Report on Orphan Works Challenges
for libraries, archives, and other memory institutions

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Introduction

Orphan works pose significant challenges to nonprofit libraries, archives, and other memory institutions. When these institutions seek to reuse orphan works—copyrighted works whose owners cannot be located—they face the perceived risk of costly infringement suits from copyright owners who might later emerge. But libraries, archives and other memory institutions hold many orphan works in their collections, and risk-averse institutions that do not make these works available may fail to fulfill part of their core missions of preserving cultural and intellectual artifacts and providing access to users in a format and context that is reasonably available to those users. The fear of liability for providing access to orphan works thus threatens memory institutions' ability to serve their primary purposes as repositories of human culture, history, and accrued knowledge.

Because of the obstacles that orphan works pose to memory institutions and others, policymakers and affected institutions in the United States and internationally have recently renewed efforts to craft solutions to the orphan works problem, including through policy reform[1] and through existing legal mechanisms, such as fair use. This renewed interest in addressing the challenges posed by orphan works arises alongside additional efforts to address copyright challenges, including reform to the library protections in Section 108 of the United States Copyright Act and community-based best practices to help deal with complex copyright questions (especially those regarding fair use).

This Report synthesizes research on specific orphan works-related challenges faced by the community of libraries, archives, and other memory institutions, including historical societies, museums, and many others. The Report concludes with recommendations based on that research for meeting these challenges. In addition to drawing on existing orphan works research, we rely on information gathered via a two additional threads of research: a research workshop with librarians, archivists and other collectors on the topic of orphan works, and in-depth follow-up interviews with members of this community.

The findings of this Report include:
- Overwhelming evidence that concerns about liability severely limit the goals libraries, archives, and other memory institutions have for digitizing and providing digital access to collections that likely contain orphan works especially goals for the mass digitization of those collections;
- In the context of digitization and digital access, evidence that concerns about orphan works may obscure uses that libraries could make under fair use or under other copyright limitations without reference to the orphan status of a work;

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[1] For example, the United States Copyright Office has reinitiated a study of the orphan works problem and policy. *See* Orphan Works and Mass Digitization Notice of Inquiry, 77 Fed. Reg. 64,555 (Oct. 22, 2012). European efforts to address the issue have already resulted in a directive on orphan works. *See* Directive 2012/28/EC of the European Parliament and of the Council of 25 October 2012 on Certain Permitted Uses of Orphan Works, 2012 O.J. (L 299) 5, *available at*: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:299:0005:0012:EN:PDF; s*ee also* *supra* notes 12-20 and accompanying text.

- General uncertainty among librarians, archivists, and other collectors about how to engage in a diligent search for rightsholders, and when such a search is necessary;
- Uncertainty among the community about the true risks of using potentially orphaned works. Librarians and archivists express great concern about using orphan works; this concern is no doubt exacerbated by litigation against the HathiTrust consortium and the suspension of the University of Michigan's nascent orphan works digitization program. At the same time, of course, the vast majority of identified orphan works likely have no owner, making the risk inherent in using those works very low. Unsurprisingly then, this report finds that some institutions that have chosen to go forward with digitizing and making available collections of these works have encountered few complaints;
- Concerns within the community about non-copyright related issues, such as respecting the privacy of individuals named in copyrighted works, and balancing these and similar concerns with the importance of providing access to their collections.

To address these obstacles, this Report identifies some potential next steps for libraries, archives, and other memory institutions:

- Community development of best practices in orphan works use and diligent search activities to provide a clearer explanation of the current state of the law and community consensus around reasonable practices. A statement of best practices could support both institutional practice and decision-making, and help potential gatekeepers, such as general counsel or library or university administrators, consider appropriate approaches to orphan works.
- Encouraging better documentation and information-sharing among community members about their experiences using orphan works to help the community assess current practice, more accurately gauge risks, and share learning on successful and unsuccessful approaches to finding owners.
- Education and information-sharing about when the orphan works status of a work is paramount. This could help institutions distinguish situations where a straightforward application of fair use, Section 108 library and archive exceptions, or an evaluation of the public domain status of the work would apply.

Research Methods

The research summarized in this Report comes from three main sources:

- A literature review of existing research into and documentation of the issues presented by orphan works. Sources include policy work, scholarly articles and white paper reports.
- An in-depth workshop on the topic of orphan works problem and appropriate steps forward in the area, specifically with respect to the development of best practices; and
- In-depth follow-up interviews with participants from that workshop and with others working with similar collections at other institutions.

In terms of existing research, libraries, industry, and public research groups have developed an increasingly rich body of work on the topic of orphan works. In 2005, the United States

Copyright Office issued a notice of inquiry regarding the problem. In response, over 850 written comments were submitted, many from the community of institutions about which this report is concerned.[2] Since that time a number of interested institutions—including JISC in the UK, and a European digital library initiative—have published series of reports on the scope of the problem and the challenges that it poses to institutions with collections that are likely to contain many orphan works.[3] Most recently, the Berkeley Digital Library Copyright Project has released several white papers summarizing much of this research. That research team has also generated new research on the orphan works by initiating the creation of several academic articles about orphan works, collected in the January 2012 issue of the *Berkeley Technology Law Journal*.[4] In April 2012, the Project hosted a conference in Berkeley, California on the topic of orphan works and mass digitization that resulted in extensive discussion of who wants to make orphan works available (and why), who has discomfort with making orphan works available (and why) and how the challenges posed by orphan works might be met in light of all of these interests.[5]

To supplement this more general background and obtain findings more focused on memory institutions' experiences with orphan works, we employed two discussion-based methodologies. First, we held an all-day workshop on the issue of orphan works with members of this community. The workshop included representatives from small and large collections, from institutions that support collections, such as, for example, the Society of American Archivists, the Association of Research Libraries, the Music Library Association, and the Dance Heritage Coalition, and from a range of geographic locations, including the East and West Coasts, the Midwest, and the Southeast. Second, we conducted individual follow-up interviews with community members, including some workshop participants and a variety of others. Interview questions focused on the perceived scope and nature of the orphan works problem, the likely number of orphan works in these institutions' collections, and the ways that institutions have tried to engage with these works in their collections in order to make them more available to users.

Literature Review: the "Orphan Works" Problem

The term "orphan works" commonly is employed to refer to items which are presumptively protected by copyright but cannot be confidently traced to particular copyright owners. Challenges presented by works whose owners cannot be located—the "orphan works problem"—have grown in recent years. In the United States, changes in the copyright law

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[2] For the complete set of documents relating to the Copyright Office study (and subsequent legislative proposals), see *Orphan Works*, U.S. COPYRIGHT OFFICE, http://www.copyright.gov/orphan/ (last updated Dec. 28, 2012).

[3] *Managing Orphan Works*, JISC, http://www.jisc.ac.uk/whatwedo/programmes/contentalliance/reports/ipr/orphanworks.aspx; *Digital Agenda for Europe*, DIGITAL LIBRARIES INITIATIVE, http://ec.europa.eu/information_society/activities/digital_libraries/index_en.htm.

[4] *Symposium: Orphan Works and Mass Digitization: Obstacles and Opportunities*, 27 BERKELEY TECH. L. J. (2013).

[5] *Orphan Works and Mass Digitization: Obstacles and Opportunities*, BERKELEY LAW, http://www.law.berkeley.edu/orphanworks.htm (last visited Jan. 5, 2012) (linking to all of the Project's orphan works related materials).

starting with the 1976 Copyright Act, such as the elimination of copyright formalities and the extension of copyright terms, now mean that many decades of copyright protection automatically attach to virtually every creative work as soon as it is fixed, regardless of any intent on the part of the creator to protect the work.[6] Over time, a vast number of works have become disconnected from these owners, who may very well no longer exist.[7] These legal changes mean that there are likely more orphan works now than at any time in the past. At the same time, recent changes in use of copyrighted works, especially collectors' need to digitize large amounts of material in order to preserve and provide digital access to it, raise the specter of possible copyright liability, yet provide no way of obtaining permission from unlocatable owners.[8]

These developments also have given rise to significant variants on the core orphan works problem. These include situations in which outreach to a tentatively identified copyright owner does not generate any response, or those in which uncertainty about copyright ownership has given rise to multiple and conflicting claims.[9] In practice, these variants may be as problematic for memory institutions as the inability to ascertain ownership. In all these contexts, orphan works can pose serious obstacles. When these institutions cannot obtain permission from the copyright owner, they might decide against using the work altogether rather than run the risk of a costly copyright infringement suit, should an owner emerge and sue.

These concerns have a clear negative effect on public access to knowledge and historical and cultural materials. Preliminary research from collections across the world indicates that libraries and archives hold a large number of orphan works.[10] Further, while collections of published books may already include many orphan works, special collections containing copyrighted works pose even greater challenges because these collections often contain ephemeral, personal, and other non-traditional materials, for which contextual information about ownership is less uniform and often, non-existent.[11] For example, one study of a collection containing early twentieth-century personal correspondence containing over 8,400 documents (with around 3,300 unique authors ultimately studied) concluded that, after over 450 hours of copyright investigation,

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[6] While this is a worldwide problem, this report focuses on uses by United States institutions.

[7] *See* REGISTER OF COPYRIGHTS, REPORT ON ORPHAN WORKS 41-44 (2006), http://www.copyright.gov/orphan/orphan-report-full.pdf.

[8] *See id* at 36-39; *see also* David R. Hansen, *Orphan Works: Causes of the Problem* (White Paper No. 3, Berkeley Digital Library Copyright Project, 2012), http://ssrn.com/abstract=2038068.

[9] The situations are to be distinguished from those in which a known owner refuses consent or declines to correspond with a permission-seeker. In the general understanding, these fall outside the scope of the complex of orphan works-related problems.

[10] *See, e.g.*, BARBARA STRATTON, SEEKING NEW LANDSCAPES: A RIGHTS CLEARANCE STUDY IN THE CONTEXT OF MASS DIGITISATION OF 140 BOOKS PUBLISHED BETWEEN 1870 AND 2010 (London: British Library, 2011), http://pressandpolicy.bl.uk/ImageLibrary/detail.aspx?MediaDetailsID=1197 (concluding that 43% of the potentially in-copyright books in the sample were orphan works, after more than an average of 4 hours of investigation for each work).

[11] Dwayne K. Butler, *Intimacy Gone Awry: Copyright and Special Collections*, 52 J. LIBR. ADMIN. 279 (2012) ("Copyright interpretation requires highly fact specific analysis. For many special collections, much of that factual predicate has simply drifted from the historical record.").

permission could be obtained for only 4 letters in the study.[12] Based on experiences like this, research from around the world has concluded that the orphan works problem has a crippling effect on libraries and archives, especially as they seek to digitize whole collections of works in order to make them more accessible to their users online.[13]

In 2005, the United States Copyright Office conducted the first substantial investigation into the orphan works problem. In 2006, the Office published a report summarizing its findings and recommending a legislative amendment to limit the copyright remedies available against users who had first conducted a reasonably diligent search for a work's rightsholders. This approach aimed to ameliorate the difficulties of using orphan works by alleviating fears of high copyright damages or injunctions. The report led to serious efforts in Congress to pass legislation based on the Copyright Office proposal, though ultimately Congress did not enact these bills into law.[14] After a hiatus, the Copyright Office recently restarted its efforts to study the orphan works problem, but has not yet made additional legislative recommendations.[15]

Outside of the United States, recent approaches include the European Commission's 2012 Orphan Works Directive, which requires European member states to implement in their national laws mechanisms to allow libraries, archives, and other nonprofit institutions to make limited uses of orphan works after a diligent search;[16] schemes under which licenses are obtained from a central administrative authority;[17] and systems where orphan works are licensed by a collective management organization that represents owners of works similar to the suspected orphan work.[18] A common thread among all proposals is the requirement that one must show reasonable diligence in identifying actual orphaned works by undertaking a search for rightsholders. The question that then arises—"what exactly constitutes a diligent search?"—remains difficult to

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[12] *See* Maggie Dickson, *Due Diligence, Futile Effort: Copyright and the Digitization of the Thomas E. Watson Papers*, 73 AM. ARCHIVIST 626 (2010), http://archivists.metapress.com/content/16rh811120280434/fulltext.pdf

[13] *See, e.g.*, COMITÉ DES SAGES, THE NEW RENAISSANCE (2011), http://ec.europa.eu/information_society/activities/digital_libraries/doc/refgroup/final_report_cds.pdf; i2010: DIGITAL LIBRARIES HIGH LEVEL EXPERT GROUP, COPYRIGHT SUBGROUP, FINAL REPORT ON DIGITAL PRESERVATION, ORPHAN WORKS, AND OUT-OF-PRINT WORKS (2008), http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/reports/copyright/copyright_subgroup_final_report_26508-clean171.pdf.

[14] REGISTER OF COPYRIGHTS, REPORT ON ORPHAN WORKS (2006), http://www.copyright.gov/orphan/orphan-report-full.pdf.

[15] Orphan Works and Mass Digitization Notice of Inquiry, 77 Fed. Reg. 64,555 (Oct. 22, 2012).

[16] *See* Directive 2012/28/EC of the European Parliament and of the Council of 25 October 2012 on Certain Permitted Uses of Orphan Works, 2012 O.J. (L 299) 5, *available at*: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:299:0005:0012:EN:PDF.

[17] *See* Jeremy De Beer & Mario Bouchard, *Canada's 'Orphan Works' Regime: Unlocatable Copyright Owners and the Copyright Board*, 10 OXFORD UNIV. COMMONWEALTH L.J. 215 (2010).

[18] *See* JOHAN AXHAMN & LUCIE GUIBAULT, CROSS-BORDER EXTENDED COLLECTIVE LICENSING: A SOLUTION TO ONLINE DISSEMINATION OF EUROPE'S CULTURAL HERITAGE? (2011), http://www.ivir.nl/publicaties/guibault/ECL_Europeana_final_report092011.pdf.

answer, despite calls in almost all proposals to develop best practices to help users address this question.[19]

In the United States, libraries and archives,[20] and researchers such as Jennifer Urban,[21] have argued that the flexible doctrine of fair use should allow for some uses of orphan works, especially when the use is nonprofit and made in the same context as uses traditionally made by libraries and archives. While no court has directly addressed this argument, in 2012, the HathiTrust Digital Library won a significant fair use decision that did address the benefits of library digitization for preservation and access purposes more generally, and held that such uses positively impact the fair use analysis.[22] At the same time, that decision could be revised on appeal, and does not specifically address orphan works. In addition, the University of Michigan's program to identify owners and make orphans in its portion of the HathiTrust collection more available was suspended and remains suspended at the time of this writing. As such, uncertainty about the parameters of a fair use defense for using orphans remains.

Librarians, archivists and other collectors do rely on fair use for many of their day-to-day activities, though they have expressed some uncertainty when doing so.[23] To help guide their actions, the research library community, as well as the community of dance heritage collections, have followed documentary filmmakers, media educators, and others in developing codes of best practices for reasonably employing fair use in fulfilling their missions. As we discuss below under Recommendations, some of these efforts could guide collections' approach to the orphan works problem, more specifically.

More directly, although not following the community-centered methodology, in 2009 the Society of American Archivists (SAA) released a statement of best practices for orphan works, specifically. That document "describes what professional archivists consider to be best practices regarding reasonable efforts to identify and locate rights holders." [24] The SAA statement, which

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[19] *See* David Hansen, Gwen Hinze, and Jennifer Urban, *Orphan Works and the Search for Rightsholders: Participants in the Search Process* (White Paper No. 4, Berkeley Digital Library Copyright Project, 2013).

[20] ASSOC. RES. LIBRS., RESOURCE PACKET ON ORPHAN WORKS: LEGAL AND POLICY ISSUES FOR RESEARCH LIBRARIES 9-17 (2011), http://www.arl.org/bm~doc/resource_orphanworks_13sept11.pdf ;

[21] *See* Jennifer Urban, *How Fair Use Can Help Solve the Orphan Works Problem,* 27 BERKELEY TECH. L.J. ___ (forthcoming 2013), http://ssrn.com/abstract=2089526; David R. Hansen, *Orphan Works: Mapping the Possible Solution Spaces* 11-16 (White Paper No. 2, Berkeley Digital Library Copyright Project, 2012), http://ssrn.com/abstract=2019121.

[22]Authors Guild, Inc. v. HathiTrust, No. 11-6351(HB), 2012 WL 4808939 (S.D.N.Y. Oct. 10, 2012). In 2011 the HathiTrust Digital Library began a program to identify orphan works in its collection and post a list of those works to its website, with the ultimate goal of enabling full-text access to those works subject to certain access restrictions. While HathiTrust never made an orphan works available through that program, the project was well publicized after HathiTrust was sued by the Authors Guild, alleging copyright infringement. HathiTrust suspended the orphan works part of the project, and the court rendered no decision on that aspect of HathiTrust's activities.

[23] *See* ASSOC. RES. LIBRS., FAIR USE CHALLENGES IN ACADEMIC AND RESEARCH LIBRARIES (Dec. 20, 2011), http://www.arl.org/bm~doc/arl_csm_fairusereport.pdf.

[24] Society of American Archivists, *Orphan Works: Statement of Best Practices* (2009), http://www.archivists.org/standards/OWBP-V4.pdf.

describes a range of steps that could be taken in an attempt to trace ownership of certain kinds of collection materials, is the only known U.S.-based guide of its type. The extent to which that statement has been used in practice remains unknown; however, it represents an effort to describe the full range of efforts that might be undertaken in highly professionalized archival settings to trace the copyright status and ownership of collection items. The SAA statement does not purport to address what measures may be practically appropriate with respect to different kinds of items held in collections of various kinds and sizes. The latter point is significant, because since 2009, libraries and archives around the country have begun experimenting with smaller-scale digitization and digital access projects to enhance the usefulness of their collections. These projects have included collections with orphan works, but have proceeded to evaluate potential orphan work status on a mostly ad hoc basis.

Workshop and Interview Findings: Memory Institutions Confront Orphan Works

Our direct discussions with representatives of libraries, archives, special collections, and subject-matter-based memory institutions (such as institutions focused on preserving dance heritage or civil rights history) revealed the following major findings: there is a high level of need to use orphan works; collectors experience a great deal of uncertainty both in deciding when to search and knowing how to search for owners; collectors confront challenges when attempting to assess the risk of using orphan works; and concerns other than copyright—especially privacy concerns—also affect collectors' ability to make orphans available.

The Need to Use Orphan Works

Nonprofit libraries, archives, and other memory institutions seek to preserve and provide access to knowledge as a core institutional mission. As such, one of their major goals is often the digitization and digital access to their collections for the benefit of their users. Because those collections likely contain a signification number of orphan works, they must address the orphan works problem, especially for digitization of special collections that contain a great number of difficult-to-trace works. These institutions have had such a focus for some time. Comments submitted in response to the Copyright Office's 2005 study, for example, made clear that libraries and archives considered orphan works a major obstacle to their digitization efforts.[25] More recent reports reaffirm the importance of digitization and digital access to collections that contain orphan works.[26] Our workshop participants and interviewees confirmed the same;

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[25] *See, e.g.*, Response by the Carnegie Mellon University Libraries to the Notice of Inquiry Concerning Orphan Works, Comment OW0537 (March 22, 2005), http://www.copyright.gov/orphan/comments/OW0537-CarnegieMellon.pdf; Response by the University of Michigan, Comment OW0565 (March 22, 2005), http://www.copyright.gov/orphan/comments/OW0565-UofMI.pdf; Response by the Cornell University Library, Comment OW0569 (March 23, 2005), http://www.copyright.gov/orphan/comments/OW0569-Thomas.pdf; Response by the Prelinger Library, (March 22, 2005), http://www.copyright.gov/orphan/comments/OW0593-PrelingerLibrary.pdf.

[26] *See, e.g.,* Brewster Kahle – Panel Presentation: Who wants to make use of orphan works and why?, Symposium: Orphan Works and Mass Digitization: Obstacles and Opportunities, Berkeley Law (April 12, 2012), http://www.law.berkeley.edu/files/kahle.pdf (speaking about broader digital access).

overall, we found a high perceived need to use orphan works in their collections in order to fulfill their missions.

Parsing the digital access question further, our workshop participants and interviewees articulated at least three categories of activities that seem to pose unique orphan works challenges:

- Digitizing and providing digital access to copies on a copy-by-copy basis;
- Systematically digitizing entire collections of copyrighted works that contain potential orphans (i.e., mass digitization), and;
- Digitally preserving and providing access to born-digital content (e.g., harvested from the Web or otherwise obtained), which also often contains likely orphans, despite its contemporary nature.

While digitization activities were cited most frequently, workshop participants and interviewees also expressed concerns about their ability to make other uses of the orphan works in their collections, such as the preparation of derivative works or the creation of in-person displays or exhibits of these works. In addition, several participants expressed interest in making limited, potentially commercial, uses (e.g., the sale of postcards with images from a collection), but only so far as those uses related to the overall non-profit institutional role.

Understanding When to Address a Work as an Orphan Work

Workshop participants and interviewees expressed uncertainty about when to engage in an analysis of the orphan works status of work for a particular use. Some uses that libraries and archives seek to make—for example, digital displays that transform or adapt the work in some way—could be made with a straightforward assertion of the fair use right, without regard to the work's orphan status.

But in interviews and at the September workshop, participants expressed concern that worries about whether a work is orphaned sometimes overshadow a more straightforward application of fair use or other exceptions or limitations that allow for use of those works regardless of orphan status. As one participant explained, "the more I think of scenarios where libraries, archives, and museums want to digitize orphans, the more I realize how many of those scenarios are already adequately covered by principles" identified by the Association of Research Libraries' *Code of Best Practices in Fair Use Best for Academic and Research Libraries*. Given the potentially costly prospect of searching for rightsholders, the same participant explained that users would need some clear guidance for distinguishing situations when "you probably don't need to worry about . . . [search], and whether something is an orphan." As another participant pointed out, the problem stems in some ways from confusion about the order of operations when considering a proposed use: does one first seek permission (and therefore search for rightsholders), or first conduct an independent fair use analysis? Furthermore, as discussed above, sometimes the two are interrelated, as the fair use argument for using a work is strongest *because* the work is orphaned, which one can only determine after conducting a search.

Conducting the Diligent Search

Participants agreed that some of the most challenging aspects of dealing with orphan works involve determining how to go about conducting a diligent search for rightsholders. At present, participants expressed, there is no actionable standard for this practice, particularly in cases where many works are at issue. While workshop participants and interviewees agreed that "diligent search" could be an actionable standard by which an institution can confirm a work's orphan status, they also agreed that they lack a clear explanation for how such a standard should be put into practice.

For instance, workshop participants and interviewees expressed a sense that several factors should affect how extensive a search must be, and appropriate steps within each search. Participants identified factors such as the (often severe) resource constraints under which they operate, potential harm to a works' copyright owner (should one exist), whether the planned use of the work is commercial or non-commercial, the published or unpublished status of the work, the public availability of documentation about the proposed use, and adherence to institutional policies. In addition, they cited good faith and compliance with owners' wishes (when an owner does come forward) as important factors in considering the continued use of a work.

To some extent, participants were expressing known issues. Libraries (and others) have long recognized similar sets of factors as potentially important for a diligent search. The Copyright Office's 2006 *Report on Orphan Works*, for example, identified a similar set of factors as potentially relevant when assessing the reasonableness of a given search under its proposal.[27] Workshop participants clearly stated, however, that the present, and difficult, challenge lies in articulating how such factors might be organized and balanced for use in practice. Enabling community members to articulate that balance may become especially important when an orphan work is used under an assertion of the fair use right, which itself requires a careful balancing of factors such as the purpose and character of the use, the nature of the work, the amount used, and the impact on the market for the work.

Workshop participants and interviewees also explained that they had little understanding of the mechanics of how to start and then follow through with a sufficient search for rightsholders. Workshop participants and interviewees knew about the SAA document, *Orphan Works: Statement of Best Practices*, which guides users through a range of steps that could be taken to search for rightsholders, and appreciated the guidance it provided. But none expressed confidence in using that document as a general rule because of the variability in their particular circumstances. Workshop participants generally agreed that following *all* of the steps identified in the SAA document would be far more than the diligent search standard would require, but expressed that there is no clear understanding of what steps were required in what circumstances, and what resource expenditures would be most appropriate. Some participants also raised more specific concerns about situations unique to particular formats of works or particular types of

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[27] REGISTER OF COPYRIGHTS, REPORT ON ORPHAN WORKS (2006), *available at* http://www.copyright.gov/orphan/orphan-report-full.pdf.

collections. For example, one participant noted that many of the works in his collection originated with an organization that no longer exists. Few resources exist to help collectors track copyright ownership through dissolved corporations, bankruptcy, or an organization that is now defunct for other reasons. Other participants pointed out that digital formats also raise special challenges and questions, such as when and how to appropriately use technological means to track files to an original creator.

In addition, participants expressed concern that undertaking individual diligent searches on a work-by-work basis might be inefficient or infeasible for enabling digital access to collections on a larger scale. Participants were interested in whether and how a diligent search could be conducted on a collection-wide basis, but few participants had developed ideas about how such a search could be implemented in practice. Many expressed concerns about how institutional capacity might affect the need to conduct a diligent search or the most appropriate steps in a search. While all community members are non-profit institutions that operate with limited resources, there are significant resource disparities between larger institutions, such as university libraries, and smaller institutions, such as local historical societies or subject-matter based non-profits.

Participants and interviewees also emphasized that, underlying all of the above questions about diligent search, they have concerns about how to explain and document diligent search activities for review by others. For example, one interviewee explained that part of his efforts to search for rightsholders included informal, direct interaction with the relevant research community. While such efforts certainly develop expertise and knowledge about potential owners of works, those efforts are difficult to quantify when analyzing search efforts for a particular work.

Explaining diligent search to gatekeepers is also a challenge. One librarian working with an online collection containing orphan works explained that "[a]t the time [the project was conducted and then published online], our University Counsel was not very responsive to inquiries regarding campus activities. [As t]hat has since changed I wonder how our project may have been influenced by a more active Counsel." Without clear documentation to help guide an orphan works use project and without documentation explaining the legal rationale supporting such projects, librarians and archivists must conduct searches based on standards that are recreated for each project, and are forced to individually learn and then argue complex legal points to gatekeepers such as administrators and general counsel.

Likewise, participants expressed uncertainty about how to proceed when a tentative assignment of copyright ownership had been made as a result of diligent search, especially in situations where correspondence addressed to the last known location of the person or entity thus identified yielded no response. Likewise, they expressed concerns about situations in which a diligent search revealed multiple persons or entities with putative ownership claims.

Assessing Risk and Sharing Knowledge

Participants and interviewees frequently mentioned uncertainty about how to accurately assess the risk of using orphan works, an issue that has also been documented in a variety of other copyright risk assessment scenarios. Librarians and archivists have, in a number of contexts, expressed concern about engaging in activities that they view as potentially infringing copyright. Sometimes fear of litigation and the potentially large damage awards drives this concern: for example, in situations where the law is intentionally flexible and allows for some interpretation, as with fair use, librarians have taken risk-averse positions despite clear statutory protections from large statutory damage awards.[28] In other cases, this conservative approach may stem from a professional culture that is "imbued with the desire to respect the law," [29] but that can struggle to apply the law in complex or newly developed situations where the law might actually allow use of the work. In yet other cases, as explained by our workshop participants and interviewees, it is gatekeepers, such as general counsel or university administrators who, perhaps acting on limited or no experience with the copyright challenges posed by orphan works, raise these concerns and take highly risk-averse positions.

Despite this cautious stance within the community, participant institutions that have taken the step of digitizing orphan works and making them available to users stated that they have experienced few legitimate complaints. As one librarian explained about her popular online archive, "to my knowledge no one has come forward and asked us to take anything down. Our students . . . and scholars from all over the world use this resource so it was absolutely worthwhile to take our chances and move forward with digitizing late-twentieth century materials." In our workshop and in subsequent interviews, curators of online archives of photos, printed materials, born-digital works, and (to a lesser extent) audiovisual works, echoed those sentiments, though other institutions have had negative experiences dealing with potential rightsholders of orphan works, and that, in the case of the HathiTrust, these experiences have led to a temporary suspension of that institution's initiative in the area.[30]

In the few situations when these participants or interviewees did receive legitimate complaints, the concerns expressed by potential owners related to privacy concerns, often stemming from some potentially embarrassing fact revealed by a digitally accessible work. In all reported situations where complaints were legitimate, the potential copyright owner and the collection owner came to a mutually acceptable solution, such as redaction or removal of the work into a dark archive.

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[28] PRUDENCE ADLER, BRANDON BUTLER, PATRICIA AUFDERHEIDE & PETER JASZI, FAIR USE CHALLENGES IN ACADEMIC AND RESEARCH LIBRARIES (Dec. 20, 2010), http://www.arl.org/bm~doc/arl_csm_fairusereport.pdf.

[29] Peter Hirtle, *Undue Diligence?*, 34 COLUMBIA J.L. & ARTS 55 (2011).

[30] Note that all of these reports came from workshop participants and interviewees working with special collections. No participants or interviewees reported digitizing published books in their core library collection, for example, and there is evidence that mass digitization of the core collection of books may be more controversial and thus more likely to raise objections. *See* Authors Guild, Inc. v. HathiTrust, No. 11-6351(HB), 2012 WL 4808939 (S.D.N.Y. Oct. 10, 2012); Authors Guild, Inc. v. Google Inc., 770 F. Supp. 2d 666 (S.D.N.Y. 2011).

Some participants expressed the view that more information about successful practices would help in assessing risk. Very few institutions have systematically documented and made publicly available their experiences working with orphan works. We did not ascertain a definite reason for this, but suspect that resource constraints and perhaps the fear of litigation contribute. Workshop participants explained that they do not regularly share information within the community about their experiences. This indicates a possible disconnect between the observed level of risk associated with using orphan works and the level of risk perceived by librarians, archivists, collectors, and associated gatekeepers making decisions about the use of these copyrighted works in the absence of knowledge about others' experiences.

Privacy and Related Non-Copyright Challenges

Finally, several workshop participants and interviewees explained that copyright created only some of the challenges that accompany orphan works.[31] As noted above, participants and interviewees frequently described encountering privacy-related concerns when working to provide access to collections containing potential orphan works. One interviewee explained, for example, that his primary worry regarding digitization and access to his collection was not motivated by copyright, but by the risk of revealing potentially embarrassing or incriminating information about people contained in the collection.

This concern came up most frequently for those working with special or other limited collections containing unpublished and potentially sensitive information. While collectors can use automated means to remove some private information, such as social security numbers, private addresses and phone numbers, collectors with works containing more detailed private information cannot do so and may feel the need to review each item individually to search for sensitive information. Even when the collector can identify that information, if the work is an orphan he must make a judgment call regarding whether to post the work online despite failing to locate the relevant person for permission.[32]

Recommendations and Next Steps

The challenges described in our findings appear substantial. In many cases, they have hampered collectors' efforts to effectively manage the orphan works in their collections, especially as they seek to digitize and make their collections more accessible to users. However, U.S. nonprofit libraries, archives, and other memory institutions may also be able to address a substantial subset

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[31] These concerns are echoed in literature on this topic. *See* Laura Clark Brown & Nancy Kaiser, *Opening Archives on the Recent American Past: Reconciling the Ethics of Access and the Ethics of Privacy*, *in*, DOING RECENT HISTORY: ON PRIVACY, COPYRIGHT, VIDEO GAMES, INSTITUTIONAL REVIEW BOARDS, ACTIVIST SCHOLARSHIP, AND HISTORY THAT TALKS BACK (Claire Bond Potter & Romano, Renee C. Romano, Eds., Univ. of Ga. Press, 2012).

[32] A related challenge is how to provide proper attribution for a work that, by its nature as an orphan work, may lack important bibliographic data about its author. While participants and interviewees expressed a strong preference for providing attribution where possible, the actual impediment posed by this norm seemed minimal. Most expressed an understanding that, in cases of uncertainty, making available most known attribution information about the work would suffice.

of the challenges noted above without drastic changes in the law and without expensive research programs. Indeed, as explained above, the law may already allow for many uses of orphan works under the existing doctrine of fair use.

Fair use itself is a complex copyright issue that user communities confront on a regular basis. In recent years some communities—including documentary filmmakers, media educators, journalists, as well as some collectors—have reduced the uncertainty surrounding fair use by employing an innovative, and now well-tested, method developed by Peter Jaszi and Patricia Aufderheide for developing norms—"best practices"—related to complex copyright questions. The method relies on extensive input from the members of the practice community who are tasked with answering those questions in their daily activities.[33] Because they grew out of this community-based methodology, in each case the best practices have been widely adopted and used by community members to address the copyright issues that they face on a regular basis. Libraries in particular have benefited from this methodology through the development of the Association of Research Libraries' *Code of Best Practices in Fair Use for Academic and Research Libraries*.[34]

Based on the research we undertook for this Report and the experience of a variety of user communities with the best practices approach, we think that memory institutions themselves likely can meet some orphan works challenges in two ways: first, by employing a similar "best practices" methodology to develop an organized framework for dealing with orphan works, agreed upon by members of the community; and second, by working to share information about risk management, search techniques, related issues on an ongoing basis. A best practices framework could alleviate the prevailing uncertainty regarding uses of orphan works, both by creating consensus reasonable best practices and by clarifying the legal justification for the use of orphan works. A best practices guide could thus help individual collections make reasonable decisions and also alleviate concerns raised by gatekeepers who have little experience evaluating the legal issues related to orphan works. Ongoing information-sharing and communication could help the community implement reasonable approaches and adjust to changing circumstances over time.

With that in mind, we suggest the following next steps:

- Development of best practices to help guide and empower digitizing institutions that seek to make good faith efforts in using orphan works. This should include best practices for topics including identifying when a search is desirable, the form that a search should take in various circumstances, the role of ancillary considerations (including privacy) in

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[33] Documentary film makers, poets, open courseware providers, K-12 media literacy teachers, dance archivists, and cinema and communications scholars have all developed best practices documents of this kind. For reports from each best practices initiative, see *Fair Use Codes & Best Practices*, AM. UNIV. CTR. FOR SOCIAL MEDIA, http://www.centerforsocialmedia.org/fair-use/best-practices/fair-use-codes-best-practices (last visited Jan. 5, 2013).

[34] ASSOC. RES. LIBR., CODE OF BEST PRACTICES FOR FAIR USE IN ACADEMIC AND RESEARCH LIBRARIES (2012), *available at* http://www.arl.org/bm~doc/code-of-best-practices-fair-use.pdf.

designing any search, and approaches to seeking permissions for use when a search has indicated a possible copyright owner.

- Documenting and sharing information within the community about experiences in using orphan works. We have found some differences within the community between the perceived and observed level of risk of using orphan works. Given the recognized importance of accurate risk assessment in dealing with copyrighted works,[35] libraries and others in the memory institution community could develop a better understanding of the risks associated with using orphan works through, for example, formal and informal information sharing through meetings, listservs, or the development of a voluntary orphan works database or registry.

- Enhanced support for librarians, archivists, and others who are working with collections that contain potential orphan to understand the copyright challenges and to identify when solutions unrelated to orphan works status might apply. The community could start with existing guidance-such as the ARL *Code of Best Practices in Fair Use for Academic and Research Libraries*, and could provide support—financial or otherwise—to develop, through separate research projects, additional guidance for other legal analysis, such as under library and archive Section 108 rights, or when conducting a public domain analysis.

- Continued meeting and discussion within the community to better understand related orphan works obstacles, such as those relating to privacy or attribution, how those relate to community members' already developed codes of practice, and the extent to which the community should address those obstacles through the other next steps identified above.

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[35] *See* Kevin L. Smith, *Copyright Risk Management: Principles and Strategies for Large-Scale Digitization Projects in Special Collections*, Research Library Issues, No. 279 (June 2012), http://publications.arl.org/2ds1pl.pdf.