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Statement Submitted for the Hearing Record
House Judiciary Committee
Subcommittee on Courts, Intellectual Property, and the Internet
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Hearing on "Preservation and Reuse of Copyrighted Works"
April 2, 2014

I. Introduction

On behalf of its members, the Association of American Publishers ("AAP") appreciates this opportunity to place its views in the record of the House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet ("IP Subcommittee") regarding the recent hearing on "The Preservation and Reuse of Copyrighted Works." AAP thanks Committee Chairman Goodlatte and Subcommittee Ranking Member Nadler for their recognition of the need to address each of these issues in a way that balances the interests of users and owners of copyrighted works.[2]

Publishers are both owners and users of copyrighted works and thus appreciate that Section 106 of the Copyright Act grants right holders a number of exclusive rights, including the right to control the reproduction and distribution of their works, and that Section 107 of Copyright Act provides a general exception for "fair use." However, relying on courts to set rules of the road for modern preservation practices, use of orphan works, or mass digitization based upon fair use would inevitably produce a patchwork of inconsistent and even conflicting determinations and rules, rather than the uniform and balanced national standards, procedures

[1] The Association of American Publishers (AAP) represents over 400 publishers, ranging from major commercial
[2] *Preservation and Reuse of Copyrighted Works*: *Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) (Opening Statement of Chairman Goodlatte (R-VA)); *Preservation and Reuse of Copyrighted Works*: *Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) (Opening Statement of Ranking Member Nadler (D-NY)).

and policies that, through Congressional vetting, are more likely to limit risk, foster innovation and take into account the numerous legitimate interests of right holders and users. Below, AAP explains its members' concerns and provides suggestions for achieving an appropriate balance between the interests of right holders and users in addressing the Section 108, orphan works and mass digitization subjects discussed at the IP Subcommittee's April 2, 2014 hearing.

II. Section 108

a. Updating Section 108 for the 21st Century

Congress created Section 108 of the Copyright Act in 1976 to provide libraries and archives with specific statutory exceptions to certain exclusive rights of copyright owners for the benefit of those institutions and their users. Specifically, Section 108 authorizes a library or archive, which is open to the public or to qualified researchers, to make a limited number of copies of works in its collection under certain specific circumstances (*e.g.*, for preservation, replacement, or private study).[3] However, with the advent of the Internet and the availability of digital capabilities to easily reproduce and distribute copyrighted works, substantial portions of Section 108 are viewed as out-of-date and functionally irrelevant, despite modest amendments enacted as part of the DMCA in 1998 to permit the limited making and use of digital copies.[4]

Recognizing the need to more thoroughly assess the impact of digital change on Section 108, the Copyright Office and the Library of Congress convened a group of experts from the publishing, library, archives, and museum communities—the Section 108 Study Group (the

[3] More specifically, Section 108 authorizes a library or archive to copy works in its collection under certain specific circumstances if such institution is open to the public or to qualified researchers, is making copies "without any purpose of direct or indirect commercial advantage," and affixes a notice that the copy is being made under the provisions of Section 108. According to the 1976 Senate report on the proposed Section 108, the requirement that permitted reproduction and distribution must occur "without any purpose of direct or indirect commercial advantage" was intended to preclude a library or archives in a profit-making organization from providing copies of copyrighted materials to employees engaged in furtherance of the organization's commercial enterprise, unless such activities qualify as fair use or the organization has obtained the necessary copyright licenses. *See* U.S. COPYRIGHT OFFICE, *Circular 21: Reproduction of Copyrighted Works by Educators and Librarians,*13 (2009). However, the House report on the version of Section 108 which was eventually enacted offered a broader interpretation noting that, under Section 108, a purely commercial enterprise could not establish a collection of copyrighted works, call itself a library or archive, and engage in for-profit reproduction and distribution of copies, nor could a nonprofit institution, by means of contractual arrangements with a commercial copying enterprise, authorize the enterprise to carry out copying and distribution functions that would be exempt if conducted by the non-profit institution itself. Effectively explaining why the provisions of Section 108 are not limited to "non-profit" libraries and archives, the House report noted that "advantage" in this context "must attach to the immediate commercial motivation behind the reproduction or distribution itself, rather than to the ultimate profit-making motivation behind the enterprise in which the library is located. *Id.* at 15.

[4] *See generally*, Symposium, *Copyright Exceptions for Libraries in the Digital Age: Section 108 Reform*, 36 COLUM. J.L. & ARTS 527 (Summer 2013) (exemplifying this view are the comments of Register Pallante that "today, there is no question that [S]ection 108 is woefully out of date…[and that in order to ensure that] libraries and archives and museums [can] make the copies they need and to distribute those copies in ways that do not unduly harm the valid interests of rights holders…[the Copyright Office] is very likely…[to] adopt and recommend many of the conclusions of the [Section 108] study group…[and] also address issues that were left unsolved by the group.").

"Study Group")—in 2006 to undertake this analysis and make recommendations for updating its provisions. Despite the Study Group's achievement of a number of consensus-based recommendations for updating Section 108 in its 2008 Report (the "Section 108 Report"),[5] no legislation has been introduced to enact and implement the recommended amendments that would support 21st-century uses of copyrighted works by these cultural institutions.

Today, however, some of the same library groups that previously participated in the Study Group now assert that their community is no longer interested in discussing legislative "updating" of Section 108, but instead prefer to rely on fair use to "authorize" many of the activities that were recommended for inclusion in an updated Section 108.[6] The Register of Copyrights, however, has made clear that adding new specific exceptions and limitations to a modernized Copyright Act would improve its clarity and functionality, and that "[w]hile fair use can also be helpful to users of copyrighted works in appropriately tailored circumstances, it requires an intensive application of the facts at hand and is therefore ill-suited as a vehicle for bright line rules or more systematic activities of users."[7]

Unfortunately, the "Code of Best Practices in Fair Use for Academic and Research Libraries" (the "Code") sponsored by the Association of Research Libraries ("ARL") shows how the application of fair use to systematic activities of libraries and archives in lieu of specific statutory limitations or exceptions could fail to provide the necessary and appropriate balance of interests needed in an "updated" Section 108.[8] Although described by ARL as "a clear and easy-to-use statement of fair and reasonable approaches to fair use developed by and for librarians who support academic inquiry and higher education," this so-called "best practices" document is essentially a one-sided statement of the ARL's "wish list," which explicitly encourages libraries to employ fair use to undertake activities the Study Group recommended for inclusion in a revised Section 108 balancing the needs of libraries and publishers.[9] Moreover, at the heart of

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[5] SECTION 108 STUDY GRP., The Section 108 Study Group Report (2008) http://www.section108.gov/index.html (the "Section 108 Report").

[6] *See Preservation and Reuse of Copyrighted Works*: *Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) (Testimony of James G. Neal); *see also* James G. Neal, *A Lay Perspective on the Copyright Wars: A Report from the Trenches of the Section 108 Study Group*, 32 COLUM. J.L. & ARTS (Winter 2009)). Recent court decisions favoring expansive assertions of fair use to justify the "mass digitization" of library book collections in the Google Books Library Project and the HathiTrust Digital Library Partnership, as well as the "electronic reserves" program at Georgia State University, have no doubt bolstered this view within the library, archival and education communities. *See Authors Guild, Inc. v. Google*, 05 Civ. 8136, 2013 WL 6017130, (Nov. 14, 2013); *Authors Guild, Inc. v. HathiTrust*, 902 F.Supp.2d 445 (S.D.N.Y. 2012); and *Cambridge University Press v. Becker*, 863 F.Supp.2d 1190 (N.D.Ga. 2012), *appeal docketed*, No. 12-15147 (11th Cir., Jan. 28, 2013).

[7] Maria Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315, 332 (Spring 2013).

[8] Association of Research Libraries, *Code of Best Practices in Fair Use* (2012) http://www.arl.org/focus-areas/copyright-ip/fair-use/code-of-best-practices (the "ARL Code").

[9] *See generally id.* (covering activities such as: (1) digitization for purposes of (a) preservation and (b) building a library's e-collections; (2) offsite access to digital copies; and (3) copying and making available materials that are

this exercise in "consensus-based community standards" derived from the views of just a single stakeholder "community,"[10] the Code argues for applying fair use through "two key analytical questions" that "effectively collapse" the four statutory factors in Section 107 in a manner that "rephrases" one of them and merely "touches" upon the key "market harm" factor with no reference to its actual statutory wording.[11] Instead of relying on fair use and one-sided "best practices" to establish modern rules of the road for cultural institutions (beyond libraries), the publishing industry agrees with the Register of Copyrights that all stakeholders could benefit from a good faith effort to legislatively update Section 108, should Congress decide that such revision is necessary.[12]

b. Section 108 Study Group Recommendations

As noted by both Co-Chairs of the Section 108 Study Group, many recommendations from the Section 108 Report were relatively non-controversial and remain a useful starting place for updating the statute,[13] such as:

- including "museums" as beneficiaries of a revised Section 108;
- adding certain eligibility criteria for beneficiary institutions (such as having a public service mission, employing a trained staff, and possessing a collection of lawfully acquired or licensed materials);
- permitting beneficiary institutions to "outsource" certain activities to outside contractors;

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publicly available online. All of these uses were the subject of Section 108 Study Group discussions and recommendations).

[10] ARL, *The Good News about Library Fair Use*, http://www.arl.org/storage/documents/publications/fair-use-infographic-aug2013.pdf (last visited Apr. 9, 2014) (expressly noting that the Code was "developed by practice communities themselves, without intimidation from hostile [or any other] outside groups.). This Subcommittee's first hearing regarding its comprehensive review of the Copyright Act (The Copyright Principles Project: A Case Study in Consensus Building) was meant to examine, in Chairman Goodlatte's words, whether people "with divergent views on copyright law [could] productively" discuss a range of copyright issues as they had done in past efforts to put forth consensus recommendations for updating the law. AAP hopes to have productive discussions with library and other stakeholder communities that could benefit from updating Section 108 and hopes that Congress will encourage this dialogue. *A Case Study for Consensus Building: The Copyright Principles Project*: *Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2013) (Opening Statement of Chairman Goodlatte (R-VA)).

[11] *Id.* at 8.

[12] *See supra* note 7.

[13] *A Case Study for Consensus Building: The Copyright Principles Project*: *Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2013) (Testimony of Laura Gasaway) (suggesting that in order to maintain a proper balance between users and owners of copyrights (a balance that is necessary "if our society is to flourish and maintain its competitive position in the world,") Congress should "revise section 108 of the Act to expand the exceptions to the exclusive rights of the copyright owner to take into account the changes wrought by the digital age *in accordance with the Section 108 Study Group Report* and update and expand those recommendations) (emphasis added); *Preservation and Reuse of Copyrighted Works*: *Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) (Testimony of Richard Rudick).

- changing the three-copy limit[14] for replacement and preservation copying to the number of copies that are reasonably necessary to create and maintain the replacement or preservation copy, as applicable, and that digital copies made in tangible form should be permitted to be lent offsite in the same formats and with the same technological protections measures (if any);
- adding "fragile" as a condition that would permit a replacement copy to be made for "at risk" collection copies, allowing a "usable" (rather than an "unused") copy available on the market to suffice for the requirement to determine if a replacement copy can be purchased by a library in lieu of making a replacement, and, in certain circumstances, allowing the availability of a license for a work to substitute for a purchase;
- creating a *new* exception for preservation of "publicly disseminated" works which, subject to certain limitations, would permit the making of preservation copies of those works by qualifying institutions able to meet certain criteria; and
- creating another *new* exception for preserving publicly available online content, given that an enormous amount of content is "born digital" and exists only online and current law makes no provision for its collection and preservation.[15]

c. Guiding Principles for Updating Section 108

While the recommendations in the Section 108 Report offer a solid foundation for considering any proposed legislative updating of Section 108, AAP notes that, as Richard Rudick pointed out in his hearing testimony, there were issues that eluded any consensus recommendation by the Study Group or were viewed as not ripe for consideration, including (among others) off-site access to digital copies made under exceptions for replacement or preservation and mass digitization.[16] Should Congress decide to embark on updating Section 108 to provide a balanced set of modern exceptions for these cultural institutions (including museums), AAP urges Congress to keep the following general principles in mind:

- An updated Section 108 should permit libraries, archives and museums to provide reasonable access to cultural and intellectual content in modern ways that do not undermine the incentives of publishers and other creators to continue supplying such content.
- Fair use is not a substitute for a specific limitation or exception where the unauthorized use at issue is predictable, systematic, and/or large scale. To the extent that Congress determines

[14] In 1998, Congress made a few modest amendments to Section 108 to facilitate digital preservation and replacement by authorizing the making of up to three copies of a working digital format. At that early stage of limited online experience, however, Congress required that such digital copies could not be made available to the public outside the library or archives premises. *See* 17 U.S.C. §108(b)(2)-(c)(2).

[15] The new exception would be subject to certain limitations, including the right of copyright owners (except for government and political websites) to "opt out" while the Library of Congress would be permitted to copy and preserve all publicly available online content without regard to a rights holders preference to "opt out."

[16] *Preservation and Reuse of Copyrighted Works*: *Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) (Testimony of Richard Rudick).

that such an unauthorized use serves a public purpose worthy of a copyright limitation or exception, the scope of the statutorily-authorized activity should be clearly described and the institutions that would be eligible to engage in that activity should be clearly identified.

- Current Section 108 activities, as well as new activities that have developed with respect to digital works, including making digital or accessible copies for library patrons, as well as the digital reproduction of copyrighted works for replacement or large-scale preservation projects, should be authorized only under a predictable set of rules that have been crafted to accommodate the interests of all relevant stakeholders, including copyright owners.
- New limitations or exceptions for making unauthorized uses of copyrighted works should be paired with appropriate new responsibilities for using and storing such digital materials. To the extent that an updated Section 108 includes the ability to make, share and, in appropriate cases, provide access to digital copies, it should also provide, as a prerequisite to exercising such privileges, that reasonable safeguards must be utilized by eligible institutions.[17]
- Copyright owners should be given meaningful recourse when a beneficiary of a limitation or exception fails to uphold their responsibilities.[18]
- In any revision of Section 108, the relationship between fair use and the specific limitations or exceptions should be more clearly defined. If a particular activity (like copying for preservation purposes or making copies for users) is addressed in a revised Section 108, the safeguards and balances built into the statutory language should not simply be disregarded in favor of applying a fair use analysis. The Congressional intent reflected in the scope of a specific Section 108 limitation or exception should, *at a minimum*, inform any fair use analysis, and Congress' intention that it do so should be made explicit in the language of the limitation or exception itself.
- Similarly, the scope of a revised Section 108 should be considered in the context of other specific limitations or exceptions, such as the first sale doctrine (Section 109) and the so-called "Chafee Amendment" (Section 121). Additionally, many concerns with respect to preserving and providing access to certain works could be addressed if an appropriate statutory treatment for "orphan works" was simultaneously crafted.

d. Evolving Role of Libraries

The creation of Section 108 as part of the comprehensive revision that led to the Copyright Act of 1976 was the subject of a great deal of discussion surrounding the increasingly widespread availability of photocopying capabilities. While libraries saw the ability to make and

[17] These safeguards could include, among other things, limiting access to a clearly defined user community (and making certain limitations or exceptions available only to those eligible entities that can define such a community); placing simultaneous user restrictions to the number of lawfully acquired copies in the relevant collections; and, requiring inclusion of reasonable and effective technical measures to hinder unauthorized access and reproduction.

[18] These responsibilities should apply to public and private eligible entities alike, which means that where the beneficiary is a state entity, it should be required to waive sovereign immunity prior to taking advantage of the limitation or exception, so that an aggrieved copyright owner can seek monetary damages as well as injunctive relief where appropriate.

distribute photocopies of works in their collections as essential to their public service mission, publishers were concerned that such widespread copying of their works would interfere with their markets and reduce their incentive and ability to invest in the creation of new works. The enactment of Section 108 was chiefly an attempt to balance those concerns, and to incorporate certain assumptions about the roles and capabilities of libraries and publishers at that time.

Although there has been much discussion of the impact of the shift to digital technologies on libraries and archives, the impact on publishers of exactly how libraries and archives may exploit the capabilities of digital technologies promises to be no less profound. Below, AAP explains how the missions and practices of institutions subject to Section 108 are changing in ways that warrant Congress's careful consideration of the circumstances under which libraries should be authorized to make and distribute copies of certain works for individual users given the potential for libraries to facilitate digital copy access, distribution and delivery in ways that pose the risk of market-harming unauthorized reproduction and distribution of publishers' works in the absence of appropriate preventive safeguards.

Any significant proposed revision of Section 108 should begin with an examination and definition of the kinds of institutions that will be the beneficiaries of such changes.[19] Despite creating the Section 108 privileges specifically for libraries and archives in 1976, Congress has never provided a definition of either institution in the Copyright Act. Is our understanding of the nature of a library or archive the same today as it was almost forty years ago, or has the advent of digital technologies and the Internet – accessible to and used by their patrons as well as by the institutions themselves – reshaped their views of their respective missions and practices? Are so-called "virtual" libraries or archives, which exist primarily or even exclusively in cyberspace, the same entities as the traditional brick-and-mortar establishments that have held specific identities and played particular roles in communities across our nation?[20]

The tension that exists today between libraries and publishers regarding appropriate policies for library lending of eBooks is, thankfully, seemingly being worked out through cooperative experimentation in the marketplace rather than by government fiats which would

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[19] *A Case Study for Consensus Building: The Copyright Principles Project*: *Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2013) (Testimony of Laura Gasaway at 3 (noting the Section 108 Study Group's recommendation to add "museums to the institutions eligible to take advantage of the exceptions but also [adding] better definitions of libraries, archives and museums that qualify for the exception.")).

[20] For example, how should the Digital Public Library of America, http://dp.la/, the HathiTrust Digital Library Partnership, http://www.hathitrust.org/, and the Internet Archive, https://archive.org/index.php, among other organizations, be viewed for purposes of potential Section 108 revisions as compared to the kinds of libraries and archives that Congress contemplated as the beneficiaries of Section 108 in 1976? *See also Penguin Group (USA) Inc. v. American Buddha*, 640 F.3d 497 (2d Cir. 2011) (Plaintiff NY-based publisher brought copyright infringement action against Defendant Oregon non-profit corporation, with its principal place of business in Arizona, which operated a website known as the Ralph Nader Library, alleging that American Buddha unlawfully uploaded to servers an unauthorized copy of four of Penguin's copyrighted works for downloading, via the Internet and free of charge, by any of the 50,000 members of what American Buddha terms its "online library.").

likely satisfy neither libraries nor publishers.[21] In many ways, it is an echo of the debates over high-speed photocopying that began in the 1960s and deeply influenced the efforts of Congress to enact Section 108 in a way that carefully balanced the interests and concerns of both libraries and publishers. But, if that technology was viewed as having the potential to impact the business of publishers by making it possible for libraries and their patrons to freely make and distribute copies of copyrighted works in library collections, consider the exponentially greater potential impact on the business of publishers that is presented by the capabilities of the Internet and the ubiquitously available and affordable consumer devices that allow individuals to digitally access, reproduce and distribute copies of such copyrighted works instantly and globally.

In the past few years, projects to advance library publishing services have become a keen interest within the academic and research library communities. Initial work in areas of open access journals, conference proceedings, and monographic publications is rapidly evolving toward something potentially much bigger as individual institutions share their experiences and expertise toward developing broader capabilities and business models for fee-based publishing services.

When the Association of Research Libraries surveyed its membership on the subject in late 2007, the results verified that publishing services "are rapidly becoming a norm for research libraries, particularly journal publishing services" similar to those provided by numerous commercial and non-profit members of AAP's Professional & Scholarly Publishing ("PSP") Division.[22] The key paper that explained the results of the survey asserted that "[t]he aspirations of libraries to replicate traditional publishing services are modest to non-existent," claiming that library publishing services "have few pretensions to the production of elaborate publications" and that "libraries pursue a different economics from those of traditional publishers."[23] Still, the paper acknowledged that "[l]ibraries' products certainly resemble many publications produced by traditional publishers," and that, in addition to base budget and overhead support from the library, the "mechanisms for supporting a library's publishing program" would also include "royalties and licensing fees, print on demand revenue, and other forms of sales of some kind," much like the sources of funding that sustain traditional publishers.[24] Stating that libraries are "addressing gaps in traditional publishing systems," the paper concluded that "collectively[,] research libraries are beginning to produce a substantial body of content" and that the question

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[21] *See The Rise of Innovative Business Models: Content Delivery Methods in the Digital Age*: *Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2013) (Statement of the AAP at 6-7 (discussing various library eBook lending models) http://www.publishers.org/_attachments/docs/copyright_policy/aapnewbusinessmodelsphs112613.pdf.
[22] Press Release, ARL, *ARL Publishes Report on Emerging Library Role* (Apr. 2, 2008) http://old.arl.org/news/pr/research-library-publishing-services-2apr08~print.shtml.
[23] Karla Hahn, *Research Library Publishing Services: New Options for University Publishing*, ARL, 6 (Mar. 2008) http://www.arl.org/storage/documents/publications/research-library-publishing-services-mar08.pdf.
[24] *Id.*

"is no longer whether libraries should offer publishing services, but what kinds of services libraries will offer."[25]

Within just five years of that initial study, it became clear that these library publishing activities were already directly challenging publishers of scholarly publications – will they extend beyond these "core campus constituencies" to other markets? It is probably much too soon to tell. But the questions that these libraries are asking of themselves and others, and the capabilities that they are seeking to develop, might offer some hints about the broader missions they may eventually decide to pursue. According to one significant report[26] on a later major survey of library publishing services:

> The vast majority of library publishing programs (almost 90%) were launched in order to contribute to change in the scholarly publishing system, supplemented by a variety of other mission-related motivations…[and] many respondents expect a greater percentage of future publishing program funding to come from service fees, product revenue, charge-backs, royalties, and other program-related income…
>
> Library publishing programs – many of which offer skeletal production systems and minimal editorial support – have discovered that authors and editors continue to demand publishing services that the library had assumed to be irrelevant in an era of digital dissemination. The skills that these publishing services require do not always align well with traditional library staff expertise, requiring libraries to either lure staff with publishing experience or to seek training for existing staff. [27]

Additionally, in the proposal that created a new Library Publishing Coalition, it was noted that "library publishing may perhaps be distinguished from other library-based dissemination activities by requiring a production process, by generally presenting original work activities not previously made available, and by applying a level of certification to the content published, whether through peer review or extension of the institutional brand.[28] Library publishing services "take inspiration and borrow elements from traditional publishing approaches, such as those practiced by scholarly societies, university presses, and commercial publishers…," but how will they respond to the "potential competitors to libraries" that "bring a culture of commercialization to new projects that are incompatible with the public good philosophies of academic libraries…?"[29]

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[25] *Id.* at 7.
[26] Purdue University Press, *Library Publishing Services: Strategies for Success: Final Research Report* (Mar. 2012).
[27] *Id.* at 12–13.
[28] *Library Publishing Coalition (LPC): A Proposal*, LIBRARY PUBLISHING COALITION, 4 (Aug. 14, 2012) http://www.educopia.org/sites/educopia.org/files/LPC-Proposal-08142012_0.pdf.
[29] *Id.* at 7.

AAP member publishers, for their part, welcome the prospect of new entrants, including libraries, as publishers in all sectors, provided these new entrants are bound by the same rules of copyright that apply to "traditional" publishers. This reasonable expectation should not stifle any legitimate library-publishing endeavors as publishing is a highly-competitive market that supports a growing number of diverse business models that AAP believes support the public good by facilitating the broad dissemination of literary and scholarly works.[30] This open and competitive industry will cease to offer a level playing field if libraries or other institutions are able to take advantage of specific privileges under limitations and exceptions to the exclusive rights of copyright that are not only unavailable to their competitors but could, in some circumstances, potentially allow library publishers to make use of the copyrighted content of "traditional" publishers without their permission.

Recognizing the evolving states of the beneficiary institutions of Section 108 in response to the opportunities presented by digital technologies is a responsibility that Congress must accept if it is to be able to balance stakeholder interests in any legislative "updating" of Section 108 as it carefully endeavored to do in 1976. To that end, it is important for Congress to examine how libraries and archives have changed in the past forty years and factor that assessment, along with an understanding of the future plans of such institutions, into its consideration of any new Section 108 legislative initiative that would expand their privileges under copyright law.

III. Orphan Works

a. The Framework of the Shawn Bentley Orphan Works Act of 2008 is Still Sound

It is important for Congress to bear in mind that the orphan works problem and the potential benefits of addressing it legislatively extend well beyond libraries[31] (*e.g.* efficient incorporation of extended orphan film clips into documentaries, inclusion of photographs into biographies and textbooks, development of derivative works such as television series based upon

[30] *See generally The Rise of Innovative Business Models: Content Delivery Methods in the Digital Age*: *Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2013) (Statement of the AAP (discussing various publishing industry models) http://www.publishers.org/_attachments/docs/copyright_policy/aapnewbusinessmodelsphs112613.pdf.

[31] Based on previous study of the potential uses of orphan works to benefit the public, AAP, the Copyright Office and past Congresses have supported orphan works legislation that permits responsible use of *all* types of works by *all* types of users. AAP sees no policy reason to limit use of orphan works to libraries under a fair use rationale where copyright owners are asked to "trust librarians to exercise their professional judgment and expertise to determine whether the copyright owners of [non-commercial] materials are likely to be unlocatable." *Orphan Works and Mass Digitization: Notice of Inquiry*, 77 Fed. Reg. 64,555 (Oct. 22, 2012) (Comments of the Library Copyright Alliance at 4).

stories protected by unknown rights holders).[32] With our members' considerable experience in seeking permissions for the embedded use of discrete copyrighted works as parts of works of history and biography, textbooks and anthologies, and virtually all other genres of literary works that they publish, they have a deep understanding of the problems that can arise when a copyright owner cannot be identified and located for purposes of obtaining necessary permissions and our members support finding an efficient, fair, and balanced solution to the orphan works problem. AAP encourages Congress to enact orphan works legislation that facilitates responsible use of orphan works in the pursuit of sharing the full potential of these works with the public in the various ways illustrated above.

Congress and the Copyright Office have attempted on several occasions to address the issue of orphan works. At the request of Congress, the Copyright Office conducted a comprehensive study of the issue in 2005, which resulted in the publication of its 2006 "Report on Orphan Works" (the "2006 Report"). Following the release of the 2006 Report, both the House and the Senate worked extensively with the Copyright Office and a wide variety of stakeholders (including publishers, authors, libraries, academics, photographers and film makers, among others) to draft and enact legislation in the 109th and 110th Congresses, a process that ultimately achieved Senate passage of the *Shawn Bentley Orphan Works Act of 2008* (the "2008 Act").[33]

Publishers recognize that there have been changes in the legal and technological landscapes that are tangentially related to the orphan works problem in the years since the Senate acted in 2008, but they would observe that these changes have not resulted in anything approaching a clear, uniform, nationwide legal policy for responsibly and efficiently using orphan works. As was made clear through the various examples recounted by the witnesses at the recent IP Subcommittee hearing, the defining characteristic of the orphan works problem remains the same, namely, there are potential users of in-copyright works that are forgoing making uses which would require permission of the copyright owner because the "owner of [the] copyrighted work cannot be identified and located."[34] To broadly enable efficient use of such works while respecting the rights of copyright owners, AAP continues to support orphan works legislation, "relevant where [permission is necessary and] all other exemptions [including fair use] have failed,"[35] that helps "to make it more likely that a user can find the relevant owner in

[32] *Preservation and Reuse of Copyrighted Works*: *Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) (Testimony of Michael Donaldson of behalf of Film Independent and the International Documentary Association).
[33] *See Shawn Bentley Orphan Works Act of 2008*, S. 2913, 110th Cong. 17 U.S.C. § 514 (2008) (passing in the Senate on Sept. 26, 2008).
[34] *See generally Preservation and Reuse of Copyrighted Works*: *Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) (Testimony of Jan Constantine, Michael Donaldson, Gregory Lukow, and Richard Rudick); *see also* U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS (2006) http://www.copyright.gov/orphan/orphan-report-full.pdf ("ORPHAN WORKS REPORT").
[35] ORPHAN WORKS REPORT at 95.

the first instance, and negotiate a voluntary agreement over permission and payment…for the intended use of the work."[36]

AAP believes that the basic tenets and structure of the 2008 Act should comprise the framework of any proposed new orphan works legislation. Conceptually, orphan works legislation should: (1) require the fewest possible changes to current U.S. copyright law; (2) have no impact on U.S. obligations under international copyright agreements; and (3) entail the least possible bureaucratic impact on governmental entities and on owners and users of copyrighted works. With constantly improving prospects for search capabilities, registries, and identification technologies, AAP believes that new legislation based on the 2008 Act can achieve these objectives, especially if the key provisions highlighted below are part of the framework of new legislation:

Key Provisions of the 2008 Act

- A common standard applied to all types of copyrighted works, whether published or unpublished, regardless of their age or national origin.[37]
- Use of orphan works without discrimination regarding the type of use or the status of the user (e.g., for-profit or not-for-profit) after the would-be user has made a reasonable, but unsuccessful, search to identify and locate the copyright owner for permission.
- Case-by-case good faith diligent search requirements for occasional uses of orphan works requiring personal documentation of the search.
- No requirement that the user of an orphan work file a search report or a notice of intent-to-use the orphan work.
- Robust limitations on infringement liability:
    - using "reasonable compensation" as the appropriate monetary remedy that would remain available to rights holders that wished to bring a claim against an infringer for using a work after conducting a proper diligent search;[38] and
    - ensuring that there are sufficient limitations on injunctive relief so that any remaining availability of such relief does not undermine the limitations on monetary damages or, for that matter, the incentives to use an "orphan work" by conducting a reasonably diligent, good-faith search for the copyright owner.
- Clear language explaining that legislation addressing occasional uses of orphan works "does not affect any right, or any limitation or defense to copyright infringement, including fair use."[39]
- A provision to appropriately address limitations on copyright owner remedies in the case of users that, acting in an official capacity, assert that they are protected under the Eleventh

[36] *Id.* at 93.
[37] *Id.* at 95.
[38] S. 2913, 110th Cong. § 2(c)(1)(A) (2008).
[39] *Id.* at § 2(d) (stating the "Preservation of Other Rights, Limitations, and Defenses").

Amendment "sovereign immunity" doctrine from being sued in federal courts for monetary damages on a claim of infringement.

Despite the passage of time and some evolving case law, it seems clear from the responses to the Copyright Office's renewed inquiries about this topic since 2012 that many entities, in addition to AAP, see orphan works legislation as essential for facilitating the use of copyrighted works where no copyright owner can be identified or located to give the user necessary permission.[40] Furthermore, many of those advocating for orphan works legislation share AAP's view that the "reasonably diligent, good-faith search" and "limitations on remedies" framework of the 2008 Act is the most effective and appropriate means of encouraging occasional uses of orphan works by a broad array of prospective users, particularly those who do not have a litigation budget to pursue the "use-first-claim-authorization-later" approach inherent in reliance on fair use.[41]

b. Weaknesses of Other Proposals

1. Fair Use

Similar to the fate of the Section 108 Report recommendations, some library communities that had supported the need for legislation to address the orphan works problem now propose that fair use suffices to allow for occasional uses of such works as well as their mass digitization. These stakeholders argue that two district court decisions, *Authors Guild v. HathiTrust*[42] (authorizing digitization to facilitate non-consumptive, *i.e.*, non-display uses of copyrighted works and the making of an accessible copy for a visually impaired individual) and *Authors Guild v. Google* (authorizing non-consumptive uses),[43] have changed the legal landscape as to orphan works such that legislation to limit the risks involved in using these works is no longer necessary.[44] However, in its official announcement of public roundtables to discuss orphan works and mass digitization, the Copyright Office expressly noted that the district court in *HathiTrust* "*did not consider the copyright claims relating to the HathiTrust Orphan Works Project*, finding that the issue was not ripe for adjudication because the defendants had

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[40] *See generally* 77 Fed. Reg. 64,555 (Comments of the American Bar Association Section of Intellectual Property Law; American Intellectual Property Law Association ("AIPLA"); Authors Guild; Copyright Alliance; Public Knowledge/Electronic Frontier Foundation (stating that "we believe that a limitation on remedies conditioned on a reasonably diligent search can serve as a useful means of lowering barriers to the use of orphan works"); and the Library of Congress).

[41] *See generally* 77 Fed. Reg. 64,555 (Comments of the American Association of Law Libraries; Copyright Alliance; Copyright Clearance Center; Future Music Coalition; International Documentary Association; Recording Industry Association of America, and Software Information Industry Association).

[42] 902 F.Supp. 2d 455 (S.D.N.Y 2012).

[43] No. 05 Civ. 8136 (DC), 2013 WL 6017130, (S.D.N.Y. Nov. 14, 2013).

[44] 77 Fed.Reg. 64,555 (Comments of LCA at 1, 2). Of note, the LCA also stated that "other communities [*i.e.*, communities other those within LCA membership] may not feel comfortable relying on fair use and may find merit in an approach based on limiting remedies if the user performed a reasonably diligent search for the copyright owner prior to the use." *Id.* at 7.

suspended the project."[45] Similarly, the Copyright Office noted that the district court in *Google* "neither indicated how broadly [its] opinion could be used to justify other types of mass digitization projects *nor did it explicitly address the issue of orphan works*."[46]

Notwithstanding the lack of application of these cases to orphan works, recent statements by the Library Copyright Alliance ("LCA") and others of a similar mind seek to propagate the idea that legislative changes are no longer necessary to permit the use of orphan works by libraries because, as a result of a handful of recent judicial opinions, "fair use is less uncertain."[47] However, as noted above, the orphan works issue and the potential benefits of addressing the issue extend well beyond non-consumptive uses or library creation of accessible format copies for the visually impaired.[48] For example, the hearing testimony of Michael Donaldson, representing Film Independent and the International Documentary Association, made clear that almost all documentary film makers are forced to limit use of important footage because there is no *ex ante* procedure for limiting liability for use of orphan works.[49] Moreover, comments on behalf of museums and other libraries also made it clear that uses of copyrighted works are still being discouraged because of the legal uncertainties presented when a copyright owner cannot be located and the use may exceed those permitted under applicable exceptions or limitations.[50]

Even if the *Google* and *HathiTrust* decisions had addressed the orphan works issue, expansive applications of "fair use" are not a sufficient solution to the orphan works problem. One basic reason is that orphan works, as generally characterized by the Copyright Office[51] and others, are inherently understood as works that require permission for an intended use but for which such permission cannot be obtained due to the inability to locate or identify the copyright

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[45] *Orphan Works and Mass Digitization: Request for Additional Comments and Announcement of Public Roundtables*, 79 Fed. Reg. 7706, 7708 (Feb. 10, 2014).
[46] *Id.* at 7707.
[47] *Preservation and Reuse of Copyrighted Works*: *Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) (Testimony of James G. Neal at 1, 11) (admitting that "over the past eight years, courts have issued a series of *expansive fair use decisions."* Neal then argues that this expansion has "clarified its [Section 107's] scope"—a position with which AAP does not agree.). (emphasis added).
[48] *See* U.S. COPYRIGHT OFFICE, Public Roundtable, *Orphan Works and Mass Digitization* (Mar. 10-11, 2014) (public record forthcoming Apr. 2014).
[49] *Preservation and Reuse of Copyrighted Works*: *Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) (Testimony of Michael Donaldson of behalf of Film Independent and the International Documentary Association).
[50] *See e.g.*, 77 Fed.Reg. 64,555 (Comments of Rutgers University Libraries and Reply Comments of J. Paul Getty Trust (including endorsement by the Association of Art Museum Directors); and the College Art Association). The Library of Congress also provided a number of reasons why orphan works legislation is still valuable to its endeavors to more broadly benefit the public. *Preservation and Reuse of Copyrighted Works*: *Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) (Testimony of Gregory Lukow); *see also* 77 Fed.Reg. 64,555 (Comment of the Library of Congress at 2-4 (explaining that a few examples of successful applications of fair use to orphan works projects do not "obviate the need for a [legislative] solution.")).
[51] "Orphan works" is the term "used to describe the situation in which the owner of a copyrighted work cannot be identified and located by someone who wishes to make use of the work *in a manner that requires permission of the copyright owner.* ORPHAN WORKS REPORT at 1.

owner who could grant such permission. Undoubtedly, the traditional four-factor fair use defense can still be raised by a user showing a good faith belief that a particular work was an orphan, the ultimate success of each such defense to be determined on a case-by-case basis.[52] However, the fact that a work may be an "orphan" does not make use of that work "fair" *per se*. Furthermore, fair use, even as expansively interpreted under the *Google* and *HathiTrust* decisions, does not enable creators to provide the public with the broadest possible array of culturally-enriching uses of orphan works (*e.g.* documentaries, derivative works, or other consumptive uses). Legislation, however, makes these broader uses possible while balancing the rights of copyright owners and users in a comprehensive manner that cannot be done through individual court decisions. AAP continues to believe that any new legislation, whether just addressing occasional uses or also addressing mass digitization of orphan works, should clearly state that it does not affect the fair use defense, but AAP also rejects the idea that fair use, absent further legislative guidance, can serve as the sole basis for addressing the use of orphan works.

In sum, relying on courts to set rules of the road for permissible uses of orphan works under fair use would inevitably produce a patchwork of conflicting determinations, rather than a uniform and consistent policy for using such works. Thus, AAP continues to support the conclusion, endorsed previously by the Copyright Office and currently by many countries, that legislation is the appropriate method to effectively, efficiently, and fairly address the orphan works issue.[53]

[52] Potentially, the "orphan status," if based upon a reasonably diligent, good-faith search, would tip the fourth factor, market harm, in favor of a finding of fair use, if the copyright owner contesting the use had no actual or likely potential market for the work at the time the alleged infringer used the "orphan" work. However, this still begs the question whether what constitutes such a search should be determined by Congress in uniform and consistently-applicable statutory terms that balance multiple stakeholder interests as a matter national policy or should be decided by individual federal courts without the benefit of specific guidance on applicable standards and procedures derived from and informed by the legislative process.

[53] Orphan works issues are also being considered by important U.S. trading partners, and are the subject of a recent European Union Directive (Directive 2012/28/EU) which limits copyright infringement liability for publicly accessible cultural heritage organizations that wish to digitize and make available (online and on demand) certain copyrighted works after conducting a diligent search. While the limitation of remedies in exchange for a diligent search resembles the proposed 2008 Act approach in the U.S., the EU Directive also differs in some significant respects by excluding certain types of copyrighted works (*e.g.*, standalone photographs and illustrations) and by limiting its application to non-commercial use by cultural heritage institutions. The UK has passed legislation to implement the EU Directive as an exception to its copyright law and has also "passed primary legislation to introduce a domestic scheme for licensing" *commercial* and non-commercial uses of *any* type of orphan work, provided the applicant conducts a satisfactory diligent search for the rights holder and pays the appropriate fee. *See* UK INTELLECTUAL PROPERTY OFFICE, COPYRIGHT WORKS: SEEKING THE LOST: CONSULTATION ON IMPLEMENTING A DOMESTIC ORPHAN WORKS LICENSING SCHEME AND THE EU DIRECTIVE ON CERTAIN PERMITTED USES OF ORPHAN WORKS (2014) http://www.ipo.gov.uk/consult-2014-lost.pdf. These examples show that requiring a diligent search before use of an alleged orphan work is the growing international norm.

2. Licensing

In its testimony before the IP Subcommittee and its Comments to the Copyright Office, the Authors Guild has proposed a collective licensing structure to solve the orphan works problem stating that "diligent searches are not the answer."[54] This new position may stem from the fact that Authors Guild members were able to identify, "with simple online searches," the authors of several works alleged to be orphans under the "diligent" search criteria of the HathiTrust Orphan Works Program.[55] Although it had previously supported the 2008 Act, the Authors Guild now says that "the answer is to allow for [a] non-compulsory, [opt-out,] collective licensing system of a limited set of out-of-print book rights," such as "display rights," but not print or eBook rights.[56]

While AAP is open to discussing new approaches to addressing the orphan works problem, publishers (and many other stakeholders) believe that a collective licensing model requiring up-front payments to a third-party collecting society is not the most effective or efficient way to encourage use of orphan works while respecting the rights of copyright owners.[57] As pointed out by the Library of Congress, few owners come forward to contest uses of orphan works.[58] Thus, requiring up-front payments is likely to impose an unnecessary cost to using orphan works. Additionally, the Copyright Office noted in its 2006 Report that the advance payment requirement was a primary reason that the Canadian process for obtaining a license to use an orphan work was so little used.[59] Furthermore, although AAP believes compensating copyright owners for use of their works is a crucial principle of copyright, AAP does not believe that channeling payments through third parties is a better way to protect this right than providing reasonable compensation directly to orphan works owners once they come forward. Thus, AAP believes that the "reasonably diligent, good-faith search" and "limitation on remedies" framework of the 2008 Act will be more effective than a licensing scheme for encouraging fair and efficient occasional uses of orphan works.

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[54] 77 Fed. Reg. 64,555 (Comment of the Authors Guild at 1); *Preservation and Reuse of Copyrighted Works*: *Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) (Testimony of Jan Constantine at 19) ("Authors Guild Testimony").

[55] *See* Authors Guild Testimony at 14-15.

[56] *See id.* at 17-18.

[57] *See generally* 77 Fed. Reg. 64,555 (Comments of AIPLA; Internet Archive; Public Knowledge /Electronic Frontier Foundation; and LCA (highlighting additional drawbacks to creating a licensing scheme, such as the conflict of interest problems that would undermine the effectiveness of third party collecting societies, not to mention the costs of creating an entirely new infrastructure to effectuate an orphan works licensing model.)).

[58] *See e.g.* 77 Fed. Reg. 64,555 (Comments of the Library of Congress at 5-6 (explaining that "in the more than ten years that the Coolidge collection has been available online, the Library has not received a single complaint.")).

[59] *See* ORPHAN WORKS REPORT at 113-114, Appendix A (describing why the Canadian model requiring an escrow payment is "highly inefficient" and noting the lack of use of the Canadian model in its Federal Register notice included at Appendix A of the Report (*Orphan Works: Notice of Inquiry*, 70 Fed. Reg. 3739, 3741 (Jan. 26, 2005))).

IV. Mass Digitization

There is a growing demand for easy, *online* access to and use of copyrighted content. To meet this growing demand for online access to new and old copyrighted material, both commercial and non-commercial entities have started digitizing works and are showing interest in digitizing additional vast collections of hard copy, printed books ranging from those that are no longer commercially available to "orphan works" to books that are currently commercially available.[60] These true mass digitization projects, such as those conducted by major commercial interests like Google or non-profit endeavors like the HathiTrust Digital Library Partnership, are high-volume efforts that require advance planning and substantial upfront investment, and while they *may* include works for which the identity or location of the copyright owner is unavailable, they also implicate many other issues, especially the copyright owners' exclusive right of reproduction.

a. Mass Digitization Generally

Recognizing this growing demand for instant, online access to all published material, publishers have been investing in modern licensing infrastructures that connect various databases around the globe to facilitate easy licensing of all-kinds—from one-off licenses to mass digitization.[61] Congress should give this market time to provide *voluntary direct licensing* options to facilitate mass digitization of copyrighted works, the groundwork for which is already in development.

However, if Congress determines that the Copyright Act should be amended to facilitate certain types of mass digitization projects, any such proposed amendments should be carefully crafted and limited in their application. Publishers are prepared to work with Congress and other stakeholders to ensure that such measures, if adopted, are designed to promote investment in efficient means for commercial and non-commercial users to engage in mass digitization of copyrighted works while respecting the copyright owner's legitimate interests in the exploitation of their works.[62] Furthermore, as noted above, the publishing industry supports a number of changes to facilitate new uses of copyrighted works in digital formats by libraries, archives and other cultural institutions.[63] However, the innovative potential of mass digitization projects will

[60] With respect to efforts to digitize commercially available books and journals, universities and colleges across the nation, are undertaking less sizeable but still widespread and systematic programs that digitize chapters or articles from books and journals for use by educators and students as so-called "electronic reserves" materials which constitute digital successors to paper course packs. These programs present legal issues that are similar to those in mass digitization projects but are, in many important respects, different because they involve levels of work selectivity and particularized intended use that are not present in true mass digitization projects.

[61] *See, e.g.*, Copyright Clearance Center's Get-It-Now service (http://www.digitalbookworld.com/2013/copyright-clearance-center-enhances-academic-library-offering); Copyright Hub (http://www.copyrighthub.co.uk/about).

[62] For example, those means should include the development of voluntary incentives and technologies to populate, link, and search databases of copyright ownership to facilitate voluntary (direct and collective) licensing.

[63] *See supra* Section II at 2-10 (detailing AAP's views with regard to updating Section 108 of the Copyright Act).

not be realized if limited solely to non-profit/non-commercial uses. Therefore, any potential legislative provision(s) addressing mass digitization, for orphan works or otherwise, should be in a separate section of the Copyright Act that provides for both commercial and non-commercial uses.

b. Mass Digitization of Orphan Works

Although AAP does not believe it necessary for Congress to intervene in the developing market for broader mass digitization projects, there may be a role for Congress in the mass digitization of orphan works. As was noted at the hearing, previous legislative proposals did not address mass digitization of orphan works.[64] However, a number of projects, including the Digital Public Library of America, Google Books, and HathiTrust, to name the most prominent, have raised this issue. Thus, AAP believes it appropriate to discuss the possibility of addressing the mass digitization of orphan works as part of comprehensive orphan works legislation.

With respect to digitizing orphan works, given the advancements in search technology (*e.g.*, Google, Shazam[65]), the wide availability of online data, and constantly improving registries (*e.g.*, PLUS Coalition, ARROW, Copyright Office Catalogue), it is not implausible to believe that a search protocol could be designed that would be as effective as an individual user's reasonably diligent search for the holder of rights in a particular work. Thus, AAP supports continued discussion of whether application of a single, principles-based, reasonably diligent, good-faith search framework for occasional uses of orphan works could also apply to mass digitization projects where the intent or effect is to make the orphan work available to users for discrete (as opposed to non-consumptive) purposes. However, should Congress deem it necessary to also address broader uses of mass digitization, such efforts should occur separately from orphan works legislation and should not undercut the importance of the reasonably diligent, good-faith search framework for digitization or other uses of orphan works.

c. Fair Use

Publishers acknowledge that a district court has "ruled that the digitization project undertaken by the HathiTrust Digital Library (HathiTrust) and its five university partners was

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[64] *See generally Preservation and Reuse of Copyrighted Works*: *Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) http://judiciary.house.gov/index.cfm/2014/4/hearing-preservation-and-reuse-of-copyrighted-works.

[65] Shazam is an app, available on all mobile platforms, that helps more than "300 million people, in more than 200 countries and 33 languages…identify music anywhere: from the radio, TV, film or in a store, bar or club" and "enable[s] people to explore, buy and share" the music they've "discovered" through Shazam. According to its website, "Shazam identifies songs by "listening" to the music then matching what it hears with a vast database collection of songs [sourced from over 100 countries]. The app can identify tracks that have no lyrics at all or tell the difference between two songs performed by different artists singing the same lyrics." *What is Shazam?* SHAZAM (Apr. 19, 2013) https://support.shazam.com/entries/23616781-What-is-Shazam-How-do-I-use-Shazam-.

largely transformative and protected by fair use"[66] and that another district court found "the Google Books mass digitization project to be fair use."[67] Publishers also recognize that many of the goals of library, university, and commercial entity mass digitization projects are laudable.

The ends, however, should not justify the means if such means turn copyright on its head. Authors and publishers should not lose protection for their works simply due to the ease with which modern technology enables individuals to engage in copyright infringement on a massive scale—digitization, *i.e*., converting a printed copy of a work to a digital copy, is reproduction, a fundamental exclusive right of copyright owners. Thus, while publishers agree that fair use may well apply in specific one-off instances of digitizing books, fair use was neither intended nor designed to authorize the systematic exercise of the reproduction right inherent in the mass digitization of diverse copyrighted works.

As a general matter, fair use is an assessment to be made on a case-by-case basis and therefore provides little actual certainty for unauthorized uses of large volumes of copyrighted works. Thus, only those willing to act speculatively and risk significant liability along with the waste of time and resources are currently able to undertake mass digitization projects. Moreover, relying upon fair use cannot establish a comprehensive, uniform, national policy for mass digitization that balances all of the various interests of users with the legitimate rights of copyright owners. Achieving such balance, comprehensiveness, and nation-wide predictability is only possible for Congress, if it should determine that the issues surrounding the mass digitization (reproduction) of copyrighted works in their entirety merits amending the Copyright Act. As noted above, AAP encourages Congress to let the voluntary licensing market for mass digitization projects mature. However, AAP believes, on the discrete issue of mass digitization of orphan works, that a properly-crafted orphan works statute can, if followed, provide substantially greater certainty in undertaking such projects and could benefit the public by bringing many of these valuable works into the public eye for the first time.

V. Conclusion

AAP appreciates this opportunity to give the IP Subcommittee the publishing industry's perspective on Section 108, orphan works and mass digitization. As the Copyright Office has said before, "policy initiatives that redefine the relationship between copyright law and new technology are in the first instance the proper domain of Congress, not the courts."[68] In that light, should Congress deem it appropriate to amend the Copyright Act with regard to Section

[66] 79 Fed. Reg. 7708 (citing *HathiTrust*, 902 F.Supp.2d 445 (S.D.N.Y. 2012)).
[67] *Id.* at 7707 (citing *Authors Guild, Inc. v. Google, Inc*., Case No. 05 Civ. 8136 (DC), 2013 WL 6017130, (S.D.N.Y. Nov. 14, 2013).
[68] U.S. COPYRIGHT OFFICE, LEGAL ISSUES IN MASS DIGITIZATION: A PRELIMINARY ANALYSIS AND DISCUSSION DOCUMENT 2 (2011) http://www.copyright.gov/docs/massdigitization/USCOMassDigitization_October2011.pdf.

108, orphan works and mass digitization, AAP believes that all stakeholders could benefit from a good faith effort to update Section 108 and that orphan works legislation (for occasional uses and mass digitization) should remain faithful to the 2008 Act's reasonably diligent, good-faith search framework. To the extent that any efforts to update Section 108 or address orphan works or mass digitization would need to be responsive to legal and market developments, AAP encourages Congress to author high-level, principles-based legislation and authorize the Copyright Office to provide nuance for implementing any new laws through rulemaking proceedings. We look forward to continued engagement with the IP Subcommittee as it undertakes future hearings on other copyright issues.

Sincerely,

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