



July 10, 2015

Maria Pallante
Register of Copyrights
Library of Congress
Copyright Office
101 Independence Avenue, S.E.
Washington, D.C. 20559-6000

RE: “Orphan Works and Mass Digitization”

Dear Ms. Pallante:

Archives in the United States hold literally billions of photographs, recordings, diaries, and letters. This documentary heritage could inform and educate audiences from students to genealogists to researchers around the country, but we cannot share it because of the high costs of determining copyright owners and seeking permissions. Virtually none of the works in archival collections were created for a commercial market, but the copyright law makes no distinction. In practice, this means that an unpublished photograph created by a 25-year-old in 1890 can still be controlled by the photographer’s descendants in 2015—whether or not they are aware of it.

Such a long duration of copyright all but ensures that current copyright owners for older materials will be untraceable, or if traceable, that the costs of the search and negotiation with the rights holder will outweigh the potential value of making one item available. This requires a large scale solution—one that takes into account the collective worth of many individual items of vanishingly small economic value. That is why the Society of American Archivists has long supported a much shorter term of copyright: the life of the author plus 25 years. It is also why the proposed solution contained in the report “Orphan Works and Mass Digitization: A Report of the Register of Copyrights” is unworkable from the perspective of archivists.

The report proposes a two-part solution: one intended for small-scale uses (several images in a book, for example) and one intended for large-scale digitization. Neither supports the mandate of archivists to preserve and make available our collective cultural heritage, or the need of our constituents, the taxpayers and citizens of this country, for access.

The small-scale solution suggests that Congress pass legislation limiting liability for a user who conducts a good faith diligent search for the copyright owner. It proposes that a minimal good faith diligent search would entail searching Copyright Office records; searching sources of copyright authorship, ownership, and licensing; using technology tools; and using databases. If the searcher determined the identity of the copyright owner, this solution requires him to negotiate for permission and pay any required license fee. If no author is identified, the user is required to submit a “Notice of Use” to the Library of Congress, providing appropriate attribution. If someone later claims copyright ownership, the solution compels the user to again negotiate for permission.

Although this might be feasible for one or two items that are to be used commercially, an archivist who wants to digitize and make available the incoming and outgoing correspondence of a significant early-20th-century politician knows that this proposal would entail unworkable costs. In such a collection, each incoming letter might have a different copyright holder. Is each writer alive or dead? If dead, are there descendants? If there are descendants, where do they live now? In one study, the cost of obtaining permission to digitize letters in the collection of a politician who died in 1922 was \$2,000 per document. Repositories seeking to increase access to our cultural heritage cannot sustain this unnecessary cost. Asking them to invest in extensive and expensive searches for the rights owners of works with little commercial value would be irresponsible.

The solution proposed for large-scale digitization, “Extended Compulsory Licensing,” is, unfortunately, no more workable. The digitizer would provide a list of works to be digitized and pay a fee to a Collective Rights Organization (CRO), such as the Authors’ Guild, that represents creators for a particular genre of materials. The CRO would then be responsible for distributing the income by identifying the appropriate recipients.

The foremost reason why this scheme is unworkable for archivists is that it excludes unpublished works and ephemera because, as your report asserts, “the administrative costs associated with managing such a vast universe of rights would likely outweigh any benefit a CMO could realize from doing so under an ECL scheme.” The fact that these kinds of works have small economic value means that not even the copyright owners organizations believe they could profit from a scheme that requires a blanket license fee. SAA agrees that an ECL scheme for orphan works “would end up ultimately as a system to collect fees, but with no one to distribute them to.”

In short, the proposed orphan works and mass digitization solutions will do nothing to help archivists provide access to our shared cultural heritage. They may, in fact, hurt these efforts. Currently archivists rely on fair use to digitize their collections. Even if this proposal were to become law, they will have to continue to rely on fair use because the proposal fails to present viable alternatives for archivists. Although a fair use “savings clause” is proposed, the danger is that many may consider the Copyright Office’s proposed solutions as representing the extent of acceptable legal practice. This recently happened

with litigation regarding the presumed impact of Section 108 on fair despite the savings clause in that section. Something similar is likely to happen with orphan works.

The proper solution to the orphan works and mass digitization program is a simple one: The cost of combatting the problems caused by the lack of formalities in copyright and its increasing duration should be borne by those who benefit from copyright's grant of exclusive privileges. Placing part of the burden of preventing works from becoming orphans on rights holders by requiring them to make their intentions known in a registry (and then making a search of that registry the standard for a diligent search) is a much more reasonable and balanced solution than those discussed in the report. The cost of search should be low enough that repositories would be more willing to make our unpublished heritage available online. As a consequence, copyright law would no longer impede—but instead foster—historical research.

As SAA's 6,200-plus member professionals know, archival collections are brimming with rich stories and essential information that cannot find their readers because of the long duration of copyright. The failure of Congress to create a workable system for digitization effectively imprisons our shared cultural heritage.

Sincerely,

A handwritten signature in black ink that reads "Kathleen D. Roe". The signature is fluid and cursive, with the first letters of each name being capitalized and prominent.

Kathleen D. Roe
President, 2014 – 2015
president@archivists.org

cc: Karyn Temple Glagett, Associate Register of Copyrights and
Director of Policy and International Affairs, US Copyright Office

Kevin Amer, Senior Counsel for Policy and International Affairs,
US Copyright Office

Nancy Perkin Beaumont, SAA Executive Director