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Maria Pallante, Register of Copyright
U.S. Copyright Office
Library of Congress

May 20, 2014

Re: Re: Orphan Works and Mass Digitization
(FR Doc. 2014-02830; Copyright Office Docket Number 2012-12)

Dear Ms. Pallante:

I have read with interest the transcripts of the March 2014 Public Roundtable on Orphan works.

What concerns me, as it has from the beginning of the process, is the preponderance of representation and opinion from those who want access to the works of individual creators, and the relative paucity of expression from those who create the works. The way hearings have been set up minimizes the input from writers themselves. Thus the problem has been framed by these louder, more organized voices: the notion that there is a vast trove of "orphan" works, and that allowing their rapid digitization and exploitation is a public service, which should be compensated by requiring minimal effort to find out if the works are, in fact "orphan."

As a writer--and a former officer and committee member on both Copyright and Orphan Works issues in Science Fiction & Fantasy Writers of America, and member also of Novelists, Inc--my perspective is very different. My work has been pirated for others' profit, at a cost to my bottom line. My work was digitized by Google without my knowledge or consent, although every work of mine they digitized was covered by copyright, in print, commercially available through a legal contract with a publisher, at the time they did so.

Copyright law was set up originally to secure to the creators of such works the right to profit from their labor. It was not set up to secure to libraries or corporations the right to profit from the labor of writers and artists while ignoring those same writers and artists.

Any change in the law that makes it quick and easy for a potential exploiter of the work to call it "orphan"--or "out of copyright"--any change that allows the assumption that out of print, or not for sale in a particular market means the work is not protected by copyright (which was Google's claim)--legalizes theft, and directly harms the individual who created it, cutting off the ability to make prudent decisions about the work that benefit its creator..

Organizations give a blunt, generalized view of things. Here's a more personal one. I began writing for money--money we needed--in the early 1980s, first nonfiction and then fiction. My first fiction was published in 1986; my first novel, in 1988. My twenty-sixth novel is already on the shelves of British bookstores and will debut in the US on May 27, of this year. I have been on the New York Times extended best seller list several times; I have received awards for my work, and been short-listed for others. All my previous works are still in print in the United States; all are available in legal electronic editions and many are also available in audiobooks. Some of my books have been translated into over a dozen languages. One of them (*The Speed of Dark*, 2003) has been chosen for community reading programs and First Year Experience by various cities and universities, most recently at Rutgers University in 2013. Since 2001, my writing income has supported our family. I maintain websites related to my writing (the general one, <http://www.elizabethmoon.com>, has been active since 1997; there are two project specific ones as well, for fans of those particular books.) and these contain bibliographic information about my work as well as contact information for me, my literary agent, and my US and UK publishers.

None of my work is orphaned, and I am not hard to find. Yet Google digitized my work anyway, without notifying me, without permission, and in the process violating existing publishing contracts. Every novel in print at that time. Every work of short fiction. Libraries cooperated in this theft of my work. Much of it had already been stolen and exploited for profit by e-pirates (with the offhand excuse by some that they were "giving you exposure.") The actions of Google and the Hathi Trust libraries colluding with Google convinced me that the forces arrayed against copyright had no concern whatever for the legal right of writers--guaranteed by copyright--to receive payment for the use of their work. They were no better than the pirate sites, for all their excuses about "social benefit" and serving the public.

When the initial settlement (the one overturned by Judge Chin) was opposed, the only "offer" made to writers whose works had been illegally digitized was that they could apply to have Google not make their work available online at whatever price Google chose. No guarantees, but...we could our own spend time digging through the complicated system Google set up to "claim" work that we had written--that we or our publishers had copyrighted. It was impossible to "claim" short fiction from the anthologies they'd digitized...but for me alone, there were *137 items listed*, for works published both here and abroad: domestic and foreign editions, hardcover, mass market, and trade paperback editions of the same title, all three short fiction collections. I spent days trying to be sure I had found all my works on their list, while I was also finishing a novel on deadline. Google made no attempt to contact writers, ask permission, or offer compensation for their use of works...but they had in mind a clear financial motive. Nor have they yet admitted their wrongdoing, nor stated that they will not ever exploit the works we writers so laboriously "claimed."

In the meantime, libraries--which writers used to think of as friends and colleagues--institutions that would help readers find books they enjoyed, and thus aid writers in gaining a readership--institutions that had long helped defend copyright--began talking

and acting as if copyright were merely a hindrance to their activities. As a writer who grew up depending on my small-town library for books my mother could not afford to buy--who spent hours in that library at least once a week--I had always valued libraries and admired them. But as a writer dependent on my earnings as a writer, I see the current attitude among librarians as hostile to writers, the very people who create the books that people come to the library to read.

While I have no problem with careful digitization of rare texts when the copyright status is clear--the Gutenberg Project, and others like them--I have a large problem with the digitization of contemporary works--many already existing in legal, contractual digital editions. The Hathi Trust digitizations, done in cooperation with Google, were and are an example of the lack of due diligence shown by libraries in that project--for librarians certainly know how to find writers and how to read the copyright dates in the books themselves. Yet the libraries did nothing to protect writers from copyright violation--instead, they enabled it. Apparently, because writers for years did not object to libraries lending books they had legally purchased, libraries got the idea that anything a library wanted to do with a text was "fair use." They could rob writers at will, while claiming to be serving society.

Copyright was not set up to benefit Google or any other corporation.

Copyright was not set up to benefit university libraries that want to act as publishers (distributing multiple electronic copies without compensating the writer.)

Copyright was set up to benefit the people who write the works others want to exploit, because it was understood that enabling writers to profit from their work was itself a benefit to society.

What will happen if copyright is eroded? If libraries and corporations can claim a work is orphaned when it is still under copyright, on the grounds that it is (often temporarily) out of print, or isn't available on Amazon for some reason? Quite simply, the rich complexity of American writing will disappear. Writers are not air ferns. They need to eat; they need somewhere to live. If they cannot live--at least in part--on their work, they will not be able to write what they now write. Writer-employees are not the same as independent writers... a society in which all writers are employees of corporations doing work-for-hire is a society where committees and the profit motive determine what can be published., what stories are told, how stories are told. The very purpose for which copyright was originally created--to encourage individual creativity, a clear benefit to society--disappears when writers and artists are not in control of their work and its disposition. At a time when the nation needs all the creativity, all the diversity of viewpoints, it can get, any attenuation of copyright protection will lessen the opportunity for creative persons to create.

For this reason, I urge the Copyright Office to support writers--not those who want to exploit writers. Do not make it easy for exploiters to find loopholes by which they can evade copyright restrictions. Google's failure to investigate the copyright status of

works--which, with their resources, they could easily have done--proves not only their bad faith, but the inherent dangers in the whole "orphan works" concept. When a billion-dollar corporation with vast profits claims it's "too expensive" to perform a serious due-diligence search--when a group of academic libraries claim that stealing a writer's royalties by publishing their own edition of a work without permission or a contract is "fair use" or "transformative"--they are acting in direct opposition to the original purpose of copyright. That's like someone stealing a truckload of tomatoes from a farmer's field to sell them, and calling it "transformative" because they "transformed them" from fruits on a plant to fruits in crates.

Writers have always suffered from literary thieves who want to profit from the writer's work without paying for it. Copyright is our one strong protection, the one legality we can call on to stop the thieves (at least some of them) and have income from the many hours of work that go into writing. And it's important to remember that writers do what none of these other people--the lawyers, the CEOs, the libraries--do: we write the works the Copyright Office was founded to protect. We do the work. Our work created the publishing industry. Our work created the need for libraries, the very texts they store and make available. Our work created the possibility of profit from it, and is the reason others want to exploit it--because they want the profit that should be making writers and artists' lives more secure. Writers are citizens, are society, are people actual people, not legal-fiction people like corporations. Writers need the profit of their work, just as a plumber or an electrician does. We need that money for the most practical reasons: food, electricity, rent, taxes, doctor bills, etc.

I want the Copyright Office to protect writers and artists, as it was intended to do from the outset. I want writers' and artists' interests to be considered paramount, outweighing the so-called "needs" of those who want to use and sell our work without paying us for it. I want the Copyright Office to understand clearly how the publishing world has changed, and how writers are able to digitize and sell their own work, thus being paid for the work they've done. To accomplish that, I want the Copyright Office and/or Congress to hold hearings where these issues, that vitally effect every working writer, can be presented by those they most concern.

Sincerely,

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