

Appendix A - Matrix of Key Stakeholders' Responses to the US Copyright Office's 2012 Notice of Inquiry Regarding Orphan Works and Mass Digitization

Issue	Authors Guild	Graphic Artist Guild	Association of American Publishers	College Art Association	Library Copyright Alliance	Public Knowledge (with Electronic Frontier Foundation)
are Orphan Works a serious issue?	no, issue is overstated, copyright holders of literary works are easy enough to find; success rate of finding copyright holders is about 85%	yes, a serious problem for visual images, for both users and creators	yes, for both copyright owners and users	yes, their members face difficulty using orphan works "for a range of artistic and scholarly purposes" and CAA prefers legislation to provide members with more certainty of their position	yes, but after recent changes in copyright, legislation is not necessary for library use, gatekeepers not as hesitant to permit use	yes, wide range of work types can be orphaned, and orphans could be used in a wide range of ways
what uses of orphan works are legitimate?	should be carefully specified - only for use where other creators can make new creative/transformative work, not just rote copying (where user becomes publisher)	LAMs, non-profit only	both non-profit and for-profit	both non-profit and for-profit	only non-profit, educational use is discussed	uses that promote the progress of science and the useful arts (the purpose of copyright law)
how much should current US copyright law be changed?			as little as possible		instead of extensive Orphan Works Act, amend 17 U.S.C. § 504(c)(2) to give courts discretion to reduce or remit statutory damages if there was a reasonably diligent search	
copyright registration?		visual artists are prolific and registration is unreasonable	should not affect "US obligations under international copyright agreements" - probably refers to international Berne Convention prohibition of registration requirement	registration requirement for copyright holders would be burdensome, and would break with US treaty obligations (Berne Convention)		
<p>This table compares different aspects regarding several common issues discussed in the responses to the NOI. All content is paraphrased from the associations' written comments, as cited in the final row of the table. Table cells have been color coded to indicate the diversity of opinions; generally green indicates the most permissive stances, yellow indicates a moderate stance, and red indicates a restrictive stance.</p>						

Appendix A - Matrix of Key Stakeholders' Responses to the US Copyright Office's 2012 Notice of Inquiry Regarding Orphan Works and Mass Digitization

Issue	Authors Guild	Graphic Artist Guild	Association of American Publishers	College Art Association	Library Copyright Alliance	Public Knowledge (with Electronic Frontier Foundation)
registry / bureaucracy?		use PLUS as hub search engine to search connected registries from different countries	as little impact as possible on bureaucracy			high expense or complicated system would further discourage use of orphan works, counteracting the legislative goal to increase access
view of 2008 act?			supported it; use 2008 act as the basis for a new version	supported it; now should follow same case-by-case approach	supported it then, but not now; 2008 act should NOT be used as the starting point; too complex and convoluted and would become more so	supported it, core can still provide a good approach
re: published vs. unpublished work		creators may not want unpublished work made available to the public - not intended for display or distribution	no difference	no difference	unpublished work in special collections and archives more likely to be orphans	
re: age		older works less likely to have an issue	no difference	no difference		
re: national origin			no difference	no difference		
for-profit vs. non-profit use/users?		non-profit only	no difference	no difference	non-profit, educational use falls under fair use	non-profit, educational use falls under fair use
type of work?				visual works should not be treated differently than other kinds of works		different types of work are likely to require different approaches, on a case-by-case basis
diligent search?	incentive to fail - then copyrighted material can be used without compensation; if used, must be combined with reasonable license fee	SU Copyright Office should provide search standards; LOC, Copyright Office, association database, visual fingerprint, fee-based service, analog records, prior user search included; periodic repeat searches required	personal documentation required, considered case-by-case	yes, but best practices should be determined in the private sector, not by government regulation	not necessary for library use, librarian expertise to judge if works are likely orphans; crowdsourcing / publicity better for finding copyright holders than the diligent search of a few	guidelines created by industry groups, separate from legislation
requirement to file a search report?		yes - Orphan Works User Registry	no	"unnecessary and wasteful"		complexity would discourage use

Appendix A - Matrix of Key Stakeholders' Responses to the US Copyright Office's 2012 Notice of Inquiry Regarding Orphan Works and Mass Digitization

Issue	Authors Guild	Graphic Artist Guild	Association of American Publishers	College Art Association	Library Copyright Alliance	Public Knowledge (with Electronic Frontier Foundation)
requirement to file notice of intent-to-use the work?		yes - Orphan Works User Registry	no	"unnecessary and wasteful"		complexity would discourage use
"Limitation of Remedies": licensing /limitations on infringement liability?	follow foreign models of collective licenses of orphan works	users pay a bond into an escrow account, to be available in case the copyright holder turns up; non-profit use only "free" if it has no commercial purpose, and believe creator would not have charged a fee; litigation is prohibitive so most creators would have no recourse without such an automated system	reasonable compensation for copyright owner who turns up, after diligent search	only "demonstrated, reasonable and customary licensing fee for the continued use of that work" after determination of infringement; non-profit should have complete "safe harbor" from liability (including scholarly publishing and other similar activities); collective licensing or bond would be prohibitive to many CAA members	collective licensing would be unreasonably costly to users; most of the funds would go to association's administrative costs and attempts to find copyright owners rather than ever reaching copyright owners; limitation should cover both library employees and consortiums; no actual damages is use ceases after notification	yes, a fee capped at a maximum, for example \$200; user can continue to use work, including online; but new uses would be require owner's permission; collective licensing can prevent access and undermine fair use, with financial incentives always overriding other factors, like increased distribution desired by many actual rights holders
process for dealing with infringement?		create a small value copyright infringement court				
limitations on injunctive relief / statutory damages		"an absolute safe harbor is contrary to the intent of orphan works legislation" - if copyright holder appears, should be acknowledged/ compensated, even in cases of non-profit, educational use	consistent with limitations on monetary damages	"no statutory damages, attorneys' fees, defendant's profits or injunction against the continued current use of the work"	2006 Supreme Court case eBay v. MercExchange ruled against automatic injunctions - burden is on the copyright holder to prove irreparable injury, which is unlikely; legislation only benefits libraries if it eliminates statutory damages for non-commercial, nonprofit library use and eliminates injunctive relief as long as library/archives discontinues use after objection of copyright holder	public access to the full work disabled if rights holder claims infringement; no statutory damages or attorney's fees
attribution		must be included when known		should be provided		

Appendix A - Matrix of Key Stakeholders' Responses to the US Copyright Office's 2012 Notice of Inquiry Regarding Orphan Works and Mass Digitization

Issue	Authors Guild	Graphic Artist Guild	Association of American Publishers	College Art Association	Library Copyright Alliance	Public Knowledge (with Electronic Frontier Foundation)
reaching infringer		user must provide contact info, to be reached if copyright owner turns up				
MASS DIGITIZATION	(no comment, but currently in litigation on this issue, v. Google and HathiTrust)	can't comment because of current litigation (w/numerous other visual arts plaintiffs, vs. Google)	also in litigation vs. Google; must screen out works for which a copyright holder can be located, pursue rights before using; search technology can likely be designed to be as effective as an individual's diligent search?	no position on this yet	mass digitization of special collections and archives becoming more common and more confident	mass digitization needs to be considered as a separate issue, not just through the lens of orphan works
does fair use cover mass digitization of orphan works?		Fair Use should not be expanded beyond preservation and archival purposes, especially not for commercial purposes	no, legislation is necessary		yes, recent cases have set precedent for that, for nonprofit educational use, which is different from original market use	yes, digital copies for preservation, indexing, and snippets easily fall under fair use
relationship to other aspects of copyright?			"does not affect any right, or any limitation or defense to copyright infringement, including fair use." (2008 act)	shouldn't affect fair use	any legislation should include text like that in 17 U.S.C. § 108(f)(4), so nothing "in any way affects the right of fair use as provided by section 107."	shouldn't affect fair use
Source	Aiken, P. (2013, February 4). Re: Notice of Inquiry Concerning Orphan Works and Mass Digitization. The Authors Guild, Inc. Retrieved from <a href="http://www.copyright.gov/orphan/comments/noi_10222012/Authors-Guild.pdf">http://www.copyright.gov/orphan/comments/noi_10222012/Authors-Guild.pdf</a>	Adams, H., LeMieux, T., Shaftel, L., & McKiernan, T. (2013a, January 31). Comments Submitted by the Graphic Artists Guild: Orphan Works and Mass Digitization. Graphic Artists Guild. Retrieved from <a href="http://www.copyright.gov/orphan/comments/noi_10222012/Graphic-Artists-Guild.pdf">http://www.copyright.gov/orphan/comments/noi_10222012/Graphic-Artists-Guild.pdf</a>	Adler, A. (2013, February 4). Re: Notice of Inquiry-Orphan Works and Mass Digitization. Association of American Publishers. Retrieved from <a href="http://www.copyright.gov/orphan/comments/noi_10222012/Association-American-Publishers.pdf">http://www.copyright.gov/orphan/comments/noi_10222012/Association-American-Publishers.pdf</a>	Cunard, J. P. (2013, March 6). Orphan Works and Mass Digitization, Docket No. 2012-12. College Art Association. Retrieved from <a href="http://www.copyright.gov/orphan/comments/noi_11302012/College-Art-Association.pdf">http://www.copyright.gov/orphan/comments/noi_11302012/College-Art-Association.pdf</a>	Library Copyright Alliance. (2013, January 14). Comments Of The Library Copyright Alliance In Response To The Copyright Office's Notice Of Inquiry Concerning Orphan Works And Mass Digitization. Retrieved from <a href="http://www.copyright.gov/orphan/comments/noi_10222012/Library-Copyright-Alliance.pdf">http://www.copyright.gov/orphan/comments/noi_10222012/Library-Copyright-Alliance.pdf</a>	Electronic Frontier Foundation, & Public Knowledge. (2013, February 4). In The Matter Of Notice Of Inquiry Of The Copyright Office, Library Of Congress Regarding Orphan Works And Mass Digitization. Retrieved from <a href="http://www.copyright.gov/orphan/comments/noi_10222012/Public-Knowledge-and-Electronic-Frontier-Foundation.pdf">http://www.copyright.gov/orphan/comments/noi_10222012/Public-Knowledge-and-Electronic-Frontier-Foundation.pdf</a>