



Comment regarding Orphan Works and Mass Digitization submitted to the U.S. Copyright Office, Library of Congress, in response to a Notice of Inquiry dated February 10, 2014.

May 20, 2014

## **Introduction**

Wikimedia District of Columbia respectfully submits these comments on orphan works reform in response to the Copyright Office's Notice of Inquiry, Docket No. 2012-12, dated February 10, 2014. We are grateful for the opportunity to participate in these roundtables and give a viewpoint from the Wikimedia movement, which we believe has not yet been expressed in previous comments to the Copyright Office.

The Wikimedia community of volunteers is dedicated to creating "a world in which every single human being can freely share in the sum of all knowledge"<sup>1</sup> through its educational projects, such as Wikipedia, Wikimedia Commons, and Wikisource. Wikipedia is the fifth-most-visited website on the Internet and the largest reference work ever assembled, with 31 million articles across 287 language editions. Wikimedia Commons is a media file repository of educational media content containing over 20 million images, sound clips, and video clips. Wikisource is an online digital library of free-content texts, 300,000 of which are in English. All the content in these Wikimedia projects is freely available to be seen and used legally by anyone in the world under a free-content license. Wikimedia content is created and maintained not by paid archivists but by volunteers from around the world and from all walks of life who contribute by editing and uploading files to Wikimedia-supported wikis on the Internet.

Wikimedia District of Columbia is the regional Wikimedia chapter serving the District of Columbia and nearby states. We are a nonprofit charitable organization dedicated to the advancement of general knowledge and the collection, development, and availability of educational content under a free license or in the public domain. We support the goals of the Wikimedia Foundation, including the work of volunteers on Wikipedia and other free-knowledge initiatives. We hold events, including training sessions and edit-a-thons, where experienced Wikipedians and newcomers have the opportunity to

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<sup>1</sup> Wikimedia Foundation: Vision: <http://wikimediafoundation.org/wiki/Vision>



network and learn from each other. We work with museums, libraries, and other specialized institutions to share their knowledge with the rest of the world through Wikipedia, the world's most widely visited not-for-profit website. We are an all-volunteer organization.

**Wikimedia's educational mission would benefit from orphan works legislation designed to minimize the burden on its volunteer contributors.** The amount of burden will affect whether we are able to use orphan works in the pursuit of our educational mission. Burdens such as an escrow fee, or allowing monetary remedies for non-profit educational use, would generally prevent us from using orphan works. It is also important that the law should provide simple and clear guidelines on what satisfies the requirement of a diligent search, to avoid the chilling effect of uncertainty among users as to when orphan works can freely be uploaded.

**We believe that a legislative solution is still necessary to allow Wikimedia projects to use orphan works.** Recent technological and legal developments, such as increased availability of online databases and the recent Google Books judicial decision expanding fair use, do not cover the types of works and uses that are of interest to Wikimedia projects. Thus a significant distinction exists between Wikimedia projects and traditional galleries, libraries, archives, and museums (abbreviated as GLAM), as we have individual contributors uploading media, and we seek to make our hosted material available for wide reuse by downstream users. For Wikimedia purposes, reform pursuant to the 2006 Copyright Office recommendations or the 2008 Senate bill would help us in our public, educational mission.

## **On the need for legislation**

Wikimedia projects have long used public-domain and freely-licensed works to support Wikimedia's educational mission. These projects include using textual and visual media as part of encyclopedia articles and making them available for reuse by others. However, very few works first published after 1922 are in the public domain, and these very few are due to technicalities that are often hard to verify (partially due to lack of copyright records modernization). Wikimedia projects also host user-provided content granted under a free license, such as those of Creative Commons or the GNU Free Documentation License (GFDL), but these have been published only recently. Most media created from 1923 to the early 2000s are therefore unavailable for use in Wikimedia projects.



Since our goal is provide material that is freely available, the Wikimedia projects use works under fair use extremely sparingly. In fact, our internal criteria for non-free content are purposely much stricter than the law would allow for: we only use works under fair use if no freely licensed equivalent could possibly be created.<sup>2</sup> For example, we generally do not host non-free photographs of living persons or of existing buildings, because a free equivalent could be created by a volunteer taking a new photograph. (These rules only apply to the English-language version of Wikipedia; other language editions such as Spanish and German Wikipedia do not allow fair-use media at all.)

Thus an expansion of fair use by the courts or through legislation would not by itself enable readers of Wikimedia to benefit from most orphan works. These works are also unlikely to be orphaned using improved search tools or databases/registries of owner information, regardless of how much these are improved, as the works we are interested in are mainly historical media whose authors who are not commercially exploiting and are probably unaware of their rights.

### **On defining "reasonably diligent search"**

Having simple and clear guidelines on what satisfies the requirement of a diligent search would be important for the use of orphan works on Wikimedia projects. This would avoid the chilling effect of uncertainty among users as to when orphan works can freely be uploaded. It is also important for us that any such definition should be accessible to individuals, not just to sophisticated players with specialized skills and/or teams of professionals supporting them. Our volunteers include a spectrum of Internet users of all ages and varying English fluency, and the procedure for doing a diligent search should be clear enough that our contributors can follow it easily by following a checklist on our web upload form. These guidelines could be provided through either legislation or Copyright Office regulations. It is reasonable to have different guidelines for different classes of works.

At the roundtable, many author groups expressed concern that their works could be stripped of metadata and posted to the Internet on sites like Twitter, thus becoming "instant orphans" that downstream users could exploit. Wikimedia's policies and practices make it clear that such content would not be welcome on Wikimedia servers. We require source and author information on every upload, and we actively

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<sup>2</sup> Wikipedia's non-free content policy: <http://en.wikipedia.org/wiki/WP:NFC>



search for and delete uploads that do not provide this metadata.<sup>3,4</sup> The web form for uploading media to English Wikipedia requires users to state that the work is either demonstrably a free work or meets Wikipedia's stringent criteria for fair use; selecting a third option that states "I found this file somewhere, but I don't really know who made it or who owns it" brings up a message sternly warning the user not to upload it.

## **On the role of registries**

Requiring mandatory registration of uses of orphan works, as is currently done in the United Kingdom, would be an added burden for Wikimedia volunteers. However, if the details are properly thought out this impediment could potentially be overcome, for example if there is an API that would allow such registration to be automated through our own upload form rather than requiring a separate process. An optional registration provision would be satisfactory as well.

We recognize the difficulty that an orphan work could be reused in a way that rights holders would have trouble becoming aware of, impeding them from seeking redress. Unlike other categories of reuse, any orphan work hosted on Wikimedia projects is widely available on the Internet and easily findable by a creator wishing to reclaim their rights. Such searches can be conducted quickly and easily for free from regular web browsers anywhere without any need to register with Wikimedia projects. The Wikimedia projects themselves thus act as a sort of public registry for the orphan works they store, and it would be easy for other registries to incorporate lists of the orphan works stored on Wikimedia projects.

## **On types of works, including photographs**

The Wikimedia community is mainly interested in historical media such as those found in archives and libraries, whose authors who are not commercially exploiting and are probably unaware of their rights. Our contributors include both individuals who obtain such historical media themselves, and partner organizations in the GLAM sector who contribute digitizations of their holdings on a selective or bulk basis. Most of these works are in the form of photographs, although other media types such as text, visual art, and sound and video recordings may be of interest as well. These may be either attached to

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<sup>3</sup> Wikipedia's image use policy: [http://en.wikipedia.org/wiki/WP:IUP#Copyright\\_and\\_licensing](http://en.wikipedia.org/wiki/WP:IUP#Copyright_and_licensing)

<sup>4</sup> Wikipedia's guide to image deletion: [http://en.wikipedia.org/wiki/WP:GID#Addressing\\_suspected\\_copyright\\_infringement](http://en.wikipedia.org/wiki/WP:GID#Addressing_suspected_copyright_infringement)



larger works like books, or be stand-alone items. The exclusion of photographs from orphan works reform would thus remove the largest part of our intended uses of orphan works. (A provision similar to the recent European Union directive on orphan works, which excludes only commercial uses of photographs, would still have implications for us as discussed in the following section.)

We have noted the concern of author groups at the roundtable discussions that works that they are currently commercially exploiting might be affected by orphan works reform that is too broad. It appears that the body of works that is the subject of their concern is different from the body of works that the Wikimedia projects seek to benefit from. We believe that it may be possible to develop a provision that draws a line between these two bodies of works, and we support further discussion to determine the details of such a provision. One possibility could be a requirement for some evidence that the work was created before a certain threshold of perhaps 20 or 30 years. It may also be possible that digital image registries such as the PLUS Registry (<http://www.useplus.com>) would even make such a provision superfluous, since rightholders can easily protect their works through submission to the registry, and such a repository can easily be searched by uploaders or Wikimedians seeking to verify orphan status.

It can often be unclear whether a copyright exists on a work at all, if for example its creation or first publication date is unclear, the country in which it was created is unclear, or if it is unclear whether its creator was a U.S. federal employee on duty, or off duty, or a government contractor. It would be helpful for our mission to allow works where the copyright status itself is uncertain, but where if copyrighted would be orphan works, to be treated as orphan works and allow use of them.

We also note that orphan work status does not override privacy concerns, and we already have guidelines about privacy issues arising from photographs and other media.

Currently, Wikimedia projects use orphan works only when they would qualify for fair use under our stringent restrictions, as discussed above. Thousands of our volunteers, across the globe, have confronted these issues. They arise frequently, and some volunteers have built up expertise about them and documented procedures and recommendations online. Following is a list of examples where reform would help serve our mission.

- **Historic photography campaign.** Wikimedia District of Columbia is organizing a "Summer of Monuments" campaign to increase Wikipedia's coverage of photographs of historic sites in the



southern United States. While new photographs created by individuals will be under a free license, we plan to obtain historical photographs, especially for buildings that no longer exist or whose appearance has changed. We are seeking to partner with local archives and historical societies to fulfill these needs. Their photos often have no metadata, making them orphan works that we cannot use in most cases. Orphan works reform would allow us to use these historical works to illustrate articles, and make them available for wider reuse by others.

- **1898 photograph of Ezra Pound.** A particularly interesting (and still current) case concerns a photo of the young Ezra Pound from 1898,<sup>5</sup> an image that has been extremely carefully researched and for which quite a lot is known about its provenance. Issues have arisen of whether the photographer, his employer, or the subject might have been the original copyright holder, as it seems that for early U. S. photographs, the subject was generally the copyright holder. Bearing in mind that possibly no one ever knew who the copyright holder was it cannot be determined whether any of its publications over the years have been lawful and so the copyright term cannot be determined with certainty. (However, in this case it seems to be accepted that Wikipedia's current use of the image, if it is still in copyright, meets our non-free content policy.) A dozen Wikimedians have worked on its provenance and copyright status. Plainly the public interest would be served by clarifying the issue and allowing the photo to be used.<sup>6</sup>
- **Family photographs.** One user struggled with the decision about whether to use a photo of economist Bert Hoselitz provided by his family to illustrate the article about him and eventually gave up since the original photographer could not be identified, to the disappointment of people who had helped him. If orphan works were available to be used, the photograph could be used to illustrate his biography on Wikipedia.
- **United States government works.** Photographs found on federal government websites sometimes do not cite the author, leading to ambiguity as to whether they were created by federal employees on duty (in which case the work is public domain) or by contractors (in which case the work is often under copyright). National laboratories, which are usually operated by outside contractors, are a major example of this. One of our users found photographs of scientists at a conference on the

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<sup>5</sup> The photograph is located here: <http://en.wikipedia.org/wiki/File:EzraPound%26IsabelPound1898.jpg>

<sup>6</sup> See discussion on Wikipedia:

[http://en.wikipedia.org/wiki/Wikipedia:Village\\_pump\\_\(miscellaneous\)/Archive\\_45#Input\\_wanted:\\_orphan\\_works](http://en.wikipedia.org/wiki/Wikipedia:Village_pump_(miscellaneous)/Archive_45#Input_wanted:_orphan_works)



website of Oak Ridge National Laboratory. Luckily, Oak Ridge National Laboratory has specifically clarified that all material on their website is public domain, but if this clarification had not been made the copyright status of these works would be unclear, and they could not be used to illustrate articles about these scientists. Orphan works reform would allow use of photographs in these situations where no such blanket declaration had been made.

- **Users avoiding specific topics.** One member reported that she is often paralyzed with fear regarding materials since 1923, which might be under copyright, and retreats to the safe harbor of materials dating from before 1923. This user reports a chilling effect on writing on topics that require sources written after 1923, due to the complex copyright laws. She would like to write new articles about topics that are more modern than clipper ships and defunct Tibetan monasteries, and is eagerly awaiting reforms in the law to allow this.

## On types of users and uses

The Wikimedia Foundation is a non-profit educational organization, but not a traditional gallery, library, archive, or museum. Any legislation that gives special treatment to these types of organization should be worded broadly enough that organizations like the Wikimedia Foundation and its volunteers would be included in that category.

Any potential restrictions on commercial use of orphan works will impact whether Wikimedia projects can use them. While the Wikimedia Foundation is a non-profit organization that itself uses content non-commercially, one of the Foundation's stated goals is to also make our content available for reusers, including those that intend commercial use. Thus, the Foundation does not consider licenses that ban commercial use to be free licenses,<sup>7</sup> but if orphan works reform does not apply to commercial uses, this may impede our ability to use these works. If reform does allow commercial uses, this uncertainty will be removed.

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<sup>7</sup> Wikimedia Commons' justification for its licensing requirements:  
<http://commons.wikimedia.org/wiki/Commons:Licensing/Justifications>



## **On remedies**

The 2006 Copyright Office report recommended that monetary relief should not be available for non-commercial uses of orphan works whose copyright owner later surfaces. We believe that limiting monetary relief to zero or a very low amount is vital to allowing the use of orphan works on Wikimedia projects, as the Wikimedia Foundation and many of our volunteers have limited financial resources, and cannot assume the risk of a large financial settlement.

With regard to injunctive relief, we note that we already routinely delete text or media upon request from rights holders without any need for legal demands or proceedings. This will remain the case whether there is orphan works reform or not.

## **On extended collective licensing**

Any provision that requires payment to use an orphan work, for example a self-defense fee in escrow, would likely impede most uses on Wikimedia, again because the Wikimedia Foundation and many of our volunteers have limited financial resources with which to pay such fees.

We also note that many GLAM organizations have partnerships with various parts of the Wikimedia community in which these organizations post their digitized holdings on Wikimedia Commons rather than on their own website. Any reform should not impose any new burdens on this, such as language that would have the effect of restricting GLAM organizations' publications of orphan works to their own websites.

Thank you.

Respectfully,

/s/ Peter Meyer

/s/ Jim Hayes

/s/ Yi-Fun Hsueh

/s/ John Sadowski

Public Policy Committee