



# Stanford University Library Comments on Orphan Works & Mass Digitization Report

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Stanford University Libraries welcomes the opportunity to respond to the Copyright Office's June 2015 report *Orphan Works and Mass Digitization*. Copyright is a factor in much of the work that is undertaken at Stanford, and lack of clarity regarding both orphan works and mass digitization impacts our ability to effectively support teaching, learning, and research in the digital era. As such, we are very interested in seeing legislative action on these issues. Notwithstanding our concerns below, we appreciate the thoroughness and thoughtfulness of this report, and look forward to future action on this concerning topic.

## Orphan Works

We are strong supporters of Fair Use, and believe that the No Legislative Change approach that you outline and discuss in section II.B.1 of your report is a valid one. We believe this is a reasonable approach for those currently engaged in the use of orphan works, and, while we don't believe every code of best practices that has been put forward is appropriate in all situations, we see that the dialog that these documents engenders further the discussion of, and use of, Fair Use. However, as we see Fair Use as an existing right that can and should be exercised, we do not anticipate that development of an alternative legislative structure would invalidate this legal approach. We appreciate and support the inclusion of the Fair Use Savings Clause in that regard.

Because of the continued applicability of Fair Use, and because we agree that Fair Use remains fundamentally an *ex post* determination, and thus unable to provide the level of comfort that many users of content require, we agree that implementation of a parallel limitation of liabilities model is a reasonable approach.

While in general we support a limitation of liabilities model, we have concerns regarding the proposed implementation. Most particularly, we believe that the rigorous search standard and Notice of Use provisions are so stringent that they will, in practice, result in



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the model being of limited use. Furthermore, the definition of “diligent” and “reasonable” are so vague as to offer no more certainty regarding their appropriate application than users would have under Fair Use. We have seen similar requirements in the UK, and the stringent search requirements there have resulted in very limited use of the orphan works registry. It would be unfortunate if the US were to follow that model.

## Mass Digitization

We are pleased to see mass digitization separated from orphan works as a category. As your report correctly notes, mass digitization cannot be undertaken under a solution requiring any diligent search for a rights holder, and thus requires a different approach.

As noted above, we are strong supporters of Fair Use, and, as was the case with orphan works, we believe that there are significant categories of and examples of mass digitization projects that can, and should, be undertaken under a Fair Use defense. Most of these projects do not include or require the distribution or reading of whole copyrighted works. In that regard we note the growth of digital humanities as a discipline, and see the increasing numbers of requests we have from our own researchers for access to test beds of data or documents not for individual reading, but for computer analysis. We see that as a driving force for digitization under Fair Use.

We also see, however, that there are many cases where digitized materials are desired to be read as individual works, and Fair Use will not be an appropriate approach to that work. Our involvement in the extensive negotiations that resulted in the admittedly unsuccessful Google settlement made clear that collective licensing is a widely acceptable and effective approach. Furthermore, a variety of European efforts at collective licensing, most notably the significant success of the French model, make it clear that this is an approach with broad acceptance. As you note, however, the US is significantly hindered in its ability to implement a collective licensing model because it lacks an existing infrastructure of collecting societies.

Your report documents the significant success of the French approach to making out-of-commerce works available. The partnership with the national library allows broad access to materials targeted under the ReLIRE program, and the very limited amount of opposition received for more than 99,000 titles registered is an indication of the effectiveness of the approach and its acceptance by rights holders. Germany has more recently established a similar model. We strongly believe that these approaches should serve as models for the US.

By contrast with the European model, the ECL approach put forward by the Copyright Office overly favors content industries and owners. We strongly favor the cooperative and collaborative model of the French ReLIRE program as a means to balance the legitimate claims of rights holders with the significant social of making truly orphan works broadly accessible. While we favor the value of the approach, the ReLIRE model’s focus on the BnF as a coordinating source could be limiting, and we would support a program that would



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engage research libraries around the US, including independent institutions like the Internet Archive, to participate more broadly, and to engage with publishers and rights holders on an even playing field.

In addition, we believe that the pilot program that is proposed is doomed to failure by virtue of its temporary nature. Since the US does not have an established CMO, one will need to be created in order to implement this system. It is not clear how such an organization is to be funded, and it is very unlikely that an investor would be willing to support the creation of such an organization if its existence is not guaranteed beyond a five-year horizon. The Book Rights Registry proposed under the Google settlement was to be supported and funded by Google. It is unlikely that a similar interested party can be found. Also, it is unclear that potential users will feel comfortable participating in a pilot project if there is any sense that they will face potential rights issues at the end of the program. Therefore, we suspect participation in the pilot will be limited.

## Requested Comments

### Examples of Projects

Stanford University Libraries house a large collection of historic newspapers that we would like to see included in a mass digitization program. Many, though not all, of the newspapers in this collection are orphan works, with publishers that no longer exist. Though newspapers are not a category targeted by the Copyright Office in their proposal, we see them as an area of significant research interest, and encourage their inclusion.

We do not believe that limiting the number of copyrighted works in a collection is appropriate at this stage. In a pilot project, it would be better to identify cases where such levels become problematic. However, it may be appropriate to limit materials to works published before a certain date, which is a much clearer instruction to potential users, and may have a similar effect of limiting available works.

In terms of access, licenses that limit use of materials to members of the digitizing organization are significantly less attractive, and also significantly more difficult to enforce, than broad licenses allowing full public access. We strongly encourage the application of the broadest possible license. Similarly, we believe that security requirements for the reuse of licensed material should be minimal, though we do agree that the inclusion of identifying material in the reproduced document is appropriate.

### Distribution of Royalties

We agree that a time limit for the distribution of royalties is appropriate, and support its implementation. We believe that the nine-months model common in Europe is adequate for this purpose.



## Diligent Search

As noted above, Stanford believes that an overly extensive requirement to meet the qualifications for a diligent search will only serve to deter the use of orphan work materials. While we understand that any search will impose some burden, which leads to the need for a distinct approach for mass digitization, it will be important to limit the search requirement to a defined set of accessible resources and a small number of attempts to reach the possible owners of rights uncovered by a due diligence process, say three, 3, attempts. The development of a collective licensing organization within the US will assist in this regard.

We understand the requirement to maintain a publicly accessible list of works that are being considered as orphans following a diligent search. And we agree that the maintenance of such lists by a variety of institutions will support potential identification of rights holders going forward. We do not recommend any further obligations as part of a CMO's diligent search obligations.