



**Statement of
The Council of University Librarians
University of California Libraries
University of California
Concerning
Orphan Works
Notice of Inquiry, Copyright Office, Library of Congress
February 2013**

By Electronic Submission

**Maria A. Pallante
Register of Copyrights
U.S. Copyright Office
101 Independence Avenue S.E.
Washington, D.C. 20559-6000**

Dear Ms. Pallante:

Thank you for the opportunity to comment regarding Orphan Works and Mass Digitization. On behalf of the Council of University Librarians at the University of California, I herein present our comments and recommendations regarding orphan works at non-profit educational institutions.

The University of California (UC) is the largest public research university in the world, spending more than \$3.8 billion annually on direct research and providing world-class educational opportunities that enrich the lives of more than 230,000 students and generate a wide range of benefits and services for California's citizens. UC awards seven percent of the nation's PhDs and has the largest continuing education program in the U.S. Directly supporting the university's mission of teaching, research, and public service are the more than one hundred libraries on UC campuses, which collectively form the largest research/academic library in the world. Providing access to the world's knowledge, the UC libraries house collections that together include upwards of thirty-three million printed volumes, twenty million pictorial items, two million maps, one million government documents, 1.8 million pamphlets, and well over half a million manuscript and archival holdings, which are accessible to all faculty, students, and staff at the UC campuses as well as international scholars and community members who visit them. A systemwide, strategic approach to the development of library collections and services has emphasized multi-campus collaboration, the application of new technology, and expanded university-wide sharing of information resources within each campus's collections.

Our statement begins by addressing the matter of orphan works in the context of "mass" or collection-level digitization, including the question of how "mass digitization" should be defined, the goals of any proposed orphan work guidelines in the context of education, and what an

appropriate legal framework that is fair to authors and copyright owners as well as good-faith users might look like. It then addresses the use of orphan work items on an occasional or case-by-case basis and highlights how the legal landscape has changed over the past four years.

As basic background for the following comments, please bear in mind the U.S. Supreme Court's definition of the purpose and objective of copyright as the "means by which an important public purpose may be achieved.... The monopoly created by copyright...rewards the individual author in order to benefit the public".¹ The public is intended to be the prime beneficiary of copyright laws, and this benefit is realized when the public is provided with access to information. Therefore, the public – including UC's students, faculty, and staff as well as the people of California for whom we hold our collections in trust – stands to be either the true loser or winner in the dispute over how to resolve the orphan works problem. The vital role played by academic and research libraries in this process, as institutions that collect, preserve, and share knowledge with the public, cannot be overstated.

Mass Digitization: More than Books

The UC libraries have taken a leadership role in developing and harnessing technology in support of new and innovative forms of scholarly communication and inquiry, including in individual and collaborative mass-digitization projects. In the context of orphan works, "mass digitization" encompasses all forms of systematic and/or programmatic digitization in which libraries and other non-profit archival and cultural heritage institutions engage. Examples include digitization for purposes of preservation, access, and discoverability; scan-on-demand services provided to individual users for personal research purposes (the digital analog of library photoduplication services allowed under Section 108); and other types of digitization routinely engaged in by libraries and archives to fulfill their educational and public service missions (e.g., Calisphere²).

A "Bright Line" Definition of Mass Digitization Is Unnecessary

The current *Glossary of Archival and Records Terminology*, published by the Society of American Archivists and viewed as the de-facto glossary for the U.S. profession, contains no definition of "mass digitization." We believe that it is not possible, nor is it necessary, to adopt a strict "bright line" definition. Rather, the relevant inquiry should be whether it is practical or appropriate to conduct an item-by-item diligent search. As used here, the definition of mass digitization includes all forms of library digitization that are undertaken systematically for programmatic reasons fundamental to the educational, research, and public service mission for

¹ *Harper and Row v Nation*, 471 U.S. 539, 549 6 (1985)

² The contents of Calisphere (<http://www.calisphere.universityofcalifornia.edu>), a public gateway to more than 220,000 digitized primary sources from hundreds of libraries and cultural heritage institutions throughout the state, reveal California's diverse history and culture and its role in national and world history. This UC public service project is designed to support the K-12 curriculum in California as well as the university's undergraduate programs and to foster civic engagement among California's citizens. Many of its non-UC contents were digitized under the auspices of the California State Library, through the LSTA-funded Local History Digital Resources Project. Liberal takedown policies complemented by readily accessible contact information and a clear process for responding to user inquires are a common feature on this and other websites of UC libraries' digitized collections and provide an avenue for interested parties to engage with us about rights statuses.

which libraries have amassed and stewarded over very long timeframes the millions of holdings that constitute the record of human intellectual achievement—purposes which can only be fulfilled by adopting scalable procedures that operate on the basis of collection-level judgments and best practices.

Orphan Works in the Context of Mass Digitization

The topic of orphan works is of critical importance to the UC libraries and to all academic and research libraries and archives, which play a unique and vital role in providing long-term preservation of and access to knowledge. Academic and research libraries in particular are integral to higher education, supporting teaching, learning, and research as well as the creation and broadest possible dissemination of knowledge. New technologies offer libraries the opportunity to more broadly and effectively fulfill their primary role of curating and providing access to their collections. For example, academic and research libraries routinely utilize digital technologies to support teaching and research by providing digital and remote access to resources that previously were accessible only to those with the time and means to travel to the particular library, archive, or special collection that owned them.

Almost all academic and research libraries contain numerous³ items likely to be orphan works in their collections and archives. If a library is unable to determine or locate the copyright holder of a work under copyright (or whose copyright status is undetermined), then the library must either restrict access to and use of the item or apply a fair use analysis. As the Notice of Inquiry recognizes, even good-faith users can be thwarted in their efforts to achieve the purpose and objective of copyright if the law creates undue barriers to socially beneficial uses of protected works.

A Collection-level Assessment Best Serves the Purpose of Copyright

In the realm of library archives and special collections, the ability to digitize entire collections and keep all of the materials of a creator or collector together both preserves the original material and provides the context necessary for thorough research and complete understanding of the collection's subject. The interrelatedness of materials within collections conveys information about the creator or collection that goes beyond the information contained in each individual object alone. Thus, an entire collection, when viewed as a whole, can reveal new insights—the very meaning of the phrase “the whole is greater than the sum of its parts.” Being forced to digitize only selected items, based on the uncertainty of copyright, significantly muddles the provenance for the digital items available, eviscerating valuable context and diminishing the

³ John Wilkin. (2011). Bibliographic Indeterminacy and the Scale of the Problems and Opportunities of “Rights” in Digital Collection Building. See <http://www.clir.org/pubs/ruminations/01wilkin>. In conclusion, Wilkin notes “the body of orphan works—works whose right holders we cannot locate---is likely to be extremely large, and perhaps the largest body of materials. If the guesses made here are right, 50% of the volumes will be orphan works.” See also Copyright Office Report on Orphan Works (2006). In the conclusion the report states, “the orphan works problem is real and the orphan work problem is elusive to quantify and describe comprehensively.” In addition, similar estimates of the number of orphan work held in libraries and archives exist outside of the United States. In 2006 the British Library estimated “the extent of the orphan work problem would cause a major challenge to the creation of an online digital library of European Cultural heritage and while estimates of the size of orphans works problem vary, it is generally held to be extensive. Libraries estimate that between 10 and 40 percent of written material in their collections is orphaned.” *Intellectual Property: a balance*. British Library Manifesto, September 2006, <http://www.bl.uk/news/pdf/ipmanifesto.pdf> (point 5)

usefulness for most research and teaching purposes. As research and teaching at all levels – undergraduate student, graduate student, faculty, external researcher – increasingly require access to digitized materials, the need to develop a commonly accepted pathway to digitizing whole collections is ever more pressing.

Item-by-item Searches Are Impractical and Unreasonable in the Context of Collection-level Mass Digitization

A diligent item-by-item search is not a practical solution for dealing with special or archival collections containing significant numbers of orphan works. To require a separate rights search for each of hundreds or thousands of unattributed personal photographs, for example, would be, on its face, absurd. Even in those instances where an author and publisher are clearly indicated, determining the copyright status and the identity of the copyright holder can pose difficulties; if this were not the case, there would be no orphan works problem. Imagine, therefore, how much more difficult a search can be when there is no identifying information at all.

The impracticality of attempting to undertake an item-by-item, reasonably diligent search for a large archival collection was described by Maggie Dickson in an article entitled “Due Diligence, Futile Effort: Copyright and the Digitization of the Thomas E. Watson Papers.”⁴ Dickson recounted the lengthy and expensive process of trying to identify authors, accurately pin down death dates (necessary for determining copyright status), locate and contact heirs, and request permission to use materials in a collection consisting of 7.5 linear feet of correspondence of a local politician. A project manager and a research assistant spent more than 450 hours at a cost of approximately \$8,000. In the end, they were able to discover birth and death dates for only slightly more than half of the correspondents. Some documents were in the public domain, some were included in other manuscript collections or repositories, and a few were excluded because no determination could be made as to whether they were works for hire (meaning that another person or business entity might hold the copyright). Dickson stated, “Going by a strict interpretation of copyright law, these results would allow us to make accessible online 35% of the correspondence series...Looking at the cost of our efforts in terms of the materials for which we were able to obtain permissions, our return on investment was \$2000 per document.”⁵

In another report, “Seeking New Landscapes,” Barbara Stratton came to a similar conclusion about the impracticality of the diligent search process when applied to large collections.⁶ In her study, experienced researchers looking only at published works spent an average of four hours per book to undertake a diligent search. As she notes, “At 4 hours per book it would take one researcher over 1,000 years to clear the rights in just 500,000 books—a drop in the ocean when compared to the rich collections of Europe’s cultural institutions.”⁷

⁴ Maggie Dickson, “Due Diligence, Futile Effort: Copyright and the Digitization of the Thomas E. Watson Papers,” *The American Archivist* (Fall/Winter 2010) 73:626-636.

⁵ Dickson, 630, 631.

⁶ Barbara Stratton, “Seeking New Landscapes: A rights clearance study in the context of mass digitization of 140 books published between 1870 and 2010,” British Library Board (2011).

⁷ Stratton, 5.

Collection-level Assessments Provide a Balanced Approach

In most cases, librarians and archivists can make a general risk/benefit assessment based on the nature of the collection and the types of items it contains. This assessment takes into account the desire of the donors, most of whom, like libraries, want to share the resources they have donated with the public; the presence of material in which a copyright holder is likely to have an active commercial interest, exposing the institution to financial or legal risk; and other legal issues as appropriate.

A collection-level assessment can also make use of the existing four fair use factors in deciding if a group of like items could be digitized and made available, either to the public or to a more limited audience. End users would also do their own fair use analyses on an item-by-item basis if the user intends to publish a particular item. Thus there will actually be two levels of fair use analysis conducted, one at the collection level by libraries and archives and one by the user before using it for purposes other than private research, etc.⁸

The first factor, purpose of the use, favors a finding of fair use, since the use by libraries is for non-profit educational purposes. The use may also be deemed transformative, since in most cases the orphaned items were created for a different purpose—for example, creating a personal scrapbook, promoting a now-defunct business or cultural event, or historical documentation such as taking minutes at a meeting—than the scholarly or educational purposes served by library digitization and access services.

The second factor, concerning the nature of the work, could go either way depending on whether the item was published or not and whether it can be characterized as factual or creative. However, Jennifer Urban argues that a deeper inquiry, including the orphan status of the work, should be considered. Such an inquiry “can illuminate whether copyright’s creation and dissemination goals are furthered by allowing the copyright owner full control or instead allowing fair use....”⁹ If the work is likely to be an orphan and a copyright holder therefore unlikely to be found, the nature of a work may “provide insight into whether traditional copyright incentives supplied an impetus to create it, and thus whether allowing fair use would damage future incentives.”¹⁰ Following this argument, the second factor may be decided in favor of fair use if no copyright holder has made a claim on the work, nor could they likely be located were a search to be carried out, making it unlikely that the copyright holder originally created the work for economic incentives or with copyright protection in mind.

For the third factor, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, the Supreme Court has stated that “the extent of the permissible

⁸ 17 U.S.C. 107

⁹ Jennifer M. Urban, “How Fair Use Can Help Solve the Orphan Works Problem,” *Berkeley Technology Law Journal* 27 (2012); http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2089526

¹⁰ *Ibid.*

copying varies with the purpose and character of the use” and the amount used should be “reasonable in relation to the purpose” for which the work is being used.¹¹ Where the purpose of the use is education and research, it is often necessary to reproduce the entirety of the work to achieve the pedagogical or research purpose. This factor should therefore be considered either neutral or favoring fair use.

The final factor, effect of the use upon the potential market for or value of the copyrighted work, weighs strongly in favor of fair use. The digitization and access to collections does not supplant any market that may exist for orphan works, as it is understood that if a ready market existed, the items would not be “orphaned.” Rather, the access to the collections provided by libraries’ and archives’ digitization may be a means of unearthing content and collections that have long been forgotten by their creators.

This kind of collection-level fair use argument is available to research libraries in the vast majority of cases where they are considering digitization of archival and historical collections.

Community Best Practices Guides Provide Support for Collection-level Assessment

The *Code of Best Practices in Fair Use for Academic and Research Libraries* states in its fourth principle that “[i]t 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.”¹² As recommended by the code, and following a practice routinely adhered to by UC libraries and archives, any digitized large collection would include a clear takedown provision, statements and examples of proper attribution wherever possible, and sensitivity to privacy issues.

Creators and users of all types, including libraries, have in the past restricted uses of orphan works because of the fear of copyright law. However, as libraries and creators become increasingly confident in relying on their fair use rights to provide appropriate access to the rich and unique materials that comprise orphan works, new and improved access to the world’s cultural heritage and the creation of new knowledge are beginning to flourish.

Examples of Large Collections Containing Orphan Works in the UC Libraries

The following are examples of collections held at libraries on various UC campuses, the use of which (including for teaching and research) has in the past been restricted due to likely orphan work content, as well as some examples of more recent projects where collections are made available to varying degrees under a fair use assessment. While there is currently a backlog of

¹¹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586-87 (1994).

¹² Association of Research Libraries, et al., *Code of Best Practices in Fair Use for Academic and Research Libraries* (2012), 20. There are additional community best practices including but not limited to the Society of American Archivists: Orphan Works: Statement of Best Practices (2009) <http://www.archivists.org/standards/OWBP-V4.pdf>, Well Intentioned Practices of Putting Digitized Collections of Unpublished Materials Online (2010) <http://www.oclc.org/resources/research/activities/rights/practice.pdf>, The Documentary Filmmaker’s Statement of Best Practices in Fair Use, <http://centerforsocialmedia.org/fair-use/best-practices/documentary/documentary-filmmakers-statement-best-practices-fair-use>, The Code of Best Practices for Fair Use in Poetry <http://centerforsocialmedia.org/fair-use/related-materials/codes/code-best-practices-fair-use-poetry>, The Code of Best Practices in Fair Use for Open CourseWare <http://centerforsocialmedia.org/ocw>, The Code of Best Practices in Fair Use of Dance-related Materials <http://centerforsocialmedia.org/fair-use/related-materials/codes/best-practices-fair-use-dance-related-materials>.

projects that have yet to be processed under a fair use rationale, it is likely that these collections will eventually be made available, unless there is new legislation requiring a cumbersome search or needless “collective license” tax. In each case, searching will almost certainly be a waste of time, and a license payment would have no real benefit to the actual authors of the works, nor would it offer any encouragement to similarly situated authors of future works.

Fritz-Metcalf Photographic Collections (Marian Koshland BioScience and Natural Resources Library, UC Berkeley Libraries)

The Fritz-Metcalf Photographic Collection¹³ is a group of about nine thousand photographs relating primarily to forestry, conservation, and the lumber industry in California and the United States. The photographs were taken from 1906 to 1984 by Emanuel Fritz, Woodbridge Metcalf, and others. Fritz and Metcalf were faculty members of the School of Forestry at UC Berkeley, and were collaborators in the development of the collection. This collection includes photographs where the copyright status is known and others, possibly orphan works, where the copyright status is unknown. The collection’s website displays the appropriate credit line and states that “most of the photographs in the collection were taken by members of the University’s Department of Forestry. The University encourages the use of these images under the fair use clause of the 1976 Copyright Act. All images in this collection may be used for educational and scholarly purposes....” To date, there have been no requests for take-down. Instead, rights holders have contacted the library since learning of the website and educational resource and offered additional photographs and material for the collection. Together with the Grateful Dead Archive described below, this collection points the way to future possibilities for digitization using fair use and collection-level evaluation of risk.

Grateful Dead Archive (UC Santa Cruz Library Special Collections)

One of the most interesting and unique collections within the large amount of material donated to UC Santa Cruz by the Grateful Dead as part of their archive are approximately 15,000 decorated envelopes sent to the band by fans requesting concert tickets from the early 1980s to the mid-1990s. The senders decorated them in various lavish and distinctive ways in an attempt to increase their chances of getting tickets. Author Paul Grushkin featured several of the envelopes in his recent book *Dead Letters*, but as he told the *Santa Cruz Sentinel*, he was largely unable to locate their creators because “they just weren’t to be found. This is probably the most peripatetic fan base in music history.”¹⁴

The library digitized the envelope artwork and added it to the Grateful Dead Archive Online (<http://www.gdao.org>), relying on fair use. The envelopes have been there for more than six months, and while the library has received a dozen or so requests to obscure addresses or otherwise assuage privacy or reputation concerns, to date there have been no assertions of copyright infringement. Several rights holders have instead written to express admiration for the website and pleasure at rediscovering items they assumed were long lost.

¹³ For more information on Fritz-Metcalf Photographic Collection, see http://lib.berkeley.edu/BIOS/fmpc/FM_about.html.

¹⁴ Wallace Baine, “ ‘Dead Letters’ – new book collects the most dazzling examples of Grateful Dead-inspired fan art,” *Santa Cruz Sentinel* October 6, 2011; http://www.santacruzsentinel.com/ci_19052031?IADID=Search-www.santacruzsentinel.com-www.santacruzsentinel.com

Assorted Historical Photos (UC Santa Cruz Library Special Collections)

UC Santa Cruz Special Collections has thousands of historical photos ranging in date from the 1920s to the 1990s, documenting business and recreational activities in Santa Cruz County. Most are assumed to be unique and could be invaluable sources for students and researchers studying subjects as wide-ranging as railroads, forestry, fishing, mining, and the Santa Cruz Beach Boardwalk.

So far, these photos have not been digitized and remain a “hidden collection,” available only to researchers who know of their existence and come to browse through them in the library. Funds and staffing for digitization projects are harder to come by and to justify when the resulting images might not be made publicly available, and photography can be daunting to post because of the dual problems of difficulty in identification and the aggressive copyright stance of the photographer community. These photographs were donated by a wide variety of people over decades, and the donors were rarely the photographers. Gift agreements are scarce and, when they exist, are generally old enough that they do not cover digital rights. For most of these photos, the only process that could comprise a “reasonably diligent search” is an examination of the front and back of each photograph for information identifying the photographer. At the same time, payment of a license for use of these works would be absurd. Copyright incentives did not motivate their creation, and the payments would never reach the photographers.

SOUL Publications, Inc. (UCLA Library Special Collections)

SOUL Magazine was published 1966-82, with the goal of providing visibility for African Americans involved in the arts. Another publication, *SOUL Illustrated*, served as a forum for critical dialogue on such topics as black liberation, images of African Americans in the media, and the Vietnam War. The UCLA Library has been given funds to digitize the collection but has not yet moved forward with the project due in part to the orphan status of thousands of publicity photos, among other concerns. Here again, the research value of this corpus far outweighs what little continuing commercial value these magazines may still hold, and license payments would simply act as a tax on education.

Miriam Matthews Photographic Collection (UCLA Library Special Collections)

Miriam Matthews graduated from UC Berkeley in 1926 and received her librarian's certificate a year later. She was hired as the first black librarian in California by the Los Angeles Public Library in 1927, despite attempts to prevent her from finding out the date of the civil service examination. After working there for ten years without promotion, Matthews took a leave of absence to pursue a master's degree in library science at the University of Chicago. She was then promoted to a position as a regional librarian, supervising the management of several libraries until her retirement in 1960. Her collection includes photographs of the daily lives of African Americans in Los Angeles, documenting their involvement in churches, social organizations, civil rights movements, entertainment, sports and recreation, businesses and professions, parades, education, military, civil service, and street scenes.

Funds have been received to digitize this valuable collection, but the work has not gone forward in part due to the orphan status of most of the collection. The collection contains approximately 4,600 photographs whose creators are either unknown or can't be located. As in the example above, the research value of these historical photographs far outweighs what little continuing commercial value they may still hold, and license payments would simply act as a tax on education.

Strachwitz Frontera Collection of Mexican and Mexican American Recordings at UCLA

The Frontera Collection at UCLA, which consists of more than one hundred thousand recordings and thirty thousand performances, is the largest repository of Mexican and Mexican-American vernacular recordings in existence.¹⁵

Among the reasons that locating the copyright owners is difficult if not impossible for the vast majority of Frontera materials are that many of the artists are not well known, so their names do not appear in standard reference works or rights databases such as ASCAP and BMI, and even where the artists' names are included in a reference work, this does not provide enough information. If a musical work is not registered with a rights organization, it is impossible to determine if the work or performance is a work for hire; many of the labels included in the collection were very small, did not produce many recordings, and may have gone out of business or been acquired by another company. Often the recordings were made in small communities and had limited distribution.

UCLA continues to get requests to expand access to the collection for educational uses (teaching and research) and educational users (students and teachers), including a recent request from the Los Angeles Unified School District for use in teaching and another from a student in Mexico whose email exchange with a UC librarian stated "how sad to know that young people interested in Mexican music who cannot travel to the U.S. cannot advance our basic values." The value of the collection to students, scholars, and the community is incalculable, yet the library has not made this work fully available due in part to the orphan status of most of the collection. The collection is too large and the artists and labels too obscure for searching to be much help, and a license fee would never reach the obscure artists in the collection.

We could cite countless equally compelling cases in the libraries of other UC campuses as well as across the spectrum of the nation's research libraries.

Use of Orphan Works on an Occasional or Case-by-case Basis

While libraries and their users generally prefer a collection-level approach to addressing the use of orphan works in teaching and research, there are circumstances where an item-by-item approach is useful. Among the educational uses routinely requested of academic and research libraries are the following:

- The use of an orphaned photograph or letter for an academic publication
- The use of an excerpt of an orphaned manuscript for a book or journal article

¹⁵ The Frontera Collection is a collaborative project of the UCLA Library, Los Tigres del Norte Fund at UCLA, and the UCLA Chicano Studies Research Center, in collaboration with the Fund for Folk Culture and Arhoolie Records. For more information, see the Frontera website: <http://digital.library.ucla.edu/frontera/project.jsp>

- The use of a specific orphaned film clip, song, or image for a student multimedia project

In each case libraries conduct a fair use assessment and inform researchers making these requests that they are responsible for conducting their own fair use analyses based on the type of intended use.

Previous Orphan Work Legislation Did Not Address Fair Use

As described in the Notice of Inquiry, the orphan works bills introduced in both houses of Congress in 2008 attempted to build on the recommendations of the Copyright Office and address the concerns of various stakeholders. However, one problem with both the Senate and House bills is that neither addressed fair use. For example, both bills required users to compensate copyright holders should they appear, but there were no exceptions related to the type or context of the use. If a use is fair, then no permission or compensation should be required. There is a real and substantial risk that any effort to provide certainty by requiring a diligent search or payment of a license fee will discourage libraries from taking advantage of their fair use rights. Because fair use is highly sensitive to context and community norms and practice, a shortsighted preference for certainty could do serious long-term damage to the fair use doctrine itself.

Prior Legislation Incorrectly Presumes that Certainty Is Possible

The prior proposed legislation also fails to recognize that in some cases it will not be possible to ascertain the copyright status of a work with complete certainty or to identify and locate a copyright holder. Academic and research libraries, and libraries in general, acquire materials such as manuscripts, photographs, and recordings but often do not receive the copyright of the material. The donor or seller may not own the copyright and often does not know who does. Historical archival and library material such as photographs, diaries, recordings, personal papers, and architectural drawings are often unsigned and unattributed, making it impossible or nearly impossible to search for and identify the copyright owner. Further, many documents found in archive and manuscript collections were created anonymously. Ephemera and materials such as notes, while often of unique research and teaching value, are also typically unsigned and therefore in most cases untraceable. Even if authorship is identifiable, it may be difficult if not impossible to either locate or determine when the creators or their heirs died, which is necessary for determining copyright ownership. Those heirs who can be located may not know the copyright status or whether the work was a work for hire and therefore subject to ownership by someone else.

Scholarly Use of Unpublished Letters, Historic Photographs, Scrapbooks Presents Additional Challenges

A further legal complication lies in the fact that prior to 1978 an unpublished work was entitled to perpetual copyright; the absence of registration records for any unpublished work prior to 1978 makes the identification and location of owners and heirs more difficult. Another factor to be taken into account is that certain types of work such as music and film have multiple layers of copyright owners and rules, making any copyright clearance highly complex and time-consuming. More difficulties arise with works not published in the United States or not published here subsequent to publication in another country. In such cases, libraries ought to be

able to use their best judgment and employ use of community best practices in making a fair use analysis.

Unfortunately, there is no single registry or list of registries that can be used to easily locate owners of typically non-commercial works that are covered under copyright. The Copyright Office Information Circular 22 states that “searches are not always conclusive” and notes that particular categories of work present additional challenges of identifying ownership. Among the categories listed are archival materials and collections, stating that “before 1978, unpublished works were entitled to protection under copyright law without registration” and “the work may have been registered under a different title or part of a larger work.”¹⁶ This lack of certainty regarding the basic question of determining copyright ownership for much historical and archival material presents a significant problem for libraries that want to take advantage of new technologies to digitize for access and dissemination but insist on obtaining permission. Unfortunately, this often results in growing segments of library and archival collections and material becoming “hidden knowledge,” thus denying full educational access to and use of rich library and archival collections.

Undue Diligence

There has never been, nor should there be, a one-size-fits-all approach to conducting a reasonably diligent search. This common-sense matter is recognized by the legal definition of due diligence: “a measure of prudence, activity, or assiduity, as it is properly to be expected from, and ordinarily exercised by, a reasonable and prudent person under the particular circumstance; not measured by any absolute standard but depends on the relative facts of the special case.”¹⁷ The prior bills related to orphan works referenced a “good faith” search but contained no explicit definition of what constituted good faith. It is instructive for purposes of this discussion and in crafting an appropriate legal framework to review the legal definition of what constitutes bad faith. The Uniform Commercial Code provides a framework and defines good faith as above as a relative standard; however, bad faith is defined by intentional dishonest conduct. According to the UCC, merely not making an inquiry does not necessarily constitute bad faith unless the facts and circumstances are so obvious that to remain passive would amount to a deliberate desire to evade.¹⁸ Academic and research libraries, archives, and museums need a similarly flexible approach, which already exists and is fleshed out in their communities’ best practices, to what constitutes a reasonably diligent search.

Appropriate Legal Framework

There are several actions that could lessen the difficulties faced by libraries and archives going forward. Most would not necessitate changes to the current copyright law, and, in fact, we believe that some of the changes proposed in the past would do more harm than good.

¹⁶ U.S. Copyright Office. Information Circular No. 22.

¹⁷ See *Black’s Law Dictionary*, 2nd edition <http://thelawdictionary.org/due-diligence/>. See also *Perry v. Cedar Falls*, 87 Iowa, 315, 54 N. W. 225; *Dillman v. Nadelhoffer*, 1G0111. 121, 43 N. E. 378; *Hendricks v. W. U. Tel. Co.*, 120 N. C. 304, 35 S. E. 543, 78 Am. St. Rep. 058; *Highland Ditch Co. v. Mumford*, 5 Colo. 330.

¹⁸ See Steven J. Burton (1994) *Good Faith in Articles 1 and 2 of the U.C.C. The Practice View*. *William and Mary Law Review*. Volume 35. Issue 4. Article 8.

Support Fair Use

First, the Copyright Office could issue a clear statement in favor of preserving the availability of fair use as a means of evaluating any proposed or potential use of orphan works. No new legislation is needed to dictate or circumscribe transformative uses of orphan works (those that change the original work or serve an entirely different purpose), and we must be very careful not to undermine this valuable right.

Digitize and Make Freely and Publicly Accessible All Copyright Registration Records

Second, the Copyright Office should place a priority on digitizing all registration records currently held in print-only form. Such records should be freely available and fully searchable. In particular, the Copyright Office should give high priority to reformatting and making publicly accessible the records of nineteenth-century works, along with any others where the Copyright Office holds the only full set of records. This would facilitate diligent rights searches where appropriate, including where recommended by a best practices community.

Reinstitute a Copyright Registration System to Prevent Future Orphan Works

Third, a registration system could be reinstated that would require copyright holders to register their work with the Copyright Office, preferably at a very minimal fee that would not discourage compliance. There is no single registry or list of registries that can be used to easily locate owners of typically non-commercial works that are covered under copyright, a difficulty recognized by the Copyright Office in the Information Circular 22 cited previously. Reinstating the registration requirement would also reduce the number of future orphan works.¹⁹

Support Collection-level Assessments

Libraries and archives would feel more comfortable making collection-level assessments if the level of risk were diminished. 17 U.S.C. §504(c)(2) could be amended to indicate that courts have the discretion to reduce or remit statutory damages if the user conducted a reasonably diligent search or made a good-faith collection-level assessment prior to the use.

No Collective Licensing

We do not believe that the solution lies with collective licensing. To begin with, this would undermine our legal entitlement to fair use. Further, since the copyright holders ostensibly cannot be located, there is no rightful person to whom to pay these fees. There is simply nothing about this scheme that makes sense.

As evidenced in our comments, when library digitization is discouraged, the cost of lost knowledge, limitations on scholarship, and impact on academic and research libraries and their

¹⁹ The reinstatement of the registration requirement, plus a limitation on the length of copyright terms, were among the potential policy solutions suggested by the Republican Study Committee's Policy Brief: "Three Myths about Copyright Law and Where to Start to Fix it" (November 16, 2012) (later withdrawn). There is also scholarly support for reinstatement of formalities; e.g., see Christopher Sprigman, *Reform(aliz)ing Copyright*. 57 STAN. L. 485 (2004) Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=578502

users can be immense. If academic and research libraries and archives are unable to digitize and make accessible significant portions of their historical and archival content and to fulfill their fundamental mission in support of teaching, research, service, and publication, they might not continue to accept such material. Any law that negatively impacts building such collections would result in a unique record of human knowledge and endeavor being lost forever. An ill-conceived orphan works law that requires cumbersome and useless searching, or a needless “collective licensing” tax on every digitization project, could do significant harm to the cultural record, as well as research, teaching, and learning.

Thank you for the opportunity to comment. We commend the Copyright Office for investigating this problem and hope the findings reflect the serious ramifications of the existing barriers and present opportunities to address orphan works fairly. For libraries and archives, the fair use of orphan works will make available hidden knowledge for present and future generations and further the purpose of copyright law to promote the progress of science and the useful arts.

Sincerely,

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