Digitizing Orphan Works: Legal Strategies to Reduce Risks for Open Access to Copyrighted Orphan Works
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Reviewed by Chloé Pascual, Archivist & Special Collections Librarian, California State University, Long Beach

The Orphan-Works Project at Harvard Library is a "project to identify no-risk or low-risk strategies for digitizing orphan works for open access, under US copyright law, giving special attention to strategies that do not depend on fair use."[1] In 2015, the project issued a request for proposals "from scholars interested in writing a comprehensive literature review on the question whether there are lawful or low-risk strategies to digitize orphan works for open access under US copyright law, with special attention to methods that do not depend on fair use."[2] In June 2015, David Hansen, clinical assistant professor and faculty research librarian at the University of North Carolina School of Law, was awarded the contract, the result of which is *Digitizing Orphan Works*. Peter Suber, director of the Harvard Office for Scholarly Communication, supervised the project. The report is edited by Suber and Kyle K. Courtney, program director and copyright advisor for the Harvard Office for Scholarly Communication.

Digitizing Orphan Works is a clear and thorough resource that examines the neglected area of defenses from claims of infringement. The report provides four main sections: "Current Practices," "Legal Defenses for Use of Orphan Works," "Reducing Risk by Minimizing the Likelihood of a Dispute," and "Reducing Risk: Minimize Negative Remedies." For archives professionals interested in copyright issues, the section on current practices will be familiar, as it does go into some detail reiterating the importance of fair use and the predominant defense used by archives in digitization projects. This section will be especially helpful to new professionals unaware of the study's context. However, a broad overview of current best practices can be useful even for those more familiar with copyright and fair use and can provide the appropriate context for understanding the purpose of the report. Digitizers of orphan works in the United States rely almost solely on fair use as a

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[1] "Orphan-Works Project." *Harvard Library*, accessed May 5, 2017, https://osc.hul.harvard.edu/programs/orphan-works/.
[2] David Hansen, *Digitizing Orphan Works: Legal Strategies to Reduce Risks for Open Access to Copyrighted Orphan Works. Harvard Library*, 2016, iii-iv, accessed May 5, 2017, http://nrs.harvard.edu/urn-3:HUL.InstRepos:27840430.

defense against infringement,[3] and a real chance exists that we are overly conservative by failing to make use of other legal arguments.

"Legal Defenses for Use of Orphan Works" considers two defenses the most promising for archives digitizing orphan works: increasing use of the Section 108 on library and archives exceptions, and equitable defenses such as laches. Legal expertise at archives can vary widely by size and focus of institution, so readers with less background in legal issues will be happy to know the author does a good job of making these concepts understandable. One concern I had in reading this section is that applying laches and other equitable defenses might result in unintended consequences. Relatively little copyright-related legal action has targeted libraries and archives,[4] but if courts or legislation recognize equitable defenses that rely on the passage of time or acquiescence by the rights holders, this may not continue to be the case. For instance, owners of trademarks are expected to enforce their intellectual property or risk weakening their claim or possible forfeiture of certain legal remedies.[5] One benefit of allowing copyright holders to sleep on their rights may turn out to be that they have less incentive to be litigious than owners of trademark. While it is outside the scope of Hansen's report, it would be fascinating to see a follow-up analysis examining the likelihood of unintended consequences from expanding the repertoire of legal defenses used by archives and libraries.

In "Reducing Risk by Minimizing the Likelihood of a Dispute," Hansen identifies several defenses that can be the most useful to archives and archives professionals, including the use of "quitclaim grants" (grants that do not require the grantor to warranty that it owns any rights in a work) and broader agreements to obtain permissions. Hansen also discusses gaining permissions through class action settlements and challenging the standing of plaintiffs, but the former is extremely risky and aggressive. The latter may make sense in the case of a claim of infringement, but at the point when one is challenging the standing of a plaintiff, one is much further into a dispute than most institutions would like to be in the first place.

"Reducing Risk: Minimize Negative Remedies" notes several promising strategies for reducing exposure to risk. High statutory damages are the bogeyman for potential digitizers, but some strategies can help to reduce exposure to this risk. These include sovereign immunity for state institutions where applicable, use of unregistered works ineligible for statutory damages, and reliance on Section 504(c), which provides for the remittance of statutory damages for educational users acting in good faith to comply with fair use.

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[3] David Hansen, *Digitizing Orphan Works: Legal Strategies to Reduce Risks for Open Access to Copyrighted Orphan Works.* Harvard Library, 2016, 4, accessed May 5, 2017, http://nrs.harvard.edu/urn-3:HUL.InstRepos:27840430.

[4] Ibid., 17.

[5] Oliver Herzfeld, "Failure to Enforce Trademarks: If You Snooze, Do You Lose?" *Forbes Magazine*, February 28, 2013, http://www.forbes.com/sites/oliverherzfeld/2013/02/28/failure-to-enforce-trademarks-if-you-snooze-do-you-lose/#2db396046c22.

In practical terms, archivists and information professionals can use this report to enhance current digitization practices by bolstering the already well-used application of fair use. Ways to incorporate this report into workflows might include using the strategies listed to develop or enhance priority lists for digitization of orphan works. For institutions interested in beginning such a project, a look at the strategies to limit statutory damages may allay some of the fear that can accompany such an undertaking. This report may also help archivists in dialogue with the institutional counsel they work with to develop appropriate policies and strategies. Overall, *Digitizing Orphan Works* is an informative, readable, and useful resource that gives readers a clear idea of how risk management strategies and legal defense can apply in practice.