

February 1, 2013

Ms. Maria Pallante
Register of Copyrights
United States Copyright Office
101 Independence Avenue S.E.
Washington, DC 20559

RE: Reply Comments to Notice of Inquiry Concerning Orphan Works and Mass Digitization

Dear Ms. Pallante:

The American Association of Law Libraries (AALL), the Medical Library Association (MLA) and the Special Libraries Association (SLA) thank the Copyright Office for the opportunity to reply to the Notice of Inquiry regarding Orphan Works and Mass Digitization. Both topics are of critical importance to the future of libraries. Our associations support solutions that encourage the productive and creative uses of and improved access to orphan works while respecting the rights of copyright holders.

Although Congress failed to pass legislation in 2008, two cases, *Authors Guild et al. v. Google* and *Authors Guild et al. v. HathiTrust*, have respectively affirmed that it is the place of Congress to resolve and adapt copyright law to new technology and that non-commercial, transformative mass digitization efforts are protected by fair use. Our associations agree with the opinion of the courts in these two cases.

Our comments support a legislative fix to resolve some of the issues related to orphan works, and address four key issues:

- The current environment for orphan works;
- Protecting libraries, educational and other non-profit institutions wishing to undertake mass digitization projects of books and other orphan works for the purpose of stimulating new scholarship and learning;
- Establishing flexible guidelines and solutions for finding original rights holders and successors; and
- Supporting equitable access and providing the highest level of service to all library users, including persons with disabilities.

I. Current State of Play for Orphan Works

We agree with the Copyright Office that the problem of orphan works is pervasive; it affects many institutions, including libraries, holding material in formats including print, photographs and film. Libraries alone hold significant numbers of orphan works, estimated in the millions¹, whose owners are unknown and difficult to identify.

Extension of the copyright term over the last century along with the abandonment of a formal registry have exacerbated the problem of orphan works. For example, since the copyright term now extends well beyond the

¹ Marc Perry, *Out of Fear, Colleges Lock Books and Images Away From Scholars*, *The Chronicle*, May 29, 2011, <http://chronicle.com/article/Out-of-Fear-Institutions-Lock/127701>.

lifetime of original creators, it is complicated to determine to whom the rights to a work may have passed after the death of the creator. This problem will continue to grow, especially since the number of new works produced every year now increases exponentially.

Previous responses to proposed orphan works legislation revealed broad consensus that there is a chilling effect on their use because there is no statutory limit on remedies against users of these works, even if the users have made good faith efforts to determine whether a copyright holder existed before using the work. Due to the costs involved in searching for rights holders and the risk of potential litigation, institutions may not make available extensive collections of valuable works. This situation limits the study and re-use of works. In addition, it limits access to these works by citizens with disabilities, who may be unable to view print materials, but could take advantage of technological access that digitization enables.

The Copyright Office's January 2006 *Report on Orphan Works* concluded that legislation is necessary to provide a meaningful solution to the orphan works problem.² We agreed and still agree with this conclusion, which represented a consensus among a diverse group of libraries, museums, publishers and content owners. Further support for this conclusion comes from two recent cases. In his ruling rejecting the proposed Google Books Settlement, *Authors Guild v. Google*, 770 F. Supp. 2d 666, 680 (S.D.N.Y. 2011), Judge Denny Chin cited his agreement with the Supreme Court's opinion in *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 431 (1984), that policy and history favor deference to Congress "when major technological innovations alter the market for copyrighted materials." *Authors Guild v. HathiTrust*, 2012 WL 4808939 (S.D.N.Y. 2012), also quotes *Sony* in support of a legislative solution, noting the Court's assertion that courts cannot "apply laws that have not yet been written."

AALL, MLA and SLA strongly supported the bipartisan Orphan Works Act of 2008 (H.R. 5889), and its major elements: (1) limited remedies available when a user of an orphan work has conducted a diligent, good faith search for the rights holder; (2) application of a case-by-case policy; and (3) reasonable compensation for rights holders with a special provision for noncommercial actors engaged in noncommercial use of orphan works, but not statutory damages or attorneys' fees. We believe these three elements successfully balanced the rights of copyright owners with protection for those wishing to use works whose ownership is in question, which is a necessary component of any successful solution to the orphan works problem. We would enthusiastically support the re-introduction of similar legislation in the new Congress.

Another important element of a solution to the orphan works problem would be to establish guidelines for what constitutes a reasonable, good faith search for rights holders. Such guidelines, which should be flexible, reasonable and inexpensive for individuals and non-profit institutions, would clarify what steps should be followed to search for a rights owner before determining that a rights holder is unidentifiable and proceeding to use a work. Search criteria would likewise reassure rights holders that there are procedures and processes in place to protect their rights. We prefer that such criteria take the form of guidelines or suggested best practices rather than a mandatory checklist. Institutions working with orphan works will have differing resources that they can employ to undertake searches and, particularly in the area of mass digitization projects, mandatory steps could lead to a cost prohibitive per-work analysis and documentation process. Like fair use, use of orphan works requires flexibility.

II. Orphan Works in the Context of Mass Digitization

Due to improved technology and decreasing costs, mass digitization of books and other orphan works is a possibility that was not contemplated in 2008 or previously. However, the ease of systematic digitization brings greater risks for institutions like libraries that may wish to share material in their collections with students, scholars, and the public for study, education and re-use. Library digitization projects are not meant to be sold or developed as commercial products, but to stimulate new scholarship and learning, thus supporting the promotion of the progress

² United States Copyright Office, *Report on Orphan Works* 93 (2006), <http://www.copyright.gov/orphan/orphan-report-full.pdf>.

of science and useful arts. Mass digitization is a powerful new development that can not only breathe new life into old materials, but can generate valuable new data and information from them.

However, because most libraries are non-profit institutions, many cannot afford the time and legal costs associated with searching for potential rights holders of millions of items, nor can they afford to risk exposing their institution to unknown amounts of potential damages if unknown rights holders make themselves known in the future. It is important that legislation or other potential solutions to the problem of orphan works protect educational and other non-profit institutions.

Protecting these institutions would provide them freedom to undertake projects such as:

- The Wise Law Library at the University of Colorado could digitize the reports of the Public Land Law Review Commission, which led to major federal public lands legislation in the 1970s. The studies were prepared by private firms under contract, some of which no longer exist, making it impossible to get official permission for the project.
- The Wise Law Library at the University of Colorado could digitize an article from a journal that has ceased publication, and on which they have received mixed messages when trying to determine the possible rights holder through the Copyright Clearance Center and other means.
- More institutions might join Flickr's Commons Project.³ Current member institutions, including the Library of Congress and the Smithsonian Institution, as well as public, university and presidential libraries and the national libraries of other countries, use the social photo-sharing service to showcase collections of photographs they hold. Members of the public both learn from the images and contribute their own memories, annotations and identifications of people, places and trends.⁴
- Institutions could create local history repositories by scanning their rare, out-of-print volumes and newspapers that are no longer published, sharing material that might not otherwise be available with genealogists and local historians.

Digitization is powerful. Digitizing works makes them available to those who cannot visit them in person, or to those with disabilities who need technology to access them. Digitization can make available works that may be important for study, yet too fragile for regular handling. Mass digitization can produce data that can reveal new insights, such as Stanford University's *Mapping the Republic of Letters*,⁵ which digitized the correspondence, travel and social networks of early modern writers, thus revealing the paths taken by ideas.

III. COPYRIGHT OFFICE AND REGISTRIES

As noted above, the abandonment of a formal rights registry by the Copyright Office in 1992 was a factor in the growth of the orphan works problem. Without a central repository, it can be difficult or impossible to track down an original rights holder, let alone successors.

If flexible guidelines for a good faith search for rights holders are established, part of their criteria could include the use of technological solutions to be put in place by the Copyright Office or third parties to fill the void left by the current lack of registry. Because it is important that searching for rights holders be affordable for both non-profit institutions and individuals, any third-party solutions must also be non-profit. We also encourage the Copyright Office to continue to explore robust use of social media solutions and crowd sourcing, as well as the digitization of its own valuable, historic records.

³ Flickr, The Commons, <http://www.flickr.com/commons>.

⁴ See For the Common Good: The Library of Congress Flickr Pilot Project 26 (2008), http://www.loc.gov/rr/print/flickr_report_final.pdf.

⁵ Stanford University, Mapping the Republic of Letters, <https://republicofletters.stanford.edu>.

IV. ACCESS FOR PERSONS WITH DISABILITIES

We have briefly touched on the issue, but we want to emphasize that another important argument for the digitization and use of orphan works is the access it can provide for citizens with disabilities. Librarians are committed to enabling all patrons and citizens to access the materials we hold for the common good. Our associations strongly support equitable access and providing the highest level of service to all library users. Those who cannot read print materials can use screen readers and other tools to access the content of digitized text. This is an important transformative use that was acknowledged by *Author's Guild v. HathiTrust* and should be acknowledged by any solution to the orphan works problem.

CONCLUSION

Orphan works include millions of print volumes, photographs and films that are part to our shared cultural heritage. These works may be common and well-known titles, or they may be obscure works of local interest. What they have in common is that the current legal situation makes it risky to provide better and digital access to them. This problem is in need of urgent solution, and we are pleased the Copyright Office is exploring the issue.

Over the years since legislation was last proposed, support for a legislative fix has only grown. The Google Books Settlement and HathiTrust cases agree that the solution must come from Congress. The Department of Justice also supports a solution to the orphan works problem, noting in its Statement of Interest in the Google Books Settlement that “breathing life into millions of works that are now effectively dormant, allowing users to search the text of millions of books at no cost, creating a rights registry, and enhancing the accessibility of such works for the disabled and others are all worthy objectives.”⁶

While they have differing copyright law situations, the European Union and its Member States also struggle with how to deal with orphan works in a useful manner. In addition to moving forward on a legislative fix, the United States Copyright Office should monitor solutions and potential resolutions being discussed elsewhere for creative and fair ideas that we could adapt to our dilemma.

Our associations fully support the efforts of the Copyright Office to seek legislative solutions that will resolve some of the issues related to orphan works, recognizing that a successful solution must balance the rights of copyright owners and rights holders with the protection of those who would make them available. We believe that legislation similar to the 2008 Orphan Works Acts would achieve this goal.

Sincerely,

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⁶ Department of Justice, Statement of Interest of the United States of America Regarding Proposed Amended Settlement Agreement at 5, *Authors Guild v. Google*, No. 05-08136 (D. D.C. 2010), <http://www.justice.gov/atr/cases/f255000/255012.pdf>.



The American Association of Law Libraries (AALL) was founded in 1906 to promote and enhance the value of law libraries to the legal and public communities, to foster the profession of law librarianship, and to provide leadership in the field of legal information. Today, with over 5,000 members, the Association represents law librarians and related professionals who are affiliated with a wide range of institutions: law firms; law schools; corporate legal departments; courts; and local, state and federal government agencies. <http://www.aall.org>
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The Medical Library Association (MLA) is a nonprofit, educational organization with more than 4,000 health sciences information professional and institutional members worldwide. Founded in 1898, MLA provides lifelong educational opportunities, supports a knowledgebase of health information research, and works with a global network of partners to promote the importance of quality information for improved health to the health care community and the public. <http://www.mlanet.org>
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The Special Libraries Association (SLA) is a nonprofit global organization for innovative information professionals and their strategic partners. SLA serves about 9,000 members in 75 countries in the information profession, including corporate, academic, and government information specialists. SLA promotes and strengthens its members through learning, advocacy, and networking initiatives. <http://www.sla.org>
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