RESPONSE TO THE U.S. COPYRIGHT OFFICE'S NOTICE OF INQUIRY ON COPYRIGHT PROTECTION FOR CERTAIN VISUAL WORKS

The Library Copyright Alliance (LCA) consists of three major library associations — the American Library Association, the Association of Research Libraries, and the Association of College and Research Libraries. These three associations collectively represent over 350,000 information professionals and over 100,000 libraries of all kinds throughout the United States. An estimated 200 million Americans use these libraries more than two billion times each year. These libraries spend more than $4 billion annually acquiring books and other information resources. LCA welcomes the opportunity to respond to questions 4 and 5 of the U.S. Copyright Office's Notice of Inquiry on Copyright Protection for Certain Visual Works.

4. What are the most significant challenges or frustrations for those who wish to make legal use of photographs, graphic art works, and/or illustrations?

In the past, the difficulty of identifying or locating the owners of the copyrights in visual works was a significant challenge for libraries. Visual works are particularly susceptible to "orphaning" and often there is ambiguity in their copyright ownership. This orphan work problem had a chilling effect on libraries interested in important preservation and archival uses of visual works. It also impeded the use of collections of visual works for teaching and classroom use. Indeed, the orphan work challenge prompted LCA to strongly support enactment of the Shawn Bentley Orphan Works Act in 2008. However, significant changes in the copyright landscape since then convince us

that libraries no longer need legislative reform in order to make appropriate uses of "orphaned" visual works in their collections.

1. Fair use is less uncertain.

In recent years, courts have issued a series of expansive fair use decisions that have clarified its scope. In *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), *A.V. v. iParadigm*, 562 F.3d 630, 639 (4th Cir. 2009), *White v. West Publishing Corp.*, 1:12-cv-01340-JSR (S.D.N.Y. July 3, 2014), and *Fox News v. TVEyes*, No. 13 Civ. 5315 (AKH) (S.D.N.Y. Sept. 9, 2014), the courts found that the repurposing or recontextualizing of entire works by commercial entities was "transformative" within the meaning of fair use jurisprudence and therefore a fair use. Courts further recognized that a nonprofit educational purpose weighed the first fair use factor in favor of a fair use finding in *Cambridge Univ. Press v. Becker*, 769 F.3d 1232 (11th Cir. 2014); *Authors Guild, Inc. v. HathiTrust*, 755 F. 3d 87 (2d Cir. 2014); *Ass'n for Info. Media and Equip. v. Regents of the Univ. of California*, No. CV 10-9378 CBM (MANx), 2011 WL 7447148 (C.D.Cal. Oct. 3, 2011), and *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). Relying on *Perfect 10*, *iParadigm*, and *Bill Graham Archives*, the general counsel of the U.S. Patent and Trademark Office (USPTO) opined that the copying of technical articles by the USPTO and patent applicants during the course of the patent examination process constituted fair

use.[1] Importantly, *Amazon.com*, *iParadigm*, and *HathiTrust* all involved mass digitization.

All these uses were determined to constitute fair use even though the copyright owners were locatable. Libraries and archives understand that similar uses of orphan works are all the more likely to fall within the fair use right because such uses would have no adverse effect on the potential market for the work.[2] Additionally, the *Code of Best Practices in Fair Use for Academic and Research Libraries*, developed by the Association of Research Libraries,[3] explicitly concludes that the orphan status of a work in a special collection enhances the likelihood that its use by a library is fair. The development of the *Code* was prompted by Professor Michael Madison's insight (following a review of numerous fair use decisions) that the courts were:

> implicitly or explicitly, asking about habit, custom, and social context of the use, using what Madison termed a 'pattern-oriented' approach to fair use reasoning. If the use was normal in a community, and you could understand how it was different from the original market use, then judges typically decided for fair use.[4]

Based on this insight, the Association of Research Libraries undertook an effort to "document the considered views of the library community about best practices in fair use,

---

[1] Bernard Knight, USPTO General Counsel, *USPTO Position on Fair Use NPL Copies of Made in Patent Examination* (January 19, 2012) http://www.uspto.gov/about/offices/ogc/USPTOPositiononFairUse_of_CopiesofNPLMadeinPatentExamination.pdf.

[2] The second fair use factor, the nature of the copyrighted work, also weighs in favor of fair use when the work is an orphan. *See* Jennifer Urban, *How Fair Use Can Solve the Orphan Works Problem*, 27 Berkeley Technology Law Journal 1379 (2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2089526.

[3] The Code has been endorsed by the American Library Association, the Association of College and Research Libraries, the Arts Libraries Society of North America, the College Art Association, the Visual Resources Association, and the Music Library Association.

[4] Patricia Aufderheide and Peter Jaszi, Reclaiming Fair Use 71 (2011).

drawn from the actual practices and experience of the library community itself."[5] The resulting *Code of Best Practices* identified "situations that represent the library community's current consensus about acceptable practices for the fair use of copyrighted materials and describes a carefully derived consensus within the library community about how those rights should apply in certain recurrent situations." *Id.*

One of the *Code's* principles directly addresses the digitizing and the making available of materials in a library's special collections and archives. The *Code* states that the fair use case for such uses "will be even stronger where items to be digitized consist largely of works, such as personal photographs, correspondence, or ephemera, whose owners are not exploiting the material commercially and likely could not be located to seek permission for new uses." *Id*. at 20. That is, the fair use case is stronger for orphan works.

2. Injunctions are less likely.

Historically, courts routinely issued injunctions when they found copyright infringement, presuming that the injury caused was irreparable. In 2006, however, the Supreme Court in *eBay v. MercExchange*, 547 U.S. 388 (2006), ruled that courts should not automatically issue injunctions in cases of patent infringement, but instead should consider the four factors traditionally employed to determine whether to enjoin conduct, including whether the injury was irreparable and whether money damages were inadequate to compensate for that injury. Lower courts in cases such as *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010), have held that the Supreme Court's reasoning in *eBay* applies to the Copyright Act as well. Abolition of the automatic injunction rule

[5] Association of Research Libraries, et al., Code of Best Practices in Fair Use for Academic and Research Libraries 3 (2012).

diminishes the probability that a court will enjoin a library's use of an orphan work in the unlikely event that the court finds the use to infringe; the copyright owner bears the burden of proving that the library's use causes irreparable injury.

3. Mass digitization is more common.

The leading search engines routinely cache billions of web pages without the copyright owners' permission. This industry practice has faced absolutely no legal challenge in the United States since the *Amazon.com* decision in 2007, cited above. A court would favorably evaluate a non-profit library's fair use defense in the context of this industry practice.

Moreover, in part because of the legal developments described above, libraries across the country have begun engaging in the mass digitization of special collections and archives.[6] The more they engage in these activities, the more confident libraries become

[6] The New York Public Library's digitization of its special collection of materials relating to the New York World's Fair of 1939 and 1940 is a representative example. At the conclusion of the Fair, the corporation in charge of the Fair dissolved and donated over 2,500 boxes of records and documents, as well 12,000 promotional photographs, to NYPL. These records document an important event in history and are heavily used by researchers and the public. When deciding whether to digitize this collection and make it available online, NYPL conducted a thorough, good-faith search for rights holders. This search was time-consuming and, ultimately, fruitless.

After balancing the educational benefit of digitizing and making portions of the collection available online with the risk that a rights holder might subsequently surface, NYPL determined to move forward with the project, guided by fair use considerations. The potential maximum copyright liability for this project was estimated to exceed $1.8 billion dollars. Despite this potential liability, NYPL not only digitized and posted the collection, but also made the material available through a free app that was later named one of Apple's "Top Education Apps" of 2011. Furthermore, an educational curriculum has been built around this material. So far, no rights holder has contacted NYPL to ask that it limit the uses of works from the Fair collection. If a rights holder wished to contact NYPL about its uses, NYPL has made its contact information available online and in the app.

with their fair use analysis concerning the mass digitization of presumptively orphan works.

5. What other issues or challenges should the Office be aware of regarding photographs, graphic artworks, and/or illustrations under the Copyright Act?

The orphan works issue discussed above is in large measure a function of the lengthy term of copyright protection. The current copyright term in the United States is already unacceptably long, limiting access to visual works that should be in the public domain. There certainly is no policy justification or economic evidence to support extension of the current copyright term and LCA opposes any such efforts.

The Constitutional rationale for the intellectual property system is "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[7] The Supreme Court has confirmed that this rationale is ultimately intended to serve the public:

> Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an "author's" creative labor. But the ultimate aim is, by this incentive, to stimulate creativity for the general public good.[8]

The first copyright term in the United States was set by the Copyright Act of 1790, modeled after the Statute of Anne (1710), and granted a period of protection of fourteen years for American authors, with a renewable period of an additional fourteen years. This term was meant to provide an incentive to creators by providing a *limited* time

[7] U.S. Const., Art, 1, Sec. 8, Cl. 8.
[8] Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

monopoly, while also aiming to create a balance by enabling the public to rely on these works once this limited period ended.

Since this first copyright act was enacted, several revisions to the term of protection were made, each lengthening the "limited time" granted to authors. In 1831, the term was revised to set the initial term at twenty-eight years, with a renewable term of fourteen years. The term was again revised in 1909, lengthening the renewal term to twenty-eight years. The Copyright Act of 1976 provided for a term of protection equal to the life of the author plus an additional fifty years, or seventy years for works for hire.

The term of protection in the United States was again extended through the Copyright Term Extension Act of 1998 to the current period of the life of the author plus seventy years or ninety-five years for works for hire. The term of copyright in the United States thus now significantly exceeds the international standard established under the Berne Convention of life plus fifty years.

Notably, as legal historian Edward Walterscheid has observed, while patents and copyrights were included in the same clause of the Constitution and originally had the same or similar durations, the patent term has increased by just 43 percent while the copyright term has increased by almost 580 percent.[9]

The continued extensions of copyright term undermine the stated Constitutional goal of the intellectual property system of serving the good by shrinking the public domain: works that are not under copyright protection. One study demonstrated that lengthy copyright term has resulted in the greater in-print availability of titles from the

[9] Edward Walterscheid, Defining the Patent and Copyright Term: Term Limits and the Intellectual Property Clause, 7 J. INTELL. PROP. L. 315, 389 (2000). Walterscheid further observes, "Congress must justify why a 20-year term can provide sufficient incentive to inventors, but not to writers and artists.").

1890s and early 1900s than works published in the mid-twentieth century because the older works are known to be in the public domain and can be reprinted without determining whether a rights holder exists and negotiating a license for the printing.[10]

The public domain is a vital component of the cultural world. It not only allows the public to access books and texts, but also serves as a storehouse of raw materials from which derivative works and new ideas are built. Longer copyright terms lengthen the amount of time a work is protected thereby escalating the costs of access to knowledge by requiring licensing for a greater period of time, increasing the resources that must be devoted to searching for authors, and contributing to potential loss of materials.

The lengthy copyright term extending far beyond the life of the author has exacerbated the orphan works problem. Rights to a particular work may pass on to the author's heirs and his heirs' heirs, or may be assigned to a third party. Thus, it can be extremely difficult, if not impossible, to determine who holds the rights. Copyright's primary objective of stimulating creativity is not furthered by granting a financial reward to the heirs of the creators.

Register of Copyrights Maria Pallante concurs. In a speech advocating the reintroduction of copyright formalities for the last twenty years of protection, Ms. Pallante stated:

> The benefits of a lengthy term are meaningless if the current owner of the work cannot be identified or cannot be located. Often times, this is complicated by the fact that the current owner is not the author or even the author's children or grandchildren. As the Copyright Office recognized in

[10] See Timothy B. Lee, Why Does Amazon have more books from the 1880s than the 1980s? Blame Copyright? WASH. POST (Jul. 31, 2013), available at http://www.washingtonpost.com/blogs/theswitch/wp/2013/07/31/why-does-amazon-have-more-books-from-the-1880s-than-the-1980s-blamecopyrig

> one of its key revision studies of the 1950s, it seems questionable whether copyright term should be extended to benefit remote heirs or assignees, "long after the purpose of the protection has been achieved."[11]

Efforts to amend the copyright term should be grounded in economic evidence. The independent Hargreaves report commissioned by the government of the United Kingdom noted that lengthier copyright terms do not incentivize further creation:

> Economic evidence is clear that the likely deadweight loss to the economy exceeds any additional incentivising effect which might result from the extension of copyright term beyond its present levels. This is doubly clear for retrospective extension to copyright term given the impossibility of incentivising the creation of already existing works, or work from artists already found dead. Despite this, there are frequent proposals to increase term . . . The UK Government assessment found it to be economically detrimental. An international study found term extensions to have no impact on output.[12]

Similarly, in her 2011 article published in the Review of Economic Research on Copyright Issues, Ruth Towse noted that:

> Almost all economists are agreed that the copyright term is now inefficiently long with the result that costs of compliance most likely exceed any financial benefits from extensions (and it is worth remembering that the term of protection for a work in the 1709 Statute of Anne was 14 years with the possibility of renewal as compared to 70 years plus life for authors in most developed countries in the present, which means a work could be protected for well over 150 years). Moreover, difficulties of tracing copyright owners and of so-called "orphan" works has prevented access to copyrighted material and inhibited both future creation and access to culturally valuable material by the public.[13]

---

[11] Maria Pallante, Register of Copyrights and Director, U.S. Copyright Office, David Nelson Memorial Keynote Address: The Curious Case of Copyright Formalities (Apr. 18, 2013), http://www.law.berkeley.edu/files/Pallante-BerkeleyKeynote.pdf (quoting U.S. COPYRIGHT OFFICE LAW REVISION, STUDY NO. 30, DURATION OF COPYRIGHT, at 80 (1961), available at http://www.copyright.gov/history/studies/study30.pdf).

[12] Ian Hargreaves, DIGITAL OPPORTUNITY: A REVIEW OF INTELLECTUAL PROPERTY GROWTH 19 (2011), http://www.ipo.gov.uk/ipreview-finalreport.pdf (citations omitted).

The present excessively long term of copyright protection diminishes the availability of visual works that should be in public domain, thereby harming access to knowledge and worsening the orphan works problem.

Accordingly, LCA respectfully submits that Congress should not lengthen the present term any further. Indeed, we believe that Congress should explore ways to shorten the present term and mitigate its adverse cultural and economic impact by, for example, adopting Register Pallante's proposal to reintroduce formalities "by reverting works to the public domain after a period of life plus fifty years unless heirs or successors register their interests with the Copyright Office."[14]

July 23, 2015

---

[13] Ruth Towse, What We Know, What we Don't and What Policy-makers Would Like Us to Know About the Economics of Copyright, 8 REVIEW OF ECONOMIC RESEARCH ON COPYRIGHT ISSUES 101, 105 (2011). Notably, this journal focusing on economic research on copyright did not exist at the time of the Copyright Term Extension Act. Since the last copyright term extension, there has been heightened interest in providing an evidence basis for copyright policy. The Hargreaves Report, for example, recommended "that in future, policy on Intellectual Property issues is constructed on the basis of evidence . . .".

[14] Statement of Maria A. Pallante, Register of Copyrights, The Register's Call for Updates to U.S. Copyright Law, United States Copyright Office before the Subcommittee on Courts, Intellectual Property and the Internet, Committee on the Judiciary, 113 Cong., 1st Sess., (Mar. 20, 2013), available at http://www.copyright.gov/regstat/2013/regstat03202013.html. By requiring registration during the last twenty years of protection, numerous works would likely enter the public domain. For those works that are renewed for an additional twenty years, the rightholder would be more easily identified and found.