

Comments on

ORPHAN WORKS AND MASS DIGITIZATION

Submitted By

THE SOFTWARE & INFORMATION INDUSTRY ASSOCIATION

to

THE UNITED STATES COPYRIGHT OFFICE

May 20, 2014

INTRODUCTION

The Software & Information Industry Association (“SIIA”) respectfully submits these comments to the United States Copyright Office in response to the Federal Register Notice entitled “Orphan Works and Mass Digitization: Request for Additional Comments and Announcement of Public Roundtables” published on February 10, 2014 (79 Fed. Reg. 7706).

SIIA is the principal trade association of the software and information industries and represents over 800 technology companies that develop and market software and digital content for business, education, consumers, the Internet, and entertainment.¹ SIIA’s members range from start-up firms to some of the largest and most recognizable corporations in the world. SIIA member companies are leading providers of, among other things:

- software publishing, graphics, and photo editing tools

¹ A list of the more than 800 SIIA member companies may be found at: <http://www.sii.net/membership/memberlist.asp>.

- corporate database and data processing software
- financial trading and investing services, news, and commodities exchanges
- online legal information and legal research tools
- education software and online education services
- open source software
- and many other products and services in the digital content industries

One of SIIA's primary missions is to protect the intellectual property of member companies, and advocate a legal and regulatory environment that benefits the software and digital content industries. Consistent with these goals, for over thirty years SIIA has engaged in a comprehensive, industry-wide campaign to advocate a legal regime in the United States and abroad that adequately and effectively protects the intellectual property rights of its software and content industry members.

SIIA members represent a wide range of business and consumer interests. They are copyright owners and users, as well as information aggregators that engage in mass digitization projects. As a result, SIIA and its members are extremely interested in working with the Copyright Office, Congress, the Administration and other interested parties as these important issues relating to orphan works and mass digitization are considered.

I. THE NEED FOR LEGISLATION

The core issues presented by the Copyright Office's request for comments is whether and how U.S. law should permit a person to lawfully use a copyrighted work when the user would need a license from the copyright owner to engage in such use but the user is not able to identify and locate the copyright owner to secure the license. In an effort to encourage the user to proceed with the proposed use in spite of the risk to the user that the copyright owner could subsequently appear and object to the use as infringing and then sue the user for a significant damage award, legislation to amend the Copyright Act was proposed in 2006 and 2008 that would limit the legal remedies that would be available to the copyright owner where the user could not, after a good faith reasonably diligent search, identify and locate the copyright owner before commencing the

use of the work. If the copyright owner came forward after the use commenced, the copyright owner would be entitled to a reasonable licensing fee or royalty (as determined by reference to market practices) but would not be entitled to recover statutory damages, the user's profits, or (in most cases) attorneys' fees, and would not be entitled to an injunction against such use. Criminal penalties for infringement also would be inapplicable to such use.

A. Whether Recent Legal Developments have Obviated the Need for Legislation

Much has changed since the Copyright Office first solicited comments on these issues back in 2005. Since that time there have been numerous changes to the copyright legal landscape, and even more significant changes in the various technologies and business models used by copyright owners and users to disseminate and protect copyrighted works. However, none of these changes seems to have squarely addressed or abated the "orphan works" problem.² With an increase in mass digitization and data analytic projects over that time, and into the foreseeable future, it could even be argued that the orphan works problem may be even more significant than it was back in 2005.

The case law and business models relevant to the Copyright Office's orphan works and mass digitization inquiry are still very much in a state of flux. As case law in this area begins to more fully develop we may find that provisions in the copyright law are able to adequately address many of the orphan works issues. The advent of new market solutions, databases and systems that help potential users identify and locate copyright owners may also evolve in a manner that sufficiently reduces the orphan works problem. Accordingly, at this point in time SIIA takes no view as to whether enacting legislation to address the orphan works problem is necessary or appropriate.

While it is our view that some combination of new databases and technologies for identifying and locating copyright owners, in conjunction with interpretation of the copyright law by the courts, holds the key to addressing the orphan work problem, at the end of the day these

² We reluctantly use the term "orphan works" here for simplicity of reference. We are concerned that this term could be misused and misunderstood in a manner that results in users mistakenly believing that once a good faith reasonably diligent search is conducted without the work's owner being identified and located, that work is forever branded as an "orphan work" and can be freely used by anyone in perpetuity.

advances may still be insufficient to fully address all the complexities presented by the multitude of potential orphan works issues that could arise and thus, there may still be a need to consider legislation in this area.

In the event that it is determined that legislation is appropriate or necessary, SIIA would continue to support the general framework proposed in the prior legislation (as described above). If legislation is deemed necessary, then believe that such legislation ought to: (i) be as uniform, simple and equitable as possible; (ii) take into account and attempt to balance the interests of copyright users and owners; (iii) incentivize the creation of new tools, technologies, and databases that help potential users identify and locate copyright owners and that make it easier for users and owners to find and communicate with one another about potential licensing, and (iv) establish an environment where it is preferential for owners and users to choose licensing over litigation.

B. Whether the Orphan Works Problem can be Resolved under Existing Exceptions and Limitations Contained in the Current Copyright Act, Such as Fair Use.

As stated above, it may be possible for the orphan works problem to be adequately addressed through existing exceptions and limitations. The fair use defense is one of those exceptions and it should be applicable in many instances involving the use of an orphan work. However, it is important to recognize that use of an orphan work is neither synonymous with nor completely subsumed by the fair use defense. Quite simply, every use of an orphan work is not a fair use.

Our primary concern is that the courts fully understand the relationship between fair use and orphan works use. If courts begin to unduly broaden the fair use defense by “shoehorning” orphan works use into the fair use defense – and in the process create a judge-made orphan-works defense contained within the fair use exception – we would want to revisit the need for codifying an orphan works defense.

Fair use and orphan works are two entirely different legal theories. A fair use analysis requires that a court consider all four factors set forth in Section 107:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

Notably, none of these factors asks whether the copyright owner is known or unknown, or located or unlocatable. Thus, while any particular use of an orphan work may ultimately qualify as a fair use based on an analysis of the four fair use factors, the fact that the user was unable to identify and locate the copyright owner is wholly irrelevant to each of these factors and thus should play no role in a fair use inquiry.

In the case of an orphan work, the most relevant fair use factor would likely be the fourth factor – the effect of the use on the actual or potential market or value of the work. If the work is truly an orphan work, it is possible, perhaps even likely, that the work is not being exploited. If the work is not being exploited by the copyright owner, then it is also *possible* that an unlicensed use of the work would have no effect on the market for or value of the work and therefore the fourth fair use factor may favor the user. But this conclusion is far from certain.

Moreover, even if the fourth factor favors the user, it is just one of four factors that a court would need to consider in evaluating a potential fair use defense. If one or more of the other three factors, or other equitable considerations, weigh in favor of the copyright owner, a court may rule against the user's fair use defense – even if the court finds that the fourth fair use factor favors the user and the copyright owner could not be identified and located at the time of the initial use. Therefore, any suggestion that the fair use defense applies to a particular use based solely on the inability of a user to identify or locate the copyright owner is simply incorrect.

There are other differences between the fair use defense and the orphan works legislative proposals. Fair use is an exception to the copyright owner's exclusive rights. When the fair use defense is successfully asserted, the result is a finding of no infringement and there can be no

injunctive relief and no damage award. On the other hand, orphan works proposals have taken a limitation-on-copyright-remedies approach. Unlike a successful fair use defense, a successful orphan works defense would not result in the use being non-infringing. An orphan works defense would simply limit the remedies that are available for the infringing use. This is important because (as discussed in more detail below) a limitation-on-remedies approach is more equitable than an approach that creates an exception or limitation to a copyright owner's exclusive rights as it would allow the owner to be adequately compensated through payment of a reasonable licensing fee or royalty (while at the same time protecting the user against a large post-use damage award and possibly an injunction).

Therefore, while the fair use defense will apply in some instances, in other instances it will not. It is also possible that another exception in the Copyright Act, like Section 108, might apply, or business models and technologies will be created to address the most vexing orphan works issues. In the meantime, we will continue to monitor the various orphan works cases that come before the courts. If the courts begin to misapply the fair use defense as a way to judicially "legislate" an orphan works exception into the fair use defense, we may change our view and recommend that orphan works legislation be enacted. At the present time, however, we believe that legislation would be premature.

II. DEFINING THE GOOD FAITH REASONABLY DILIGENT SEARCH STANDARD

The only difference between a copyrighted work that is considered to be an orphan work and one that is not, is the result of a user's good faith, reasonably diligent search. Most users do not know the identity of the copyright owner(s) of the copyrighted works they use and must undertake some level of effort to discover the copyright owner's identity. That effort may be as easy as flipping through the first few pages of a book in search of the copyright notice or clicking on the "properties" in the pull-down menu of a software application. However, in most other instances a successful search effort will require a more in-depth search.

For this reason, every single copyrighted work has the *capacity* to be an orphan work. The only dividing line between one that will be considered to be an orphan work and one that will not is the level of effort needed to determine the identity and location of the copyright owner.

Therefore, it is essential that any statutory solution to the orphan works issue be crafted in a balanced way so that the level of effort required under the statute mirrors as closely as possible the actual level of effort that would be needed to determine the identity and location of the copyright owner, if the owner can be found.

If the search standard is set too low, works will be classified as orphaned that should not be, resulting in an undue and potential significant diminution in value of the copyright owner's work. On the other hand, setting the standard too high will result in users undertaking superfluous and potentially onerous search efforts that are unlikely to bear fruit. The additional costs and time associated with this extra effort might result in a scuttling of the use of the work or creation of a project. It is therefore important to get the balance as precise and accurate as possible as failure to do so may harm either the copyright owner or user communities.

To establish the right balance for the good faith, reasonably diligent search standard, the standard must be sufficiently:

- Flexible, to take into account different types of works, uses, users, and owners;
- Standardized, so that all similarly situated users and uses looking for the owner of the same work will be held to the same standard; and
- Adaptable, so that the standards can be rapidly changed to take into account new technologies and databases and new business models.

In addition to these criteria, the definition of “good faith” must require that the potential user of the work conduct the search prior to using the work and that the user adequately documents that search. Any orphan works regime should apply only to uses that occur after the search is completed and only if the search was unsuccessful.³

³ An “unsuccessful search” is one where the user was unable to identify and/or locate the copyright owner after conducting a good faith, reasonably diligent search. For example, if the user identifies and locates the copyright

The burden should be placed on the user (not the owner) to prove that a search was done in advance of use and that the search was reasonably diligent. What is reasonable will depend on the circumstances and should be based on both an objective and subjective standard. Under the subjective standard, it would be reasonable to hold certain users who routinely search for copyrighted works and have developed a level of search expertise, such as libraries and archives, to a higher standard as a result of that expertise. It is important that the search also be measured against objective standards, so that a user who lacks the level of expertise in conducting searches or the financial resources to conduct a thorough search does not get a free pass. Doing so would set up a multi-tiered system whereby users looking for the same copyright owner of the same work are held to different standards.

An evaluation of the adequacy of the search also should account for the identity of the user (and possibly the copyright owner), the type of work at issue, and the type of use. For example, the search standard ought to take into account whether the work is of a type where the identity of the copyright owner is often easily removed, like a photograph. In that case a more stringent search for the owner ought to be required. On the other hand, where the use is for a mass digitization project (discussed in more detail below) it might be appropriate to lower the reasonably diligent standard in exchange for other considerations.

We do not believe that the only choice is between a rigid or flexible search standard. The standard should be a combination of both. The standard should be rigid in that for every search – without exception – the user should be required to conduct certain searches and use certain tools, such as the Copyright Office records, the copyrighted work itself, ownership databases relating to the type of work, and commonly used online search tools, such as text and image search engines. The standard should also be flexible in that it should take into account attributes relating to certain types of works and to the characteristics of the work itself. For instance, for

owner and reaches out to him or her but gets no response, the user's search should be deemed to be successful under the terms of the statute and the orphan works defense should not apply. Similarly, if the user identifies and locates a group of individuals or organizations but there is dispute amongst these parties as to which of them owns which rights in the copyrighted work, the user's search should be deemed to be successful because he or she has identified and located the copyright owner(s) and all that is unclear is which of these individuals has the ability to give the user the requested license, which is a different issue entirely.

certain works use of a particular search tool might be required whereas that search tool might be unnecessary for a different group of works.

The Copyright Office should help create the search criteria by bringing stakeholders together and establishing a process for stakeholders to create and standardize search criteria through the development of best practices. The Office should ensure that the groups that are creating these standards represent balanced interests of owners and users.

The Copyright Office should not create the search standards or best practices themselves but could play a role by certifying them after they have been finalized by the relevant stakeholder groups. Once these standards or best practices are certified, the Office can educate users about the standards and make them available on its website and elsewhere. The Copyright Office can also convene the stakeholder groups to revise the best practices when changes in technology, business models, search tools or other issues arise.

The Copyright Office should not get involved in certifying or evaluating individual searches. Nor is there a need for the Copyright Office to create a copyright tribunal responsible for handing down judgments on potential orphan work uses prior to their use. Such a tribunal would merely add undue cost and delay and further burden the user, while providing no real benefit. Any orphan works use should be the providence of the federal courts, as is the case with all other copyright matters.

III. THE ROLE OF PRIVATE AND PUBLIC REGISTRIES

Private and public registries will play an important role in any orphan works regime that is created.

A. How can Copyright Owners be Incentivized to Register their Works and Keep their Ownership and Contact Information Current?

Today, there exist numerous legal incentives for copyright owners to timely register their copyrighted works with the U.S. Copyright Office, such as the ability to obtain statutory damages, access to the Federal Courts, reimbursement for attorneys' fees and court costs, and

presumption of validity. The Copyright Office could further incentivize copyright owners to register their works and keep ownership information current in a manner consistent with the U.S. obligations under the Berne Convention, by providing copyright owners who register and keep their information current with enhanced rights and/or tools beyond what are required by the Berne Convention and presently provided under U.S. law.

One easy way to provide an additional incentive to copyright owners to register their works is to exempt all works that are timely registered with the Office or otherwise recorded in a certified database from any orphan works classification provided the ownership information relating to the work is kept current.

Another possibility would be to create a new type of recordation system that would simply entail the copyright owner recording his or her information along with the name of the work with the Copyright Office through an online form accessible through the Copyright Office website.⁴ Unlike the current registration system, this new type of recordation would not entitle the copyright owner to any of the benefits contained in Sections 408 - 412 of Title 17. There would be no fee for submitting the recordation and no need to file a deposit copy.⁵ The recordation would not be examined by the Copyright Office. The idea is provide an extremely simple and fast way for copyright owners to record their interests in their copyrighted works with the Office. The information in these recordations would be compiled by the Copyright Office and made available to potential licensees and others in an automated fashion through a publicly-accessible database.

This type of recordation system could be a win-win scenario. Because the recordation will be simple and free, copyright owners who do not presently register their works because their works are not commercial or they lack the monetary resources or time to register all their works under

⁴ This system would work much like the petty patent systems many countries have where there is a trade off between the benefits associated with registration in order to make the registration easier and less cumbersome.

⁵ However, for some works, like images, that are not easily recognizable by title, an alternative to deposit (like a link to or “fingerprinting” of the image) might be necessary.

the existing system would likely embrace the new system. In turn, users would benefit from having access to the volume of information in the new copyright owner database.

This new recordation system would likely have no adverse effect on the current registration system. Revenue generated by the Copyright Office from registration fees and copies deposited with the Library of Congress from the present registration system would likely be unchanged since the vast majority of copyright owners would continue to register their works in order to get the benefits associated with these registrations. If some of the additional benefits suggested above are provided, the gap between a registration and a recordation would be even greater, thereby further assuaging any concern that this new recordation system might lead to fewer registrations, and thus few fees and deposits.

In addition to providing copyright owners with additional incentives, it would also be beneficial to provide third-party data aggregators and technology companies with incentives to proactively seek out and collect ownership information and make it publicly available through a registry (more information on registries is provided below). While the most obvious target to provide such encouragement is the U.S. Copyright Act, other means should also be considered, such as the granting of a tax credit to businesses that create new tools for identifying and locating copyright owners, or the provision of financial assistance by the Small Business Administration to small businesses that create new copyright owner identification and location tools.

B. What should be the Copyright Office's Role in Overseeing Third Party Registries?

There is no reason for the Copyright Office to oversee third-party registries because the market should be able to exert the necessary control. If a registry is inadequate, then it will be susceptible to be overtaken by registries created by competitors who recognize the registry's vulnerabilities and create a better database that draws more users. This competition in the market should spur more successful registries – registries that are comprehensive, accurate, current and easily searchable.

Standards could be established for evaluating registries' searchability, accuracy, comprehensiveness, currentness and accessibility. If a copyrighted work is recorded in a database that meets these standards – the work should be per se “non-orphanable” and there should be a presumption that the user’s search did not satisfy the reasonably diligent search criteria. The entity that establishes these standards could be the Copyright Office, but the standards could also be established by other groups that represent a balanced mixture of owners and users or an independent third party standard setting bodies.

C. Should the Copyright Office Require Users to Register their Use of, or Intent to Use, Orphan Works?

Where an owner cannot be identified there should be no requirement that the user file a use or an intent-to-use statement or make any similar public announcement as these would only serve to delay potential uses and be burdensome for owners to monitor. Where the user knows the owner’s identity but not his or her location or knows the location of the owner but not his or her identity there might be some small value in a targeted public announcement, although it is still highly unlikely that such announcement would help identify or locate the owner after a reasonably diligent search failed to bear fruit and would still be onerous for owners to monitor.⁶

To prevent abuse, a record of the search must be made prior to use. The Copyright Office could establish a process for accepting and retaining orphan work search records and for making them available upon a proper request. Since the benefit and the burden of submitting the records both fall on the user, the filing of a search report with the Copyright Office should be entirely voluntary. The report would merely be date stamped and retained by the Copyright Office in the event the user’s orphan work use is called into question in the future.

IV. TYPES OF WORKS

The U.S. Copyright Act treats all copyrighted works the same – each work is imbued with the same rights, term of protection and remedies. Consistent with this approach, any orphan works solution should apply to all copyrighted works equally regardless of the type of work or how and

⁶ See below for additional input for cases involving mass digitization.

when it is fixed or published. We understand that it may be more difficult to identify the owners of certain works, such as photographs, because, among other things, the copyright notice and title of these works are often not readily discernible from the work itself due to the nature of the work. This fact, however, does not mean these works ought to be excluded from any orphan works system. Rather, these additional concerns can be taken into account when determining whether a user has met its diligent search burden for the work to be considered to be orphaned.

There should be no minimum “age” requirement for a work before it can be deemed to be “orphaned.” It is just as likely that the identity and/or location of the owner of a newer work will not be determinable as with an older work. There is simply no reason to discriminate amongst works based on their age, and doing so could add an additional burden on users by requiring users to not only search for the copyright owner’s identity and location but also the date when the work was first fixed or published.

Similarly, orphan works status should apply regardless of whether the work is published or unpublished. Requiring that a work be published would add an extra burden on the user. Restricting an orphan works regime to published works could also effectively prevent any user from trying to take advantage of the orphan works scheme because it may be too difficult to determine whether a work was ever published. For similar reasons, the nationality of the owner as well as the work’s country of origin should also have no bearing on any application of an orphan work regime.

Lastly, no work should ever be permanently designated as an orphan work. This means that: (i) once the owner makes himself known, the owner would have to authorize any subsequent new uses; and (ii) only those users who perform and satisfy the reasonably diligent search (and any other) requirements to use a work as an orphan work should be allowed to avail themselves of the orphan work defense. Those who are unaffiliated with the orphan work user should not be able to rely on the orphan work user’s actions to qualify for the orphan work regime.⁷

⁷ Subject to the successor-in-interest and agency considerations discussed below.

V. TYPES OF USERS AND USES

Each user's search must be considered on its own merits. If the user's search qualifies under the orphan work's scheme, use of that orphan work should be extended to apply to successors-in-interest (*e.g.*, author, book publisher, book distributors and licensees). It should not extend to unrelated users. Uses by unrelated users should be considered separately as each situation will be different. An unrelated party should not be able to rely on the orphan use by another party.

Any orphan works solution should also not discriminate amongst potential uses and users (with one exception, below). Consequently, the ability to use a work as an orphan should not be restricted to entities that are libraries, museums, archives or nonprofits or uses that are noncommercial. In various provisions of the Copyright Act, libraries, archives and museums receive somewhat different treatment than other users. We do not rule out the possibility that under an orphan works regime it may be appropriate for these groups to be treated differently due to the different nature of their activities. However, the fact that it might be appropriate to accord different treatment to libraries, archives and museums does not also justify excluding other groups from an orphan works scheme. The problem of identifying and locating copyright owners applies equally to all users – it is not unique to libraries, archives, museums or nonprofits. Therefore, it would be imprudent to restrict an orphan works scheme to certain groups or certain types of uses.

The one exception to the above statement applies in the case of state entities. State entities should not be able to avail themselves of any orphan works regime because doing so could cause the United States to be in violation of certain international copyright treaties and agreements, such as the Berne Convention and the TRIPs Agreement. As the result of a series of federal court decisions on the sovereign immunity of States under the Eleventh Amendment, state entities cannot be liable for monetary damages resulting from their acts of copyright infringement. They may, however, be subject to injunctions prohibiting further infringing use of copyrighted works. An orphan works regime that provides the opposite remedy – allowing the copyright owner of the infringed work to obtain money but not an injunction – would result in a copyright owner who comes forward being unable to get both an injunction (under the orphan

works defense) and a monetary award (under the sovereign immunity defense) and, thus, would be left with no legal recourse. This would be a patently unfair result, which almost certainly would violate U.S. obligations under the Berne Convention and the TRIPs Agreement. To avoid this situation, any orphan work regime must either exclude state entities or provide that any state entity must waive its sovereign immunity to avail itself of the orphan work regime.

Lastly, if orphan works use becomes commonplace amongst certain types of users it might make sense to establish some type of “trusted user” classification. These users would need to be certified as orphan work search experts. Any search conducted by one of these “trusted users” could presumptively be deemed to be a “reasonably diligent search.”

VI. REMEDIES AND PROCEDURES

If the reasonably diligent search standards are properly drafted and the user completes the search without successfully identifying and locating the copyright owner, then it’s highly unlikely that the copyright owner of the orphan work will subsequently come forward. In the rare cases where the owner does subsequently appear and object to use of the work, the owner should be compensated for the past use and the user should be required to stop using the work in the future⁸ or, in certain limited circumstances (discussed below), to compensate the owner for any future uses.

This limitation-on-remedies approach is more equitable than a legislative solution that creates an exception or limitation to a copyright owner’s exclusive rights. An exception or limitation approach would preclude any compensation whatsoever for the copyright owner. On the other hand, a limitation-on-remedies approach allows the copyright owner to be adequately compensated through payment of a reasonable licensing fee or royalty, as determined by market practices that existed at the time of the use. This approach also benefits users by protecting users against the risks associated with paying large post-use statutory damage awards, attorneys’ fees and court costs.

⁸ Any injunctive relief imposed on an orphan works user that has met the reasonably diligent search standard and any other statutory requirement should account for the user’s reliance on the orphan works defense. For example, the user should be afforded time to sell off existing products and to find a suitable replacement for the orphan work.

Where the user creates a derivative work that incorporates an orphan work, equity may demand that the remedies available against that user be further limited. Where the orphan work and the user's contribution to the derivative work are inseparably comingled within the derivative work, injunctive relief may cause the user more harm than the harm caused to the copyright owner by allowing the user to continue to use the work. In that instance, injunctive relief should either be limited or unavailable.

VII. MASS DIGITIZATION

It is appropriate that the Copyright Office is conducting its orphan works inquiry in conjunction with its inquiry of mass digitization because the two issues are inseparable. If the mass digitizer is able ascertain the identity and location of the copyright owner there does not need to be any legislative proposal to address mass digitization because the mass digitizer – like any other user – can simply contact the copyright owner and request permission to include the work in the mass digitization project. The fact that the mass digitizer will need to seek a large volume of permissions is irrelevant and is not very different than the situation that has existed for many years in copyright when an organization undertakes a large project that requires multiple (sometimes complex) rights clearances. Therefore, there is no need for the Copyright Office to consider issues of mass digitization other than in situations where the works being digitized are orphan works.

As explained in Section II of these comments, whether a work is considered to be an orphan work depends entirely on the definition of a “reasonably diligent search.” If the search standard is set too low, works will be improperly classified as orphans. If the standard is set too high, then the burden on the mass digitizer might be so high that it could prevent certain mass digitization projects from occurring, thereby depriving others of a new valuable and potential innovative creation. So it's very important that this definition be appropriately balanced.

Because there are different considerations that arise in a mass digitization project as opposed to an occasional or isolated orphan work use, what is considered to be a “reasonable diligent

search” for a mass digitization project will likely be quite different than for the occasional or isolated use of an orphan work. For example, it might be appropriate to specify that “reasonably diligent search” is satisfied for purposes of mass digitization when the mass digitizer conducts automated queries of certain specified databases defined in best practices and the search did not result in the mass digitizer finding current and accurate owner contact information.

If the search standard is set at a lower level for mass digitization projects then arguably there will be a greater chance that those searches will fail to find copyright owners that may have been found under the standard that would apply for occasional or isolated orphan work uses. To offset this problem, orphan works legislation could require that mass digitizers take certain additional actions that occasional and isolated orphan work users would not need to do.

In exchange for the lower search standard it would be prudent to require mass digitizers to put aside money in an escrow account in which to pay those copyright owners who come forward. The amount of money the mass digitizer would have to deposit in the escrow account would assume that only a small percentage of copyright owners reveal themselves. In the case of occasional or isolated orphan work uses, an escrow makes little sense since the money will likely just sit untouched in the escrow account. However, in the case of a mass digitization project a lower search standard may result in more copyright owners coming forward. Also, since many more works are being used in the mass digitization project there is a greater chance one or more copyright owners will come forward to make themselves known.

A public announcement of intent-to-use may also make sense in the mass digitization context, especially where the works being digitized are of a certain type, similar location or otherwise share similar features. The public announcement would describe the mass digitization project and the works that are going to be digitized in that project. The burden associated with a public announcement for mass digitization project should be significantly less than if a public announcement would be required for occasional or isolated orphan works uses. Since mass digitization projects are often conducted over a long period of time, the announcements can be published at certain times of year, thereby reducing the burden on copyright owners to monitor

and review announcements and reducing the burden on users to publish numerous announcements throughout the year.

While there is reason to reduce the search burden for mass digitizers and to require them to take certain additional actions that occasional and isolated orphan work users would not need to (such as escrow and publication), all other aspects of the mass digitization scheme should apply to mass digitizers just as they do to those who are making occasional or isolated uses of orphan works. There is no reason for an orphan works regime to be limited to certain types of digitization projects, certain types of mass digitization entities, or certain types of works.

VIII. COLLECTIVE LICENSING

We oppose the creation of an extended collective licensing (ECL) regime under U.S. law because it is inconsistent with U.S. copyright laws, legal norms, and industry practices. Although an ECL regime would allow the copyright owner to be compensated for a use, an ECL regime would effectively eliminate the copyright owner's right to authorize the use of his or her works – contrary to long-standing U.S. policy and law. At this time, there is insufficient information relating to the use of orphan works in mass digitization projects to warrant the dramatic departure in the U.S. copyright system that would be necessitated by adoption of an ECL regime for mass digitization projects involving orphan works.

CONCLUSION

We would like to thank the Copyright Office for giving us the opportunity to participate in this process and to submit these comments. Any questions or requests for additional information about these comments can be directed to Keith Kupferschmid, SIIA's General Counsel and Senior Vice President for Intellectual Property, at (202) 789-4442 or keithk@siia.net.