



Emory University Libraries

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**COMMENTS OF EMORY UNIVERSITY LIBRARIES
IN RESPONSE TO THE COPYRIGHT OFFICE'S NOTICE OF INQUIRY
CONCERNING ORPHAN WORKS AND MASS DIGITIZATION**

Ranked among the top 25 academic research libraries in North America, Emory University Libraries in Atlanta and Oxford, Georgia are an intellectual commons for Emory University. Comprised of 9 libraries, the holdings include more than 3.4 million print and electronic volumes, 83,000-plus electronic journals, and internationally renowned special collections. Emory is well known in a number of collection areas including modern literature, African-American history and culture, U.S. Southern history and culture, and U.S. civil rights.

With special collections that focus on the 20th Century, Emory University Libraries welcomes this opportunity to comment on the Copyright Office's Notice of Inquiry dated October 12, 2012 concerning Orphan Works and Mass Digitization. Emory University Libraries' share a common mission with many academic libraries to preserve and make accessible our intellectual heritage:

We develop distinctive collections, services, staff and facilities to preserve our intellectual heritage and advance the discovery and transmission of knowledge for students and scholars of today and tomorrow.

The Libraries' work is in service of the university's enduring mission to educate students and generate new knowledge.

1. Orphan Works on an Occasional or Case-by-Case Basis

Since the 2008 orphan works legislation was proposed, the digitization efforts of libraries have become a regular part of preservation and service activities, with collections reviewed and selected for digitization based on copyright status, physical condition, uniqueness, and historical significance of the works in the collections. Also, the focus of digitization activities has expanded from print materials to images and audiovisual materials. Prior to digitization, a copyright status review frequently reveals that within these collections are both public domain and in copyright works, and among the in copyright works are orphan works. For uses of in copyright works that do not fall within section 108 (Reproduction by libraries and archives) or a reasonable interpretation of section 107 (Fair use), the Libraries will seek permission of the copyright owner. However, this is not possible for orphan works. We have yet to complete a copyright status review of a special collection that did not identify some orphan works.

The distinctions made between occasional or isolated use of orphan works and orphan works included as part of mass digitization are somewhat false distinctions in practice. Libraries frequently focus digitization efforts on collections of works, rather than only single or select items, to preserve the intellectual context of the collection. Also, while a lot of attention has been given to orphan works that were published, library special collections often contain unpublished works that are orphans.

As an example, Emory's Manuscript, Archives and Rare Book Library (MARBL) collections include the records of Neighbor's Network, a volunteer group founded in 1987 with the mission to counter hate-crime and hate-groups in Georgia through research, education, victims assistance and community action. The Neighbor's Network distributed fliers denouncing the Ku Klux Klan and skinhead organizers, documenting sightings of known skinheads or Klan members, infiltrating the Klan, and publishing a newsletter,

among other activities. This collection, primarily from 1987-1998, consists of 12.5 linear feet and two bound volumes that include administrative records, printed materials and photographs. The Neighbor's Network collection chronicles a dramatic shift in the 1980's in the ideology and recruiting tactics of hate groups to attract urban and suburban kids in their teens and early twenties; tactics that are still being practiced today. Many of the photographs of hate group rallies in the collection have no known photographer, although it is reasonable that volunteer members of Neighbor's Network who had infiltrated these hate groups and not professional photographers took many of the photographs. The printed works in the collection, including newsletters, fliers, reports, and educational materials, were published by hate groups or by groups dedicated to countering them. Most of these groups no longer exist and there are no known authors of these works. While the Neighbor's Network collection has both historical significance and relevance for understanding the tactics of hate groups today, many of the works in the collection are orphan works, with no known author or creator. Therefore it is not possible to request permission of the copyright owners to make uses beyond what is reasonably a fair use of digitized works in the collection.

Another MARBL collection of historical significance is the Langmuir photograph collection, circa 1840-1970. This collection of approximately 10,000 photographs depicting African-American life in the United States includes tintypes, daguerreotypes, cabinet cards, portraits, snapshots and postcards. Known photographers took only a small number of the photographs in this collection, and many photographs have no known date of creation. Many of the photographs in this collection are in copyright and orphans, so it is not possible to either make a public domain determination or request permission for the 10,000 photographs in the collection that were not taken by a known photographer who can be located. To digitize and make accessible only the public domain works, where

a public domain determination is even possible, would be to derogate the intellectual value of this collection, negating the ability to evaluate through a century of images the changes in circumstance, status and lives of African-Americans in the U.S. To provide access only to the physical collection housed in Atlanta is to limit the value and reach of the collection to only those who can afford to travel, and handling of the physical photographs precipitates their deterioration and damage.

The reasonably diligent search requirement of the 2008 proposed legislation for orphan works has proven to be largely unworkable in practice. Included in the legislation were provisions for (1) a good faith, reasonably diligent search for the copyright owner, (2) attribution to the author and copyright owner, if possible and appropriate under the circumstances; and (3) limitation on remedies that would be available if the user proves that he or she conducted a reasonably diligent search. In the years since this legislation was proposed, libraries have gained more experience with investigating orphan works, including the HathiTrust Orphan Works Project. Although the Copyright Office has committed to digitizing copyright registration records, and should be applauded for this work, the reality is that there is no single source or group of records that can be relied upon to complete an exhaustive search. The cost of checking the many possible sources, where it is even possible to do so, quickly becomes untenable for the limited staff and budgets of cultural and intellectual heritage institutions like libraries when digitizing collections of works for non-commercial purposes.

In *Authors Guild, Inc. v. HathiTrust*, No. 11 CV 6351, 2012 WL 4808939 (S.D.N.Y. Oct. 10, 2012) the Authors Guild litigated over the proposed release of published books in the collection of the University of Michigan Library that had been identified as orphan works. The list of 150 proposed orphan works was publicly posted on a website, and as a result the Authors Guild identified the copyright owner of one book, although they

identified the authors of several others. As a result, the Orphan Works Project was suspended, no orphan works were released, and the court determined the question of orphan works in HathiTrust was not currently ripe for adjudication. While the outcome of this case may be thought to have a chilling effect on libraries and orphan works, in fact the strong finding of fair use for the archive of these published works has given libraries more confidence in the contours of fair use in digitizing collections. Also, the works at issue in HathiTrust are all published books that had been commercially available. Much of the special collection materials in libraries, like the Neighbor's Network and Langmuir collections described above, consist of unpublished works or works never created for commercial gain. To impose the complexities of the 2008 orphan works legislation on all orphan works is not a solution to the orphan works problem, and creates greater confusion and barriers to the non-commercial use of orphan works than a reliance on fair use.

2. Orphan Works in the Context of Mass Digitization

The mass digitization efforts of projects such as Google Books, HathiTrust and Europeana have brought to the forefront the issue of orphan works. However, as noted above, most digitization efforts are not on this scale, making a distinction of mass digitization for orphan works problematic. We estimate that every collection we have, including our special collections, includes some orphan works. The number varies by type and age of the works in the collection, with orphan works consisting of the majority of some special collections.

Many of the works libraries seek to digitize were not created with the intent of commercial exploitation, and if there is a copyright owner, they likely are not seeking remuneration. In fact, many of the works produced by faculty members at universities are

created for reputational gain, and not financial gain. The approach of collective licensing for mass digitization would serve as a tax on our cultural and intellectual heritage institutions, and would not promote socially beneficial uses of these orphan works. To impose a collective licensing fee on orphan works would only deter their use by cultural and intellectual heritage institutions, and would not fulfill the aim of compensating the copyright owners of these works. Also, as a matter of public policy, it is inequitable to reward a copyright owner for abandoning a work, or to reward a collective that did nothing to create the work, while imposing a fee on the institutions already financially supporting the preservation and availability of our cultural and intellectual heritage.

Many of the uses of orphan works by libraries can be analyzed within the framework of fair use, and recent fair use decisions have defined the scope of fair use more clearly. Transformative fair use was found for uses by commercial entities in *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006), *Perfect 10 v. Amazon.com*, 508 F.3d 1146 (9th Cir. 2007), and *A.V. v. iParadigm*, 562 F.3d 630, 639 (4th Cir. 2009). Courts found nonprofit educational uses to be a fair use in *Cambridge Univ. Press v. Becker*, 863 F. Supp. 2d 1190 (N.D. Ga. 2012), *Authors Guild, Inc. v. HathiTrust*, No. 11 CV 6351, 2012 WL 4808939 (S.D.N.Y. Oct. 10, 2012), *Ass'n for Info. Media and Equip. v. Regents of the Univ. of California*, No. CV 10-9378 CBM (MANx), 2011 WL 7447148 (C.D.Cal. Oct. 3, 2011), and *Ass'n for Info. Media and Equip. v. Regents of the Univ. of California*, No. CV 10-9378 CBM (MANx) (C.D.Cal. Nov. 20, 2012).

This is not to suggest that every use of an orphan work is a fair use. However, analyzing the four factors for educational uses of orphan works can lead to a finding of fair use. The first factor, purpose and character of the use, favors fair use for nonprofit educational uses. In her article "*How Fair Use Can Help Solve the Orphan Works Problem*," Jennifer M. Urban argues that the orphan status of a work should be considered under the

second factor of fair use, the nature of the work, and that this orphan status weighs in favor of fair use for the second factor.¹ Analyzing the fourth factor of effect on the market for use of an orphan work must include the lack of impact on the market for the work, since by definition an orphan work is not being offered for sale by the copyright owner. Therefore, three of four fair use factors may favor noncommercial, nonprofit, educational uses of orphan works like those of cultural and intellectual heritage organizations.

If the Copyright Office chooses to recommend orphan works legislation, the following elements are necessary for orphan works legislation to successfully address the issues and concerns of cultural and intellectual heritage institutions like libraries.

- Non-commercial use by a non-profit library or archive of a work in its collection would not be subject to statutory damages, or actual damages if the use ceases when the library or archives receives an objection from the copyright owner, or injunctive relief if the library or archives removed the work from public display after receiving the objection from the copyright owner.
- The limitation on remedies would also apply to a consortia of libraries and to the employees of the library or archives, similar to section 504(c)(2)
- Nothing in the orphan works legislation in any way affects the right of fair use as provided by section 107, as is found in section 108(f)(4).

The possibility of statutory damages does prevent cultural and heritage institutions from digitizing and making their collections more visible and available to their users and to the public, which impedes the mission of these institutions and does not serve society.

Removing statutory damages as a consequence of a nonprofit library making a noncommercial use of an incorrectly identified orphan work would help serve to address the use of orphan works, which comprise a larger portion of library collections than

previously thought. Requiring the take down of works previously identified as orphan works when a copyright owner comes forward is both reasonable and good public policy. The high visibility of cultural and heritage institutions, our public mission, and our longevity (Emory University was founded in 1836), make us good stewards of orphan works. Creating certainty for noncommercial uses of orphan works by nonprofit libraries and archives, and limiting the negative consequences for making a mistake in identifying an orphan work, increases our ability to 'to preserve our intellectual heritage and advance the discovery and transmission of knowledge' in service of our universities and society.

Respectfully submitted,

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ⁱ Jennifer M. Urban, How Fair Use Can Solve the Orphan Works Problem, 27 Berkeley Technology Law Journal ____ (2012), available in SSRN at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2089526