



May 20, 2014

Maria Pallante
Register of Copyrights
Library of Congress
Copyright Office
101 Independence Avenue, S.E.
Washington, D.C. 20559-6000

RE: Inquiry on “Orphan Works and Mass Digitization”

Dear Ms. Pallante:

Further to the public roundtables held as part of the Copyright Office’s Inquiry Concerning Orphan Works and Mass Digitization, 77 FR 64555 (22 October 2012), the Society of American Archivists (SAA) submits these additional comments on behalf of all archivists. SAA is the oldest and largest organization of archivists in North America. It serves the education and information needs of its members, including more than 6,100 individual archivists and institutions, and provides leadership to help ensure the identification, preservation, and use of the nation's historical record. To fulfill this mission, SAA addresses significant archival issues by shaping policies and standards and serves as an advocate on behalf of both professionals who manage archival records and the citizens who use those records.

For SAA’s comments to the Copyright Office on January 29, 2014, see http://www.copyright.gov/orphan/comments/noi_10222012/Society-American-Archivists.pdf. Certain issues that were not addressed in SAA’s earlier submission arose at the roundtables held in Washington, D.C., on March 10 and 11, 2014. We now wish to provide the following additional comments.

Multiple Copyright Registries: Central to SAA’s position on orphan works is a copyright registry populated by the rights holders of older works not currently being commercially exploited. A “diligent search” would consist simply of an automated search of the registry. The roundtables revealed the existence of a number of “registries” run by owner groups, as well as a wide range of opinions on the value, purpose, nature, and sponsorship of registries. If registries are to be the means of a diligent search, a

proliferation of registries significantly complicates the search process. If a single registry is not viable, an up-to-date register of copyright registries is essential.

Unpublished, Non-commercial Nature of Archival Holdings: At the public roundtables it was clear that many of those representing rights holders are concerned about published works created for commercial purposes. Archival material is very different; it is largely unpublished, and works created for commercial gain tend to be the exception. We wish to strongly reiterate a key part of SAA's position, i.e., that any solution to the orphan works problem must draw a distinction between copyrighted works that were created with material gain in mind and those works that were never intended for the commercial market.

Diligent Search Guidelines: Although SAA's preferred position sidesteps the need to define "diligent search" in favor of a register, the diligent search issue was discussed vigorously at the roundtables. The consensus seemed to be that no single set of guidelines would adequately cover all types of works and uses. We support guidelines developed by specific communities of practice, such as SAA's Orphan Works Best Practices (OWBP) (available at www.archivists.org/standards/OWBP-V4.pdf). Rights holder groups complain that they have not been consulted in the development of various best practice documents; however, these groups have not identified specific objections. Should an owner group(s) object to OWBP, SAA would be happy to discuss the objections but, once again, the unpublished, non-commercial nature of archival holdings makes it unlikely that they are of concern to owners of published commercial works.

Extended Collective Licensing (ECL): We cannot state too strongly that an ECL scheme will not work for archives. Fundamental to the concept of orphan works is the idea that the rights holders are un-locatable. ECL does not solve the un-locatable rights holder problem. ECL is an easy collecting mechanism that generates a lot of money, but that money is not disburseable if you do not know who the rights holders are. Payment into a fund to compensate rights holders would be nothing more than a tax on archives. SAA is also concerned that an ECL scheme would diminish fair use in that users would unnecessarily pay a licensing fee when what they are doing is a fair use. It may be that archival holdings would be outside the scope of ECL. If the Nordic model is followed, unpublished works would be excluded from any ECL scheme.

Thank you for this opportunity to provide additional comments.

Sincerely,



Kathleen D. Roe
Vice President/President-Elect, 2013 – 2014