

*Before the*  
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Washington, DC 20559

Orphan Works and Mass Digitization

Docket No. 2012-12

### **Introduction and Summary**

Public Knowledge and the Electronic Frontier Foundation (“Commenters”) respectfully submit these comments in response to the Copyright Office’s Request for Additional Comments dated February 10, 2014.<sup>1</sup>

After two rounds of comments and a two-day roundtable held in Washington, DC, Commenters observe that there is clear consensus, from the record, that the public needs greater access to orphan works and that extended collective licensing is not an optimal solution. Commenters urge the Copyright Office to recommend limitation of remedies legislation and to issue a report that explains why uses of orphan works are more likely to be fair uses.

#### **I. There Is Consensus that the Public Needs Greater Access to Orphan Works**

The Copyright Office must recommend a solution that will enhance public access to orphan works, thus honoring copyright’s goal of facilitating the distribution of creative works. Many participants weighed in in this proceeding to ask for greater public access to orphan works. For example, the American Association of Law Libraries, Medical Library Association, and Special Libraries Association explained that “[o]rphan works include millions of print volumes, photographs and films that are part to our shared cultural heritage. . . . This problem is in need of urgent solution.”<sup>2</sup> The American Society of Journalists and

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<sup>1</sup> Request for Additional Comments and Announcement of Public Roundtables, *Orphan Works and Mass Digitization*, 79 FR 7706 (Feb. 10, 2014), *available at* <https://www.federalregister.gov/articles/2014/02/10/2014-02830/orphan-works-and-mass-digitization-request-for-additional-comments-and-announcement-of-public>.

<sup>2</sup> Comments of AALL, MLA, and SLA, *Orphan Works and Mass Digitization*, Jan. 1, 2013, *available at*

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Authors recognized “the need to make orphan works accessible,” noting that “most of us [writers] would prefer to have our works remain accessible to future generations, even if we ourselves or our heirs cannot be found.”<sup>3</sup> The Digital Media Association stated that “[o]rphan works frustrate the fundamental balanced approach that is the explicit goal of our copyright system; to balance the creative and economic interests of copyright producers with the public interest in access to those created works.”<sup>4</sup>

## II. There Is Consensus that Extended Collective Licensing Is Not an Optimal Solution

Whatever the Copyright Office decides to do about the orphan works problem, it should not recommend an extended collective licensing solution. Roundtable participants raised a number of concerns regarding extended collective licensing, including:

- Requiring payment for the use of works of unlocatable rightsholders would not change the fact that those rightsholders are unlocatable.<sup>5</sup>
- In the absence of the market forces that normally determine the fees for licenses, it would be difficult or impossible to set fair license fees.<sup>6</sup>
- It would be very difficult to figure out what to do with the money collected through license fees.<sup>7</sup>

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(footnote continued)

[http://www.copyright.gov/orphan/comments/noi\\_10222012/American-Association-Law-Libraries.pdf](http://www.copyright.gov/orphan/comments/noi_10222012/American-Association-Law-Libraries.pdf).

<sup>3</sup> Comments of American Society of Journalists and Authors, [http://www.copyright.gov/orphan/comments/noi\\_10222012/American-Society-Journalists-and-Authors.pdf](http://www.copyright.gov/orphan/comments/noi_10222012/American-Society-Journalists-and-Authors.pdf).

<sup>4</sup> Comments of DiMA, *Orphan Works and Mass Digitization*, [http://www.copyright.gov/orphan/comments/noi\\_10222012/Digital-Media-Association-DiMA.pdf](http://www.copyright.gov/orphan/comments/noi_10222012/Digital-Media-Association-DiMA.pdf).

<sup>5</sup> Remarks of Mr. Katz, Roundtable Day 2 Transcript at 184.

<sup>6</sup> Remarks of Mr. Butler, *id.* at 190.

<sup>7</sup> Remarks of Mr. Butler, *id.* at 188–189.

- Naturally risk-averse parties making fair uses of orphan works would in many cases pay for licenses anyway, which would ultimately degrade the perceived robustness of fair use.<sup>8</sup>
- If rightsholders of orphan works could be found, not all of them would agree that users of their works should have to pay a fee.<sup>9</sup>

In comments, it was clear that almost no participants support the idea of extended collective licensing. Parties who opposed the idea included—among others—the Internet Archive,<sup>10</sup> Independent Film and Television Alliance,<sup>11</sup> the Berkeley Digital Library Copyright Project,<sup>12</sup> Carnegie Mellon University,<sup>13</sup> Dance Heritage Coalition,<sup>14</sup> a broad coalition of documentary and independent

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<sup>8</sup> Remarks of Mr. Butler, *id.* at 191–192; remarks of Mr. Furlough, *id.* at 200.

<sup>9</sup> Remarks of Ms. McSherry, *id.* at 217.

<sup>10</sup> Comments of Internet Archive at 2–3,

[http://www.copyright.gov/orphan/comments/noi\\_10222012/Internet-Archive.pdf](http://www.copyright.gov/orphan/comments/noi_10222012/Internet-Archive.pdf).

<sup>11</sup> Comments of IFTA at 6,

[http://www.copyright.gov/orphan/comments/noi\\_10222012/Independent-Film-&-Television-Alliance.pdf](http://www.copyright.gov/orphan/comments/noi_10222012/Independent-Film-&-Television-Alliance.pdf).

<sup>12</sup> Comments of Berkeley Digital Library Project at 4,

[http://www.copyright.gov/orphan/comments/noi\\_10222012/Berkeley-Digital-Library-Copyright-Project.pdf](http://www.copyright.gov/orphan/comments/noi_10222012/Berkeley-Digital-Library-Copyright-Project.pdf).

<sup>13</sup> Comments of Carnegie Mellon University at 16,

[http://www.copyright.gov/orphan/comments/noi\\_10222012/Carnegie-Mellon-University-Libraries.pdf](http://www.copyright.gov/orphan/comments/noi_10222012/Carnegie-Mellon-University-Libraries.pdf).

<sup>14</sup> Comments of Dance Heritage Coalition at 11,

[http://www.copyright.gov/orphan/comments/noi\\_10222012/Dance-Heritage.pdf](http://www.copyright.gov/orphan/comments/noi_10222012/Dance-Heritage.pdf).

filmmakers,<sup>15</sup> the Society of American Archivists,<sup>16</sup> the College Art Association,<sup>17</sup> the National Federation of the Blind,<sup>18</sup> and the New York Public Libraries.<sup>19</sup>

### **III. The Copyright Office Should Recommend Limitation of Remedies Legislation and Take Steps to Ensure the Fair Use Doctrine Remains Robust**

Because there is broad consensus that the public needs greater access to orphan works and that extended collective licensing is not the way to achieve it, the Copyright Office should move forward with a proposed solution based on its last proposal and on the legislation that grew from it. The key to a workable solution to the orphan works problem is a limitation on remedies, conditioned on a reasonably diligent search for the rightsholder. We recommend that in the event a user of a work conducted a reasonably diligent search for the rightsholder and was unable to locate him or her, but the rightsholder later appears, damages be limited to no more than \$200 per work, plus, in appropriate cases, injunctive relief in the form of disabling public access to the full work.

The Copyright Office should also take steps to ensure the fair use doctrine—which is a critical tool for users of orphan works—remains robust. The Copyright Office should begin by setting forth, in a report, the reasons that uses of orphan works are more likely to be fair uses. As Commenters discussed in our initial

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<sup>15</sup> Comments of International Documentary Association, et al. at 3, [http://www.copyright.gov/orphan/comments/noi\\_10222012/International-Documentary-Association.pdf](http://www.copyright.gov/orphan/comments/noi_10222012/International-Documentary-Association.pdf).

<sup>16</sup> Comments of Society of American Archivists at 7, [http://www.copyright.gov/orphan/comments/noi\\_10222012/Society-American-Archivists.pdf](http://www.copyright.gov/orphan/comments/noi_10222012/Society-American-Archivists.pdf).

<sup>17</sup> Reply Comments of College Art Association at 7, [http://www.copyright.gov/orphan/comments/noi\\_11302012/College-Art-Association.pdf](http://www.copyright.gov/orphan/comments/noi_11302012/College-Art-Association.pdf).

<sup>18</sup> Reply Comments of National Federation of the Blind at 4, [http://www.copyright.gov/orphan/comments/noi\\_11302012/National-Federation-of-the-Blind.pdf](http://www.copyright.gov/orphan/comments/noi_11302012/National-Federation-of-the-Blind.pdf).

<sup>19</sup> Reply Comments of the New York Public Library, Astor, Lenox and Tilden Foundations at 3, [http://www.copyright.gov/orphan/comments/noi\\_11302012/New-York-Public-Library.pdf](http://www.copyright.gov/orphan/comments/noi_11302012/New-York-Public-Library.pdf).

comments in this proceeding, a user of an orphan work is more likely to prevail under both the first and fourth fair use factors than a similarly situated user of a work whose rightsholder is known.<sup>20</sup>

#### IV. Conclusion

Based on the record in this proceeding, the Copyright Office should conclude that the public needs greater access to orphan works, and that extended collective licensing is not the best way to achieve that greater access. The Copyright Office should recommend orphan works legislation that limits remedies against a user who conducted a reasonably diligent search for the rightsholder before using the work at issue. The Copyright Office should also recognize the critical importance of the fair use doctrine and take steps to ensure the doctrine remains robust.

Respectfully submitted,

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By:

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<sup>20</sup> Comments of the Electronic Frontier Foundation and Public Knowledge at 3, [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).