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Karyn Temple Claggett
Associate Register of Copyrights and
Director of Policy and International Affairs
U.S. Copyright Office

Dear Ms. Claggett:

My colleague, Michael Furlough (Executive Director of the HathiTrust), and I attended the Roundtables on March 10-11, 2014. I write today on our behalf to provide additional comment regarding the issue of Orphan Works and Mass Digitization.

HathiTrust is a broad collaborative of more than 90 academic and research institutions that are pooling resources and expertise to ensure the long-term preservation and accessibility of the cultural and scholarly record. These institutions collectively own and operate a trustworthy digital repository that currently contains more than 11.1 million book and serial publications digitized in mass- and smaller-scale digitization initiatives from their library collections and other sources. Approximately 3.7 million or 33% of the preserved volumes have been determined to be in the public domain and are made available through the HathiTrust Digital Library website. Measured by the scale of our services and the value we provide to a global community of users, it is no exaggeration to say that HathiTrust is one of the largest and most valuable library initiatives of the 21st century.

HathiTrust was launched in 2008, and since that time has experienced first hand both the challenges and opportunities of mass digitization, and the challenging issues surrounding access to orphan works. In particular, HathiTrust has endeavored to leverage the digitization activities of member institutions for lawful purposes such as long-term preservation and enhanced discovery and access—including full-text search across both public domain and in-copyright materials, unprecedented access for users who have print disabilities,¹ and opportunities for ground-breaking research using text mining and computational analysis techniques.

¹ <http://www.hathitrust.org/accessibility>

In all of these activities, HathiTrust adheres assiduously to copyright law and has developed processes and services that maximize the benefits of mass digitization to partners and the general public while respecting the rights of copyright holders. As the HathiTrust website describes:

HathiTrust is devoted to an array of archival and access services in support of preserving and within the rule of law making available the record of human knowledge. All objects in the archive are either in the public domain, have the necessary permissions to support the level of access afforded, or are simply archived in such a way as to ensure an enduring copy of the content. HathiTrust only provides reading access to those publications where permitted by law or by the rights holder. In cases where a rights holder has granted HathiTrust permission to provide reading access to a publication, the administrative office of the University of Michigan Library retains a record of those permissions....Access policies are exercised using IP address detection, user authentication, and geography detection in conjunction with the determined copyright status of each item stored in the rights database.²

Our principled adherence to copyright law includes, of course, limiting access to materials as appropriate. However, HathiTrust also relies on copyright law to pursue our enduring goal to provide access to information and knowledge for the public good wherever it is possible to do so lawfully. This is evidenced in our policies regarding access for users who have print disabilities, in projects HathiTrust institutions have undertaken to manually review the copyright status of targeted sets of volumes in the repository³, and in our past effort to identify and provide access to orphan works under strictly limited circumstances.

Regarding the identification of orphan works, in the summer of 2011 the University of Michigan undertook a project to contact or identify the rights holders of a sample of works in the HathiTrust repository that appeared to be orphan works. After the works were subjected to a defined and publicized search protocol, we posted for public review *titles* of the works (not the works themselves) for which no rights holder had been found. Members of the Authors Guild, among others, were able to identify or contact rights holders for several of the works posted to the list. In the end, we got as far as posting a list of possible orphan works. None of the works were made available in full-text view to patrons and no rights were infringed in this process. While the orphan works project was and would still be a lawful project, the process

² <http://www.hathitrust.org/copyright>

³ Of more approximately 415,000 volumes reviewed since 2008, more than 216,000 have been determined according to copyright law to be in the public domain, either within certain jurisdictions or worldwide.

demonstrated the difficulties of defining and implementing a “reasonably diligent” search protocol at scale. The University of Michigan and HathiTrust discontinued the orphan works project with no intention to revive it in the future.

In light of HathiTrust’s experience with mass digitization, orphan works, and the provision of lawful access to the cultural record, we have the following positions on the questions posed in the Orphan Works and Mass Digitization Roundtables:

Orphan works

- HathiTrust uses the extant law to provide its services (including preservation, full-text search, and access for those with print disabilities) and does not need orphan works legislation to do this work. To the extent that Congress wishes to advance education and scholarship, especially for materials such as unpublished manuscripts or photographs found in libraries and archives, we believe it is imperative that any orphan works legislation that is passed must not a) impinge on existing rights and limitations now codified in Sections 107, 108, 109, 110, and 121 of the Copyright Act, or b) require payments for uses of works that could now be made without charge under existing law. Legislation that does otherwise would have the potential to undermine the valuable services that libraries of all kinds provide to the public, and that libraries in HathiTrust in particular have carefully sought to provide for the benefit of their immediate scholarly and academic communities, as well as for the general public.
- Best practices for a rightsholder search could be of value to many potential users of in-copyright works. There is a danger, however, that legally defined standards for a “reasonably diligent search” could be so general as to be unhelpful, or so demanding that they lack flexibility to adequately address a variety of complex circumstances. Any such legally defined standards that might be created must guard against these dangers and not reduce the accessibility of orphan works to the general public that is afforded under current law. Furthermore, relevant to the crafting of such standards, we believe that individual user communities are in the best position to understand search requirements and formulate best practices for searches within their respective communities.
- The Copyright Office should consider seriously that the difficulties of identifying orphan works stem in large part from a lack of information. For example, searches for rights holders are complicated and time-consuming today because relevant information about rights transfers is not widely accessible. In light of this, a broad effort to establish and share facts concerning the rights holders of works, including heirs, would be of great benefit at this time to communities interested in making use of orphan works.

Extended Collective Licensing

- HathiTrust is not persuaded that extended collective licenses (ECLs) are a solution to the orphan works problem. Most nations that have adopted ECLs are smaller and have a different copyright environment than the U.S., where the rights of the copyright holder and the needs of the public for broad access to works are balanced through provisions in the law.
- Moreover, the nations that have adopted extended collective licensing schemes have done so in a manner that would transgress the First Amendment and would trammel the ability of fair use and other rights and limitations necessary in U.S. law.
- HathiTrust has shown that we can pursue digitization projects within the law, and without compulsory, statutory, or collective licensing schemes. A collective licensing scheme would thwart the kinds of truly transformative uses that we have seen HathiTrust and other digitization projects make. In addition, ECLs would drive up costs and could have the effect of further limiting access to orphan works.
- We were struck by the degree to which Roundtable participants opposed the implementation of an extended collective licensing scheme in the United States, and believe that this demonstrates clearly that such a legislative solution should not be pursued.

Mass Digitization

- The courts have resoundingly ruled that mass digitization projects pursued by HathiTrust and our participants fall within fair use.⁴
- Mass digitization provides valuable new opportunities for research, including text mining and computational research. The courts have determined that such non-consumptive research is fair use and benefits society broadly.
- Through mass digitization the collections of some of the world's greatest research libraries are for the first time fully available to users who have print disabilities.

HathiTrust is deeply committed to the provision of lawful, long-term, non-profit, educational and scholarly uses of the vast record of human knowledge. We are grateful to have had the opportunity to participate in the Roundtable discussions, and to engage with other organizations and groups that are similarly invested in, and would be impacted by, decisions surrounding orphan works and collective licensing. We look forward to engaging with others on

⁴ See for example the comments of Judge Baer in his opinion in the Authors Guild, Inc. et al. v. HathiTrust et al. (<http://www.scribd.com/doc/109647049/HathiTrust-Opinion> p.22): "I cannot imagine a definition of fair use that would not encompass the transformative uses made by Defendants' MDP and would require that I terminate this invaluable contribution to the progress of science and cultivation of the arts that at the same time effectuates the ideals espoused by the ADA."

these important issues in the future, and speaking to uphold the tremendous value that libraries contribute to the scientific and artistic progress of our society.

Again, thank you for including HathiTrust in these deliberations.

Sincerely,

Sarah Michalak