

**REPORT ON THE US COPYRIGHT OFFICE ROUNDTABLES ON ORPHAN WORKS  
AND MASS DIGITIZATION, MARCH 10-11, 2014**

**To:** Society of American Archivists Council

**From:** Jean Dryden and Eric Harbeson, Intellectual Property Working Group

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On March 10 and 11, 2014 in Washington, D.C., the US Copyright Office (USCO) hosted nine public roundtables on potential legislative solutions for orphan works and mass digitization. The following issues were addressed by panels of 15-16 people, representing a range of stakeholder perspectives. The USCO will post the transcripts and video on its website once they are available.

*Day One*

- Session 1: The need for legislation in light of recent legal and technological developments
- Session 2: Defining a good faith ‘Reasonably Diligent Search’ standard
- Session 3: The role of private and public registries
- Session 4: Types of works subject to orphan works legislation, including issues related specifically to photographs
- Session 5: Types of users and uses subject to orphan works legislation

*Day Two*

- Session 6: Remedies and procedures regarding orphan works
- Session 7: Mass digitization, generally
- Session 8: Extended collective licensing and mass digitization
- Session 9: Structure & mechanics of a possible extended collective licensing system in the US
- Session 10: Audience participation (for audience members not selected for specific panels)

**SAA Participants**

Intellectual Property Working Group members Eric Harbeson (Day 1) and Jean Dryden (Day 2) represented the SAA. Although Harbeson and Dryden had submitted formal requests to participate in specific panels, only Harbeson’s requests to participate in Sessions 2 (Defining a good faith ‘Reasonably Diligent Search’ standard) and 3 (The role of private and public registries) were approved.

**Session Highlights:**

*Session 1:* Jonathan Band, from the Library Copyright Alliance, opened the day with the argument that legislation is not needed, especially in light of positive rulings from the courts that support the position that the Fair Use Doctrine will sanction nearly every use of orphan works

that a library or archives would need. This set the tone for much of the day: there was a lot of discussion of fair use and best practices documents, as has been common in these discussions for the last few years. Unlike in previous discussions, though, the fair use proponents seemed to have the wind at their backs. Those that have been arguing that fair use has been interpreted too liberally seemed more defensive than in the past, and the proponents of the best practices documents seemed to be in the ascendant. The fair use proponents were controlling much of the discussion, and that seemed to put us all in a stronger position. This was especially apparent during sessions 1 and 2.

*Session 2:* In discussion of the "Reasonably Diligent Search" requirement, Harbeson emphasized that for a reasonably diligent search to be "reasonable" it has to be sufficiently time- and cost-effective that the search requirements will not themselves foreclose use of orphan works. He discussed Maggie Dickson's study at UNC which showed how much time is lost in conducting thorough searches for right holders, how rarely the searches are successful, and how rarely successful searches turn up right holders who actually require fees for use.<sup>1</sup> There was some concern raised that rights holders have some non-financial interests that could be protected by refusing permission to publish under copyright law -- the right to say "no," for example, may relate to concerns over privacy and right of publicity. That concern seemed directed especially at archives. Harbeson responded that archivists have well-established professional ethics standards, and that we take very seriously the trust which is placed in us when we accept collections, and that we're quite good at balancing the sensitive nature of documents with the public's right to know. Cultural memory institutions were well represented in this session, and made a good showing.

*Session 3:* The moderator, Robert Kasunic focused discussion more on how to make registries work than on whether a registry would be appropriate. As a result, the roundtable was one of the quieter sessions in terms of controversy, though it was good to have an SAA presence on the panel. The first part of the panel focused on existing public registries, what the USCO could do to improve its existing registry, and how the USCO might be involved in making public registries more effective in solving the orphan works problem. The second part of the discussion focused on private registries, including those compiled by the content industry groups (ASCAP, for example) or non-profit organisations (such as ORCID or ISNI)<sup>2</sup>, and how those might be a part of the solution. Somewhat surprisingly, the general consensus appeared to be against private registries run by profit-motivated organizations. There was a lot of sentiment that anything that would place the US imprimatur on private registries would be problematic. Harbeson emphasized for SAA that a registry solution is strongly preferable over any extended collective licensing, and that to be useful, a registry search must by itself constitute a diligent search. This session also provided a good opportunity to make SAA's point that there should be a distinction between works designed for commercial purposes and those that were not. Though Harbeson was unaware at the time, Kasunic, the moderator, has authored a paper in which he made a very similar point with respect to the second fair use factor. The discussion of how the USCO could

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<sup>1</sup> Maggie Dickson. Due Diligence, Futile Effort: Copyright and the Digitization of the Thomas E. Watson Papers. *American Archivist* 73 (Fall/Winter 2010) 626-636

<sup>2</sup>ORCID (Open Researcher and Contributor ID) is a community-driven effort to create a registry of unique researcher identifiers and a method of linking research activities and outputs to these identifiers. ISNI (International Standard Name Identifier) is a method for uniquely identifying the public identities of contributors to media content.

improve was productive in some ways, though it involved a lot of non-policy discussion.

*Session 4:* The discussion on what works should be subject to orphan works legislation brought out a lot of hyperbole and rhetoric. One panelist suggested that copyright is becoming impossible to enforce and we so may as well just abolish it altogether. Another said that fair use had become the rule, with copyright being the exception. Another suggested that this was an attack on human rights. For much of the session most at the table seemed talking past, rather than with each other, and in some cases many at the table seemed to forget that the topic was orphan works, not enforcement against bad actors. It was interesting that a few folks from the content industry were arguing that legislation should not exclude any classes of works (of course there were some panelists, such as the Music Publishers Association's representative, that wanted to exclude their particular kind of works).

*Session 5:* This was probably the best discussion of the first day, in that the circus-like atmosphere of the previous session had cooled, and the discussion became more productive. Very happily, there was pretty broad agreement that commercial uses should be within the scope of any legislation. There was lots of discussion of §107 savings clauses, private uses, derivative works, and a variety of different specific uses.

*Session 6:* The Copyright Office is well aware that the current registration process needs an overhaul, and they are working on that. The Copyright Office register may be our best bet for a registry system, a point which seemed to be underlying the Session 3 discussion the previous day. We should look at the Copyright Office's paper on a small claims process for resolving licensing issues, which they see as a possible remedy should an owner appear.

*Session 7:* This session explored questions such as the scope and meaning of mass digitization, which provided an opportunity for Dryden to comment that, for archivists, mass digitization means digitizing entire collections, rather than cherry picking (a point which Harbeson also made during Session 2). Several people spoke to Dryden later to say they were glad to hear that perspective.

*Session 8:* Extended Collective Licensing (ECL) and mass digitization were discussed generally, and most groups represented on the panel were against it for various reasons.

*Session 9:* The panel discussed what an ECL scheme might look like. Given the results of the previous session, it was clear that any ECL solution would be very limited in scope and most likely would apply to specific sectors. It was noted that the ECL system in the Nordic countries excluded unpublished works, so even if an ECL scheme were implemented, much of our holdings would not be affected.

*Session 10:* This was open to the audience. Dryden concisely set out the findings of her research that archivists were conscientious but cautious and risk averse, and that statutory damages or statutory licenses would further chill making archival holdings available online. She concluded by mentioning the public interest that we serve (accountability, transparency, etc.) as well as marking significant anniversaries, events, etc.