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Register of Copyrights
U.S. Copyright Office
101 Independence Ave., SE
Washington, DC 20559-6000

**Re: Orphan Works and Mass Digitization: Response to Notice of Inquiry
(77 F.R. 204) (Docket No. 2012-12)**

Questions posed:

Occasional or Isolated Use of an Orphan Work: *How has the legal landscape changed since the 2008 proposed orphan works legislation and is the framework of that bill still viable for occasional uses of orphan works?*

Potential Orphan Works Solutions in the Context of Mass Digitization: *How should 'mass digitization' be defined, what are its goals, and what therefore is an appropriate legal framework that is fair to authors and copyright holders as well as good faith users?*

Dear Register Pallante:

Thank you for the opportunity to comment on this Notice of Inquiry regarding orphan works. You ask broadly whether and how the landscape has changed for the handling of orphan works since the 2006 Register's Report on Orphan Works and since the 2008 bill. You also ask about how best to deal with orphan works in the context of mass digitization.

What Remains the Same?

As a central matter, what has not changed since 2006 is the fundamental mission of libraries and the essential nature of what libraries do. Digitization has had an impact on the means and methods that libraries employ and would seek to employ their missions, but the core purpose and responsibility remains unchanged. Whether a library collection encompasses clay tablets, papyrus, wax cylinders, or expression embodied in digital media makes no essential difference – it is still a library.

Given my position as Dean of Libraries at the University of Michigan, most of what I have to say in response to your Inquiry will be from the perspective of academic libraries; although I note that as a professor of public policy I also seek to advance the broad national interest – *inter alia*, the progress of science and the useful arts.

Libraries are, and have always been, institutions that collect, preserve, and make available knowledge and information in all media of expression. Technologies come and go. New technologies are often disruptive, changing the way that we accomplish our charge to collect, preserve, and make collections available for learning, education, scholarship, innovation, and to encourage or satisfy human curiosity.

We care about the question of orphan works because we care about these charges. Differences in how works designated as ‘orphan works’ are used or produced do not change our core purpose. We want relative ease and safety for people everywhere to have the opportunity to learn. A robust commercial marketplace for academic works is essential to this goal, and libraries spend billions of dollars a year acquiring published works and making them available to their patrons. Orphan works pose special challenges precisely because, by definition, the supply side of the market either does not exist or is prohibitively difficult to find.

As an academic library, our primary, though not exclusive, concern with orphan works is with *books* that may be orphan works. We wish to preserve books, to make books accessible to people who have disabilities, to enable people to identify and locate books relevant to their pursuits, to enable complex, state-of-the-art research on and about books, and to maintain the cultural and scholarly record for future generations. We are not concerned with commercializing orphan works, and of course we have no interest in abridging the rights of authors, publishers, or other rights holders. Our mission is to serve scholarship and the students and faculty of the University of Michigan, as we have done since the founding of the University of Michigan Library in 1837.

What Has Changed?

That said, some things have changed over the past seven or so years. In 2006, the scope of the orphan works problem was less well defined than it is today. The comments submitted to your office in the series of Notice of Inquiries leading up to the 2008 bill varied greatly, with diverse business interests and institutions staking out predictable positions on how and to what degree orphan works should be subject to exploitation and the nature of the inquiry required to determine a work was, indeed, an orphan work.

Today, we know much more about the issue. There is tremendous range among types of orphan works and diversity among actors who wish to use such works, as well as in the types of uses that are desired, both commercial and noncommercial. For example, the differences between a recently produced, born-digital orphan work like a YouTube video with no clear attribution, a short story posted on a forum, and a seventy year old book sitting long unused and unread on a library's shelf is

so vast that to craft a simple policy that rationally deals with all will is difficult to imagine and will likely be impossible to accomplish. Additionally, solutions at the national level will not always work globally. Mass digitization makes it technically possible to distribute orphan works (as well as other works) almost frictionlessly to readers and potential readers. This change in the technical landscape poses important issues for public policy and for the development of publishing and related industries as well as for relationships – commercial and otherwise – among authors, publishers, distributors, and libraries.

One thing we have learned since 2006 is that establishing whether a work is an orphan work is difficult and costly, especially without federal standards that we can rely upon. To borrow from medicine, orphan work status is a diagnosis of exclusion; in order to establish that a work is an orphan work one must prove a complementary negative – that it cannot be claimed by rightsholder. No matter how deeply one does the research, there may be one more avenue of inquiry or fact just out of reach that may lead to a putative rightsholder – often a party who is so remote from the creation of the work as to be unsure or unaware of their rights. The need for specialized industry information makes crowdsourcing these questions an interesting possibility. There may well be other approaches where there are communities of interest that would be more effective than an individually conducted diligent search. Several commenters have suggested that extended collective licensing may be among the possibilities worth exploring. I do not know enough about the specific legal and technical issues to have an opinion, but have high regard for a number of proponents of this approach.¹

We will continue to look for opportunities for collaboration with authors, creators, publishers, and others. We note that our campus community includes thousands of published authors, a hundred or more publishers, thousands of musicians and artists, and thousands of other creators of copyrightable works. Most of these have as their primary interest either the advancement of the grand scholarly conversation or the production of new art and culture. The library and the university that it serves the scholarly conversation to be as broad and open as possible, and want the associated cultural production to be similarly broadly disseminated and usable.

The orphan works problem is especially consequential for anyone looking to make money from the sale or reuse of those works. But commercial exploitation is not a major issue for libraries. In recent years there have been many visions of how orphan works could be subject to commercial exploitation, including mechanisms to collect, administer, and distribute funds collected from such ventures. As a

¹ See Johan Axhamn & Lucie Guibault, [Cross-Border Extended Collective Licensing: A Solution to Online Dissemination of Europe's Cultural Heritage?](#), Final report prepared for EuropeanaConnect, 2011; David R. Hansen, [Orphan Works: Mapping the Possible Solution Spaces](#), Berkeley Digital Library Copyright Project, White Paper No. 2, 2012; and Pamela Samuelson, [Legislative Alternatives to the Google Book Settlement](#), 34 Colum. J.L. & Arts 697 (2011).

library, we do not inhabit this space (we do not even charge late fees for overdue books) and we wish to make clear that there are differences between the uses of orphan works in a commercial context and uses of orphan works employed for our purposes.

The Copyright Act affords the general public—and libraries in particular—a variety of ways to use orphan works, although not *because* they are orphan works. That is, because there is no orphan works law in the United States, the public and libraries may make uses of orphan works—without authorization of the copyright holder—when those uses are non-infringing under a provision of the Copyright Act. There are, however, other important uses of orphan works that may not be possible under current copyright law because a rights holder cannot reasonably be identified, located, or contacted.

Conclusion

On balance, we do not see the need for any additional orphan works legislation for libraries at this time. While we would not object to more clarity on the issue, we believe that the actions we are undertaking as a library are well within the rights and uses authorized under the Copyright Act. We remain interested in working with all parties to advance the purpose of libraries: to collect, preserve, and make available knowledge and information in all media of expression. We will gladly participate in both design and implementation of any legislation, regulation, or collaboration that advances those causes in the context of orphan works or copyright more broadly.

Thank you again for the opportunity to comment on these important matters.

Sincerely,

A handwritten signature in cursive script that reads "Paul N. Courant".

Paul N. Courant