
March 6, 2013

Library of Congress
Copyright Office
[Docket No. 2012-12]
Orphan Works and Mass Digitization

Reply Comments by the Copyright Alliance

The Copyright Alliance welcomes this opportunity to submit reply comments in the U.S. Copyright Office's review of the issue of orphan works under U.S. copyright law. Since several of our members are likely to submit their own replies, we will focus our reply on broader issues raised by some of the comments submitted to the Office. Specifically, the Copyright Alliance raises three main points of concern.

We additionally caution that several comments suggest antipathy, or even downright hostility, toward creators and copyright owners.[1] Any legal framework that operates in a punitive manner as implied by such comments will turn the fundamental principles of copyright on their head and would ultimately be detrimental to the public.

*First, several commenters appear to be using this NOI as a venue to drive a broader, regressive "copyright reform" agenda, aimed at stripping authors, creators, and innovators of their copyrights and rendering these rights less valuable, harder to enforce, and more difficult to maintain.*

These groups seek to reduce the term of copyrights, eliminate or sharply reduce statutory damages, and re-implement copyright formalities. Each such proposal would serve to strip individual creators and copyright owners of their rights, while transferring such benefits to those who seek to exploit creative works through mass digitization projects, and otherwise with minimal or no return to the creators.

> **Reduction in Copyright Term**. Some have suggested a reduction of copyright term or requirements that copyright owners register multiple times to extend a term of copyright.

[1] We use the term "creator" and "author" in these comments to embrace all individual members of the creative community, regardless of the type of work of authorship they produce. We note also that in some instances the creator/author of the work will not necessarily be the copyright owner of the work. Our comments do not generally address the situations in which this distinction is of greatest importance.

Discussion about the appropriate length of copyright protection could fill many pages,[2] but arguments over term of protection in the context of orphan works are a red herring.

Reducing the length of copyright protection does not make it easier to identify or locate the owner of a work. Several comments have indicated situations where such an approach would, in fact, yield *no* benefits unless reduction was made to unprecedented levels. Emory University Libraries describes a collection of materials it is seeking to identify that was created between 1987 and 1998. University of North Carolina, Chapel Hill Libraries similarly makes note of a collection it has with materials dated as recently as 1986. Unless copyright duration was reduced to a shorter term than even the 1790 Copyright Act provided,[3] then reduction would not facilitate uses of works in such collections.

Reducing copyright term serves to harm those independent authors and creators who through their creativity, talent, and hard work have created an original work of authorship with lasting value for future generations. Copyrighted works are infringed upon in ways that are impossible to enforce against so quickly and ubiquitously as to make length of term meaningless, except in those cases where a work has lasting economic value to the creator. In instances where a family or small business is built on hard work in the creative sector, it should be treated no differently than one built on hard work in any other sector. For instance, in the manufacturing sector, the assets of the business are transferrable to heirs upon the death of the owner. This recognizes that heirs are in the best position to determine the most appropriate disposition of the assets of a family business. This is even more appropriate in the case of a family business built on a decedent's creative works.

**Elimination of Statutory Damages.** Various groups, including Computer Communications Industry Association (CCIA), Electronic Frontier Foundation, and Public Knowledge, submitted comments suggesting that statutory damages should be drastically reduced to a mere fraction of what is currently allowed. Individual authors of high volume and low value works, such as photographers or songwriters, are already disproportionately disadvantaged when it comes to enforcing their rights. Such authors often don't register their works or register only very significant works because the registration system is not well set-up to handle their needs. When their unregistered work is infringed upon, they are essentially precluded from any meaningful recovery for the infringement. The case of a photographer, who recently reached out to the Copyright Alliance after a yearlong copyright infringement battle, illustrates the ongoing need for statutory damages and an accommodating registration system. Last year, the photographer became aware that a popular photograph she'd taken was being used by a fashion designer, a large clothing retailer, and a cosmetics company on products and advertising. The photographer had not registered the work prior to the infringement, and

[2] Indeed, the Copyright Office itself devoted over 100 pages on the duration of copyright protection in its 1957 study as part of the general revision of the Copyright Act; *see* J. Guinan, Jr., *Duration of Copyright*, Copyright Law Revision Study No. 30.

[3] Under the 1790 Copyright Act, works could be protected for a maximum of 28 years, Act of May 31, 1790, 1 Stat. 124.

repeated attempts to settle with the infringing parties have been unsuccessful. The lack of registration prior to the infringement limits any meaningful recovery.

The fact that copyright owners so often must resort to statutory damages to recover damages for an infringement is not because they have "suffered no actual damages," as some argue.[4] Rather it is because damages are notoriously difficult to prove in a copyright case (and may include non-economic damages), particularly where a work is infringed in an unexpected manner.

Statutory damages are often the only means of legal recourse for an independent author or small business. Eliminating or limiting this channel deprives creators of effective remedies for infringement on their works.

**Return to Copyright Formalities.** The United States was one of the last nations with copyright laws to eliminate formalities, doing so in the 1976 Copyright Act for legitimate and well-documented purposes. The elimination of formalities brought the U.S. into compliance with the Berne Convention. In addition to violating Berne (as well as other international IP and trade agreements), reinstating copyright formalities would primarily harm individuals and small businesses that lack the resources to monitor compliance. Copyright protection that is not contingent on formalities ensures that individuals and small businesses are not stripped of the rights to their creative works for inadvertent mistakes or technical reasons.

*Second, several comments, submitted primarily by the museum and library communities, suggest that legislation is not necessary (or that it should be minimal in nature), because recent court cases have expanded the doctrine of fair use sufficiently to enable the orphan works and/or mass digitization uses contemplated by some users.*

The defense of fair use is a fundamental aspect of copyright law; many of our members rely on fair uses of copyrighted works on a regular basis. However, claims made in some comments that legislation for orphan works is no longer needed because courts have expanded the doctrine of fair use to reduce the risk of liability for using orphan works is premature, given that some of the cases cited are currently on appeal.[5] The analysis relied upon by the library associations who reach the conclusion that their actions are permitted by fair use is not supported by the facts or law. The cases that they cite arose under entirely different fact patterns and the issues were not orphan works issues.[6]

"The fair use doctrine is not a license for corporate theft, empowering a court to ignore a copyright whenever it determines the underlying work contains material of possible public

---

[4] For example, the CCIA, pg. 4.

[5] For example, *Cambridge Univ. Press v. Becker*, No. 12-15147 (11th Cir.), filed Oct. 5, 2012; *Authors' Guild v. Hathitrust*, No. 12-4547 (2nd Cir.), filed Nov. 14, 2012.

[6] *E.g., Cambridge Univ. Press v. Becker*, 863 F. Supp. 2d 1190 (N.D. Ga. 2012) (currently on appeal in the United States Court of Appeals for the Eleventh Circuit), concerned whether copying currently in-print materials by university professors for digital coursepacks was a fair use.

importance."[7] Similar to other points raised in this reply, the comments that hide behind fair use seem motivated by an agenda that goes beyond resolving the orphan works issue. Instead, they appear aimed at finding means by which to strip independent authors and creators of the fruits of their labor. It appears those proposing reliance on fair use are gambling that independent creators and copyright owners will not have the financial wherewithal to enforce their rights through means of a federal legal proceeding, should that be required. As the experience in the Google Books case suggests,[8] this is likely to be the case if the Copyright Office follows such an approach. Rights holders who are not financially positioned to defend their rights will simply be disenfranchised for the administrative convenience of others who might wish to use their works.

*Finally, several comments suggest that mass digitization solutions be adopted in the context of this proceeding, which would likewise strip authors, creators, and innovators of their rights without compensation.*

The Copyright Alliance reiterates and emphasizes that while identifying rights holders may be an issue in both mass digitization projects and orphan works legislation, the two challenges are motivated by distinctly different goals and they do not share sufficient common issues to warrant similar treatment or consideration in the same proceeding.

The lodestar of any orphan works solution must be to identify and **find** the orphan work's owner, so that he or she can determine whether to license the work and receive appropriate compensation, not to merely "orphan" a work for purposes of licensing ease. Conversely, the issues raised by those seeking to carry out mass digitization projects do not necessarily suggest an interest in identifying and finding owners of works for purposes of facilitating the granting of permission to undertake mass digitization.

Unfortunately, conflating these two challenges would seem to result in a situation where works could be deliberately "orphaned" in order to address interests of users in the mass digitization context. Notably, the joint comment by Public Knowledge and the Electronic Frontier Foundation and other commenters urge a solution, which would severely limit the rights of copyright holders. First, they suggest providing for an "opt-out" only approach, similar to what was tried in the Google Books context and rejected by the court for being inconsistent with copyright law.[9] Furthermore, they suggest limiting remedies in various situations, including

---

[7] *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 US 539, 558 (1985), quoting *Iowa State University Research Foundation, Inc. v. American Broadcasting Cos., Inc.*, 621 F. 2d 57, 61 (1980).

[8] See *Authors' Guild v. Google*, 770 F. Supp. 2d 666 (S.D. NY 2011) ("While its competitors went through the 'painstaking' and 'costly' process of obtaining permissions before scanning copyrighted books, 'Google by comparison took a shortcut by copying anything and everything regardless of copyright status.' As one objector put it: 'Google pursued its copyright project in calculated disregard of authors' rights. Its business plan was: `So, sue me.'"") (citations omitted).

[9] *Id.* at 682, (finding merit in assertion that Google's opt-out scheme "would grant Google the ability to expropriate the rights of copyright owners who have not agreed to transfer those rights" in violation of the Copyright Act and moreover that "it is incongruous with the purpose of the copyright laws to place the onus on copyright owners to come forward to protect their rights . . . ").

where works are out-of-print (a classification that includes the majority of orphaned works) or where identifying information or metadata has been stripped (a scenario often encountered when works are distributed digitally). Finally, they seek to prevent the use of DRM measures on works, which would not only increase the risk of unauthorized reproduction and distribution but also perpetuate problems with missing information and metadata. The cumulative effect is one that elevates concerns for creators who wish to protect their works against infringement.

In conclusion, it is unfortunate that some groups have chosen to use this forum as a stalking horse for attacks on copyright. Carefully crafted orphan works solutions should allow the public to benefit from *truly* orphaned works without jeopardizing the already tenuous legal protections that artists and creators have. It is our hope that the Copyright Office keeps this in mind as it continues to consider orphan works and mass digitization issues.

Respectfully submitted,

Sandra M. Aistars
Executive Director
Copyright Alliance