricia Aufderheide and Peter Jaszi, *Reclaiming Fair Use* 71 (2011). Based on this insight, numerous communities have developed codes of fair use best practices with the goal of making fair uses analysis more predictable for their members. The need for predictability in the application of fair use has grown more acute during the information revolution over the past three decades. Digital technology invariably involves the making of copies, and it is the fair use doctrine that has enabled the copyright law to accommodate the rapid pace of innovation. More people place more reliance on fair use for more activities than ever before.

As part of this broad movement to make fair use more predictable, the Association of Research Libraries undertook an effort to “document[] the considered views of the library community about best practices in fair use, drawn from the actual practices and experience of the library community itself.” Association of Research Libraries, *et al.*, *Code of Best Practices in Fair Use for Academic and Research Libraries*

3 (2012). This involved interviews and focus groups with hundreds of librarians across the country. The resulting Code of Best Practices identified “situations that represent the library community’s current consensus about acceptable practices for the fair use of copyrighted materials and describes a carefully derived consensus within the library community about how those rights should apply in certain recurrent situations.” *Id.* For each of the eight situations identified, the Code sets forth numerous “limitations that should be observed to assure that the case for fair use is strong, and enhancements that could further strengthen that case.” Code at 11. The Code thus provides nuanced fair use guidance for libraries to apply in a wide range of circumstances.

Several of the situations in the Code relate directly to orphan works and mass digitization. They concern digitizing to preserve at-risk items; creating digital collections of archival and special collections materials; creating databases to facilitate non-consumptive research uses; and collecting material posted on the World Wide Web and making it available. As with the other situations, the Code enumerates limitations and enhancements that would strengthen a library’s assertion of the fair use right. For example, with respect to creating digital collections of archival materials, the following is one of the six enhancements indicated: “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.” Code at 20.

Since its promulgation in 2012, the Code has gained wide support within the

library community.² Additionally, the Society of American Archivists released a statement of best practices concerning orphan works in 2009.³ Rights holders at the public meeting and elsewhere have criticized the codes on the grounds that they were developed without the input of the rights holders. But these rights holders fail to understand the nature of these best practices. They are not intended to be negotiated compromises that take the place of legislation. Rather, they are intended to be expressions of norms and customs relating to specific uses in specific communities. As Professor Madison found, courts give weight to these norms and customs in the fair use analysis. Rights holders, of course, are free to develop their own codes of best practices for fair use in their communities.⁴ They also are free to offer critiques of the codes of best practices of other communities. But until now, they have provided no substantive criticisms; rather, they just complain about not being consulted.

Moreover, as a practical matter, there could be little doubt concerning the futility of rights holders and users negotiating best practices concerning orphan works or mass digitization. As demonstrated by the inconclusive Conference on Fair Use (CONFU) in the late 1990s, the strong opposition to orphan works legislation in the 110th Congress, the controversy and ultimate rejection of the Google Books Settlement, and the lack of

² The Code has been endorsed by the American Library Association, the Association of College and Research Libraries, the Arts Libraries Society of North America, the College Art Association, the Visual Resources Association, and the Music Library Association.

³ A code of best practices for fair use relating to orphan works is under development. See also American Library Association Video Roundtable, *Fair Use and Video: Community Practices in the Fair Use of Video in Libraries*, https://pages.shanti.virginia.edu/Fair_Use_and_Video/2011/07/13/fairusevideo/; University of Massachusetts Amherst Libraries Orphan Works Guidelines, <http://www.library.umass.edu/about-the-libraries/library-policies-procedures-and-guidelines/orphan-works-guidelines/>.

⁴ Many of the codes of fair use best practices have been developed for the benefit of traditional creators, e.g., documentary filmmakers, poets, journalists, and visual artists.

concrete results from the Section 108 Study Group, there are too many stakeholders; their views are too divergent; and too many want to preserve the status quo. In the highly unlikely event that agreement could be reached after prolonged negotiations, the resulting best practices probably would be either too general to provide users with meaningful guidance; or so narrow and technical as to be impracticable for users to apply. Accordingly, it would be a waste of Copyright Office resources to attempt to sponsor negotiations concerning best practices.

Nonetheless, there are measures the Copyright Office can take to reduce the obstacles copyright places in the way of the use of orphan works and mass digitization. First, the Copyright Office can redouble its efforts to make its records more accessible. Second, the Office can seek to bolster the fair use doctrine in both judicial and international fora.

Regardless of the outcome, LCA is grateful for the open and transparent manner in which the Copyright Office has conducted this inquiry.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "J. Band".

Counsel for the Library Copyright Alliance
jband@policybandwidth.com

May 16, 2014