

1-18-2018

Permission Impossible: An Exception-Based Legislative Solution for Digitizing Copyright-Protected Works

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Connor J. Hansen, *Permission Impossible: An Exception-Based Legislative Solution for Digitizing Copyright-Protected Works*, 17 Chi. -Kent J. Intell. Prop. 74 (2018).

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PERMISSION IMPOSSIBLE:
AN EXCEPTION-BASED LEGISLATIVE SOLUTION FOR
DIGITIZING COPYRIGHT-PROTECTED WORKS

CONNOR J. HANSEN*

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* J.D. Candidate, Class of 2018, The George Washington University Law School. Thank you to Professor Ralph Oman and Professor Gerald Mossinghoff—for whom an earlier version of this note was prepared as part of a seminar class—for their valuable feedback during the preparation of this note and for inspiring the topic in the first place. Thank you to the Chicago-Kent Journal of Intellectual Property for the publication opportunity.

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I. INTRODUCTION

Copyright law encourages the creation and dissemination of “original works of authorship”¹ by granting authors the exclusive rights of reproduction, distribution, public performance, and public display of their works.² Giving authors exclusive rights over their works gives them “a financial incentive to create informative, intellectually enriching works” in pursuit of the ultimate goal of copyright: “to expand public knowledge and understanding.”³ One generally must get permission to use an author’s work,⁴ but parties wishing to establish large digital collections of protected works are faced with the daunting task of obtaining permission for the use of every work that would be included in the collection.⁵ The sheer volume of works to be included and the number of individual or collective licensing agreements that need to be established pose both a logistical nightmare and a commitment of resources that often render obtaining permission impossible.⁶ These barriers to obtaining permission have come to the forefront of copyright law as the legislative and judicial branches have dealt with the question of how to protect the exclusive rights granted to authors in the face of mass collections of digitized works.⁷

1. 17 U.S.C. § 102(a) (2017).

2. *See id.* § 106.

3. *Authors Guild v. Google, Inc.*, 804 F.3d 202, 212 (2d Cir. 2015) [hereinafter “*Authors Guild 2d*”]. Of course, not all works are intellectually enriching, perhaps some even detract from the public knowledge, but copyright does not discriminate. *See Bleistein v. Donaldson Lithography Co.*, 188 U.S. 239, 251 (1903) (“It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [works], outside of the narrowest and most obvious limits.”). Any work that is “fixed in any tangible medium of expression” from which it can be perceived or communicated is granted copyright protection upon fixation. 17 U.S.C. § 102.

4. *See* 17 U.S.C. § 106 (noting that only the copyright owner has the right “to do or authorize” any of the exclusive rights, subject to some limitations); *see also id.* § 501 (“Anyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright or right of the author, as the case may be.”).

5. KEVIN AMER & CHRIS WESTON, U.S. COPYRIGHT OFFICE, ORPHAN WORKS AND MASS DIGITALIZATION 1 (2015) (calling it practically impossible to obtain permission on a work-by-work basis).

6. *Id.* at 5 (noting that the cost of obtaining permission “from every rightsholder individually often will exceed the value of the use to the user”).

7. *See, e.g., Authors Guild*, 804 F.3d at 202, *cert. denied*, 136 S. Ct. 1658 (2016).

There are “enormous cultural, intellectual, and educational benefits” associated with greater access to expressive works through digital collections.⁸ Promoting digitization efforts would allow libraries and other entities to preserve works and enhance access to them for non-consumptive research purposes.⁹ Universities could devote less real estate to physical libraries and more easily distribute works to increasingly technology-dependent students while avoiding the expense of maintaining physical collections.¹⁰ Millions of out-of-print books would become digitally available for all readers, which is especially beneficial to print-disabled persons and for readers in remote locations without access to leading research libraries.¹¹ Authors and publishers are likely to benefit from the increased access to their works, as end-users will be directed to websites where they can purchase copies of the books, potentially creating a new market for and reviving previously out-of-print works.¹² Most importantly, digitization of works will preserve the collective knowledge of mankind as expressed in copyright protected works and allow greater access for individuals to tap into that collective knowledge.

Adaptation of copyright law in response to new technology is a matter best suited for congressional intervention and will likely be required to facilitate mass digitization of copyright protected works.¹³ Congress has repeatedly amended copyright statutes in attempt to strike a balance between copyright owners’ interests in controlling and exploiting their works and society’s interests in the free flow of information, ideas, and expressions.¹⁴ Digitization projects promote the expansion of the collective knowledge but face several copyright barriers, to which a solution is “desperately needed.”¹⁵

This note outlines a new exception to the exclusive rights of reproduction and display to allow parties to digitize collections of protected works. This exception applies if the digitizing parties can show that the circumstances of the project render obtaining permission impossible, and if they

8. Matthew Sag, *The Google Books Settlement and the Fair Use Counterfactual*, 55 N.Y.L. SCH. L. REV. 19, 73 (2010).

9. Pamela Samuelson, *The Google Books Settlement as Copyright Reform*, 2011 WIS. L. REV. 479, 561 (2011).

10. *Id.* at 494.

11. Sag, *supra* note 8, at 73.

12. *Id.* (“[Google Books] promises new ways to profit from out-of-print works, as well as the possibility that increased access will draw in new readers and open up niche markets.”).

13. See, e.g., *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666, 676–77 (S.D.N.Y. 2011). It is well established that it is up to Congress “to decide how best to pursue the Copyright Clause’s objectives.” *Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003).

14. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429–31 (1984) (explaining the difficulty in balancing competing societal and personal interests in works and highlighting specific amendments to the Copyright Act).

15. AMER & WESTON, *supra* note 5, at 105.

pay reasonable royalties for the use of the works included in the collection. The exception is inspired by and adopts provisions from several existing and previously proposed solutions which are discussed first.

II. POTENTIAL SOLUTIONS FOR DIGITIZATION: EXISTING POSSIBILITIES & PRIOR PROPOSALS

A. *Existing Possibilities: Fair Use & Exceptions to the Exclusive Rights*

Several limitations ensure that copyright protection does not hinder the ability of the public to tap into the collective knowledge and generate creative works. Only original elements are protected by copyright in the first place, which ensures that underlying facts and ideas remain free to the public, and that no author has the power to suppress or control information of societal importance, such as historical information, data, and mathematical formulas.¹⁶ Phrases, situations, storylines, and other expressive elements common to a class of work are also not protectable, which enables all potential authors working in that class to utilize them.¹⁷ There are also categories of works, such as statutes or judicial opinions, that are not protected because public policy dictates that they be freely available to the public.¹⁸

Copyright owners also are not given absolute exclusionary control over the protected portions of their works because this “would tend . . . to limit, rather than expand, public knowledge.”¹⁹ The public may use protected elements of copyrighted works if the use is so minimal that it does not expropriate the exclusive rights from the copyright owner.²⁰ In general, this means the public may build upon copyright protected works when generating their own works, unless it is clear to a jury of reasonable persons that the second work copied a substantial portion of the original work.²¹ In the context of mass digital collections, digitizing parties typically reproduce entire works, so they will not be able to convince a jury that the copying is insubstantial.

16. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 340–41 (1991). The expression of facts or ideas can be protected if the expression is original and there are multiple ways of expressing the facts or ideas, otherwise the expression merges with the underlying facts or ideas and is not protected. See, e.g., *CCC Info. Servs. Inc. v. Maclean Hunter Mkt. Reports, Inc.*, 44 F.3d 61, 70–72 (2d Cir. 1994).

17. See, e.g., *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930).

18. See, e.g., *Wheaton v. Peters*, 33 U.S. 591, 593 (1834) (“No reporter of the decisions of the supreme court has, nor can he have, any copyright in the written opinions delivered by the court: and the judges of the court cannot confer on any reporter any such right.”).

19. *Authors Guild v. Google, Inc.*, 804 F.3d 202, 212 (“[G]iving authors absolute control over all copying from their works would tend . . . to limit, rather than expand, public knowledge.”).

20. See, e.g., *Gottlieb Dev. LLC v. Paramount Pictures Corp.*, 590 F. Supp. 2d 625, 632 (S.D.N.Y. 2008).

21. See *id.*

However, they may be able to benefit from an existing limitation to the exclusive rights, namely the fair use doctrine, or an express exception to the exclusive rights.²²

1. The Fair Use Doctrine

One may use copyright protected works without permission “for purposes such as criticism, comment, news reporting, teaching . . . scholarship, [] research,”²³ or any other use that is determined to be a fair use.²⁴

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.²⁵

The factors present no bright-line rules, but rather they serve as guidelines, each of which the judicial branch has fleshed out over the years.²⁶ The first factor weighs in favor of a finding of fair use when the secondary work is non-commercial and serves a new or further function than the original, usually by transforming or adding something new to, rather than merely copying, the original.²⁷ That is to say transformative works that comment upon, criticize, parody, provide information about, or serve a different function than the original are likely to be considered fair use.²⁸ The second factor is likely to favor fair use when the original work is non-fiction or was published prior to the secondary use.²⁹ The third factor generally favors a finding of

22. See 17 U.S.C. §§ 107–22 (2012).

23. *Id.* § 107.

24. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (“The text [of section 107] employs the terms ‘including’ and ‘such as’ in the preamble paragraph to indicate the illustrative and not limitative function of the examples given.”) (citation omitted).

25. 17 U.S.C. § 107.

26. *Authors Guild v. Google, Inc.*, 804 F.3d 202, 213 (2d Cir. 2015).

27. *Campbell*, 510 U.S. at 578–79.

28. *Authors Guild*, 804 F.3d at 214–16 (describing the application of factor one in past cases).

29. Bryan Oberle, Note, *The Online Archive: Fair Use and Digital Reproductions of Copyrighted Works*, 25 S. CAL. INTERDIS. L.J. 753, 756 (2016).

fair use when the secondary work uses qualitatively insignificant portions of or quantitatively insignificant amounts of a work.³⁰ The final factor favors a finding of fair use when the secondary work cannot serve as a replacement for the original and has little or no effect on the market for the original.³¹

The fair use analysis is fact intensive. Moreover, the factors are considered on a case-by-case basis and, while no one factor is dispositive, the factors are often intertwined.³² For example, factor one calls for a transformative or non-commercial use, in part, because they do not serve as a replacement for the original use and therefore it will not shrink the market for the original, which is the primary consideration of factor four.³³ Likewise, the more significant the amount and quality of the work is copied, (the third factor) the less likely it is that the second work is transformative (the first factor) and the more likely it is that market demand for the original is depleted (the fourth factor). The interrelated nature of the factors and the case-by-case application of fair use renders the doctrine a powerful but unpredictable defense for unauthorized uses.

Recently, the Second Circuit found that the searchable collection behind Google Books constitutes a fair use of the millions of books copied into a digital format to establish the collection.³⁴ The Court noted that the searchable nature of Google Books and the snippet view—which displays just enough of a book to give an end-user the context needed to determine whether a book is relevant to his or her search query—were “highly transformative.”³⁵ The court stressed that Google Books, in its current form, provides information about and access to books without serving as a meaningful replacement for the books, thereby imposing limited market harm for the copyright protected books.³⁶

The outcome of the Google Books case was far from predictable because prior cases dealing with digitization of protected works reached different outcomes. In *Kelly v. Arriba Soft Corp.*, the Ninth Circuit ruled that a

30. *Id.* at 756–57. The factor is more ambiguous when the secondary use copies a large amount of substantively insignificant portions of a work or a minimal amount of substantively significant portions of the work. See *Harper & Row, Publrs. v. Nation Enters.*, 471 U.S. 539, 565 (1985) (finding that copying of an insignificant amount of President Ford’s memoir was not fair use because the portion copied was the most significant and most interesting portion, or the “heart” of the work).

31. *Harper & Row*, 471 U.S. at 568. When considering the market, one must consider all potential markets, including those for derivative works, and must consider the market effects if the allegedly infringing practice or use became widespread. *Campbell*, 510 U.S. at 590–92.

32. *Campbell*, 510 U.S. at 577–78.

33. *Id.* at 591 (noting that when a work is transformative, it is less likely to serve as a “market substitution . . . and market harm may not be so readily inferred.”).

34. See *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015).

35. *Id.* at 217–18.

36. *Id.* at 220, 224–25.

search engine that copies images from open websites and displays thumbnails of the images in response to end-user queries is fair use.³⁷ A similar case involving thumbnail images of photos posted without the copyright owner's permission affirmed that searchable databases of thumbnail images are a fair use.³⁸ Both of the thumbnail cases relied heavily on the fact that the searchable database is transformative and increases access to the copyright protected work without supplanting the market for the original³⁹ and both suggest that Google Books is a fair use. Conversely, in *American Geophysical Union v. Texaco*, the Second Circuit ruled that photocopying research articles from technical journals was not a fair use, despite the educational purposes of the copying.⁴⁰ A database of sound recordings established to provide end-users an MP3 copy of music that they already owned in different formats was also found not to be a fair use due to the wholesale copying and storage of the music.⁴¹ The *Texaco* and MP3 cases seem to suggest that Google Books is not a fair use. In holding that the methodology of Google Books is a fair use, the Second Circuit supplied one more data point on the smorgasbord of fair use cases but does little to clearly define the law for future digitization projects. This is clear by the disclaimer that the fair use status of Google Books pertains to the search function and snippet view "as presently designed," which indicates that a digital database that displays slightly more than a snippet of a work or otherwise varies from the design may not benefit from a similar finding of fair use.⁴² The doctrine of fair use is far from stable and predictable and therefore should not be the sole means by which digitization efforts are pursued.⁴³

2. Exceptions to Exclusive Rights & Copyright Liability

Exceptions to the exclusive rights have developed over the years as new technologies and uses have questioned the scope of the limited monopoly granted by copyright law.⁴⁴ The current exceptions do not directly provide protection for a party wishing to establish a digital collection of works, but they might serve as models for an exception tailored to allow mass

37. *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 815 (9th Cir. 2002).

38. *See Perfect10 v. Google, Inc.*, 508 F.3d 1146, 1165–68 (9th Cir. 2007).

39. *Id.*; *see also Kelly*, 336 F.3d at 818–23; *Field v. Google, Inc.*, 412 F. Supp. 2d 1106 (D. Nev. 2006) (finding a web-crawler that searches and displays texts from websites is a fair use).

40. *Am. Geophysical Union v. Texaco*, 60 F.3d 913, 930–31 (2d Cir. 1994).

41. *UMG Recordings, Inc. v. MP3.com, Inc.*, 2000 U.S. Dist. LEXIS 13293, *10–13 (S.D.N.Y. 2000).

42. *See, e.g., Authors Guild v. Google, Inc.*, 804 F.3d at 202, 212–25 (2d Cir. 2015).

43. *AMER & WESTON, supra note 5*, at 76–77.

44. *See, e.g., Authors Guild*, 804 F.3d at 212–13.

digitization projects for which obtaining permission from authors is logistically impossible.

The Library and Archive Exception, for example, allows qualifying libraries or archives to make one to three copies of a work to replace damaged, deteriorating, lost, or stolen copies of works contained in their collections; to deposit works in another library or archive for research purposes; or to preserve and secure the work for future generations.⁴⁵ The exception would not extend to new digitization projects because the library or archive may only reproduce works they already own and only allows for creation of digital copies of works that are not already available in digital format.⁴⁶ A similar exception allows qualifying entities to reproduce and distribute works in specialized formats for use by sight impaired or otherwise disabled individuals,⁴⁷ but would not allow general reproduction for the creation of a digital collection.

The Nondramatic Musical Works Exception is an example of a compulsory license exception that allows complying parties to produce and distribute new versions of phonorecord⁴⁸ works that have already been publicly distributed by the copyright owner of the underlying musical work.⁴⁹ To obtain a compulsory license, a user must be reproducing and distributing the phonorecords for private use and can only reproduce the phonorecord in a manner that does not alter “the basic melody or fundamental character of the work.”⁵⁰ Parties must also serve notice, to the Copyright Office, or to identified copyright owners of each work, of their intention to obtain a compulsory license and to distribute copies of a new recording of the work.⁵¹ Copyright Royalty Judges—three full-time judges appointed by the Librarian of Congress—determine reasonable royalty rates for compulsory license based exceptions and authorize the distribution of royalties to copyright owners whose rights are implicated.⁵² The royalties are ideally calculated at an

45. 17 U.S.C. § 108 (a)–(c) (2012).

46. *Id.* (explaining that digital copies must also be confined to use within the premises of the library or archive).

47. *See id.* § 121.

48. A phonorecord includes a CD, cassette tape, or any other “material object in which sounds, other than those accompanying a motion picture or audiovisual work, are fixed by any method now known or later developed, and from which the sound can be perceived, reproduced, or otherwise communicated.” *Id.* § 101.

49. *See id.* § 115.

50. *Id.* § 115(a).

51. *Id.* § 115(b).

52. *Id.* § 801(b)(1), (b)(3) (describing the general function of Copyright Royalty Judges); *see also id.* § 115(c)(3)(C)–(E) (describing the Copyright Royalty Judges’ roles in determining reasonable royalty rates for nondramatic musical works compulsory licenses). Copyright owners can participate in proceedings in front of the Copyright Royalty Judges to help determine the royalty rates. *See id.* § 804(a), (b)(4).

amount that (1) maximizes the availability of the creative works for the public; (2) provides the copyright owner and the licensee fair economic returns under existing conditions; (3) reflects the relative roles of the copyright owner and the licensee with respect to creative contribution, technological contribution, capital investment, risk, cost, and contribution to the opening of new markets for the work; and (4) minimizes any disruptive impacts of the structure of the industry.⁵³ The copyright owners are then entitled to receive royalties for the reproduction and distribution of their works, but only if they register with the Copyright Office and only for copies made or distributed after their registration with the Copyright Office.⁵⁴ Existing compulsory license exceptions do not allow for development of digital collections, but provide a framework for the collection and distribution of royalties owed to a large number of copyright owners, which may be useful in digital collections.

Congress has also enacted safe harbors specifically for internet service providers (ISPs) who provide online services or network access to the public.⁵⁵ Under the safe-harbors, ISPs are not liable for copyright infringement caused by (1) the ISP automatically transmitting, routing or providing connections for material initiated at the direction of someone other than the ISP; (2) intermediate and temporary storage of material made available by a person other than the ISP; (3) storage of material provided by someone other than the ISP on a system or network operated by the ISP; or (4) the ISP referring or linking an end-user to an online location containing infringing material.⁵⁶ To qualify for one of the safe harbors, an ISP must adopt a policy to terminate repeat infringers from accessing the system or network and must accommodate standard technological measures designed to identify and protect copyright protected works.⁵⁷ If infringing activity is apparent to the ISP or if a copyright owner notifies the ISP of infringing activity, the ISP has to disable access to or remove any allegedly infringing material.⁵⁸ If the allegedly infringing material was provided by an end-user of a system or network, the ISP must notify the end-user of the removal and facilitate communication between the end-user and the copyright owner if there is a dispute as to the

53. *Id.* § 801(b)(1)(A)–(D).

54. *See id.* § 115 (c)(1) (“The owner is entitled to royalties for phonorecords made and distributed after being [identified in the Copyright Office records], but is not entitled to recover for any phonorecords previously made and distributed.”).

55. *Id.* § 512(k)(1)(B).

56. *See id.* § 512(a)–(d).

57. *Id.* § 512 (i).

58. *Id.* § 512 (g)(1).

infringing nature of the material.⁵⁹ The ISP safe-harbors provide guidance for managing digital collections and preventing infringement by end-users of digital collections.

B. Prior Legislative Proposals

The concerns surrounding digital collections have previously been addressed by many commentators, the Copyright Office, and Congress; even so, no bills addressing the issues have been enacted.⁶⁰ Prior Legislative proposals have generally fallen into three categories: limiting liability, extending collective licensing efforts, or creating exceptions to the exclusive rights.⁶¹

1. Limited Liability Approaches

Bills introduced in both the 109th Congress and the 110th Congress recommended amending the Copyright Act to limit the remedies available for certain unauthorized uses.⁶² The Shawn Bentley Orphan Works Act of 2008⁶³ came closest to being adopted, it would have limited remedies when four conditions are met: (1) the protected works are used in good faith; (2) the user has performed a “reasonably diligent search” for the copyright owners; (3) the user properly attributes to authors whenever possible; and (4) the user includes a copyright notice with any public distribution, display, or use of a protected work.⁶⁴ A reasonably diligent search was further defined to require a search of the Copyright Office records, of additional subscription-based databases, of other resources that are reasonable and appropriate under the circumstances, and in compliance with Recommended Practices to

59. *Id.* § 512 (g)(2) (requiring an ISP to notify the user that it has removed allegedly infringing material and to notify the copyright owner if the user submits a counter notification alleging the non-infringing nature of the use or activity).

60. *Id.*

61. Many commentators suggest that fair use and the existing exceptions are sufficient to cover orphan use or digitization efforts. *See supra* Part II.A.1 (discussing fair use and why it is inadequate for digitization projects).

62. *See, e.g.*, Shawn Bentley Orphan Works Act of 2008, S. 2913, 110th Cong. (2008); Orphan Works Act of 2008, H.R. 5889, 110th Cong. (2008); Orphan Works Act of 2006, H.R. 5439, 109th Cong. (2006); *see also* AMER & WESTON, *supra* note 5, at 11–13 (discussing the 2006 and 2008 Congressional proposals).

63. *See generally* 154 CONG. REC. S9867 (daily ed. Sept. 26, 2008) (reporting that the act unanimously passed the Senate). The Bill focuses on orphan works, those with no known author, but the proposal may be adapted for digitization projects because the same underlying issue, impossibility of obtaining author permission, plagues digitization projects and use of orphan works. U.S. COPYRIGHT OFF., REPORT ON ORPHAN WORKS (2006), <https://www.copyright.gov/orphan/orphan-report.pdf>.

64. *See* AMER & WESTON, *supra* note 5, at 12.

be set by the Register of Copyrights.⁶⁵ Complying users would only be subject to injunctions to prevent or restrain infringement;⁶⁶ however, users failing to make a reasonably diligent search for copyright owners as defined by the statute would be subject to full liability.⁶⁷

In the 2015 Report on Orphan Works and Mass Digitalization, the Copyright Office recommends a limited liability approach similar to the prior bills and the four conditions outlined above remain in the heart of the current proposal.⁶⁸ Additionally, the recommendation requires a user to file a description of the works used, a summary of the search for the authors, the sources of the works, any identifying data available to the user, and the name and description of the user.⁶⁹ Users that comply with the requirements of the proposal would be liable for reasonable monetary compensation rather than actual or statutory damages if the copyright owner of the work later comes forward.⁷⁰

The current recommendation also further defines a “reasonably diligent search” for copyright owners and proposes best practices for doing so.⁷¹ In short, in performing a search, a user must utilize (1) the Copyright Office’s online records; (2) reasonably available sources of copyright ownership and authorship; (3) technology tools and expert assistance when reasonable; and (4) appropriate databases.⁷² The requirements serve as guidelines and the required search would change depending on the facts and circumstances of a particular case.⁷³ The Copyright Office would also have the authority to generate Recommended Practices for locating authors for each category of work (e.g., different standards for literary works and pictorial works) and to modify the Recommendations based on feedback from interested stakeholders.⁷⁴

65. See S. 2913 sec. 2, § 514(b). Nonprofit educational institutions, museums, libraries, archives, or public broadcasting entities would have been exempt from the search requirements if their use was noncommercial and primarily educational, religious, or charitable in nature and they promptly ceased use of the work upon receiving notice of infringement. *Id.* § 514(c)(1)(B).

66. *Id.* § 514(c)(2)(B).

67. Unless the user added a significant amount of original content to the work, paid reasonable compensation for the use, and provided attribution to the owner of the work when requested, in which case he or she is not subject to an injunction. *Id.* § 514(c)(1).

68. AMER & WESTON, *supra* note 5, at 40, 50–72.

69. *Id.* at 60–61.

70. *Id.* at 63. The proposal also limits injunctive relief for derivatives based on supposed orphan works, but generally allows injunctive relief for the use of original orphan works. *Id.* at 67.

71. *Id.* at 56–60.

72. *Id.* at 57.

73. Notice that each of these requirements is qualified by phrases such as “when reasonable” or “appropriate.” *Id.* at 57–58.

74. *Id.* at 59.

2. Collective Licensing Approaches

Collective licensing approaches are comparable to the existing compulsory licensing exceptions described above⁷⁵ except users negotiate with private collective licensing organizations to obtain the right to use classes of protected works rather than adhering to terms set by statute and by the Copyright Royalty Judges. Collective licensing agreements are binding upon entire classes of copyright owners unless or until individual owners opt-out of the agreement.⁷⁶ Users generally pay a flat royalty fee to collective licensing organizations who then redistribute the funds to represented copyright owners or, if the copyright owner is unknown or unreachable, direct funds to organizations involved in protecting copyright interests and promoting development of new creative works.⁷⁷ For example, the Nordic countries have followed this approach for several decades to support socially beneficial undertakings such as libraries, archives, and museums, and to allow reproduction for educational or internal business purposes.⁷⁸

The Copyright Office currently recommends a collective licensing pilot program to evaluate the effectiveness of collective licensing in accommodating digitization projects in the United States.⁷⁹ The pilot program would allow collective licensing organizations to represent the rights of members and non-members of the organization when negotiating royalties for digitization projects involving literary works, pictorial or graphical works embedded in literary works, and photographs and would be limited to digitization projects with nonprofit, educational, and research purposes.⁸⁰ Collective licensing organizations would have to seek authorization from the Copyright Office by proving their representativeness in the relevant field, the consent of their members to representation, and their adherence to transparency, accountability, and governance standards.⁸¹

A central problem with the collective licensing approach is that authors may never be located or identified and the money collected for their benefit will never reach them.⁸² Collecting funds without redistributing or exploiting

75. *See supra* Part II.A.2.

76. AMER & WESTON, *supra* note 5, at 18–19.

77. *Id.* at 49.

78. *Id.* at 18–19.

79. *Id.* at 83. The Copyright Office is currently seeking public comments on the proposal. *Id.* at 104.

80. *Id.* at 83–84.

81. *Id.* at 104.

82. *Id.* at 50 (Collective licensing “would end up ultimately as a system to collect fees, but with no one to distribute them to, potentially undermining the value of the whole enterprise”).

them does little to promote the creation or enjoyment of creative works or protect the rights of copyright owners.

3. Exception-Based Approaches

The United States has not seriously considered exception-based legislation for digitization, but the European Union (“EU”) recently adopted a Directive,⁸³ structured as a statutory exception to the rights of reproduction and display, to promote digitization projects.⁸⁴ The EU Directive allows an entity to digitize works if the entity qualifies as a public service organization,⁸⁵ and allows private organizations to partner with a qualifying public service organization to generate revenue for and further the mission of the public service organization.⁸⁶ The EU Directive is limited in application: textual, audiovisual, and cinematographic works qualify for the exception outright whereas graphic works are included only if they are incorporated in a qualifying work.⁸⁷ Similar to the limited liability approaches, described above, the EU Directive requires users to make a reasonably diligent search for copyright owners;⁸⁸ however, if copyright owners are later identified or come forward, the user is not entitled to limited liability and must provide fair compensation to the copyright owners for prior use and obtain permission for future use.⁸⁹ What constitutes a reasonably diligent search is a matter left to each EU state as they adopt the EU Directive, but generally users must make a good faith attempt to locate the copyright holder and document their search strategies and results on an online database.⁹⁰

Exception-based solutions generally have the benefit of providing clear and detailed circumstances in which users can access or use copyright protected works without infringing upon the exclusive rights, but they may be over- or under-inclusive depending on the way the statute defines the circumstances, works, uses, and users that are included in the exception.

83. *See id.* at 21. The Copyright Office is reporting that Australia is close to adopting a similar approach. *Id.* at 47.

84. Directive 2012/28 of the European Parliament and of the Council of 25 October 2012 on Certain Permitted Uses of Orphan Works, art. 1(1), 2012 O.J. (L 299) 8, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:299:0005:0012:EN:PDF> [hereinafter “EU Exception-Based Directive”].

85. Public Service Organization is defined as a publicly accessible library, educational establishment, museum, archive, film or audio heritage institution, or public service broadcasting archive, that has a non-commercial public service mission. *Id.* at 8.

86. AMER & WESTON, *supra* note 5, at 21.

87. Pamela Samuelson, Jennifer M. Urban, David R. Hansen, Kathryn Hashimoto & Gwen Hinze, *Solving the Orphan Works Problem for the United States*, 37 COLUM. J.L. & ARTS 1, 36 (2013) [hereinafter “Urban”].

88. EU Exception-Based Directive, *supra* note 84, arts. 2(1), 3, at 9.

89. Urban, *supra* note 87, at 37.

90. *Id.*

Ambiguity in the wording of the exceptions can also lead to uncertainty in applying the exception and lead to litigation.⁹¹

Supplementing the EU Directive's exception-based approach with the recording and author-location requirements of the limited liability approaches as well as the centralized management of the collective licensing approaches, and incorporating the framework of the existing compulsory licenses and safe-harbors may be the most effective solution for U.S. copyright law to promote digitization projects while protecting the exclusive rights of copyright owners.

III. AN EXCEPTION-BASED PROPOSAL FOR PROMOTING DIGITIZATION OF PROTECTED WORKS

An exception to the reproduction and display rights for the creation of collections comprised of digitally reproduced works is proposed, wherein the Copyright Office pre-authorizes digitization projects and authorized digitizing parties pay a reasonable royalty for use of the works included in a digital collection. Under the exception, a digitizing party is permitted to reproduce a work in its entirety for the purposes of generating the digital collection and to display works to a degree suitable to enable the intended use of the collection but not to enable end-users of the collection to copy, retain, or use a work in a manner exceeding a fair use.⁹² The exception is limited to published literary works, works embedded in such literary works, and published photographs,⁹³ and to digitization projects that are primarily intended to direct end-users to legal avenues of obtaining original copies of included works and digitization projects otherwise providing a societal benefit without serving as a replacement for the original works.⁹⁴ The digitizing party may be private or public as long as they comply with the qualifications and requirements of the exception.⁹⁵

91. AMER & WESTON, *supra* note 5, at 77.

92. This limitation is intended to give digitizing parties the right to reproduce works in a manner that exceeds a fair use, but retains fair use as the standard for end users of the digital collection.

93. This tracks the recommendation of the Copyright Office collective licensing approach, see *supra* Part II.B.2, and recognizes an author's exclusive right to determine how and when a work is first published. See also *Harper & Row, Publs. v. Nation Enters.*, 471 U.S. 539, 553 (1985).

94. Future digital projects are unforeseeable so it would be premature to attempt to define societal benefit. Whether a use is societally beneficial and whether it serves as a replacement for the original can be guided by fair use guidelines, see *supra* Part II.A.1, and may be an area in which the Copyright Office shall promulgate clear rules for qualification. See *infra* Part III.B.2.

95. The nature of the digitizing party (religious, nonprofit, educational, etc.) should be considered in determining the societal benefit a digital collection provides, but the exception is available for all digitizing parties.

A. *Qualifications for & Requirements of the Proposed Exception*

1. Impossibility of Obtaining Permission & Copyright Office Authorization

The essential requirement for the exception is that the Copyright Office must approve a digitization project based on a showing that obtaining permission from the copyright owners whose rights are implicated is impossible. The digitizing party has the burden of proving impossibility, which requires a showing that it is logistically unreasonable or prohibitively expensive to obtain individual permission from every owner whose work is included in the proposed digital project. Before the digitizing party can make this argument, they must perform a reasonably diligent attempt to locate copyright owners, including a search of: Copyright Office records, additional subscription-based databases, other resources that are reasonable and appropriate under the circumstances, and other Recommended Searches to be set by the Register of Copyrights.⁹⁶ The digitizing party must also submit a detailed description of the digitization project including how the digitizing party and end-users of the digital collection will use the digitized works and what classes of works are included in the project.

The Copyright Office will determine the impossibility of obtaining permission—to grant or deny eligibility for this exception—on a case-by-case basis depending on the number of copyright owners whose rights are implicated, the anticipated costs of locating and negotiating with each owner, the inclusion of pseudonymous, anonymous, or other works for which the author is unreachable, and any other relevant factors.⁹⁷ When the Copyright Office authorizes a digitization project, the qualified digitizing party must submit a digital copy of each work included in the project and a disclosure concerning included works. The disclosure should include all known information pertaining to the copyright status of each work including, for example, the identity of the author or owner and the remaining duration of the copyright term or the publication date of the work.

96. The search requirements here are identical to those required by the prior limited liability proposals. *See, e.g.*, Shawn Bentley Orphan Works Act of 2008, S. 2913, 110th Cong. sec. 2, § 514(b) (2008); *see supra* Part II.B.1. The requirement is intended to ensure that the finding of impossibility is not merely speculative.

97. *See* AMER & WESTON, *supra* note 5, at 5 (noting that the cost of obtaining permission “from every rightsholder individually often will exceed the value of the use to the user”); *see also id.* at 73 (noting that it is a “practical impossibility” to obtain permission for digitization projects based on these factors).

2. Reasonable Royalties Set by Copyright Royalty Judges

The existing Copyright Royalty Judges will set a reasonable royalty that digitizing parties must pay for the inclusion of works in their digital collections.⁹⁸ The royalty would be set to maximize the availability of the creative works for digital collections; provide the copyright owner and the digitizing party fair economic returns under existing conditions; reflect the relative roles of the copyright owner and the digitizing party with respect to creative contribution, technological contribution, capital investment, risk, cost, and contribution to the opening of new markets for the work; and minimize any disruptive impacts of the structure of the industry for the original work.⁹⁹ The royalty may vary depending on the classification of the digital collection, the works involved, the end-use of the collection, or a combination thereof.

The reasonable royalties would be paid to the Copyright Office who would then redistribute funds¹⁰⁰ to all known copyright owners whose works are included in a digital collection.¹⁰¹ Copyright owners are identified by the submissions from digitizing parties—who were required to perform a reasonably diligent search for owners, as described above—and by information supplied directly from copyright owners who are incentivized to register with the Copyright Office by the fact that they only receive the royalty payments after they have been identified.¹⁰² Any excess funds collected in relation to works with unknown or unreachable authors to whom the Copyright Office cannot distribute funds, may be invested in the Copyright Office for purposes of overseeing this exception, searching for owners of protected works, and other costs associated with Copyright Office administration.¹⁰³

3. Digital Safeguards Protecting the Exclusive Rights of Copyright Owners

There are three related requirements that protect of the exclusive rights of copyright owners whose works are included in digital collections. The first is that digitizing parties are required to continually maintain and monitor

98. This is inspired by the compulsory licenses existing under current copyright law. *See supra* Part II.A.2.

99. This is the existing standard Copyright Royalty Judges follow for determining royalties under the existing compulsory license exceptions. *See* 17 U.S.C. § 801(b)(1)(A)–(D) (2012). It is also contemplated that copyright owners may participate in the royalty setting process. *See id.* § 804(a), (b)(4).

100. The Copyright Office effectively acts like a collective licensing agency as used in the Nordic Countries and as recommended by the proposed Copyright Office pilot program. *See supra* Part II.B.2.

101. The Copyright Office keeps a record of all authorized digital collections, the works included within them, and the owners of each work. *See infra* Part III.B.1.

102. This same incentive is central to existing compulsory licenses. *See supra* Part II.A.2.

103. A common problem with collective licensing approaches—that royalties are collected without being redistributed—becomes a financial boon for the Copyright Office. *See supra* Part II.B.2.

digital collections to ensure that end-users are not able to infringe upon the owner's exclusive rights and to terminate repeat infringers from accessing the digital collection.¹⁰⁴ The second requirement is that digital collections must accommodate standard technological measures designed to identify and protect works such as watermarks, copyright notices, and encryption technology.¹⁰⁵ The final requirement is that digitizing parties must implement access control and copy control measures of their own design—meeting or exceeding industry standards¹⁰⁶—to prevent end-users from hacking the digital collection, downloading works without authorization, or otherwise infringing the rights of copyright owners.¹⁰⁷

Copyright Owners can also have their works removed from a digital collection by notifying the Copyright Office, who would then notify the digitizing party or parties who include the work in a digital collection that they must remove the work from the collection as soon as reasonably possible and notify the Copyright Office and the copyright owner of the removal.¹⁰⁸ The work must then remain down unless and until the copyright owner and the digitizing party come to a separate agreement.¹⁰⁹ The exception would also allow copyright owners to impose use limitations on digitizing parties and, or, digital collections by contacting the Copyright Office or the digitizing party directly. For example, a copyright owner may allow digitizing parties to continue using his or her work, but may require that a portion of the work be excluded—perhaps specific paragraphs, pages, or chapters or a percentage of the total work—from a digital collection.¹¹⁰ The copyright owner may impose this condition on digital collections individually, or he or she may set this requirement with the Copyright Office, thereby imposing the condition on every digital collection including his or her work.

104. This requirement is inspired by a similar one imposed on ISPs as part of the safe-harbors as described above. 17 U.S.C. § 512(i); *see supra* Part II.A.2.

105. *See* 17 U.S.C. § 512(i); *see also supra* Part II.A.2.

106. The technological measures required for access and copy control measures under this exception may be an area in which the Copyright Office should promulgate more definitive rules. *See infra* Part III.B.2.

107. This brings works included in digital collections under the protection of Section 1201 of the Copyright Act which makes it illegal to circumvent access controls or traffic services and devices designed to circumvent access or copy controls protecting a work. *See* 17 U.S.C. § 1201(a)–(b).

108. The Copyright Office will keep a record of all authorized digital collections and the works included within them and will communicate between copyright owners and digitizing parties. *See infra* Part III.B.1.

109. The “take-down procedures” included here track those used for ISPs. *See* 17 U.S.C. § 512(g); *see also supra* Part II.A.2.

110. Google Books currently allows copyright owners to dictate whether their works are available in full, in limited previews, or in snippet views; this exception affords copyright owners the same power. *See What You'll See When You Search on Google Books*, GOOGLE BOOKS, <https://books.google.com/googlebooks/library/screenshots.html> (last visited Oct. 18, 2016).

B. Administering the Proposed Exception

1. Database Established & Managed by the Copyright Office

The proposed exception facilitates the development of a comprehensive database within the Copyright Office containing the information that digitizing parties are required to submit, which includes a digital copy of each work included in a digital collection, any known copyright information pertaining to each work, and intended uses and purposes of digital collections.¹¹¹ This information can rejuvenate current Copyright Office records and serve as a foundation for a searchable, digital database of copyright ownership information.¹¹² The Copyright Office is suited to manage this data better than an independent agency because they will allow access to every entity, are less likely to be biased, and do not face the potential of going out of business.¹¹³ The database will also enable the Copyright Office to act as a middle man for the collection and distribution of royalty funds, allow copyright owners to track and manage the use of their works in digital collections, and enable parties wishing to use copyright protected works to more easily identify and locate copyright owners.¹¹⁴

The digital database will also enable the Copyright Office to serve its intermediate roles in royalty distribution and removal of works from digital collections and to police digital collections to ensure they are adhering to the requirements and qualifications of the exception. For example, the Copyright Office may find that a digitizing party is not adhering to its approved intended use or purpose and should no longer be eligible to benefit from this exception. Continual or numerous request from individual copyright owners for removal of their works from a given digital collection may also indicate that the digital collection is not serving a societally beneficial purpose or that there are other reasons to reconsider the authorized digital collection.

111. See *supra* Parts III.A.1, III.A.3.

112. See STAFF OF H.R. COMM. ON THE JUDICIARY, 114TH CONG., REFORM OF THE U.S. COPYRIGHT OFF. (published Dec. 8, 2016), <https://judiciary.house.gov/wp-content/uploads/2016/12/Copyright-Reform.pdf> [hereinafter H.R. JUDICIARY COMM.] (recommending that the Copyright Office establish and maintain “a searchable, digital database of historical and current copyright ownership information”); see also Samuelson, *supra* note 9, at 502–04 (discussing the deficiencies of the Copyright Office’s current records).

113. See *Author’s Guild v. Google Inc.*, 770 F. Supp. 2d 666, 677 (S.D.N.Y. 2011) (expressing concern over allowing a private entity to control this data and to represent copyright owners); see also Oberle, *supra* note 29, at 776 (discussing an ideal archive run by the government and the benefits over a privately-run database).

114. See *supra* Part III.A.3 (describing the procedure for having a work removed from a digital collection).

2. Administrative Power Granted to the Copyright Office

The Copyright Office would be granted all powers necessary to implement and administer this exception including the ability to promulgate rules, policies, and interpretations relating to the exception. The Copyright Office may particularly wish to undergo rulemaking procedures to determine what factors are relevant to a finding of impossibility and what Recommended Searches should be required for a reasonably diligent attempt to locate and contact copyright owners.¹¹⁵ The exception requires a showing of the impossibility of obtaining permission from copyright owners based on the circumstance and contemplates that the Copyright Office will find impossibility based on the digitizing party's attempts to locate or contact authors and the specifics of the use of the digital collection.¹¹⁶ While there are several cases pertaining to digital collections that may guide the Copyright Office's impossibility determination,¹¹⁷ they do not ideally track the requirement of the exception and the Copyright Office would likely be better served creating a rule for the finding rather than undertaking an ad hoc determination for every digitizing party.

The exception is also embedded with the fair use standard in that a digital collection cannot enable end-users to use a digital work in any manner that infringes upon the copyright owners rights—i.e., in a manner that is beyond a fair use.¹¹⁸ Digitizing parties may not be able to accurately determine what would constitute a fair use by end-users of their collection given the often unpredictable nature of the fair use analysis.¹¹⁹ Additional guidance from the Copyright Office would enable digitizing parties to more effectively promote access to digitized works without facilitating infringement.

The Copyright Office would also be granted the power to hold hearings to determine whether authorized parties are in compliance with the exception.¹²⁰ A copyright owner may bring potential violations of any of the requirements of this exception to the attention of the Copyright Office and participate in an administrative proceeding to determine whether a digitizing party can benefit from the exception. A digitizing party found to no longer

115. The Copyright Office's recommendation for establishing a limited liability approach contemplates similar rules. *See supra* Part II.B.2.

116. *See supra* Part III.A.1 (describing the required search for copyright owners and the information that digitizing parties must submit in the authorization process).

117. *See, e.g.*, cases cited *supra* notes 34–41.

118. *See supra* Part III pmb1.

119. *See supra* Part II.A.1 (referring to several fair use cases, with varying outcomes, involving digital collections that may benefit from this exception).

120. The precise contours of the administrative procedure required to determine whether a digitizing party is no longer in compliance with the exception is beyond the purview of this note. The Copyright Office would likely promulgate rules governing the adjudicative procedure.

comply with the requirements of this exception is simply barred from raising the exception as a defense in any subsequent litigation. Nothing in the exception is intended to abridge or modify copyright infringement actions, including the ability of the digitizing party to rely on another existing exception or fair use. It is also contemplated that a copyright owner may initiate an infringement action without first obtaining a Copyright Office eligibility determination and litigate whether the digitizing party can rely on the exception in the infringement action.¹²¹

C. *Justification for the Exception-Based Approach*

There is no doubt that digital collections promote the distribution of creative works and would be beneficial to society. The issue becomes how we can continue to protect authors' exclusive rights in the digital environment. This exception addresses the issue without significantly departing from established copyright law or previously proposed amendments. In fact, the only novel portion of the exception is the requirement that a digitizing party shows impossibility in front of the Copyright Office prior to being eligible for the exception. This requirement is not unreasonable, however, because the Copyright Office and others have identified several factors that render it impossible to obtain permission from large amounts of copyright owners,¹²² and allowing the Copyright Office to pre-approve projects has been contemplated.¹²³

Mechanisms used for administering existing compulsory licenses, such as royalties set by Copyright Royalty Judges, and for ISP safe-harbors, such as data management and take-down procedures, are directly applicable to the proposed exception and inform how Congress should structure the collection and distribution of royalties owed to copyright owners and the safe guards needed to protect the exclusive rights in the digital format. The exception adopted the existing mechanisms to the extent possible, modifying them only to give the Copyright Office a more prominent role in serving as an intermediate between copyright owners and parties establishing the digital collections.¹²⁴

121. It is contemplated that the Copyright Office's determination of eligibility would act as a rebuttable presumption of no infringement. It may be the case that digitizing parties seek an affirmative determination prior to engaging in litigation.

122. AMER & WESTON, *supra* note 5, at 5, 74.

123. In the collective licensing program currently proposed by the Copyright Office, collective licensing organizations would be pre-approved to represent classes of copyright owners. *Id.* at 104; *see also supra* Part II.B.2. Here, the Copyright Office represents the class of copyright owners and pre-approves given uses of protected works.

124. For example, in the current ISP safe-harbors, the ISP acts as an intermediate between copyright owners and end-user when there is an infringement dispute, *see supra* Part II.A.2, whereas in the proposed

The exception places a significant burden on digitizing parties by requiring the reasonably diligent search for copyright owners, the process of obtaining authorization from the Copyright Office, and the payment of reasonably royalties. Digitizing parties may very well choose to rely on fair use, rather than this exception, because it requires less of them and allows them to use protected works with fewer limitations and without paying royalties. The goal of the exception was not to replace fair use, but to allow a more predictable system to encourage those digitizing parties unwilling to risk fair use to pursue digitization projects. The exception also enables projects that would have a hard time proving a fair use defense due to their commercial nature, which is not barred under this exception.¹²⁵ This is an advantage of the exception-based approach because private entities attempting to make a commercially profitable database are realistically the entities best suited to endure the significant financial investment required to generate digital collections. Given the “enormous cultural, intellectual, and educational benefits” associated with greater access to expressive works through digital collections,¹²⁶ a goal of this exception is to foster rapid investment in and development of digitization projects.

The Copyright Office has much to gain through the proposed exception and the investments of private entities. The House of Representatives Judiciary Committee is currently recommending that the Copyright Office establish and maintain “a searchable, digital database of historical and current copyright ownership information,”¹²⁷ and the data that will be submitted to the Office through this exception, including digital copies of works, will facilitate the establishment of such a database. The exception would also allow the Copyright Office to collect royalty payments for works with unknown authors which will allow them to maintain the database and otherwise invest in improving the Copyright Office to fulfill the needs of the digital era. Improvement of the Copyright Office records also serve the public by allowing for more accurate and complete records of copyright status and ownership interests. The public will more easily discern which works are in the public domain and therefore free for public use, which remain protected, and whom to contact for permission to use protected works. This clarity will lead to more exploitation of works without fear of potential infringement and enable

exception, the Copyright Office facilitates communication between the digitizing party and copyright owners. *See supra* Part III.A.3.

125. Recall that the first factor of the fair use analysis points towards an unfair use when it is commercial in nature. *See supra* Part II.A.1.

126. *Sag, supra* note 8, at 73.

127. H.R. JUDICIARY COMM., *supra* note 112.

development of new creative works inspired by, derived from, or based upon the collective knowledge contained in existing works.

IV. CONCLUSION

The exception-based legislative proposal outlined above promotes the progress of science and the arts by facilitating the development of digital collections of copyright protected works and provides copyright owners with reasonable compensation for the inclusion and use of their works in such digital collections. It also protects copyright owners' exclusive rights by requiring digital collections to be protected by copy and access control technologies and by allowing copyright owners to remove their works from the digital collection. Most importantly, the exception encourages investment in digitization of works, which will preserve the collective knowledge of mankind as expressed in copyright protected works and allow greater access for individuals to tap into the collective knowledge.

Congress should implement the proposed exception because digital collections of works are the next chapter in the preservation and dissemination of copyright protected works and the exception outlines a "desperately needed" solution to problem of promoting digitization projects while concurrently protecting the exclusive rights of copyright owners,¹²⁸ thereby preserving the primary goal of copyright law: to promote the progress of science through incentivizing the creation and distribution of creative works.¹²⁹

128. AMER & WESTON, *supra* note 5, at 105.

129. Authors Guild v. Google, Inc., 804 F.3d 202, 212 (2d Cir. 2015).