



June 15, 2015

The Honorable Maria A. Pallante
Register of Copyrights
U.S. Copyright Office
Library of Congress

Re: June 2015 Orphan Works Report

Dear Register Pallante:

Attached is the response of the Library Copyright Alliance (LCA) to the Copyright Office's recently released report on orphan works. In the report, the Copyright Office misunderstands the position of the Library Copyright Alliance and the utility of fair use, and the fair use best practices, in addressing the orphan works problem. Our clarification should prove helpful if orphan works legislation does proceed. In particular:

- LCA does not oppose any orphan works legislation. Rather, LCA takes the more nuanced position that *libraries'* need for orphan works legislation has diminished.
- LCA bases its fair use analysis related to the digitization of special collections not only on *Authors Guild v. Google* and *Authors Guild v. HathiTrust*, but also on many other fair use determinations.
- LCA's assessment of the changed legal environment goes beyond the evolving fair use jurisprudence to include changes in the law relating to injunctions, the widespread industry practice of website archiving, and library experience with mass digitization.
- The best practices in fair use for libraries and archives do not create a blanket solution that removes from the copyright owner the ability to recover reasonable compensation in all cases. To the contrary, they provide specific guidance for libraries on how to apply the fair use doctrine to the digitization of special collections.

Moreover, as the Copyright Office concedes, the orphan works legislation it proposes would be of little benefit to libraries because it is a mechanism for isolated uses of orphan works. For digitization of special collections, the Copyright Office instead suggests its proposed extended collective licensing (ECL) framework. However, this framework would not apply to many items in special collections, such as unpublished works and ephemera. Additionally, the Office itself believes that an ECL for orphan works "would end up ultimately as a system to collect fees, but with no one to distribute them to."

In short, the Copyright Office criticizes libraries for relying on fair use to digitize their special collections, but offers no viable alternative. While LCA continues to believe that fair use provides libraries with sufficient flexibility to digitize their special collections, it understands that other communities may not feel as comfortable relying on fair use. To address these communities' concerns, LCA would support a simple one sentence amendment to 17 U.S.C. § 504(c)(2) that grants courts the discretion to reduce or remit statutory damages if the user conducted a reasonably diligent search prior to the use.

We look forward to discussing our response in more detail with you and your staff.

Respectfully,

A handwritten signature in purple ink, appearing to read 'J. Band'.

Jonathan Band
Counsel
Library Copyright Alliance