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ORPHAN WORKS AND MASS DIGITIZATION – REPLY COMMENTS

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I. Introduction

The Center for Democracy & Technology (CDT) appreciates the opportunity to offer these reply comments in the Copyright Office’s inquiry into the issues raised by orphan works and mass digitization projects. CDT is a non-profit public policy organization dedicated to keeping the Internet innovative, open, and free. CDT works with a broad range of stakeholders to ensure that Internet policy continues to develop in ways that reflect core civil liberties values and promote innovation. On copyright matters, CDT seeks balanced policies that respect the rights of content creators without curtailing the Internet’s tremendous potential for fostering free expression and innovation.

The Internet and the wide array of rapidly evolving digital communications tools are revolutionizing the way we create and enjoy creative works. Creating and publishing works, even on a large scale, is no longer solely the domain of a few. Digital tools offer new avenues for discovery and reuse of creative works, giving even the most specialized works new avenues to potential audiences. Digital storage offers significant advances in the preservation of and access to cultural collections such that rare and fragile works will not be lost or inaccessible. These developments significantly increase not only the potential pool of uses and users for orphan works, but also the number of creative works that might fall into orphan status in the future.

These trends hold great promise for artistic and cultural progress. Copyright law and policy should accommodate and indeed foster this progress, so that the potential of the Internet and digital technology can serve the best interests of creators, users of creative works, and the public at large. CDT believes that developing balanced reforms regarding both orphan works and mass digitization would serve copyright’s fundamental goal of promoting the creation and dissemination of creative works.

These brief reply comments offer our perspective on the issues, where they overlap, and possible paths forward on each.

For the case-by-case use of orphan works, CDT supports the basic framework from the 2006 Report and subsequent legislative proposals built around

reasonably diligent searches and limitations on damages. In addition, while we recognize the importance of fair use and the section 108 limitations and exceptions to many ongoing mass digitization projects and are encouraged by recent developments in the case law, we believe broader mass digitization projects of great value to the progress of the arts can best be realized if legislation is enacted to allow them to proceed. We suggest that the Copyright Office initiate a separate inquiry into how best to shape such legislation.

II. Orphan Works and Mass Digitization raise separate (but overlapping) sets of issues

Perhaps the most apparent conclusion to be drawn from the comments filed in this proceeding is that the sets of issues raised by orphan works on one hand and by mass digitization projects on the other, while overlapping, are not coextensive. The Copyright Office itself recognized this in the current Notice of Inquiry,¹ but it is an important distinction that bears explicit recognition. Many commenters noted the differences, often pointing out the need for a separate framework for addressing the broader issues raised by mass digitization, even as they disagreed over what that framework should be.²

The issues are quite different. The canonical orphan works problem involves a desire to make use of specific works in a specific way, but being unable to identify or locate rightsholders to get permission where it is required. It is the futile diligent search that defines a work as an orphan. The obstacles to mass-digitization projects (for projects not covered by existing limitations and exceptions) have more to do with efficiency and scalability. When operating on an extremely large scale, it often will not be feasible to conduct diligent searches and negotiate permissions on a work-by-work basis.³ To illustrate, the 2008 legislation to limit remedies for uses of orphan works would not have resolved the key issues raised in the Google Books litigation,⁴ nor would the licensing system envisioned in the rejected settlement to that litigation have been of much use to individuals looking to make any from a wide range of uses of works whose authors they have tried but failed to locate.

To be sure, the issues can and do overlap. Many mass digitization projects focus primarily or exclusively on orphans or likely orphans.⁵ If Congress were to pursue an orphan works solution based on the 2006 framework, it would be worth considering adjustments aimed at accommodating such specialized mass digitization projects that nonetheless go beyond what is covered by fair use or other existing limitations and exceptions. But as discussed below, CDT sees strong potential value in mass digitization projects that are not limited to true orphans.

¹ *Orphan Works and Mass Digitization Notice of Inquiry* (“NOI”) at 9.

² See Comments ASCAP & BMI at 9; Comments of the Copyright Clearance Center at 7–8; Comments of Google at 3–4; Comments of RIAA at 4–5; Comments of Berkeley Digital Library Project at 27–31 (discussing extended collective licensing and offering different recommendations for its potential application to orphan works and mass digitization); Comments of the American Association of Publishers at 3 (discussing lack of applicability of the diligent search requirement in the mass digitization context); Comments of MIT Libraries at 4.

³ Comments of Google at 3–4; Comments of Microsoft at 5; Comments of Library of Congress at 5–8.

⁴ First, the scanning project involved orphan and non-orphan books alike; second, the costs of individually seeking permission from each of millions of rightsholders in order to qualify for orphan-works protection would have been prohibitive.

⁵ See Library of Congress Appendix (case studies).

Mass digitization that extends beyond orphan works may merit a separate inquiry and distinct legislative recommendations.

III. Orphan Works

A. Reducing number of orphans is beneficial to the orphans problem

Both proponents and skeptics of the orphan works framework the Copyright Office proposed in 2006 agree on the value of improving ownership information. Advocates for more detailed and stringent requirements for what constitutes a diligent search frequently cite the growth of private registries and advances in Internet-based search since the Copyright Office's last inquiry.⁶ At the same time, proponents of broader or more flexible standards for orphan works protection recognize the need for good data to facilitate licensing where necessary for particular uses of works.⁷ Making it easier to find rightsholders in the first place can reduce the number of orphans and hence narrow the scope of the orphan works problem.

The Copyright Office should take steps to encourage the development of registries and databases of ownership information and continue its efforts to digitize and improve the searchability of its records. Easy steps the Office could take would include collecting information on its website about available information sources that may prove helpful in the course of a search for rightsholders. While CDT is inclined to agree with commenters wary of adopting either a formal certification process for private registries or a strict checklist of resources to be consulted in the course of a search, the Copyright Office seems nonetheless an obvious place to host a directory of a growing number of copyright information resources. In the longer term, CDT believes it is essential for the Office to continue to invest in its own database of registration and ownership information, including digitization and indexing of registrations and deposit copies where appropriate. In addition, we agree with commenters Public Knowledge and EFF, among others, that search-by-image technology could go a long way toward improving registries and addressing the objections of rightsholders concerned that their works will be wrongly considered orphans.

B. Existing limitations and exceptions, including fair use, have important roles to play, but they are not sufficient to address all problems.

Many library commenters cite increasing clarity around how fair use and the section 108 exceptions apply to mass digitization projects to support their position that, for their purposes, orphan works is no longer required.⁸ While robust limitations and exceptions are essential parts of overcoming the orphan works problem, CDT believes that there is still an important role for solutions to address orphan works challenges that may arise for parties who are not libraries and in contexts where it is less clear that limitations and exceptions would apply.

⁶ See Comments of ASCAP & BMI at 2–5, Appendix; Comments of American Society of Media Photographers at 3–6; Comments of American Photographic Artists at 4–6. See also Comments of MPAA at 4–6.

⁷ Comments of Public Knowledge & EFF at 7; Comments of Microsoft at 6; Comments of American Association of Law Libraries et. al. at 3.

⁸ Comments of Library Copyright Alliance; Comments of MIT Libraries; Comments of University of Michigan Libraries.

CDT believes that fair use and other exceptions can and should facilitate the use of technology to improve the accessibility and lawful enjoyment of copyrighted works.⁹ We agree with the analysis and conclusions of many of the cases cited favorably by the Library Copyright Alliance, including the recent decision in *Authors Guild, Inc. v. HathiTrust*.¹⁰ Findings of fair use have been essential to the development of, to name just two examples, consumer electronics and search engines. And it is good for the development and preservation of culture that libraries are increasingly comfortable pursuing mass digitization projects, whether focused solely on orphan works or not. It is therefore important that any legislative solution not foreclose any of the space for innovation that has been opened up by recent case law. Where mass digitization efforts or other uses of orphan works have been able to rely on fair use or other exceptions, that ability must be preserved.¹¹ As noted by the Berkeley Digital Library Copyright Project, a savings clause may be the best way to ensure this. Such a savings clause was included in the 2008 proposed legislation.

Nonetheless, a legislative solution for those users and uses of orphan works that fall outside existing limitations and exceptions is still warranted. First, there are many potential users of orphan works and mass digitizers who are not libraries or archives and thus won't qualify for Section 108 exceptions.¹² Second, there are many beneficial uses of copyrighted works that may not qualify as fair use. For example, consider remakes and adaptations,¹³ public access to archival photographs,¹⁴ and the sale of works not commercially available.¹⁵

Importantly, comments in this proceeding reveal that despite advances in fair use case law, some libraries continue to feel chilled from making use of orphan works.¹⁶ Moreover, while the *HathiTrust* decision was an important step forward for mass digitization projects, the Copyright Office should note that the decision did not address the legality of the HathiTrust's Orphan Works Project, so the fair use status of broader uses of orphans (such as full text access) remains uncertain.¹⁷ In fact, the HathiTrust suspended the Orphan Works Project after the lawsuit was filed due to apparent problems with its methods for identifying orphans. The indefinite suspension suggests that uncertainties about current law remain significant enough to be a barrier to broader uses of mass-digitized orphan works.

⁹ See CDT, Comments to the Intellectual Property Enforcement Coordinator, March 2010, <https://www.cdt.org/comments/comments-joint-strategic-plan>.

¹⁰ Comments of Library Copyright Alliance at 2–3; *Authors Guild v. HathiTrust*, no. 11 CV 6351, 2012 WL 4808939 (S.D.N.Y. Oct. 10, 2012).

¹¹ Comments of Berkeley Digital Library Copyright Project at 16; Comments of Public Knowledge & EFF at 2–4, 8–9.

¹² See, e.g., Comments of International Documentary Association et. al.; Comments of RIAA; Comments of American Association of Publishers; Comments of Google; Comments of Microsoft.

¹³ See Comments of International Documentary Association et. al.

¹⁴ See Comments of Library of Congress.

¹⁵ See proposed settlement in *Authors Guild v. Google*.

¹⁶ See Comments of Library of Congress. Comments of American Association of Law Libraries et. al.

¹⁷ But see Association of Research Libraries, *Resource Packet on Orphan Works: Legal and Policy Issues for Research Libraries*, part III, http://www.arl.org/bm~doc/resource_orphanworks_13sept11.pdf (arguing that the OWP would be covered under existing limitations and exceptions).

Legislation to enable for broader beneficial uses of orphan works could address those uncertainties and hence reduce the barriers to beneficial uses – not just for libraries, but for other users as well.

C. Principles to guide a case-by-case orphan works solution

In light of the comments in this proceeding, CDT would offer the following principles to guide the Copyright Office's inquiry into potential solutions for parties seeking to use orphan works on a case-by-case basis.

In the interest of facilitating the widest range of new creative works (and creative re-use of works), **a solution should apply to all classes of creative work.** This is not to say there are not differences among classes of works. The most strenuous objections to orphan works legislation as proposed in the 2006 Report continue to come from photographers concerned that their work will be over-represented among works assumed to be orphans, in part because of obstacles to effective search and the propensity of images to spread online without accompanying copyright ownership information.¹⁸ These concerns are real and should inform any legislation, but should not lead to the exclusion of photographs from an eventual legislative solution. First, as several commenters describe, databases and search methods have improved since 2006.¹⁹ Second, and more importantly, any differences among classes of works primarily relate to the ability to search for rightsholders and can therefore best be addressed by developing flexible standards for what constitutes diligence in varying contexts, as discussed below.

Similarly, **a solution should be available to all types of potential users and re-users of creative works.** The range of orphan works users is as broad as the range of works that may be orphaned, and includes well-resourced corporations, independent artists, and libraries and archives of all sizes. There is no principled reason to exclude certain types of users. This is part of what makes the *ex post* framework proposed in 2006 and subsequent legislation attractive. Rather than offering certainty to only those users with the resources to come forward and, for example, apply for a license from a central authority as in the Canadian system,²⁰ limitations on damages would be available to all users who make a good-faith diligent search for rightsholders.

Legitimate differences between different types of works and users would be best addressed not by littering a solution with exceptions, but rather by recognizing that **what constitutes a diligent search will vary greatly based on context.** Because of this, the Copyright Office should avoid recommending that diligence be strictly defined for the case-by-case use of orphan works, instead favoring a flexible standard that can account for new information resources and developing community standards. The Library Copyright Alliance has suggested a light and very flexible approach – granting discretion to courts to reduce damages in appropriate circumstances when the defendant has made a reasonably diligent search.²¹ CDT believes this

¹⁸ See, e.g., Comments of American Society of Media Photographers, Comments of American Photographic Artists.

¹⁹ See *supra* notes 6 and 7 and accompanying text.

²⁰ See Jeremy F. DeBeer and Mario Bouchard, "Canada's 'Orphan Works' Regime: Unlocatable Owners and the Copyright Board," 10 *Oxford University Commonwealth Law Journal* no. 2 (2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1916840.

²¹ Comments and Reply Comments of Library Copyright Alliance.

kind of flexible approach could work, but ideally would be accompanied by a set of factors to guide the analysis, as the Copyright Office proposed in 2006.²² Factors that should affect the analysis include:

- Type of user – Users of orphan works will have widely varying missions and resources, and will range from individuals to large institutions. It would not make sense for a large movie studio to be held to the same standard as an independent producer working for a small community event. A diligence standard should not require the two types of parties to expend directly equal resources in order for their respective searches to be considered reasonable.
- Type of use – For example, whether a use is for commercial or non-commercial purposes and how the work figures into the use should affect whether a search is considered reasonable. A more exhaustive search should be expected in the case of a large-scale republication or performance than for the incorporation of a work into a new creative work for a small audience.
- Type of work – As the Office has noted, a search for the rightsholder to a book with a title page will be quite different from a search for the rightsholder to a photograph with no identifying information.²³ And as shown by the comments in this proceeding, sources of rights ownership information are in development and vary across classes of work.

One of the more contentious issues continues to be whether collective licensing or requiring escrow payments should be a part of an orphan works solution.²⁴ **As to the case-by-case use of orphan works, CDT believes a collective licensing system is not the right approach.** Such systems add obstacles to beneficial uses of orphan works while providing little ultimate benefit to actual rightsholders. Collective licensing is a means to address market failures – situations where beneficial uses of copyrighted works are foreclosed by the prohibitive cost of obtaining licenses at scale. For true orphans, the market failure is incurable – it results from a participant’s total absence from the market. The Copyright Office recognized this in 2006 when it noted that a system of escrow payments was likely to be “highly inefficient” for orphan works, since “in a vast majority of cases, no copyright owner would resurface to claim the funds, which means the system would not in most cases actually facilitate payments between owners and users of orphan works.”²⁵ Several commenters in this proceeding additionally point out the potential conflict of interest that arises where a collective, rather than the user of the work, takes on the responsibility of searching for rightsholders.²⁶ So rather than set up a licensing system that creates inefficiencies and won’t solve the whole problem, policymakers should set up a system to allow for the use of orphan works while providing for fair remedies at the margins where seemingly orphan works turn out not to be. The key is ensuring that the system applies to the extent possible only to true orphans. Improving access to ownership data and requiring appropriate diligence in the initial search remain viable ways to accomplish this.

²² Register of Copyrights, *Report on Orphan Works*, Jan. 2006 (“2006 Report”) at 98–108.

²³ NOI at 4–6; *Id.*

²⁴ Commenters proposing escrow payments include the RIAA, Independent Film & Television Alliance, National Press Photographers Association, and Science Fiction and Fantasy Writers of America.

²⁵ 2006 Report at 114.

²⁶ See Comments of Berkeley Digital Library Project; Comments of Public Knowledge & EFF.

IV. Mass Digitization

As described above, mass digitization projects can involve significantly more than just orphan works, and such projects raise substantially different issues. CDT believes the potential benefits of broader digitization projects are significant. While we recognize that this would be a much larger issue to take on than orphan works, we would like to see the Copyright Office explore policy approaches to facilitating broader mass digitization projects.

Many commenters cite the benefits of wide-ranging digitization projects to society.²⁷ CDT agrees that digitization projects hold great promise; they capture the advantages and efficiencies of digital media to greatly increase access to creative, educational, and cultural works. In 2009–2010, CDT supported the proposed Google Books settlement because of the potential we saw to transform how the public conducts research, interacts with written text, and shares information and ideas.²⁸ At the same time, we recognized the limitations of the settlement – principally that the opportunity it would have created to provide a massive digital bookstore would have been limited to a single party. As the Copyright Office noted, this fact and the legislative nature of the licensing system envisioned in the settlement ultimately led to its rejection.²⁹

Legislative action to allow for multiple competing digital bookstores would not suffer from the same drawback. While such legislation would certainly be a challenge to craft, it could offer sweeping benefits.

For mass digitization projects, a licensing system like the one outlined in the proposed Google Books settlement deserves consideration. In contrast to the orphan works context, in which it is generally not possible to locate the actual rights holder for purposes of providing compensation, mass digitization projects involve many works for which the actual rights holder can be found. The obstacles to mass digitization are much more in line with the typical market failures that can be remedied by collective licensing.³⁰ Many would-be digitizers may face prohibitive transaction costs, at least with respect intended uses that would go beyond what is reliably covered by fair use or other exceptions. (As described above, we believe it essential that any licensing system not foreclose existing limitations and exceptions.)

A significant challenge would be drawing lines between covered and non-covered works. At least for books, there is a useful and workable distinction between commercially available and commercially unavailable (or in-print / out-of-print) titles. Including out-of-print books in a collective licensing regime, on an opt-out basis, would seem to strike a reasonable and administrable balance. Users would get the benefits of increased access to dormant creative

²⁷ See, e.g., Comments of Microsoft at 2–3; Comments of Library of Congress; Comments of Public Knowledge & EFF at 9.

²⁸ See CDT, Privacy Recommendations for the Google Books Settlement, July 2009, http://cdt.org/copyright/20090727_GoogleRecs.pdf

²⁹ NOI at 9–12.

³⁰ CDT appreciates that more thorough analysis will be necessary to examine and overcome the pitfalls associated with collective licensing. See Comments of the Berkeley Digital Library Project at 27–31. But we are encouraged that among groups that oppose collective licensing for case-by-case use of orphan works there is some recognition that licensing may be more appropriate in the broader mass-digitization context. *Id.* See also Comments of Public Knowledge & EFF.

and scholarly works; rightsholders would get remuneration and the right to opt out if they so choose.

For other types of works, where to draw the line would be less obvious. Commercial viability might not be easily determined, or may not be the right criterion. Unlike in the context of case-by-case uses of orphan works, licensing solutions to broader mass digitization may require tailoring to different classes of protected work. In some cases, such as musical compositions, there are already statutory and collective licensing systems in place that could be extended to cover mass digitization where other limitations and exceptions do not apply.³¹ In other cases, entirely new systems might need to be developed. Given the wealth of analysis of the proposed Google Books settlement,³² it may be that books could serve as a useful starting point from which lessons for the mass digitization of other types of works can be drawn.

V. Conclusion

Improved registries, better search tools, and developing appropriate case law precedents concerning fair use and other exceptions and limitations are all essential parts of an effective response to the challenge posed by orphan works. At the same time, CDT believes there is good cause to pursue legislation aimed at enabling the full range of beneficial uses of orphan works by both non-commercial and commercial actors. To that end, we continue to support the 2006 framework consisting of limitations on damages following a reasonably diligent search, flexibly applied on a case-by-case basis to a wide range of works and users.

Furthermore, while the protections provided under orphan works legislation should certainly be available to mass digitizers, it is clear from the comments that mass digitization raises wider issues that may require more tailored solutions. CDT believes that the broader purposes of copyright in promoting the dissemination and production of creative works would be well served by the Copyright Office exploring broader solutions to the obstacles to mass digitization, even outside the context of orphan works.

We appreciate this opportunity to provide our perspective, and are prepared to assist as the Copyright Office continues to explore these important issues.

Respectfully submitted,

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³¹ See Comments of ASCAP & BMI, Comments of SESAC.

³² See the collection of academic, legal, and popular materials at thepublicindex.org