

AMERICAN SOCIETY OF



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Comments on the Question of Mass Digitization of Orphan Works
From Minda Zetlin, president, American Society of Journalists and Authors

ASJA was a prominent objector to the proposed settlement of the Authors Guild/Google lawsuit. Our major objection to that settlement was to the regime that would have given a large corporation, Google, along with a consortium controlled by a small number of powerful interested parties, control over orphan works--a resource which by rights belongs to the people of the United States.

Today, that regime is several steps closer to being a reality than it was in 2008. Google's ongoing mass digitization of copyrighted books (both orphan and non-orphan) is a breathtaking act of copyright infringement but that infringement has now been granted legitimacy by the settlement of publisher plaintiffs in the Google Books Search suit, and perhaps by the recent HathiTrust decision which grants libraries the use of these works (although that decision is sure to be appealed). We reiterate that a world in which a corporation keeps control of our collective cultural heritage—even if it does so with the participation of a writers or publishers group, or consortium of libraries—is not one we want to live in.

At the same time, as researchers and citizens ourselves, we recognize the need to make orphan works accessible and the great good created by increased availability mass digitization creates. As writers, most of us would prefer to have our works remain accessible to future generations, even if we ourselves or our heirs cannot be found.

We believe that Congress should again take up the question of orphan works legislation, taking into account the need to require a rigorous search for a rights holder before an orphan work can be used, and the need to allow rights holders to remove their work from orphan status at any time and to ensure proper compensation for rights holders who do appear as well as powerful discouragement for anyone to abuse the use of orphan works.

We believe oversight of orphan works most properly rests with the Copyright Office, as the best representative of the people of the United States. Given the ongoing project to digitize the

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entire copyright inventory, the Copyright Office is and will be in a uniquely good position to determine whether a work truly is an orphan. Extended collective licensing as referenced in your call for comments seems to us a reasonable mechanism for the management of orphan works and payments, and a registry collectively representing rights holders in the form of multiple writers' organizations could effectively negotiate for orphaned books and other text works on behalf of their absent rights holders.

Since mass digitization is already a reality today, the need for a legitimate regime to oversee orphan works is now urgent. To date, Google is the only company scanning copyrighted works and it has attempted to secure its hegemony via exclusivity agreements with the libraries where it is doing so. But we should assume that, in time, other companies with other agendas will also undertake mass digitization, working with non-HathiTrust libraries, publishers, schools, and other sources of book collections. The resulting morass of competing digital collections and lawsuits will make the use of orphan works even more of a legal hazard than it is today, making it even more difficult for good faith users to make use of these works with any kind of confidence.

The lack of a legislative solution to this problem creates a vacuum into which Google has rushed and others will undoubtedly follow. The time to do something about it is now. So we urge you to join with us and other writers' organizations in urging Congress to again take up the subject of orphan works and enact legislation to place control of this resource where it properly belongs.

In addition, we believe it is time for representatives from the Copyright Office to work with your counterparts in other countries to begin crafting international accords for the governance of orphan works. In a world where book piracy is increasingly rampant and so many works are published over the aptly named World Wide Web, national borders are increasingly meaningless to infringement. International agreements are sorely needed if copyright protection is to have much power in this digital age.

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