

Attn:
U.S. Copyright Office, Library of Congress
101 Independence Avenue, SE, Washington, DC 20559

RE: Copyright Office's Notice of Inquiry on Orphan Works and Mass Digitization

Massachusetts Institute of Technology (MIT) Libraries' comments on Federal Register Document 2012-25932

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The Massachusetts Institute of Technology (MIT) Libraries appreciate the opportunity to comment in response to the Copyright Office's October 22, 2012 Notice of Inquiry concerning Orphan Works and Mass Digitization. Finding a workable solution that enables creative and transformative uses of orphan works is of substantial significance to the MIT Libraries since our mission includes a commitment to promote discovery, preserve knowledge, and improve worldwide scholarly communication. Our comments below address the topics specified in your Notice of Inquiry.

A. Current state of play for orphan works:

Recent changes in the legal and business environments have generated wider consensus in the library community about its fair use rights, especially in the context of mass digitization. In response to these developments, the MIT Libraries believe the copyright landscape has changed significantly enough in the years since Congress last considered orphan works legislation that we no longer believe a legislative solution is necessary for libraries to make appropriate uses of orphan works. This view aligns with the comments submitted by the Library Copyright Alliance (LCA) in response to this Notice of Inquiry.¹

¹ Library Copyright Alliance, "Comments of the Library Copyright Alliance in response to the Copyright Office's Notice of Inquiry concerning orphan works and mass digitization" (January 14, 2013).
<http://www.arl.org/bm~doc/lca-orphanworks-comments-14jan13.pdf>

Recent court decisions have clarified the scope of fair use in contexts that are relevant to libraries. The court's decision in *Authors' Guild, Inc. v. HathiTrust* revealed: 1) that a fair use ruling favors non-profit, educational uses; 2) that mass digitization for the purposes of search, preservation, and accessibility constitutes a fair use; and 3) that use of an entire work is fair when it is appropriate to the purpose.² In *A.V. v. iParadigm*, which involved activity analogous to libraries' mass digitization, the court determined that use of an entire work is fair when the purpose of the use is sufficiently transformative. Wider consensus in the library community around its fair use rights has emerged as result of these recent court cases.

The library community has articulated this wider consensus about fair use into a formal document of community standards and best practices, expressed in the Association of Research Libraries' *Code of Best Practices in Fair Use for Academic and Research Libraries*.³ The content of the *Code* was drawn from surveying the library community's actual practices, standards, and experiences, and, as such, it represents a normative statement about what the library community believes is appropriate under fair use. As the LCA noted in its comments submitted to this Notice of Inquiry, the *Code* was developed in part because of the courts' ruling that particular uses are more likely to be determined as fair if they represent the norm in a given community. The *Code* explicitly states that "it is fair use to create digital versions of a library's special collections and archives and to make these versions electronically accessible in appropriate contexts," and, regarding orphan works specifically, highlights that "the fair use case will be even stronger where items to be digitized consist largely of works, such as personal photographs, correspondence, or ephemera, whose owners are not exploiting the material commercially and likely could not be located to seek permission for new uses" (p. 20).

² Brandon Butler, "Authors' Guild v. HathiTrust et al. – Decision Summary" (2012). <http://www.aserl.org/wp-content/uploads/2012/11/Hathi-Decision-summary.pdf>

³ Association of Research Libraries, et al., *Code of Best Practices in Fair Use for Academic and Research Libraries* (2012). <http://www.arl.org/bm~doc/code-of-best-practices-fair-use.pdf>

Mass digitization of special collections and archives has also become increasingly common in libraries, further demonstrating the library community's wider consensus about its fair use rights in this realm. Prior to recent years, many libraries, including the MIT Libraries, were reluctant to pursue ambitious digitization programs in the face of legal uncertainties around fair use and mass digitization. Libraries are now approaching fair use as the best solution to the orphan works problem,⁴ and have more confidence, experience, and expertise making fair use decisions about the appropriate uses of potentially orphan works in their archival and special collections. Moreover, as mentioned above in reference to the ARL *Code of Best Practices*, the types of works libraries are digitizing from these collections, such as personal papers, photographs, or historical documents, have never been commercially exploited and thus digitization of these works would have little to no effect on their potential markets. Through growing experience with mass digitization programs, libraries increasingly understand that the non-commercial, educational, and transformative purposes for which they are using these types of materials are within the boundaries of fair use.

An analysis of the four fair use factors, as outlined in US Copyright Law Section 107, highlights how libraries have been making a strong case for fair use of orphan works under the current law:⁵

1. Purpose of the use: Libraries are non-profit entities using works for educational, non-commercial purposes, including the enhancement of teaching, research, and scholarship;

⁴ See Kevin L. Smith, "Copyright risk management: Principles and strategies for large-scale digitization projects in special collections." *Research Library Issues: A Quarterly Report from ARL, CNI, and SPARC*, no. 279 (June 2012): 17-23. <http://publications.arl.org/rli279/>. Smith states, "fair use is probably itself the best 'solution' to the orphan works problem, at least in the context of large-scale digitization of library collections." See also Jennifer M. Urban, "How Fair Use Can Help Solve the Orphan Works Problem." (June 18, 2012). *Berkeley Technology Law Journal*, Vol. 27, 2012; UC Berkeley Public Law Research Paper No. 2089526. Available at SSRN: <http://ssrn.com/abstract=2089526>.

⁵ For more information, see Association of Research Libraries, "Resource packet on orphan works: Legal and policy issues for research libraries" (2011). http://www.arl.org/bm~doc/resource_orphanworks_13sept11.pdf

2. Nature of the work: Orphan works typically used by libraries would include works that are non-fiction, scholarly, archival, or in special collections, and by their nature, are not being exploited commercially;
3. Amount of the work used: For some uses, such as a digitizing particular collection in its entirety and providing search functionality and other added values, the use of a work may be sufficiently transformative to warrant use of the entire work; such use would be supported under the first factor, purpose of the use, as well;
4. Effect on the potential market: Orphan works, as mentioned in the second factor, are, by their nature, not being exploited by their rights holders in the market, and therefore use of such works by libraries would have little effect on their potential market value; additionally, libraries can also offer “notice-and-takedown” policies to allow copyright holders the opportunity to assert their rights over a particular work.

As this summary demonstrates, there is a compelling fair use case for libraries to build services around orphan works, within the existing law.

B. Recommendations:

The MIT Libraries agree with the conclusion reached by the LCA that libraries do not need legislative reform in order to make appropriate uses of orphan works. We also support the LCA’s recommendation that the Copyright Office and Congress *not* adopt the framework of the 2008 proposed orphan works legislation as a starting point for the consideration of future legislation, in part because the “reasonably diligent search,” as it is outlined in the 2008 legislative framework, is simply not a workable solution for libraries, given limited resources and the scale of mass digitization programs. However, the MIT Libraries recommend that if Congress and the Copyright Office do seek a legislative solution, that they consider the approach suggested by the LCA: a one-sentence amendment to 17

U.S.C. § 504(c)2 that grants courts the discretion to limit statutory damages if the user performed a diligent search, as well as the discretion to determine what constitutes a reasonably diligent search. Due to the immense variety of possible works, uses, and users, decisions as to what constitutes a reasonably diligent search in a given context should be left to the courts rather than specified in complex and highly technical legislation.

The MIT Libraries also support the LCA's recommendation that any potential legislation considered by Congress and the Copyright Office explicitly contain a savings clause to the effect that "nothing in this provision in any way affects the right of fair use as provided by section 107."

Lastly, the MIT libraries reject any legislative solution that includes the concept of licensing orphan works for use. Such a solution would be prohibitively expensive for users and would not result in what it intends to accomplish: direct compensation for copyright holders, as Jonathan Band demonstrated in his recent examination of licensing societies.⁶ Band showed that collective rights organizations have failed repeatedly to contribute an equitable system of compensation.

The MIT Libraries recognize that MIT Press, which is part of the Libraries' organization, may have a different perspective on the current state of play for orphan works and potential solutions for their use, based on the Press' particular contributions to the scholarly and research dissemination process. The MIT Libraries are aware of the MIT Press' business requirements and respect their unique contributions to the scholarly communication ecosystem, and do not presume to speak for the MIT Press here. We anticipate that the Press will make a separate response from their perspective, and hope that other university presses, which play an important role in our universities, will respond as well.

The MIT Libraries thank the Copyright Office for the opportunity to comment on this important topic. Policy decisions made now about the use of orphan works have significant consequences for future scholars and bear heavily on our society's ability to access, document, and preserve its cultural

⁶ Jonathan Band, "Cautionary Tales about Collective Rights Organizations" (September 19, 2012). Available at SSRN: <http://ssrn.com/abstract=2149036> or <http://dx.doi.org/10.2139/ssrn.2149036>.

and intellectual heritage. The flexibility of fair use, demonstrated by the courts in recent years, allows for creative and transformative uses of this heritage that contribute to new knowledge. The MIT Libraries, in serving a community and an institution with a strong culture of openness that has consistently adopted policies that support greater accessibility to knowledge, believe that finding a workable solution to ensure appropriate uses of orphan works is fundamental to our mission, the mission of research libraries, and the universities we serve.