



February 4, 2013

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Register of Copyrights  
United States Copyright Office  
101 Independence Ave. S.E.  
Washington, DC 20559

*RE: Notice of Inquiry—Orphan Works and Mass Digitization*

To the Register of Copyrights:

Pursuant to the Notice of Inquiry (“NOI”) published in the Federal Register on October 22, 2012 (77 Fed.Reg. 64,555), I submit these comments on behalf of the Association of American Publishers (“AAP”) regarding the Copyright Office’s efforts to assess the current state of orphan works issues, including potential solutions for occasional uses and the mass digitization of orphan works.

AAP’s core mission is to support publishers—copyright owners and users. As the principal national trade association of the U.S. book publishing industry, AAP represents more than 250 member companies and organizations that include most of the major commercial book publishers in the U.S., as well as many small and non-profit publishers, university presses and scholarly societies. As such, AAP and its member publishers have an interest in supporting the wide dissemination and use of copyrighted works under established principles of copyright law. With our members’ considerable experience in seeking permission for the use of discrete copyrighted works as parts of works of history and biography, textbooks and anthologies, and virtually all other genres of literary works that they publish, they have a deep understanding of the problems that can arise when a copyright owner cannot be identified and located for purposes of obtaining necessary permissions, and would welcome a change in the copyright law that helps to address those issues.

That said, the importance of finding an efficient, fair, and balanced solution to the orphan works problem has been a priority of AAP for many years. In fact, AAP has been on the public record as supporting the development of a solution to the problem of “orphan works” since it provided comments and testimony to that effect in the proceedings that resulted in the issuance of the Register of Copyright’s *Report on Copyright and Digital Distance Education* in May 1999. We

welcome this new opportunity to address both the occasional use and mass digitization of orphan works, and look forward to reaching a solution that will, this time, be implemented.

## **I. The Changing Legal Landscape vs. Continued Need for Orphan Works Legislation**

As the Copyright Office noted in its NOI, the legal landscape has evolved in respect to orphan works since it last studied the topic in 2005-2006. This evolution, however, does not mean that the primary goal of previous orphan works legislation should change. To be sure, the defining characteristic of the orphan works problem remains the same, namely, there are still works for which the “owner of [the] copyrighted work cannot be identified and located.”<sup>1</sup> To truly enable fair and efficient use of such works, AAP continues to support orphan works legislation, “relevant where [permission is necessary and] all other exemptions [including fair use] have failed,”<sup>2</sup> that helps “to make it more likely that a user can find the relevant owner in the first instance, and negotiate a voluntary agreement over permission and payment...for the intended use of the work.”<sup>3</sup>

## **II. Occasional Uses of Orphan Works**

More specifically, AAP continues to support the orphan works solution approved by the Senate under the *Shawn Bentley Orphan Works Act of 2008* (“2008 Act”). AAP believes the basic tenets and structure of the 2008 Act should comprise the framework of any new orphan works legislation addressing occasional uses. However, this suggestion is put forward as a preliminary starting point, and AAP supports future discussion of the various aspects of the 2008 Act and new proposals to ensure that any new legislative solution addressing orphan works results in a benefit, on balance, to all stakeholders.

Furthermore, AAP supports a “minimalist” approach that is intended to: (1) require the fewest possible changes to current U.S. copyright law; (2) have no impact on U.S. obligations under international copyright agreements; and (3) entail the least possible bureaucratic impact on governmental entities and on owners and users of copyrighted works. AAP believes that basing new legislation on the 2008 Act will achieve this goal and provides a short list of the key provisions that should constitute the framework of any new legislation.

### ***Key Provisions of the 2008 Act***

- A common standard applied to all types of copyrighted works, whether published or unpublished, regardless of their age or national origin.<sup>4</sup>
- Use of orphan works without discrimination regarding the type of use or the status of the user (e.g., for-profit or not-for-profit) after the would-be user has made a reasonable, but unsuccessful, search to identify and locate the copyright owner for permission.
- Case-by-case good faith diligent search requirements for occasional uses of orphan works requiring personal documentation of the search.

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<sup>1</sup> OFFICE OF THE REGISTER OF COPYRIGHTS, REPORT ON ORPHAN WORKS, 1 (2006).

<sup>2</sup> *Id.* at 95.

<sup>3</sup> *Id.* at 93.

<sup>4</sup> *Id.* at 95.

- No requirement that the user of an orphan work file a search report or a notice of intent-to-use the orphan work.
- Robust limitations on infringement liability:
  - using “reasonable compensation” as the appropriate monetary remedy that would remain available to rights holders that wished to bring a claim against an infringer for using a work after conducting a proper diligent search;<sup>5</sup> and
  - ensuring that the limitations on injunctive relief do not undermine the limitations on monetary damages.
- Clear language explaining that legislation addressing occasional uses of orphan works “does not affect any right, or any limitation or defense to copyright infringement, including fair use.”<sup>6</sup>

In sum, AAP supports legislation with diligent search requirements that minimize misclassification of works as orphans, are clear and simple to apply in practice, and do not create unnecessary burdens on prospective users of orphan works. A legislative solution that remains true to these objectives should increase use of orphan works, protect the rights of copyright owners, and result in a net benefit to the public by opening up the vaults currently locking away many works of unknown importance.

### **III. Mass Digitization of Orphan Works**

Previous legislative proposals did not address mass digitization of orphan works. However, a number of projects, including the Digital Public Library of America, Google Books, and HathiTrust, to name the most prominent, have raised this issue. Thus, AAP believes it appropriate to discuss the possibility of addressing the mass digitization of orphan works as part of comprehensive orphan works legislation.<sup>7</sup>

AAP believes that an approach similar to that taken in the 2008 Act with respect to occasional uses could be applied to the mass digitization of orphan works. As with occasional uses, legislation could offer a limitation of remedies if the party engaging in mass digitization acted with reasonable diligence. In place of the reasonably diligent search for the rightsholder required in the case of occasional uses, the party engaging in mass digitization would be required to act with reasonable diligence in screening from the project those works for which a rightsholder could be located. Given the advancements in technology, the wide availability of online data, and constantly improving registries, it is not implausible to believe that a search protocol could be designed that would be as effective as an individual user’s reasonably diligent search for the holder of rights in a particular work.

AAP at this time is not ready to endorse such an approach, but looks forward to reviewing the comments of stakeholders that have an interest in engaging in mass digitization efforts.

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<sup>5</sup>*Shawn Bentley Orphan Works Act of 2008*, S. 2913, 110th Cong. § 2(c)(1)(A) (2008).

<sup>6</sup> *Id.* at § 2(d) (stating the “Preservation of Other Rights, Limitations, and Defenses”).

<sup>7</sup> AAP does note, however, that many groups, from libraries and universities to commercial entities, evidence an interest in pursuing mass digitization in contexts other than orphan works. Therefore, AAP supports having the Copyright Office open a separate inquiry into a broader legislative framework for mass digitization.

#### **IV. Fair Use as an Alternative?**

Today, some communities propose that fair use suffices to allow for mass digitization of orphan works as well as occasional uses. AAP, however, continues to support the conclusion, endorsed previously by the Copyright Office and currently by many countries, that legislation is necessary to effectively, efficiently, and fairly address the orphan works issue.

To be sure, the 2008 Act clearly stated that it did not affect the fair use defense. And, as stated above, AAP believes that any new legislation, whether just addressing occasional uses or also addressing mass digitization of orphan works, should take the same approach.

AAP is skeptical, however, that fair use is a sufficient basis for many of the mass digitization projects now envisioned. AAP agrees with Judge Chin's statement, in the context of the Google Books project, that fair use is unlikely to apply to "unauthorized copying and selling or other exploitation of *entire* copyrighted books."<sup>8</sup>

Fair use is an assessment to be made on a case-by-case basis. Depending on the selection of copyrighted works involved and the uses to be made of them, mass digitizers cannot be confident that their uses will, after the fact, be found to have been fair, and the exposure should they guess wrong can be quite large. AAP believes, therefore, that a properly-crafted orphan works statute can, if followed, be an important factor in reducing the risk in mass digitization of orphan works not currently available to the public.

#### **V. Conclusion**

AAP will carefully review and consider other Comments submitted to the Copyright Office in response to its Notice of Inquiry. We look forward to submitting Reply Comments that will address the views and proposals put forward by other Commenters, while further discussing and refining the views and proposal submitted in our initial response.

Respectfully Submitted,



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<sup>8</sup> OFFICE OF THE REGISTER OF COPYRIGHTS, LEGAL ISSUES IN MASS DIGITIZATION: A PRELIMINARY ANALYSIS AND DISCUSSION DOCUMENT, 23 (2011).