



Computer & Communications
Industry Association
Tech Advocacy Since 1972

Before the
United States House of Representatives Committee on the Judiciary
Subcommittee on Courts, Intellectual Property, and the Internet

Regarding

Preservation and Reuse of Copyrighted Works

April 2, 2014

Statement of the
Computer & Communications Industry Association

The Computer & Communications Industry Association (CCIA) represents large, medium-sized, and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications and Internet products and services – companies that collectively generate more than \$250 billion in annual revenues.¹ CCIA requests that this statement be included in the record of this hearing.

I. Limitations and Exceptions Facilitating Preservation and Reuse

As other stakeholders will no doubt explain in greater detail, current limitations and exceptions in the U.S. Copyright Act, principally Section 107 and 108, enable various types of preservation, reuse, and digitization of protected works. Although often performed by non-profit entities and educational institutions, these activities depend substantially upon commercially-produced information technology. Thus, whether for-profit or non-profit, most preservation and digitization is ultimately facilitated at least in part by businesses, including some CCIA members. This facilitation may involve direct participation, or it may consist of providing inputs such as software, hardware, and systems, without which the task would be impossible.

Legal uncertainty will impede these important activities. If the terms of copyright law around these exercises are unclear, businesses may be disincentivized to engage in or facilitate projects that federal courts have lauded as serving important social goals, including the preservation of knowledge and cultural works. For example, Second Circuit Judge Denny Chin, sitting by designation in the Southern District of New York district court, lauded the societal

¹ A complete list of CCIA members is available at <http://www.ccianet.org/members>.

benefits of mass digitization in a November 2013 opinion, finding that

Google Books provides significant public benefits. It advances the progress of the arts and sciences, while maintaining respectful consideration for the rights of authors and other creative individuals, and without adversely impacting the rights of copyright holders. It has become an invaluable research tool that permits students, teachers, librarians, and others to more efficiently identify and locate books. It has given scholars the ability, for the first time, to conduct full-text searches of tens of millions of books. It preserves books, in particular out-of-print and old books that have been forgotten in the bowels of libraries, and it gives them new life. It facilitates access to books for print-disabled and remote or underserved populations. It generates new audiences and creates new sources of income for authors and publishers. Indeed, all society benefits.

Authors Guild v. Google, 954 F. Supp. 2d 282, 293 (S.D.N.Y. 2013). Judge Chin also favorably cited Judge Baer's 2012 *HathiTrust* opinion, which said, "I cannot imagine a definition of fair use that would not encompass the transformative uses made by Defendants' [Mass Digitization Project] and would require that I terminate this invaluable contribution to the progress of science and cultivation of the arts that at the same time effectuates the ideals espoused by the [Americans with Disabilities Act]." *Id.* at 294 (quoting *Authors Guild, Inc. v. HathiTrust*, 902 F. Supp. 2d 445, 460-61, 464 (S.D.N.Y. 2012)). Accordingly, to the extent Congressional action addresses this subject, it should be done with the objective of preserving and promoting these valuable activities.

II. Causes and Effects of the Orphan Works Problem

Existing limitations and exceptions are bounded, of course, and beyond those boundaries uses of works must be licensed. Licensing, however, is greatly hampered by the orphan works problem. Orphan works represent a substantial obstacle to the promises of mass digitization. The orphan works problem is the product of three independent policy choices in the late 20th century: (1) the repudiation of formalities; (2) repeatedly lengthening copyright terms; and (3) disproportionate remedies. The confluence of these policy choices has produced a system in which rights are dispensed without record, for a period of time likely to exceed human memory, and yet succeeding generations face penalties for violating those rights that are de-linked from the magnitude of the injury. The result is a system that consigns large numbers of works to obscurity and non-use. Given formalities, intellectual property would behave more like the property to which it is often analogized; and given shorter terms, authors and rights-holders would be less likely to disappear over the passage of time.

Insofar as the first two sources of the orphan works problem were perceived as prerequisites to harmonization with international copyright conventions, policy options around

these may be limited. Remedies, on the other hand, are not so limited. Although the Berne Convention restricts formalities, it leaves the means of redress to the laws of the nations where protection is claimed.² In particular, statutory damages are a form of redress particularly characteristic of U.S. law, not employed or accepted universally, and thus constitute a viable area for reforms to alleviate the orphan works problem and encourage mass digitization and preservation efforts.

A. Formalities

Moving away from an “opt-in” default for copyright protection was the most proximate cause of the orphan works problem. While one of the merits of an opt-in system is that it does not dispense unsought entitlements, re-implementing formalities may pose certain international complications. Berne’s prohibition on formalities is carried forward in the World Trade Organization Agreement on Trade-related Aspects of Intellectual Property Rights,³ the WIPO Copyright Treaty,⁴ and the WIPO Performances and Phonograms Treaty.⁵ Various proposals have been advanced toward restoring formalities in an ostensibly Berne-compliant manner,⁶ but the U.S. Copyright Office has previously recommended against formalities-related proposals in light of international obligations.⁷

B. Term

According to a liberal interpretation of the Constitution’s Progress Clause,⁸ copyright term has repeatedly been extended to its current, extraordinary length. The most recent extension in 1998, validated by the Supreme Court in *Eldred v. Ashcroft*, 537 U.S. 186 (2003), compounded by two decades the problem of orphan works. The effect of term extension on orphan works was a “known bug” – the Copyright Office had previously identified problems associated with term extension, having cited users’ complaints from as early as the consideration

² Berne Convention for the Protection of Literary and Artistic Works, as last revised July 24, 1971, amended Oct. 2, 1979, S. TREATY DOC. NO. 99-27, 828 U.N.T.S. 221.

³ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 81.

⁴ WIPO Copyright Treaty, Dec. 20, 1996, S. TREATY DOC. NO. 105-17, 36 I.L.M. 65.

⁵ WIPO Performances and Phonograms Treaty, Dec. 20, 1996, S. TREATY DOC. NO. 105-17, 36 I.L.M. 76.

⁶ See, e.g., Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STANFORD L. REV. 485 (2004).

⁷ See, e.g., U.S. Copyright Office, *Report on Orphan Works* (2006) (available at <http://www.copyright.gov/orphan/orphan-report-full.pdf>), at 60-61 (noting options of a registration requirement, a notice requirement, and notice requirement as condition of enforcement).

⁸ U.S. Constitution, art. 1, § 8, cl. 8 (“To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”).

of the 1976 Act, where “some users pointed out that the longer copyright term created by that revision might inhibit scholarly or academic uses of works where the copyright owner may no longer be actively exploiting the work commercially.”⁹ The Copyright Office’s report also pointed out that “[d]uring consideration of the Sonny Bono Copyright Term Extension Act of 1998 [CTEA] (which extended the term of copyright by 20 years), the Copyright Office [had] noted problems with unlocatable copyright owners, while some users pointed out that term extension could exacerbate problems with orphan works.”¹⁰ These misgivings notwithstanding, the CTEA was enacted and endorsed, albeit half-heartedly, by the Supreme Court in *Eldred*. Since then, a life+70-term obligation has repeatedly appeared in U.S. free trade agreements.

C. Disproportionate remedies

The availability of statutory damages for copyright infringement – and in particular the potential for steep penalties independent of any demonstration of actual harm – dramatically increases the inherent risks associated with using orphan works. This has the effect of deterring productive noncommercial and commercial uses of works of minimal economic value. Commercial entities are less likely to build upon, disseminate, digitize, aggregate, or pursue other activities, due to the potential for 6-figure awards per work. Particularly in the orphan context, where digitization involves a large number of potentially registered works, the prospects for large statutory awards are daunting.¹¹ In light of the lack of treaty obligations around statutory damages and the lack of international consensus on this subject, Congress could consider rationalizing statutory damages to further promote the preservation and reuse of orphaned works.

Given the policy choices of the previous century, there are few attractive options for directly addressing the orphan works problem in a way that will encourage lawful mass digitization of works. The credibility of the copyright system depends upon its capacity to promote the creation *and use* of works of authorship, however. Accordingly, to the extent that Congress’s ongoing review of U.S. copyright law concludes that legislative action should be taken with respect to the digitization, preservation, and reuse of works, mitigating statutory damages should be considered.

⁹ *Report on Orphan Works*, *supra* note 7, at 16.

¹⁰ *Id.*

¹¹ Scholars have painted an in-depth picture of the punitive, unpredictable, inconsistent, and arbitrary outcomes that may occur under statutory damages. *See, e.g.*, Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439 (2009).