

**Before the  
COPYRIGHT OFFICE  
LIBRARY OF CONGRESS  
Washington, D.C.**

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<b>In the Matter of</b>	)	<b>Docket No. 2012-12</b>
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<b>Orphan Works and Mass Digitization</b>	)	<b>Submitted March 6, 2013</b>
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**REPLY COMMENTS OF THE  
MOTION PICTURE ASSOCIATION OF AMERICA, INC.  
AND THE  
INDEPENDENT FILM & TELEVISION ALLIANCE**

The Motion Picture Association of America, Inc. (“MPAA”) and the Independent Film & Television Alliance (“IFTA”) are pleased to provide these reply comments in response to the Federal Register Notice on Orphan Works and Mass Digitization (Docket No. 2012-12) appearing at 77 Fed. Reg. 64,555 (Oct. 22, 2012).<sup>1</sup>

In these reply comments, MPAA and IFTA will not attempt to respond comprehensively to all of the issues raised in the initial comments submitted or all of the issues raised in those comments.<sup>2</sup> Instead, we will focus on a few broader themes that we believe may be particularly relevant to the Copyright Office’s decisions on next steps. We remain intensely interested in many of the other issues raised in the initial comments, however, and reiterate our request to participate in future roundtables, hearings or other fora for discussion among stakeholders that the Copyright Office may choose to sponsor.

The initial comments indicate that orphan works are causing certain productive users difficulty. Such users may need relief – legislative or otherwise. But the initial round of

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<sup>1</sup> MPAA and IFTA filed separate sets of comments in the initial round, but submit these reply comments jointly. For a description of MPAA and IFTA and their respective members, please see their initial comments, which are available at [http://www.copyright.gov/orphan/comments/noi\\_10222012/Motion-Picture-Association-America-Inc.pdf](http://www.copyright.gov/orphan/comments/noi_10222012/Motion-Picture-Association-America-Inc.pdf) and [http://www.copyright.gov/orphan/comments/noi\\_10222012/Independent-Film-&-Television-Alliance.pdf](http://www.copyright.gov/orphan/comments/noi_10222012/Independent-Film-&-Television-Alliance.pdf).

<sup>2</sup> For the purposes of these reply comments, the abbreviated citation form gives the name of the submitter, index numbers assigned by the Copyright Office on its website, Comments on Orphan Works, at [http://www.copyright.gov/orphan/comments/noi\\_10222012/](http://www.copyright.gov/orphan/comments/noi_10222012/), and where applicable, a page number referring to the pages of the specific submission.

comments also supports our view that the pool of such works, and the number of such users, could be further reduced by improvements in the Copyright Office database, development of other resources for identifying and locating copyright owners, and other non-legislative solutions.

### **A. Respect For Copyright's Value Should Be Paramount**

Many of the initial comments expressed serious concerns that a legislative proposal on orphan works might negatively impact individual copyright owners and destabilize the default presumptions underlying our copyright system generally.<sup>3</sup> MPAA and IFTA believe that these legitimate concerns must remain front and center throughout the Copyright Office's consideration of responses – legislative or non-legislative – to the orphan works issue.

Contrary to the views expressed in a few of the initial comments, the fundamental contours of the current Copyright Act produce significant societal benefits and do not require radical readjustment. Respect for copyright's premise – *i.e.*, that economic incentives in the form of exclusive rights and effective deterrent remedies is the best way to spur the creation and broad dissemination of works of authorship – should be at the core of any orphan works regime. Two crucial aspects of any solution follow from the conclusion that fundamental copyright changes are not only unnecessary but also counter-productive as responses to orphan works issues. First, any solution should be designed to solve a real, documented problem. Second, the initial onus should remain on users to seek permission from copyright owners to reproduce, adapt, distribute, publicly perform, and publicly display copyrighted works. The Copyright Office's efforts should focus on reducing the frequency of situations in which voluntary transactions among users and rightsholders cannot occur because rightsholders cannot be identified or located.

#### **1. The Solution Should Be Tailored To The Problem**

In response to the request for information regarding relevant changes that occurred since the Copyright Office last studied the issue, the initial comments identified several approaches to resolving the orphan works problem that merit attention. For example, a number of initial comments<sup>4</sup> (including MPAA's and IFTA's) noted that one recent development that deserves close consideration and scrutiny is the approval of the European Union Directive on orphan

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<sup>3</sup> *See, e.g.*, Illustrator's Partnership of America, No. 50, at 1-5 (expressing concerns regarding the costs for creators associated with mandatory registration, etc.); Museum of Fine Arts, Boston, No. 68, at 3 (orphan works solution should not be "a license to ignore the U.S.'s copyright system"); National Music Publishers' Association (NMPA) and The Harry Fox Agency (HFA), No. 69, at 3-4 (expressing concern that orphan works legislation "would result in a system that strips away the rights granted to owners in the Copyright Act"); Picture Archive Council of America, No. 76, at 1 ("PACA's interest in orphan works legislation is to insure that works that are actively managed and licensed are not inadvertently considered 'orphans' and used without permission and licensing.").

<sup>4</sup> *See, e.g.*, American Association of Law Libraries (AALL), The Medical Library Association (MLA) and the Special Libraries Association (SLA), No. 4, at 4; American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI), No. 9, at 8-9; Consortium of College & University Media Centers (CCUMC), No. 26, at 3; Graphic Artists Guild, No. 48, at 2-10; Illustrators' Partnership of America, No. 50, at 13-14; National Music Publishers' Association (NMPA) and The Harry Fox Agency (HFA), No. 69, at 5.

works. The EU Directive takes a focused approach and applies only to a limited category of uses and potential users of orphan works.

Before proposing legislation or any other solution, the Copyright Office should clearly identify the contours of the orphan works problem, and tailor the solution to that problem. As some initial comments suggest, “United States researchers have not produced the types of robust studies that would reveal with any accuracy the true extent of the orphan works problem across types of works or types of users.” Berkeley Digital Library Copyright Project, No. 21, at 2. Studies by objective, impartial parties will be essential to the task of accurately isolating the problem and determining what steps will remedy it.

Certainly the Copyright Office should reject proposed solutions that are *not* tailored to the actual problem. For example, a few of the initial comments advocated wholesale changes to the current statutory damages regime in lieu of a targeted orphan works solution.<sup>5</sup> This is largely a red herring. Under current law, statutory damages are available only for infringement of works that have been registered before the infringement commences (or within three months of first authorized publication). *See* 17 U.S.C. § 412. Such works are less likely to be orphans, since at least initial information about ownership is readily accessible. Although some copyright owners may subsequently go out of business or otherwise become difficult to locate, a targeted proposal that deals specifically with orphan works would be far superior to a broad initiative.

In addition, improved research tools could help address the actual problem without depriving copyright owners of adequate remedies in other contexts. Rather than making it even more difficult for owners to enforce their rights, improving the Copyright Office databases to upgrade their searchability and to make them easier to update would better address the situation.

Moreover, the fact that information in the Copyright Office database is insufficient to identify or locate the owner does not in itself justify depriving the owner of an effective remedy against infringers or negate the policy justifications for statutory damages. Those situations may commonly involve uses where the actual harm to the copyright owner is difficult to determine. *See Sony BMG Music Entm’t v. Tenenbaum*, 660 F.3d 487, 502 (1st Cir. 2011) (“Section 504’s text reflects Congress’s intent ‘to give the owner of a copyright some recompense for injury done him, in a case where the rules of law render difficult or impossible proof of damages or discovery of profits.’” (*quoting Douglas v. Cunningham*, 294 U.S. 207, 209 (1935))). As discussed below, seeking a license should involve searching Office records *in addition to* all other reasonable efforts and sources.

## **2. Asking For Permission Should Remain A Requirement**

Many other initial commenters agreed with MPAA’s observation that there have been significant advancements in the capabilities and availability of tools and resources designed to

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<sup>5</sup> *See, e.g.*, Electronic Frontier Foundation (EFF) and Public Knowledge, No. 40, at 4.

enable users to identify and locate copyright owners.<sup>6</sup> To cite just one example, Google described its efforts to “help people who are trying to find copyright owners in order to get permission to make uses of works.” Google Inc., No. 47, at 2.<sup>7</sup> MPAA and IFTA agree that such advancements are the best way to reduce the population of the orphanage and benefit the public. As the initial comments make clear, properly defining what qualifies as a reasonable and diligent search and ensuring that future tools that increase the likelihood of finding a copyright owner must be adopted as they develop is the crux of any orphan works legislative proposal. In crafting any such proposal, the Copyright Office should carefully review marketplace developments to fashion the right standard for a reasonably diligent attempt to locate a copyright owner.

In our view, “reasonable” is not synonymous with “convenient” or “automated.”<sup>8</sup> If certain steps reasonably increase the likelihood that a copyright owner may be located, those steps should not be dispensed with merely because a robot cannot take them, or because a person cannot perform them without looking up from his laptop.<sup>9</sup> Nevertheless, increasing the ease with which potential licensees can locate willing licensors should be a top priority. MPAA and IFTA applaud efforts by the Copyright Office, as well as the private sector, to do so. Along with many other commenters, we support increased funding to make Copyright Office records available online and in a searchable format. As these efforts produce results, the orphan works problem will likely continue to shrink, another factor that counsels in favor of a targeted solution.

## **B. Mass Digitization Is A Separate And Complex Issue**

In its initial comments, MPAA and IFTA asked the Copyright Office to consider the issue of mass digitization (if at all) apart from the orphan works problem. The initial comments confirmed that such an approach is preferable. Many commenters, including proponents of mass digitization such as Google (*see* No. 47, at 3-4), described the issues as distinct.<sup>10</sup>

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<sup>6</sup> *See* American Bar Association Section of Intellectual Property Law, No. 5, at 11-12; Berkeley Digital Library Copyright Project, No. 21, at 33; Copyright Alliance, No. 28, at 4; Google Inc., No. 47, at 1-2; Library of Congress, No. 60, at 4; National Music Publishers’ Association (NMPA) and The Harry Fox Agency (HFA), No. 69, at 2-3.

<sup>7</sup> For information on additional efforts see the comments of Copyright Clearance Center, No. 29, and American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI), No. 9, at 4-5.

<sup>8</sup> *Cf.* Google Inc., No. 47, at 5 (calling for “reasonably diligent search” standards to be satisfied by “automated searches that meet objective, pre-determined criteria”).

<sup>9</sup> These steps may include contacting parties, such as motion picture directors or writers, who never owned any rights in a work but were involved in its creation. Those parties may be able to help a user find a copyright owner. However, obtaining permissions from such persons should not be sufficient to the extent they hold no exclusive rights under copyright law. The Copyright Office should decline the invitation of the Directors Guild of America (DGA) and the Writers Guild of America, West (WGAW), No. 36, to propose any solution that so drastically alters long-standing copyright law principles.

<sup>10</sup> *See also* American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI), No. 9, at 9; Copyright Alliance, No. 28, at 5; Magazine Publishers of America, No. 63, at 2; National Writers Union, No. 71, at 14; Recording Industry Association of America (RIAA), No. 79, at 4; SESAC, Inc., No. 83, at 4.

First, the initial comments indicate that several proponents of mass digitization want to digitize and make works available after making little or no effort to locate copyright owners.<sup>11</sup> This approach is not a response to the problem of orphan works but instead an attempt to avoid the cost and effort of securing permission. Any true orphan works solution should not serve as a shield against liability for users who simply fail to make an effort to properly license works from copyright owners.

Second, sharp disagreements exist regarding the legal status of mass digitization.<sup>12</sup> The law regarding mass digitization remains unsettled as the issue works its way through the courts.<sup>13</sup> Connecting mass digitization to the somewhat less controversial issue of orphan works is a recipe for legislative impasse.

Although some commenters were clearly emboldened by the recent *HathiTrust* decision,<sup>14</sup> that case simply did not blaze a trail that the Copyright Office should follow, especially since that highly questionable opinion is on appeal. *HathiTrust* only dealt with a small sliver of the mass digitization question. It expressly set aside the orphan works-related aspects of the project at issue. Nor did *HathiTrust* address the commercial aspects of the use in question. The Copyright Office (and Congress) would benefit from having the opportunity to observe further developments before weighing action.

Finally, it is difficult to define precisely what mass digitization involves, given the myriad forms it may take. Trying to sort through all of the approaches and select some (if any) to bless in a legislative proposal would only slow the already protracted process of determining how to best address the orphan works problem. Taking the opposite approach, and indiscriminately sanctioning all mass digitization projects by forcing copyright owners into a generally applicable opt-out or notice-and-takedown regime, would raise serious questions of compatibility with U.S. international obligations, and would undoubtedly face significant opposition.

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<sup>11</sup> See, e.g., Council of University Librarians at the University of California, No. 30, at 3-4; Google Inc., No. 47, at 5; Institute for Intellectual Property and Social Justice (IIPSJ), No. 53, at 2; Microsoft Corporation, No. 66, at 5; Society of American Archivists, No. 85, at 6-8; Software & Information Industry Association (SIIA), No. 86, at 8.

<sup>12</sup> Compare Library Copyright Alliance (LCA) et al., No. 61, at 3 (suggesting that mass digitization by libraries is already allowed as fair use); Duke University Libraries, No. 39, at 3-4 (same) with Association of American Publishers (AAP), No. 16, at 4 (rejecting notion that most mass digitization is fair use); Picture Archive Council of America, Inc. (PACA), No. 76, at 9 (same).

<sup>13</sup> As in the MPAA's initial comments, we put to one side one well-founded concern expressed by museums, libraries and archives, including some initial commenters: the need to digitize some large collections of materials for the non-commercial purpose of preservation and retention of fragile and deteriorating items. These problems are better approached through a focus on other copyright law provisions, notably section 108, than through either fair use or new orphan works provisions.

<sup>14</sup> *Authors Guild Inc. v. HathiTrust*, No. 11 CV 6351 (HB), 2012 WL 4808939 (S.D.N.Y. Oct. 10, 2012) (appeal pending).

The MPAA and IFTA appreciate this opportunity to provide our views in response to the Federal Register Notice. We look forward to providing further input and working with the Copyright Office going forward.

Respectfully submitted,

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