

Comments from the NCSU Libraries in response to the Copyright Office's Notice of Inquiry Concerning Orphan Works and Mass Digitization

January, 2013

As the gateway to knowledge for a large R1 university with a focus on STEM fields, the North Carolina State University Libraries has significant experience with, and a strong commitment to, managing and sharing content to support academic research and scholarship. Along with our partners in the Triangle Research Libraries Network - Duke University, the University of North Carolina at Chapel Hill, and North Carolina Central University - the NCSU Libraries have pioneered strategies for using new technology to support our academic mission. Units such as our Special Collections Research Center frequently manage collections including orphan works. Through our Copyright and Digital Scholarship Center we have also worked for more than a decade to develop expertise in copyright policy and practice as it relates to libraries and information sharing.

Based on this experience, we welcome this opportunity to offer our Comments on the two questions posed in the Copyright Office's October 22, 2012 Notice of Inquiry Concerning Orphan Works and Mass Digitization. In both cases significant changes in the copyright landscape over the past seven years persuade us that legislative reform is no longer necessary, and may not even be desirable, as a solution to the problems posed by orphan works.

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

In the period prior to the development of orphan works legislation introduced in the 109th and the 110th Congresses, many stakeholders argued that existing laws were insufficient to address the "orphan work problem" for individual and small-batch items. As such, many presumed that legislative reform was necessary for libraries and related memory institutions to fulfill their socially-valuable missions. Based on our experiences and ongoing evolution of both fair use and library practice, however, we are persuaded that current law is adequate and no updates are required.

Legislative updates proposed by stakeholders generally adopt a basic remedy-limitation approach, based on a user-conducted diligent search, similar to that outlined by the 2006 *Report on Orphan Works*. Although these “diligent search” options come in many flavors¹ our experience, and that reported by most other libraries, is that those proposed options are likely to be prohibitively expensive and time consuming. Any benefit gained from compliance can be expected to be far outweighed by the cost of a search. Remedy-limitation may also be of limited value - or in some cases simply be redundant - in light of the similar protection from onerous damages offered by 17 U.S.C. § 504(c)2 when libraries engage in an equally “reasonable” good faith effort guided by the principles of fair use.

Always a powerful engine for the nonprofit, academic and educational work done by libraries, fair use’s value for libraries engaging with orphan works has been clarified and strengthened by several recent judicial decisions. In the past five years libraries have faced several lawsuits challenging traditional library practices in the digital environment and in each case the court endorsed the established view that tailored, nonprofit, educational uses were likely to be fair. Evaluating libraries streaming media,² offering electronic reserves,³ and digitizing to accommodate students with disabilities,⁴ courts have repeatedly reaffirmed the special nature of nonprofit, educational institutions such as libraries in the fair use analysis.

Further, in the same period that the 109th Congress began to investigate orphan works, a line of cases developed that clarified the fact that use that merely recontextualizes or repurposes work similar to many library mass digitization projects may be considered transformative, and thus fair.⁵ Taken together, this clarity about the nature of transformative use and powerful reaffirmation of the central place of nonprofit educational uses in fair use analysis persuades us that fair use is sufficient to support responsible library digitization of orphan works. As Jennifer Urban concludes in her recent article on orphan works, “for the digitization projects of nonprofit libraries and archives in the United States, its benefits make fair use a powerful tool for freeing the orphans in their collections.”⁶

¹ See *Orphan Works and the Search for Rightsholders: Who Participates in a 'Diligent Search' under Present and Proposed Regimes?* Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2208163)

² *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),

³ *Cambridge Univ. Press v. Becker*, 863 F. Supp. 2d 1190 (N.D. Ga. 2012))

⁴ *Authors Guild, Inc. v. HathiTrust*, No. 11 CV 6351, 2012 WL 4808939 (S.D.N.Y. Oct. 10, 2012)

⁵ See *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)).

⁶ Jennifer Urban, *How Fair Use Can Help Solve the Orphan Works Problem*, 27 Berkeley Technology Law Journal (2012). Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2089526

2. Orphan Works in the Context of Mass Digitization

At the outset we wish to note our concern about the problems inherent in devising a workable definition for “mass” digitization of orphan works. Even if a reasonable figure could be selected as a tipping point, most library collections contain a mix of orphan works, works with an identifiable rightsholder, and works in the public domain. Any large-scale solution is bound to be an exceedingly blunt instrument and risk doing serious harm to the library’s rights, the user’s access, and to the owner by potentially forcing licenses on owners who would not prefer to license their works. Even setting aside those difficulties, however, the NCSU Libraries are persuaded that fair use offers the most workable solution to the problem of mass digitization of orphan works.

Since the line of cases discussed above, beginning with *Bill Graham Archives* in 2006, libraries across the country have begun engaging in the targeted mass digitization of special collections and archives. As a result, shared practice has developed, and continues to develop, around digitization of library collections that takes into account factors such as the different types of materials, expected uses, and so forth. In some cases these practices have been codified - most prominently in the *Code of Best Practices in Fair Use for Academic and Research Libraries* - but practice continues to evolve as new strategies are tested, new technologies are developed, and legal rules are further clarified.

Any legislative solution predicated on implementing a complex set of rules that define size, scope, purpose, and so forth risks freezing copyright law in place at an early moment and potentially rendering it “obsolete out of the box.” Once again, we believe that the flexibility of fair use offers a more promising solution to this nascent but rapidly-developing area of law.

3. Legislative Proposals

Despite our belief that appropriate application of fair use provides sufficient latitude to address the orphan works issue we recognize that some parties may demand further assurances to clarify use of orphan works. If such legislative solutions are sought, we recommend the following five principles to guide creation of new legislation:

1. Start fresh - The thicket of existing comments, reports, proposed legislation, and ancillary documents and legislative history would not be a productive place to begin. Many of the materials are outdated, having been developed before the cases discussed above. Further, the tangled and contentious record surrounding legislative proposals for orphan works is likely to

invite lengthy, unproductive quarreling over presumptively established terms, particularly what constitutes a “reasonably diligent search.”

2. Simplicity - Particularly in an area of such rapid development, any legislative solution should leave room for evolving practice and judicial interpretation, rather than attempting to anticipate every potential scenario. For example, a one-sentence amendment to 17 U.S.C. § 504(c)(2) granting courts the discretion to reduce or remit statutory damages if the user conducted a reasonably diligent search prior to the use would encourage responsible behavior by limiting liability. It would also permit courts to evaluate reasonable diligence in light of the facts of a particular case as they have done for decades with fair use. To do otherwise would necessitate a lengthy, abstruse document that could be expected to consume tremendous time and resources in its creation and potentially be rendered obsolete by the rapid advance of technology and practice.
3. Do no harm to other statutory rights - As the recent *Hathi* litigation makes clear, an explicit savings clause for related rights such as fair use is absolutely essential to protect rights granted by Congress and grounded in the expressive interests of the Copyright Clause. In no case should any orphan works legislation foreclose - implicitly or otherwise - libraries’ vital fair use rights. Similarly, any legislative solution should recognize the broad set of uses around orphan works that clearly qualify as fair use. A statute aimed exclusively at commercial uses, for example, would make it clear that core library fair use practices would not be impacted.
4. No collective licensing - Proposals for some form of collective licensing regime are misguided and likely to be counterproductive. Such systems inevitably act as a tax on nonprofit, educational bodies, doing substantial harm to users but providing few benefits to actual owners of orphan works. Instead, a collective licensing regime is likely to enrich only collecting agencies, which have a history of mismanagement that has generally funneled more money to administrative costs than to creators.⁷ Such an inefficient use of resources would create a negligible incentive for the creation of future works and would be highly unlikely to serve the constitutional purpose of copyright - to promote the progress of science and the useful arts.

⁷ See Jonathan Band, *Cautionary Tales About Collective Rights Organizations*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2149036

5. Shared responsibility - Instead, any legislative solution should be designed to empower creators and libraries to maximize the value of the works and locate rightsholders where they exist. When attempting to reunite an orphan work with its creator or owner both parties - library and rightsholder - have an important piece of the puzzle. As such, any solution that places the entire burden on a single party would be unreasonable and counterproductive. Instead of placing the complete onus on either party, an effective statutory solution will specify that reasonable steps taken by either party should be recognized in judicial proceedings. A library that conducts and documents a reasonable search should be given a limitation on damages. Similarly, it is reasonable to expect a rightsholder seeking notice and damages to take the voluntary step of registering their interest in some form of central registry. By incentivizing all stakeholders to take responsible, affirmative steps, legislation is more likely to encourage greater public access and the discovery of more creators - to the benefit of all parties.

We appreciate the opportunity to share these thoughts about an important aspect of copyright law for library services.

Sincerely,

William M. Cross
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NCSU Libraries