

Stakeholders in the Orphan Works Debate

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Introduction

The United States Copyright Office has recently re-opened official debate on the issue of orphan works, by opening a Notice of Inquiry (NOI) in the Federal Register in October of 2012 and accepting comments in early 2013 (US Copyright Office, 2012). This paper will examine the perspectives of six of the stakeholders who provided their comments in response to the Copyright Office's NOI. These six associations represent the wide range of oppositional viewpoints regarding orphan works. At times the issue seems to place copyright owners in opposition to potential users of copyrighted material. The Author's Guild and Graphic Artist's Guild represent the perspective of copyright owners, while the Library Copyright Alliance and Public Knowledge represent the perspective of potential users of copyrighted material. However, many are in the particularly awkward position of simultaneously being both copyright owners and users, as represented here by the Association of American Publishers and the College Art Association.

Background of Orphan Works

In the US Copyright Office's 2006 Report on Orphan Works, this term is defined as "the situation where the owner of a copyrighted work cannot be identified and located by someone who wishes to make use of the work in a manner that requires permission of the copyright owner." This situation has particularly been acknowledged after some major changes to US copyright law in the last 40 years, which have made it harder to find copyright holders:

- the 1976 copyright act extended the term for copyright protection to the author's life plus 50 years, and added protection for unpublished works
- when the US joined the international Berne Convention in 1988, the previous requirement to formally register material for copyright was abolished
- The Sonny Bono Copyright Extension Act of 1998 added another 20 years to the term of protection for most works
(Hirtle, Hudson & Kenyon, 2009, p. 13-14).

The issue of orphan works has been a matter for public debate ever since. The US Copyright office has monitored this debate, with notable reports and periods of public inquiry, but notable litigation has also complicated the landscape (as discussed in the Copyright Office's 2012 NOI and listed at <http://www.copyright.gov/orphan/>):

- in May 1999, the Register of Copyright's Report on Copyright and Digital Distance Education formally acknowledged the issue of orphan works
- in 2005, the Copyright Office solicited public comments on the issue, resulting in over 850 written comments and replies
- in summer 2005, they also hosted a series of public roundtable discussion, in Washington, DC and in Berkeley, CA
- in 2005, the Author's Guild (along with other plaintiffs, including the Association of American Publishers) filed suit against Google for its mass digitization for the Google Book Search project, including orphan works
- in January 2006, the Register of Copyright released a Report on Orphan Works
- in spring 2006, both House and Senate sub-committees held hearings regarding orphan works
- in May 2006, the Orphan Works Act of 2006 (HR-5439) was introduced by Rep. Lamar Smith of Texas but did not make it out of committee
- in March 2008, the House sub-committee and full judiciary committee held hearings regarding orphan works
- in 2008, the Shawn Bentley Orphan Works Act of 2008 (S-2913) was introduced by Senator Patrick Leahy of Vermont (with Senators Bennett and Hatch of Utah), passed in the Senate, but could not get through the House in time
- in 2008 - a proposed settlement was filed for the Authors, Guild, Inc. v. Google, Inc. case
- in 2010, several plaintiffs representing artists and photographers, including the Graphic Artists Guild, filed a separate suit against Google for the Google Book project
- in March 2011, Judge Chin rejected the proposed Google settlement, stating that "questions of who should be entrusted with guardianship over orphan books, under what terms, and with what safeguards, are matters more appropriately decided by Congress than through an agreement among private, self-interested parties." (quoted in US Copyright Office, 2012).
- in October 2011, the Register of Copyrights released a report on Legal Issues in Mass Digitization: A Preliminary Analysis and Discussion Document
- on October 22, 2012, the US Copyright Office issued its most recent notice of inquiry, with comments due February 4, 2013 and reply comments due March 6, 2013

This combination of litigation and attempted legislative action provide evidence for the deeply oppositional perspectives of key stakeholders in this debate. Each of the American associations discussed here presents a very different approach to the issue.

Some Key Stakeholders

Author's Guild

Section 1: Identifying the Organization

The Author's Guild (AG) is a national association with over 9000 members, with its main office in New York, NY. Their stated mission, on the History page of their website, is

"The Authors Guild and its parent organization, the Authors League of America, have achieved much for individual authors through the collective power and voice of their members—from improvement of contracts and royalty statements, to protection of authors' rights under the First Amendment, to the redress of damaging tax inequities"

(Author's Guild, n.d.-b).

Therefore, their goals are to provide legal support for members (in the form of contracts, disputes, and education), lobbying at both a national and local level (with regards to copyright, taxation, and freedom of expression), and education for their members.

Section 2: Membership or Supporters

Eligibility for the Author's Guild has fairly strict guidelines, as indicated on their website (Authors Guild, n.d.-a). To be eligible as a member of the Guild, an author must have had a book published by "established American publishers" or can be a freelance writer (such as a journalist) who has published at least three works in "a periodical of general circulation" in the 18 months prior to their application for membership. Other authors, for example those who have self-published, are eligible only if they earned at least \$5000 from writing in the last 18 months (if they only earned \$500 they can only qualify as associate members).

Section 3: Public Policy Agenda

The Author's Guild has been active both in litigation and in lobbying regarding orphan works, and other issues of intellectual property. Their lawsuits against Google and HathiTrust have received a great deal of public attention. Their stance is in the public record in the form of comments responding to both the 2005 and 2012 US Copyright Office NOIs. First, they have repeatedly made it clear that they believe the

problem of Orphan Works is overstated, and that they have had a success rate around 85% when trying to find missing copyright holders related to their own Authors Registry (Aiken, 2013). The comments on posts in the Advocacy section of their website indicate that some of their members are engaged in helping to find copyright holders for works that they believe have been mis-identified as orphans, and have had some success in their search. Ironically, the Library Copyright Alliance, discussed below, has described such cases not as a fault of the use of orphan works, but rather as evidence of the potential for crowd-sourcing and publicity to help identify rights holders. Second, they are interested in following foreign models of collective licensing of orphan works, requiring the payment of a licensing fee even if the copyright holder cannot be found. Finally, they are concerned that uses of orphan works should be limited to creative re-use, not rote copying. The AG positions can be compared to those of the other groups discussed in this paper in a detailed table in Appendix A.

Section 4: Member Interest in the Policies Advocated

It is clear from their eligibility requirements that the association exists to help authors who depend in some form on the income from their writing, and much of their collective action is based on matters that they fear could damage their profit-earning potential. Their positions regarding orphan works are justified by their responsibility to look out for the economic well-being of their members and to ensure that they are able to make a living from their writing both now and in the future. In their Google lawsuit, the AG is seeking a minimum of \$750 in copyright damages for each allegedly infringed work, coming to a total of \$2 billion for 2.7 million infringed works (Kravets, 2012). Their controversial attempt to frame the Google lawsuit as a class-action suit, protecting all authors whose work was infringed, whether or not they belong to the AG or another one of the plaintiff organizations, was recently rejected (Schwartz, 2013). In fact, many academic authors had objected to their inclusion in the proposed class, and held a very different position than the AG (Samuelson, 2010).

Greenfield has argued that the AG fights to preserve older models of publishing, authorship, and compensation that benefitted only an elite few (2013), in the face of new publishing paradigms that allow a wider range of authors to emerge, some of whom may write more for pleasure or for reputation than for profit. By pursuing litigation more actively than legislation, they appear to be more concerned with collecting damages for current authors/creators than for protecting future authors.

Graphic Artist's Guild

Section 1: Identifying the Organization

The Graphic Artist's Guild (GAG) is a national association with its main office in New York, NY, and 6 regional chapters in NY, Boston, Chicago, Northern CA, Seattle, and At-Large (for all other areas). Their stated mission, on the About page of their website, is

"to promote and protect the social, economic, and professional interests of its members"

"to help our members build successful careers by equipping them with the skills and support needed to compete more effectively in an ever-changing field"

(Graphic Artists Guild, n.d.-a).

The GAG constitution identifies their goals of collective bargaining, development of standards and ethics, advocacy in support of their mission, and the possibility of international growth (Graphic Artists Guild, 2011). Their comment in response to the latest NOI indicates that they are now working jointly with the American Society of Media Photographers (ASMP), Picture Archive Council of America (PACA), Professional Photographers of America (PPA), North American Nature Photography Association (NANPA), National Press Photographers Association (NPPA), and the American Photographic Artists (APA) to work on legislative issues that concern visual artists. The GAG has also been a co-plaintiff with several of those associations, and with other individual artists, in filing a class action lawsuit against Google, not unlike that filed by the Author's Guild.

Section 2: Membership or Supporters

They have described their members as being animators, cartoonists, designers, illustrators, digital artists, graphic and interactive designers, and web programmers and developers. Their membership includes both professionals and students. Full members must be working artists, earning more than half of their income from their art. Associate members and students don't have to meet that income requirement, but don't have voting rights (Graphic Artists Guild, n.d.-b).

Section 3: Public Policy Agenda

The GAG is active in its advocacy for its members' interests. As with the AG, they have been involved both in lobbying and in litigation. Their comments in response to both the 2005 and 2012 NOIs provide a detailed view of their position with regards to orphan works (Adams, LeMieux, Shaftel & McKiernan, 2013a and 2013b). They are clear about the specific challenges regarding attribution for visual works, pointing out that industry practice means far too often that work is displayed without attribution, or that attribution is easily separated from a visual work, and they distinguish between an unknown and an un-locatable copyright holder. They describe the prolific nature of many artists' work, and the resulting difficulty in formally registering each work with the Copyright Office. Their approach places the burden on the user of an orphan work to document their search and register their use, and to pay a bond for a licensing fee in case the rights holder appears.

Section 4: Member Interest in the Policies Advocated

Their positions on orphan works are justified by their need to protect the income-earning potential of their members. Their recent comment presents two different imagined worst-case scenarios in which the market for visual arts could be severely damaged by orphan works legislation that is too permissive. They are concerned with building legislation that creates more strict regulations to protect their business, and in their opinion no commercial use of orphan works should be allowed, as it could create a specific market for "free" orphan works that they believe would compete directly with their day-to-day businesses. In addition, they have suggested the creation of a bond system in which users of orphan works must make a payment even if the copyright holder cannot be found, held in escrow in case they turn up. Such a system would theoretically alleviate the need for costly litigation on the part of rights holders.

As with the AG suit against Google, the GAG suit has been filed as a class action, on behalf of all visual artists whose work was infringed. There has not been as much public conversation about this case as about the AG case, so it remains to be seen whether visual artists who are not members of the GAG or the other co-plaintiff organizations will opt-in or out of the suit, or what specific benefits would accrue to class members. However, their stance clearly weighs more heavily in the interest of visual arts creators than visual arts consumers.

Association of American Publishers

Section 1: Identifying the Organization

The Association of American Publishers (AAP) is a national association representing 250-300 companies, which in turn represent 200,000 members of the American book publishing industry. They have their headquarters in Washington, DC, with offices also in NY. Their stated mission, on the About page of their website, is

"AAP represents the industry's priorities on policy, legislative and regulatory issues regionally, nationally and worldwide. These include the protection of intellectual property rights and worldwide copyright enforcement, digital and new technology issues, funding for education and libraries, tax and trade, censorship and literacy."

(Association of American Publishers, n.d.-b).

The AAP is actively involved in influencing public policy with regards to copyright (including orphan works and piracy), freedom of expression, international copyright issues, K-12 education, higher education, and professional and scholarly publishing (including open access issues). They advocate for US book publishers in the global market.

Section 2: Membership or Supporters

The members of the AAP are book publishers, including commercial, educational, and professional. They also represent publishers that are independent, non-profit, university presses, and scholarly societies. They specifically have divisions for Trade, School (K-12), Higher Education, Professional and Scholarly Publishing. Their members run the full range from global corporations to self-employed individuals. From 2012-13, their members provided more than 160,000 staff jobs, and paid taxes in 94% of America's communities, in every state plus DC (Association of American Publishers, n.d.-a).

Section 3: Public Policy Agenda

With regards to orphan works, the AAP has been involved in both lobbying and litigation. They are one of several co-plaintiffs with the Authors Guild in the Google Books lawsuit. Allan Adler, General Counsel for the AAP, wrote comments and replies for both the 2005 and 2012 NOIs (Adler, 2013), and testified in the 2008 Congressional Hearing regarding orphan

works (Promoting the Use of Orphan Works, 2008). The AAP is caught in the middle of this issue, balancing the needs of authors wanting to reuse existing work with the needs of the authors whose work is being reused, as they work with both. To some extent this is true of the AG as well, but the AG does not represent many academic authors, who are more prone to reuse existing historic or literary work. As a result, the AG comes out firmly on the side of copyright owners not users, whereas the AAP, including more scholarly publishing, has to more carefully balance these interests. They support the need for legislation, agreeing that orphan works do pose a serious problem, and that balanced litigation could result favorably in greatly increased public access to a variety of work. However, their goal is to ensure that changes to existing copyright law are minimal, with a similarly minimal increase in bureaucracy. They support the need for clear search requirements, but don't want them to be overly burdensome for prospective users.

Section 4: Member Interest in the Policies Advocated

The careful balance desired by the AAP's position begins to get closer to a policy that benefits not only the copyright owners and users, but also the general public. Rather than imagining worst-case scenarios in detail, like the GAG, the AAP takes a more balanced approach to imagining a system in which users are able to have access to reuse orphan works, but copyright holders also get found, attributed, and paid. As a result, the general public benefits from access to work currently locked away.

College Art Association

Section 1: Identifying the Organization

The College Art Association (CAA), founded in 1911, is a national association with over 12,000 individual members and 2000 institutional members, with its main office in New York, NY. Their stated mission, from the About section of their website, is

"The College Art Association (CAA) promotes the visual arts and their understanding through committed practice and intellectual engagement."
(College Art Association, n.d.).

Their goals relate primarily to scholarship and teaching, with regard to both art history and visual art practice. Their activities include advocacy, fostering communication, development of standards, publication, career development, and assistance with seeking funding.

Section 2: Membership or Supporters

Individual members of the CAA include artists, art historians, scholars, curators, critics, collectors, educators, publishers, and other professionals in the visual arts. Institutional members of the CAA include departments of art and art history in colleges and universities, art schools, museums, libraries, and professional and commercial organizations. Members share a common concern for "the practice of art, teaching, and research of and about the visual arts and humanities" (College Art Association, n.d.).

Section 3: Public Policy Agenda

The CAA has been very involved with the continued development over the years of legislation regarding orphan works, as their members encounter many challenges working with orphan works, for both critical and creative reuse at many different levels. In the reply comment to the 2012 NOI, prepared by the CAA's counsel, it is clear that the CAA still feels that legislation is very necessary, and that they still agree with many aspects of the 2008 Orphan Works Act (Cunard, 2013). They support a case-by-case approach to possible infringement, with a limitation on the liability for use work deemed to be an orphan after a diligent search for the rights holder, in fact with no liability in the case of not-for-profit activities. As the CAA's members also include working artists, museums, galleries, and other parties who may wish to use orphan works for commercial activities, they support allowances for commercial use.

Section 4: Member Interest in the Policies Advocated

CAA members are concerned not only with their own usage of orphan works, but also their students' access to them. While CAA members may also be copyright holders, as academic authors and creators they are unlikely to experience much financial profit from their holdings, so their interest tends to fall more on the side of expansive use of copyrighted work.

Library Copyright Alliance

Section 1: Identifying the Organization

The Library Copyright Alliance (LCA) is an alliance of three associations: the American Library Association (ALA) which is centered in Chicago, IL, the Association of College and Research Libraries (ACRL) which is also centered in Chicago, IL, and the Association of Research Libraries (ARL) which is centered in Washington, DC. Their stated mission, on the About page of their website, is

"to foster global access and fair use of information for creativity, research, and education."

(Library Copyright Alliance, n.d.-a)

The goals they have identified on the Principles page of their website were developed for discussions at the World Intellectual Property Organization (Library Copyright Alliance, n.d.-b). They include growth of the public domain, programs and services for libraries to facilitate the advancement of knowledge, significant technological advancement and creativity from individual research and study, and "harmonization of copyright." They also have expressed a goal of unification of the library community with regard to intellectual property issues.

Section 2: Membership or Supporters

Together, the three member organizations of the LCA include 100,000 libraries in the US, and 350,000 librarians and other library personnel or supporters (Library Copyright Alliance, 2013). ALA and ACRL are national associations, whose personal members include librarians, library support staff, trustees, retirees, students, friends, and associates. ALA also includes organizations, from very small to very large libraries, in its membership, along with corporate members who have businesses related

to the library industry. ACRL is a division of ALA, focused on academic librarianship (American Library Association, n.d.-b). ARL represents 125 research libraries at institutions in the US and Canada, and membership is by invitation only, after a careful review process (Association of Research Libraries, n.d.).

Section 3: Public Policy Agenda

While the LCA actively supported the Orphan Works Act of 2008, their recent response to the latest NOI indicates that they now feel that recent judicial decisions have made further legislation about orphan works unnecessary with regards to library usage (Library Copyright Alliance, 2013). They believe that recent court decisions have led to an expansive view of fair use and a decreased fear of injunctions for the non-profit, educational projects in which libraries are engaged. Also, they have seen how mass digitization projects have grown in number and in size, increasing the confidence of the librarians involved.

Section 4: Member Interest in the Policies Advocated

Previously, librarians have feared statutory damages, for themselves or their institutions, of up to \$150,000 in the case that a copyright holder appeared after the library had already made use of a work that had been deemed to be an orphan (American Library Association, n.d.-a). This was seen as a potentially dangerous action, with a chilling effect on how access was provided to the public, especially in terms of digital projects. The librarians represented by the LCA have found relief in the recent judicial decisions regarding fair use. Of course, beyond protecting their own institutions from litigation, their primary interest in this matter concerns making as much content available to the public, as openly as possible. Also, while their stance is that recent judicial decisions have been in libraries favor and have deemed legislation unnecessary for library interests, they still are involved in advocacy with regard to how orphan works legislation could support usage of orphan works outside of libraries.

Public Knowledge

Section 1: Identifying the Organization

Public Knowledge (PK) is an advocacy group, with its main office in Washington, DC. Their stated mission, from the About section of their website, is

" Public Knowledge preserves the openness of the Internet and the public's access to knowledge; promotes creativity through balanced copyright; and upholds and protects the rights of consumers to use innovative technology lawfully"

(Public Knowledge, n.d.).

Their goals include increased open access, government transparency, balanced copyright, innovation, consumer rights, expansive fair use. Their actions include education, facilitation of the exchange of ideas, and lobbying. They also provide a forum for readers to learn about issues and then speak out, whether to their legislators or to corporations.

Section 2: Membership or Supporters

Unlike the other stakeholders discussed here, PK does not represent a particular membership, but rather advocates on behalf of the general public's access to information. The About section of their website indicates that PK consists of 18 staff members, 10 members of the Board of Directors (including Brewster Kahle of the Internet Archive), and 4 interns (law students) during the summer of 2013 (Public Knowledge, n.d.).

Section 3: Public Policy Agenda

Public Knowledge has been actively involved in the orphan works debate for many years. They submitted comments to both the 2005 and 2012 Copyright Office NOIs, and their 2013 comment was written jointly with the Electronic Frontier Foundation (Electronic Frontier Foundation & Public Knowledge, 2013). PK has also filed amicus briefs in the cases of *The Authors Guild v. Google, Inc.* and *The Authors Guild v. HathiTrust*.

Section 4: Member Interest in the Policies Advocated

PK stands out in this discussion as an organization that does not represent either side of the debate: copyright owners or specific copyright users. Rather, their goal is advocacy for the general public's access to the widest range of materials, including orphan works. The only self-interest they may represent is the need of their small staff and board to defend their reputation as advocacy leaders.

Conclusion

These six stakeholders are only a handful among the 91 that posted initial comments and the 89 that posted reply comments. While their perspectives are extremely diverse, there are many additional perspectives that add even more diversity. As the EFF and PK stated in their recent NOI comment,

"there can never be any one solution to 'the orphan works problem,' any more than there is any one solution to "the crime problem" or "the disease problem." Various fact patterns may call for different solutions, depending upon the type of work, the proposed use, and even the type of user" (EFF & PK, 2013).

It remains to be seen whether the solution will be found in legislation or litigation, or whether it will simply remain unsolved for lack of consensus regarding a solution. The various lawsuits against the Google Book project continue to move slowly with dramatic changes in opinion along the way, affecting views of fair use, orphan works, and mass digitization at every step of the way. However, as much as the LCA has noted that recent litigation has changed the landscape of orphan works, changes in technology and culture over time are likely to bring further changes. For example, starting on June 28th of this year, the Copyright Office began to offer a new electronic registration option called the "single application" (Blake, 2013), which may streamline the registration process and prevent some future orphanage cases. Also Google's Image Search technology is gaining popularity and may be increasingly adopted by visual artists as a way of making sure their copyrighted works aren't being infringed upon, and of finding the infringers if they are. Only one conclusion can safely be drawn from this complex situation: those involved in the attempt at orphan works legislation are courageous and patient in their efforts to achieve consensus against the odds.

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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> | | | | | | |

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|--------------------------------------|---|--|---|--|---|--|
| 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 |

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|---|--|--|---|---|---|--|
| 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 | | |

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|--|---|--|--|--|--|--|
| 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 |
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