

Kluwer Copyright Blog

Report by the US Copyright Office on Orphan Works and Mass Digitization

Johan Axhamn (Department of Business Law, Lund University) · Wednesday, June 24th, 2015



On June 4th, the US Copyright Office published a report on [Orphan Works and Mass Digitization](#). The report addresses two situations where the current US copyright system may not fulfill its aim to “[promote the Progress of Science](#)”: orphan works and mass-digitization. As regards orphan works, the Office notes that a user’s ability to seek permission or to negotiate licensing terms is compromised by the fact that, despite his or her diligent efforts, the user cannot identify or locate the copyright owner. As regards mass digitization – which involves making reproductions of many works, as well as possible efforts to make the works publicly accessible – the Office observes that obtaining permission is essentially impossible, not necessarily because of a lack of identifying information or the inability to contact the copyright owner (which is the case for orphan works), but because of the sheer number of individual permissions required.

The report is based on previous work carried out by the Office on these matters (see [here](#) and [here](#)). The work is also influenced by two lawsuits arising out of the Google Books project (see [here](#) and [here](#)). In addition, the report highlights the fact that several countries in Europe have adopted legislative responses to both orphan works and mass digitization, ranging from calibrated exceptions to government licenses to extended collective licensing.

As regards *Orphan Works*, the Office recommends a legislative framework that would limit good faith orphan works users’ legal liability. The proposed legislative framework would establish a *limitation on remedies* for copyright infringement for eligible users who can prove they have engaged in a good faith diligent search for the owner of a copyright and have been unable to identify or locate him or her. The framework would also define a diligent search as, at a minimum, searching certain sources of copyright authorship, ownership, and licensing. The Copyright Office would be required to maintain and update Recommended Practices for diligent searches for various categories of works. Any monetary relief for infringement of an orphan work by an eligible user would be limited to “reasonable compensation”, the amount that a willing buyer and a willing seller would have agreed upon before the use began. Monetary relief would be barred for infringements of orphan works by eligible nonprofit educational institutions, museums, libraries, archives, or public broadcasters and other similar users, provided the eligible entity promptly ceases the infringing use. These aspects of the

proposed legislation on Orphan Works have many similarities with the EU directive 2012/28 on orphan works, which is also referred to in the report as an inspiration for the Office's proposal.

As regards *mass digitization*, the Office argues that the issue is not so much a lack of information (on the identification and location of the relevant rightholders), as it is a lack of efficiency in the licensing marketplace. This is because for a digitization project involving hundreds, thousands, or millions of copyrighted works, the costs of securing *ex ante* permissions from every rightholder individually will often exceed the value of the use to the user – and this would be true even if every relevant rightholder could be identified and located. As the Office recognizes, that kind of use would most likely need to be based on some type of *collective licensing mechanism*. The Copyright Office proposes a statutory framework on *extended collective licensing* (“ECL”), which can be used to authorize projects on terms set forth by the parties under government supervision. Under this model, licenses are issued and administered by collective management organizations (“CMOs”) representing copyright owners in particular categories of works. CMOs would be authorized by the Copyright Office to issue licenses for mass digitization projects and to collect royalties on behalf of both members and non-members of the organizations, based on transparent formulas and accounting practices. All rightholders would have the right to opt out, and procedures for doing so would be clear and unencumbered.

The proposal on the mechanism of extended collective licensing for mass-digitization follows the footsteps taken recently by several major European countries; France, Germany and the [United Kingdom](#)). The ECL mechanism as such has been in use in the Nordic countries since the 1960s, covering areas of mass use such as [primary broadcasting and repography](#). Several of the Nordic countries have recently amended their ECL provisions to also cover areas of [mass-digitization](#).

In sum, the proposal by the US Copyright Office is aligned with contemporary developments in other western countries. The report is also an important contribution to ongoing [regional](#) and [international](#) discussions on the (eventual) need to “balance” the rights of rightholders with the interests of other stakeholders and the general public interest. Most interestingly, the report highlights *collective management* supported by legislation as an important mechanism for access to information and knowledge: a mechanism which forms the [middle ground](#) between individual rights management and traditional limitations and exceptions to exclusive rights.

To assist the Office in developing their proposal on extended collective licensing, the Office combined their report with a [Notice of Inquiry](#) inviting public comment. It will be interesting to follow the future process.

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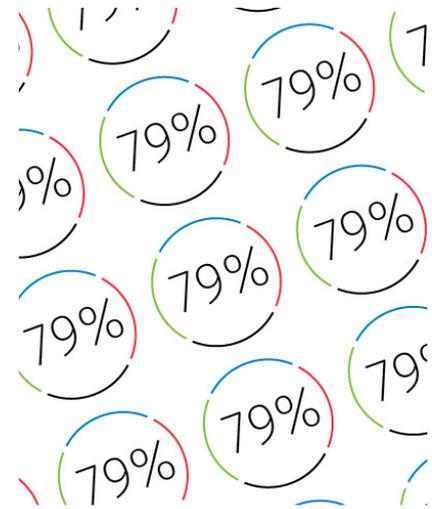
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