

*Before the*  
**United States Copyright Office**  
**Library of Congress**

**In the Matter of**

**Orphan Works and Mass Digitization**

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**Docket No. 2012-12**

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**COMMENT OF**

**THE INTERNATIONAL DOCUMENTARY ASSOCIATION  
AND  
FILM INDEPENDENT**

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Submitted By:

**Jack I. Lerner**  
**Rom Bar-Nissim**  
USC Intellectual Property and  
Technology Law Clinic  
University of Southern California  
Gould School of Law  
699 Exposition Boulevard  
Los Angeles, CA 90089

**Michael C. Donaldson**  
Donaldson & Callif, LLP  
400 South Beverly Drive  
Beverly Hills, CA 90212

With the participation of clinical interns  
Patrick Boyle and Patrick McCormick

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I. Introduction

The International Documentary Association (“IDA”) and Film Independent (“FIND”) respectfully submit this comment on behalf of thousands of working documentary and independent filmmakers and other creators who continue to struggle daily with the orphan works problem. Filmmakers who use orphan works face the threat of lawsuits, statutory damages, or an injunction no matter how responsible the use or how diligent the search for the owner. This persistent threat has kept project after project on the shelf while filmmakers await a legislative solution. IDA and FIND have been involved with orphan works reform efforts led by the Copyright Office since 2005, including via comments submitted in 2013<sup>1</sup>, participation in the March 2014 Orphan Works and Mass Digitization Roundtables<sup>2</sup> (“Orphan Works Roundtables”), and Congressional testimony provided by Michael C. Donaldson in April 2014.<sup>3</sup> We continue to support the balanced approach the Copyright Office recommended in 2006. A reform that permits the use of orphan works after a diligent search, while compensating rightsholders who resurface, remains the most promising and workable solution to the orphan works problem.

The orphan works problem remains a significant impediment to documentary and independent filmmaking today. Independent and documentary filmmakers often seek to use third-party materials in ways not protected by fair use, including by using extended footage or musical accompaniment, or in the case of adaptations, sequels or remakes. For example, William J. Saunders is making a documentary about his grandfather Billy Mize, an influential yet forgotten country music artist. Saunders would like to use his

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<sup>1</sup> International Documentary Association et al. Comment in the Matter of Orphan Works and Mass Digitization at 2 (Docket No. 2012-12 2013), [http://www.copyright.gov/orphan/comments/noi\\_10222012/International-Documentary-Association.pdf](http://www.copyright.gov/orphan/comments/noi_10222012/International-Documentary-Association.pdf) (hereinafter “IDA et al. 2013 Orphan Works Comment”), attached hereto as Appendix B; International Documentary Association et al. Reply Comment in the Matter of Orphan Works and Mass Digitization at 2 (Docket No. 2012-12 2013), [http://www.copyright.gov/orphan/comments/noi\\_11302012/IDA-FI-NAMAC-GP-TFA.pdf](http://www.copyright.gov/orphan/comments/noi_11302012/IDA-FI-NAMAC-GP-TFA.pdf) (hereinafter “IDA et al. 2013 Orphan Works Reply Comment”), attached hereto as Appendix C.

<sup>2</sup> *Orphan Works and Mass Digitization Roundtables* (“Orphan Works Roundtables”), U.S. Copyright Office Mar. 10, (2014), *Session 2: Defining a Good Faith Reasonably Diligent Search*, (statement of Jack I Lerner, on behalf of International Documentary Association and Film Independent at 110); *Id. Session 3: The Role of Public and Private Registries*, (statement of Patrick J. McCormick, on behalf of International Documentary Association and Film Independent at 217), <http://www.copyright.gov/orphan/transcript/0310LOC.pdf>; *Id. Session 6: Remedies and Procedures Regarding Orphan Works*, March 11, (2014), (statement of Partick Boyle, on behalf of International Documentary Association and Film Independent at 66), <http://www.copyright.gov/orphan/transcript/0311LOC.pdf>.

<sup>3</sup> *Preservation and Reuse of Copyrighted Works: Hearing before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. of the Judiciary*, 113th Cong. (2014), <http://www.donaldsoncallif.com/michael-donaldsons-witness-testimony-on-the-house-of-representatives-committee-on-the-judiciary/> (last visited May 20, 2014).

grandfather's music throughout the documentary and has Mize's entire catalog on vinyl, but many of the record companies that originally held the rights to these songs no longer exist. For almost all of Mize's catalog, Saunders has been unable to identify or locate the rightsholders. Mr. Saunders's documentary should be overflowing with his grandfather's music. Instead, because of the orphan works problem, he will be confined to whatever highly limited excerpts fair use permits.<sup>4</sup>

Countless filmmakers face similar dilemmas, or worse. The current situation dissuades many filmmakers even from beginning searches for rightsholders. For every fruitless search, the user faces the same risk of liability, even after expending significant time and expense. Instead, many creators simply decide to forgo the orphan work's use all together.

The result is that many filmmakers cannot tell their stories as richly or fully as they otherwise would—and countless projects are abandoned. When asked by Representative Ron DeSantis (R-FL) how many projects do not proceed due to the orphan works problem, Michael Donaldson responded, "Probably thousands. . . . In the documentary field, virtually all documentaries eventually run into the problem of wanting to use something and not being able to find the owner."<sup>5</sup>

Since the Copyright Office began working on the orphan works issue in 2005, there has been a phenomenal increase in the amount of works that are accessible and available, yet orphaned. The result is that documentary and independent filmmakers cannot fully participate in the breathtaking opportunities that the digital revolution offers.

We continue to support the approach the Copyright Office took in its 2006 *Report on Orphan Works*, which allows users to make use of orphan works, but only after a diligent search, while rightsholders that do resurface are entitled to fair and reasonable compensation.<sup>6</sup> A reform such as this will let the private market function most efficiently, giving the proper incentives to users and rightsholders alike. With this approach, we expect more searches, more tools such as registries and indexes to develop,<sup>7</sup> and more licensing opportunities.

We are pleased that the Copyright Office continues to pursue orphan works reform, and we look forward to the next steps in this process.

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> REGISTER OF COPYRIGHTS, REPORT ON ORPHAN WORKS 95-125 (2006).

<sup>7</sup> *Infra* Parts II and III.

II. The Need for Legislation in Light of Recent Technological Advances

As we discussed in our 2013 comments and at this year's Orphan Works Roundtables, the *Documentary Filmmaker's Statement of Best Practices in Fair Use* ("the *Statement*")<sup>8</sup> has revolutionized documentary and independent filmmaking since it was introduced in 2005. Because of the *Statement*, filmmakers can obtain media liability insurance for films that include fair use of third party material, freeing them to make fair use for criticism, commentary, or demonstration of their arguments. But fair use is insufficient protection for non-archival users who would like to obtain a license to utilize a greater portion of the work. Many searches for rightsholders continue to be unsuccessful; the threat of statutory damages and an injunction deters filmmakers from using orphaned works; and there is no technological solution in sight. The success of the *Statement* is in stark contrast to the orphan works problem, which continues to prevent significant historical and cultural stories from reaching the public.

Recent technological advances have not mitigated the need for a legislative solution. Although several useful registries have become available in the last few years, these resources do not come close to accounting for all works that filmmakers and other creators might wish to license from rightsholders; our experience is that even with these new resources, orphan works' issues are pervasive and affect the vast majority of film projects. In addition, as we discuss below, registries may not have the capacity to keep up with the rush of new works made available by digital preservation programs and other efforts to preserve works. As we discuss in Part IV, the infrastructure for private registries already exists, and under the orphan works reform we support, many more registries will emerge. But while registries will be an important component of reform, they are not a solution in and of themselves.

In our 2013 Orphan Works Comments, we identified numerous initiatives aimed at preserving audiovisual and audio materials that are under way, highlighted by efforts at the University of Southern California, Indiana University and the University of Maryland.<sup>9</sup> Film preservation has become so important that it is now an academic discipline; New York University,<sup>10</sup> the University of California, Los Angeles<sup>11</sup> and the University of Rochester<sup>12</sup> offer graduate degrees in film preservation. Further, the University of California, Los Angeles's UCLA Library Broadcast NewsScape has added

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<sup>8</sup> DOCUMENTARY FILMMAKERS' STATEMENT OF BEST PRACTICES IN FAIR USE (2005), <http://www.cmsimpact.org/fair-use/best-practices/documentary/documentary-filmmakers-statement-best-practices-fair-use> (last visited May 21, 2014).

<sup>9</sup> IDA et al. 2013 Orphan Works Comment at 4.

<sup>10</sup> Moving Image Archiving and Preservation: M.A. Degree Program, NEW YORK UNIVERSITY, <http://www.nyu.edu/tisch/preservation/> (last visited May 18, 2014).

<sup>11</sup> UCLA Moving Image Archive Studies, UCLA, <http://mias.gseis.ucla.edu> (last visited May 18, 2014).

<sup>12</sup> Film & Media Studies: University of Rochester, THE UNIVERSITY OF ROCHESTER, <http://www.rochester.edu/college/fms/graduate/selznick.html> (last visited May 18, 2014).

20,000 new programs in the past year to a total of 220,000 programs and 170,000 hours of content.<sup>13</sup> In addition, users now upload 100 hours of video content to YouTube *every minute*,<sup>14</sup> but many of these works are instant orphans because rightsholder identification often does not accompany the uploaded material. These few examples illustrate the massive amounts of material that are continuously becoming available to the public. But the orphan works problem prevents authors from utilizing many if not most of these materials, leaving filmmakers frustrated and their stories untold.

The orphan works problem also continues to undercut gains that documentary and independent filmmakers have made through the use of new digital business models. As we have noted previously, filmmakers have had enormous success with crowd funding services such as Kickstarter<sup>15</sup> and IndieGoGo<sup>16</sup> in financing creative projects.<sup>17</sup> Further new digital distribution channels continue to become available to filmmakers as Netflix<sup>18</sup>, Hulu<sup>19</sup>, Fandor<sup>20</sup>, DailyMotion<sup>21</sup>, Amazon Prime<sup>22</sup>, YouTube<sup>23</sup>, and many others continue to grow, and as cable companies such as HBO and FX continue to grow their digital distribution channels.<sup>24</sup> These developments continue to expand the audience for documentaries and independent filmmakers and allow them to produce films on subjects that may have previously been too obscure for traditional distribution. Unfortunately, those types of projects remain difficult to produce, because they often depend on orphan works that cannot be licensed.<sup>25</sup>

Orphan works reform legislation similar to that supported by the Register in 2006 would remedy these problems by encouraging users to perform diligent searches and by

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<sup>13</sup> See *About*, THE UCLA LIBRARY BROADCAST NEWSscape, <http://newsscape.library.ucla.edu/public/home.php?mode=about> (last visited April 23, 2014).

<sup>13</sup> Download & Streaming: Moving Image Archive, INTERNET ARCHIVE, <http://archive.org/details/movies> (last visited Apr. 23, 2014).

<sup>14</sup> YOUTUBE STATISTICS, <http://www.youtube.com/yt/press/statistics.html> (last visited May 17, 2014).

<sup>15</sup> Kickstarter, <http://kickstarter.com> (last visited May 19, 2014).

<sup>16</sup> IndieGoGo, <http://indiegogo.com> (last visited May 19, 2014).

<sup>17</sup> IDA et al. 2013 Orphan Works Comment at 6.

<sup>18</sup> NetFlix, <http://netflix.com> (last visited May 1, 2014).

<sup>19</sup> Hulu, <http://www.hulu.com/about> (last visited May 1, 2014).

<sup>20</sup> Fandor, <http://www.fandor.com/company/about> (last visited May 1, 2014).

<sup>21</sup> DailyMotion, <http://www.dailymotion.com/us/about> (last visited May 1, 2014).

<sup>22</sup> Amazon Prime Instant Video, <http://www.amazon.com/Prime-Instant-Video/b?node=2676882011> (last visited May 1, 2014).

<sup>23</sup> YouTube, <https://www.youtube.com/yt/about/> (last visited May 1, 2014).

<sup>24</sup> HBO GO, <http://www.hbogo.com/> (last visited May 1, 2014); FXNow, <http://www.fxnetworks.com/fxnow> (last visited May 1, 2014).

<sup>25</sup> Cf Brianna Dahlberg, *The Orphan Works Problem: Preserving Access to the Cultural History of Disadvantaged Groups*, 20 S. CAL. REV. L. & SOC. JUST. 275 (2011) (showing that a relatively high proportion of cultural materials from marginalized and disadvantaged groups are orphan works).

encouraging rightsholders to make themselves discoverable. Both will lead to more licensing opportunities and, more importantly, reduce the number of orphan works.

### III. Defining a Good Faith “Reasonably Diligent Search” Standard

In our view, a robust yet flexible diligent search requirement will effectively protect rightsholders and appropriately limit the scope of eligible orphan works.<sup>26</sup> When potential users must make a good faith, reasonable effort to locate the rightsholder, they will find more of them, which will increase licensing opportunities for rightsholders, decrease the overall number of orphan works, and allow truly orphaned works to be used once again.

A flexible standard that defines a reasonably diligent search is critical to the effectiveness of any orphan works legislation. Artificially rigid standards applied across multiple forms and uses of media will be cumbersome, ineffective, and more prone to abuse than flexible, industry-specific standards defined by communities of practice in each field.<sup>27</sup> Flexibility allows communities of practice to develop standards based on their knowledge and expertise in the field. Their expertise enables these communities to respond quickly to changes in technology and the law instead of being bound to rigid standards that will quickly become outdated.

As we explained during the Orphan Works Roundtables, when developing diligent search best practices, the enormous success of the *Documentary Filmmakers’ Statement of Best Practices in Fair Use* should be a beacon guiding the way forward.<sup>28</sup> The *Statement* has not only revolutionized documentary filmmaking<sup>29</sup> but has been utilized as a template to create successful statements of best practice in other areas.<sup>30</sup> The *Statement* was successful despite dealing with what had been previously thought to be a murky area of the law. It set forth clear, workable practices written by those who both create and utilize works on a daily basis and who are themselves subject to the *Statement*.

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<sup>26</sup> IDA et al. 2013 Orphan Works Comment at 7-8.

<sup>27</sup> Many stakeholders argued as much during the Orphan Works Roundtables. See *Orphan Works Roundtables: Session 2* (statement of Krista Cox, on behalf of the Association for Research Libraries at 114); *Id.* (statement of Greg Cram, on behalf of the New York Public Library at 122); *Id.* (statement of Meredith Jacob, on behalf of the Program on Information, Justice & Intellectual Property - American University Washington College of Law at 129); *Id.* (statement of Carrie Russell, on behalf of American Library Association at 126); *Id.* (statement of Sarah Michalak, on behalf of HathiTrust Digital Library at 103).

<sup>28</sup> IDA et al. 2013 Orphan Works Comment at 4; *Orphan Works Roundtables Session 2*, (Statement of Jack I. Lerner, on behalf of the International Documentary Association at 110).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* See generally PATRICIA AUFDERHEIDE & PETER JASZI, RECLAIMING FAIR USE: HOW TO RESTORE BALANCE IN COPYRIGHT 96 (2011).

The process that led to the *Statement* and those that came after it would work equally well for establishing best practices for diligent searches. The community of practice that developed *Statement* comprised individual documentarians as well as organizations that collectively represent thousands of documentary filmmakers.<sup>31</sup> The composition of the community of practice is critically important: the drafters not only wanted to provide guidance to fellow filmmakers making fair use, but they also had a strong interest in protecting their own copyrighted works.<sup>32</sup>

Thoughtful consultation with well-informed, seasoned members of a community of practice is essential to the success of a statement of best practices. The process for the *Documentary Filmmakers' Statement* began with an extensive fact-finding report on the issues surrounding fair use and filmmaking and included long form, open-ended interviews with documentary filmmakers across the country.<sup>33</sup> For diligent search best practices, we suggest a similar step that would include clearance specialists, “footage finders,” and licensing experts who locate difficult-to-find rightsholders on a regular basis. The next step in writing the *Statement* was to meet with small groups of veteran stakeholders to discuss what fair use practices would be appropriate in different scenarios; the common decisions of these groups formed a rudimentary code of best practices.<sup>34</sup> For diligent search best practices, these groups would comprise specialists who locate rightsholders and obtain clearances. In addition, filmmakers will be important members of this process, both because they regularly confront the orphan works problem when they seek to license an orphaned work, and because they themselves are rightsholders.<sup>35</sup> The final step in writing the *Statement* was distilling the results of these meetings and presenting the findings to a legal advisory board who closely scrutinized the findings, focusing on a need for clarity and legal validity until a final statement was agreed upon.<sup>36</sup> The careful process used to develop the *Statement* was successful because it combined the experience and knowledge of experienced members of a community of practice with the practical concern for clarity and legal validity. As such, it is the best hope for developing diligent search best practices that will be widely used.

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<sup>31</sup> DOCUMENTARY FILMMAKERS' STATEMENT OF BEST PRACTICES IN FAIR USE, 12 (2005).

<sup>32</sup> We heard complaints during the Roundtables that all rightsholder groups are not involved in the creation of best practices. See *Orphan Works Roundtables: Session 1 The Need for Legislation in Light of Recent Legal and Technological Developments*, Mar. 10 (2014) (statements of Brad Holland, on behalf of American Society of Illustrators Partnership at 46); *Id.* (statements of Salley Shannon, on behalf of American Society of Journalists & Authors at 25). In nine years of experience with the *Statement*, however, we know of no specific objections to any of the best practice it promulgates, and we know of no accusation that the *Statement* has been misused. In any event, any community or group of stakeholders is free to establish its own statement of best practices.

<sup>33</sup> PATRICIA AUFDERHEIDE & PETER JASZI, *UNTOLD STORIES: CREATIVE CONSEQUENCES OF THE RIGHTS CLEARANCE CULTURE FOR DOCUMENTARY FILMMAKERS* (2004).

<sup>34</sup> AUFDERHEIDE & JASZI, *RECLAIMING FAIR USE* at 96 (2011).

<sup>35</sup> *UNTOLD STORIES*, *supra* note 33.

<sup>36</sup> AMERICAN UNIVERSITY CENTER FOR SOCIAL MEDIA, *DOCUMENTARY FILMMAKERS' STATEMENT OF BEST PRACTICES IN FAIR USE*, at 100.

IV. The Role of Private and Public Registries

We emphasize again that orphan works reform that imposes diligent search requirements, guarantees reasonable compensation for rightsholders, and limits remedies in appropriate circumstances will incentivize the private market to maintain efficient and effective private registries. Private registries are going to be an increasingly important component of the copyright ecosystem, and in a post-orphan works reform era, they are likely to be more efficient, fair, and cost-effective than a government-run registry.

A. The infrastructure for private registries already exists and they are best suited for responding to changes in technology and market needs

Many stakeholders agree that although the Copyright Office's catalog of registrations is relatively comprehensive and should be a central component of the registry system,<sup>37</sup> it would be a bad idea for the Office to supervise orphan works registries or run a central registry dedicated solely to orphan works.

Instead of spending the Office's limited funds constantly modifying a registry and its infrastructure to keep pace with technological advances that will change the way rightsholder searches function, the Copyright Office should serve as a clearinghouse for private registries. The reason the Copyright Office's registry is ill-suited to serve as the primary registry became apparent during the Orphan Works Roundtables. Much of the time was spent discussing the huge overhauls required to bring the Copyright Office's current registry to the level of existing private registries.<sup>38</sup> By cataloging private registries and maintaining a central database of registries for users, the Copyright Office can allow private registries to adapt and update as technology and conditions evolve. The Copyright Office should make explicitly clear that it neither endorses nor certifies any of the registries on the list, so that users do not incorrectly assume that the registries represent a stopping point in their search. The Copyright Office should also take steps to remove bad actors from the list and create a system for users to submit complaints. As Register Peters stated in her Congressional testimony for proposed legislation in 2008, "the marketplace offers, and will continue to offer, an array of databases and search technologies that will result in more choices for the copyright owner and more aids for the prospective user. ...

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<sup>37</sup> See, e.g., *Orphan Works Roundtables: Session 3*, "The current registration practice and in particular the group registration ... ends up with a registration that's fairly meaningless from a search or enforcement standpoint because there's no searchability." (Statement of Eugene Mopsik, on behalf American Society of Media Photographers at 190); "[T]he Copyright Office should not be in the position of running a global registry network." (Statement Jeff Sedlik, on behalf of of the PLUS Coalition at 220). "It's just not possible for [the Copyright Office] to be the repository for everything that could possibly be used." (Statement of Douglass Hill on behalf of RightsAssist at 235-36).

<sup>38</sup> *Orphan Works Roundtables: Session 3*, Pages 189-216.

[A] government database would be wasteful, ineffective and fraught with legal and practical problems.”<sup>39</sup>

Of course, private registries already exist to facilitate identification of rightsholders or individuals associated with a particular work, including PLUS Coalition,<sup>40</sup> DGA,<sup>41</sup> WGA,<sup>42</sup> Flickr,<sup>43</sup> and wedding photographer registries.<sup>44</sup> Many registries did not even exist prior to the proposed 2008 legislation, which demonstrates that in a private market, specialized, independent voluntary registries will proliferate. Any orphan works solution should leverage this dynamic to further incentivize creators to sign up with these registries and users to employ these registries in a diligent search.

B. An intent-to-use registry would not work.

An orphan works solution that requires users to register with an intent-to-use registry (“ITU Registry”) would be unworkable for documentary and independent filmmakers. Such a registry would disrupt production timelines, present confidentiality issues, mislead future users, and be a honeypot for trolls, all while providing next to no benefit to the actual rightsholder.

First, an ITU registry with a mandatory waiting period would disrupt time-sensitive productions. Often, filmmakers know only weeks before distribution which items will actually be featured in the film. A mandatory waiting period would cause an over-submission of works in some cases, and destroy the ability to meet deadlines in others. One only has to look to Canada to understand how poorly this approach would solve our massive orphan works problem. Numerous commentators and participants have criticized this system as inefficient, and it is not commonly used: just 277 licenses have been granted between 1990 and 2014.<sup>45</sup> Critics of this system also note that lengthy delays deter users from applying for a license and the administrative costs often outweigh the value of the use.<sup>46</sup>

Second, filmmakers often have projects that deal with sensitive or controversial matters that require substantial discretion regarding their topic or approach; they also

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<sup>39</sup> *Statement of Marybeth Peters, The Register of Copyrights, before the Subcomm. on Courts, the Internet, and Intellectual Property of the House Comm. on the Judiciary*, 110th Cong. (March 13, 2008).

<sup>40</sup> PLUS REGISTRY, <http://www.plusregistry.org> (last visited May 18, 2014).

<sup>41</sup> Membership Directory, Directors Guild of America, <http://www.dga.org/The-Guild/Members.aspx> (last visited May 19, 2014).

<sup>42</sup> WGAW REGISTRY, <http://www.wgawregistry.org> (last visited May 18, 2014).

<sup>43</sup> FLICKR: GETTY, <https://www.flickr.com/gettyimages/> (last visited May, 18 2014).

<sup>44</sup> PROPHOTO REGISTRY, <http://www.prophotoregistry.com> (last visited May 19, 2014).

<sup>45</sup> *Decisions – Unlocatable Copyright Owners*, COPYRIGHT BOARD OF CANADA (last visited April 23, 2014), <http://www.cd-cda.gc.ca/unlocatable-introuvables/licenses-e.html>.

<sup>46</sup> REGISTER OF COPYRIGHTS, LEGAL ISSUES IN MASS DIGITIZATION: A PRELIMINARY ANALYSIS AND DISCUSSION DOCUMENT, Note 1 at 83 (2011).

make commitments to sources or subjects that involve third-party materials and how they are used. An ITU registry would violate these commitments and severely compromise countless projects.

Third, an ITU registry would be misleading to later parties interested in using material listed on such a registry. A declaration of orphan status could stop other users from performing their own diligent searches, which would undermine orphan works reform given that every search for a rightsholder increases the likelihood that that rightsholder will be found. An ITU registry reduces that likelihood—and reduces *ex ante* licensing opportunities for rightsholders.

Finally, an ITU registry would be a honeypot for trolls. Entities posing as rightsholders would monitor the ITU registry and “come forward” at the most inopportune time for the user, threatening to seek an injunction in order to extract a settlement from the user. A rightsholder interested in the use and licensing of its work will likely be locatable through a diligent search, while rightsholders not locatable by such a search are unlikely to be closely monitoring an ITU registry.

An ITU registry would reduce the incentive to perform a diligent search and in turn reduce the number of located rightsholders, and its ultimate effect would be to deter nearly all filmmakers from using the new regime.

C. A private registry system is preferable to an Extended Collective Licensing regime for both users and rightsholders.

We continue to believe that an extended collective licensing (“ECL”) regime would be a counterproductive approach in orphan works reform. An ECL regime would completely skew market incentives, fail to reward users who complete diligent searches, and do very little to increase licensing opportunities for rightsholders. We discuss our objections to an ECL regime in greater depth in sections 8 and 9 below.

V. The Types of Works Subject to Orphan Works Legislation
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As we stated in our 2013 Reply Comment<sup>47</sup> we, like numerous other stakeholders,<sup>48</sup> believe visual works are central to the orphan works problem and exempting visual works from an orphan works solution would cripple the solution's effectiveness.<sup>49</sup> Furthermore, the difficulties present in including visual works in orphan works reform are mitigated by technological advances in reverse-image searches and

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<sup>47</sup> See generally IDA et al. 2013 Orphan Works Reply Comment.

<sup>48</sup> See generally *Orphan Works Roundtables, Session 4: The Types of Works Subject to Any Orphan Works Legislation, Including Issues Related Specifically to Photographs*, (Mar. 10, 2014).

<sup>49</sup> IDA et al. 2013 Orphan Works Reply Comment at § II.

metadata.<sup>50</sup> Google's "Search by Image" feature continues to improve the accuracy with which it locates images with no identifying information aside from the image itself.<sup>51</sup> Since we filed our 2013 Reply Comment just over a year ago<sup>52</sup>, four more content-based image retrieval ("CIBR") engines offer image-specific location services, for a current total of twenty-three functioning CIBR engines (and twenty-nine in development).<sup>53</sup> As we mentioned in the Reply Comment, many visual artists already have their works on websites such as Flickr, Picasa, and Facebook<sup>54</sup> that use metadata and registry-like systems to catalog visual works.<sup>55</sup> Registries such as the PLUS Coalition<sup>56</sup>, Artists Rights Society<sup>57</sup>, and others continue to advance in their capabilities and are poised to be important components of an orphan works solution. These tools and registries, together with those that will appear<sup>58</sup> under an orphan works regime like the one the Copyright Office proposed in 2006, will go a long way toward protecting rightsholders' interests while facilitating and improving users' attempts to locate rightsholders.<sup>59</sup>

## VI. The Types of Uses and Users Subject to Orphan Works Legislation

We have suggested in previous comments and in the Orphan Works Roundtables that Congress and the Copyright Office should approach orphan works reform with fair use in mind. As with fair use, the orphan works problem affects every part of the copyright system, from libraries and archives, to public and private news outlets, to documentary and independent film. Orphan works reform should therefore be

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<sup>50</sup> Id. at § II.b.

<sup>51</sup> Search by Image – Inside Search,

<http://www.google.com/insidesearch/features/images/searchbyimage.html> (last visited May 1, 2014).

<sup>52</sup> IDA et al. 2013 Orphan Works Reply Comment at § III.E Footnote 33.

<sup>53</sup> "List of CBIR engines" *Wikipedia: The Free Encyclopedia*. Wikimedia Foundation, Inc., date last updated (Feb. 17, 2014), date last visited (May 18, 2014), [http://en.wikipedia.org/wiki/List\\_of\\_CBIR\\_engines](http://en.wikipedia.org/wiki/List_of_CBIR_engines).

<sup>54</sup> These websites are just a few examples of the private market already responding to the need for artists to be locatable in order to increase their licensing opportunities and the existing infrastructure that would allow the private market to implement a private-registry system quickly and effectively.

<sup>55</sup> 2013 IDA Reply § III.E.

<sup>56</sup> PLUS, <http://www.useplus.com> (last visited May 1, 2014).

<sup>57</sup> About Artist Rights Society, <http://arsny.com/about.html> (last visited May 1, 2013).

<sup>58</sup> See *Orphan Works Roundtables Session 3*, (statement of Jeff Sedlik, on behalf of PLUS Coalition) at 210); *Id. Session 4* at 298.

<sup>59</sup> We agree with commenters who have suggested that if registries are incorporated into diligent search best practices, making oneself available on a registry should be voluntary for all rightsholders; *Id. Session 2* (statement of Michael Capobianco, on behalf of Science Fiction and Fantasy Writers of America at 133). There should be no presumption that absence from the registry deems a work orphaned, just as there should be no hard and fast requirement certain registries must be consulted in order for a search to be deemed diligent. Registries, technologies, and industries change over time, and therefore diligent search best practices should be flexible enough to accommodate such changes.

comprehensive and should cover all anticipated types of uses. In particular, we urge the Copyright Office not to recommend that commercial users be excluded.

Most documentary and independent filmmakers are, of course, commercial users,<sup>60</sup> but that does not diminish their important role in our democracy as journalists, storytellers, and historians documenting the American experience. Again, we think that the recent history of fair use provides important guidance for orphan works reform. Despite the mention of commercial versus nonprofit uses in the fair use statute,<sup>61</sup> no recent case has turned on whether the use was commercial or nonprofit.<sup>62</sup> Even when unlicensed footage was used by a for-profit entity in an advertisement, that case turned on the transformative aspect of the work in favor of fair use, not its commercial nature.<sup>63</sup> The Copyright Office should recognize that, just as with fair use, the commercial/non-commercial distinction is of limited utility where individual uses of orphan works are concerned.

Along similar lines, our experience with best practices in fair use should inform the question of how to differentiate across uses and users. As needs arise in diverse contexts, the relevant communities of practice will develop diverse best practices—just as they have done with fair use. As the body of practice develops, the private market and the courts will clarify what constitutes diligent search practices in a certain context.

## VII. Remedies and Procedures Regarding Orphan Works

A limitation on remedies, along with reasonable compensation for resurfacing rightsholders, is the linchpin of a workable solution. Copyright is a strict liability regime. If no limitation on remedies is available to users who conduct a diligent search, artists and creators will remain very reluctant to use orphan works for fear of severe copyright infringement penalties<sup>64</sup> or an injunction<sup>65</sup>. A limitation on remedies will incentivize users to conduct a diligent search for the rightsholder, because they will be able to utilize the orphan works—and thus, see a return on their investment in the search—if it is unsuccessful. Without such a provision, there can be no workable orphan works solution.

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<sup>60</sup> *Storey v. Comm'r of Internal Revenue*, 103 T.C.M. (CCH) 1631 (T.C. 2012) (Lee Storey was a law firm partner who took six years to make her film while working full-time as an attorney. The Tax Court held Storey's filmmaking was not a hobby but done for profit for tax purposes).

<sup>61</sup> 17 U.S.C. § 107(1) (1992).

<sup>62</sup> Michael Donaldson, *Refuge from the Storm: A Fair Use Safe Harbor for Non-Fiction Works*, 59 J. COPYRIGHT SOC'Y U.S.A. 477, 516 (2012).

<sup>63</sup> *Los Angeles News Service v. CBS Broad.*, 305 F.3d 701 (9<sup>th</sup> Cir. 2007).

<sup>64</sup> See 17 U.S.C. §§ 502-504 (2006).

<sup>65</sup> Despite jurisprudence shifting away from granting injunctions for minor uses of copyrighted material, injunctions still remain a large threat and can be obtained for even just five seconds of infringing material in a thirteen minute film. See *Garcia v. Google*, 743 F. 3d 1258 (9<sup>th</sup> Cir. 2014).

Some comments during the Orphan Works Roundtables indicated concern that a limitation on remedies would deprive rightsholders of revenue.<sup>66</sup> Again, we disagree.<sup>67</sup> In our view, the overall effect of a limitation on remedies will be to *increase* licensing opportunities for rightsholders because it will encourage users to search for rightsholders. Properly designed, orphan works reform will enable an entirely new revenue stream for rightsholders who discover their work being used or are discovered because the user performs a diligent search. Under the current system, no such revenue stream exists, because many would-be users of works that appear orphaned are deterred from investing in a search.

Under the approach we support, bad faith users who perform sham searches or remove copyright information will not have performed a diligent search and therefore will not be able to rely on the limitation on remedies. Instead, such situations will present a traditional copyright infringement case where the rightsholder remains entitled to full statutory damages and injunctive relief.

Well-developed, rigorous diligent search best practices will serve as further protection for rightsholders. For example, rightsholders who know they can be contacted through well-established channels should be quite confident that the limitation on remedies will not affect them, because any reasonably diligent search will locate them. Further, a limitation on remedies will encourage rightsholders to be easily discoverable, thereby decreasing the number of orphan works and increasing licensing opportunities.

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<sup>66</sup> See *Orphan Works Roundtables: Session 1*, (statement of Brad Holland at 46).

<sup>67</sup> See *Id. Session 6* (statement of Patrick Boyle at 66).

VIII. Mass Digitization, Generally

It is important to differentiate between large-scale preservation efforts and case-by-case uses. Institutions involved in large-scale preservation of orphan works can rely – to an extent – on fair use to accomplish their goals. Individual users can also make fair use of the work, but often would prefer to license the material in question, in order to enable a different uses of the work. A workable orphan works solution should account for users who seek to license the work, if only the rightsholder can be located. We therefore continue to support a legislative solution similar to that proposed by the Copyright Office in 2006, which accounts for the unique needs of non-archival users.

IX. Extended Collective Licensing and Mass Digitization

X. The Structure and Mechanics of a Possible Extended Collective Licensing System in the United States

We discussed the many problems with an ECL regime at length in our 2013 Orphan Works Comments,<sup>68</sup> and we have seen no new developments that mitigate our concerns. Furthermore, the statements made in the 2014 Orphan Works Roundtables make it clear that no interested party thinks that an ECL system would be beneficial.<sup>69</sup> We think it is clear that an ECL system would be unfair, costly and wasteful; would clash with the American copyright tradition; and would create unnecessary and intractable conflicts of interest.<sup>70</sup> We urge to the Copyright Office to reject this approach entirely.

XI. Conclusion

We continue to endorse an orphan works solution similar to that proposed by the Copyright Office in 2006. Orphan works reform that allows for industry-specific standards for diligent searches, limits the remedies for users who perform diligent searches, and compensates rightsholders that resurface will incentivize the private market to respond with registries and other tools with little to no added expense for the Copyright Office. Most importantly, the solution we support enables safe, responsible use of orphan works, reduces transaction costs for all parties, reduces the number of orphan works in the system, and increases licensing opportunities for rightsholders.

<sup>68</sup> IDA et al. 2013 Orphan Works Comment § IV.

<sup>69</sup> See generally *Orphan Works Roundtables: Session 8 Extended Collective Licensing and Mass Digitization*, Mar. 11 (2014); *Id. Session 9 The Structure and Mechanics of a Possible Extended Collective Licensing System in the United States*, Mar. 11 (2014).

<sup>70</sup> IDA et al. 2013 Orphan Works Comment § IV.

## APPENDIX A

### ABOUT THE COMMENTERS

This comment is submitted on behalf of a coalition of organizations and filmmakers whose work supports independent and documentary filmmakers.

**The International Documentary Association (IDA)** is a non-profit 501(c)(3) organization that promotes nonfiction filmmaking, and is dedicated to increasing public awareness for the documentary genre. At IDA, we believe that the power and artistry of the documentary art form are vital to cultures and societies globally, and we exist to serve the needs of those who create this art form. At IDA, we help advocate for, protect and advance the legal rights of documentary filmmakers. Our major program areas are: Advocacy, Filmmaker Services, Education, and Public Programs and Events. IDA also has a long history of protecting documentary filmmaking as a vital art form, and we continue to seek ways to ensure that the artists who make documentaries receive the funding that they deserve. For almost 30 years, IDA has worked to support the documentary art form.

**Film Independent** is a non-profit arts organization and our mission is to champion the cause of Independent film and support a community of artists who embody diversity, innovation and a uniqueness of vision. We help independent filmmakers tell their stories, build an audience for their projects and diversify the voices in the film industry, supporting filmmakers at every experience level with a community in which their works can be appreciated and sustained. With over 200 annual screenings and events, Film Independent provides access to a network of like-minded artists who are driving creativity in the film industry. Our free Filmmaker Labs for selected writers, directors, producers and documentary filmmakers and year-round educational programs serve as a bridge from film school to the real world of filmmaking – one with no defined career ladder. Project Involve is Film Independent's signature program dedicated to fostering the careers of talented emerging filmmakers from communities traditionally underrepresented in the film industry. We also produce the weekly Film Independent at LACMA film series, the Los Angeles Film Festival in June and the annual awards programs for the finest independent films of the year—the Film Independent Spirit Awards.

*In the Matter of Orphan Works and Mass Digitization*, No. 2012-12  
Comment of International Documentary Association and Film Independent

**APPENDIX B**

**IN THE MATTER OF  
ORPHAN WORKS AND MASS DIGITIZATION**

**DOCKET NO. 2012-12**

**COMMENT OF**

**INTERNATIONAL DOCUMENTARY ASSOCIATION  
FILM INDEPENDENT  
INDEPENDENT FILMMAKER PROJECT  
KARTEMQUIN EDUCATIONAL FILMS, INC.  
NATIONAL ALLIANCE FOR MEDIA ARTS AND CULTURE  
MARJAN SAFINIA / MERGEMEDIA  
KAREN OLSON / SACRAMENTO VIDEO INDUSTRY PROFESSIONALS  
GILDA BRASCH  
KELLY DUANE DE LA VEGA / LOTERIA FILMS  
GEOFFREY SMITH / EYE LINE FILMS  
ROBERTO HERNANDEZ  
KATIE GALLOWAY**

**FEBRUARY 4, 2013**

*Before the*  
**United States Copyright Office**  
**Library of Congress**

In the Matter of

Orphan Works and Mass Digitization

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**Docket No. 2012-12**

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**COMMENT OF**

**INTERNATIONAL DOCUMENTARY ASSOCIATION  
FILM INDEPENDENT  
INDEPENDENT FILMMAKER PROJECT  
KARTEMQUIN EDUCATIONAL FILMS, INC.  
NATIONAL ALLIANCE FOR MEDIA ARTS AND CULTURE**

**MARJAN SAFINIA / MERGEMEDIA  
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GILDA BRASCH  
KELLY DUANE DE LA VEGA / LOTERIA FILMS  
GEOFFREY SMITH / EYE LINE FILMS  
ROBERTO HERNANDEZ  
KATIE GALLOWAY**

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Submitted By:

**Jack I. Lerner**  
USC Intellectual Property and  
Technology Law Clinic  
University of Southern California  
Gould School of Law  
699 Exposition Boulevard  
Los Angeles, CA 90089

**Michael C. Donaldson**  
Donaldson & Callif, LLP  
400 South Beverly Drive  
Beverly Hills, CA 90212

With the participation of clinical interns  
Minku Kang and Christopher Mastick

February 4, 2013

## **I. INTRODUCTION**

The International Documentary Association, Film Independent, the Independent Filmmaker Project, Kartemquin Educational Films, Inc., the National Alliance for Media Arts and Culture, Gilda Brasch, Kelly Duane de la Vega of Loteria Films, Katie Galloway, Roberto Hernandez, Karen Olson of Sacramento Video Industry Professionals, Marjan Safinia of Merge Media, and Geoffrey Smith of Eye Line Films respectfully submit this comment on behalf of thousands of documentary and independent filmmakers and other creators who struggle every day with the orphan works problem. This problem effectively prevents filmmakers from licensing third party materials whenever the rightsholder cannot be identified or found; for many filmmakers, the threat of a lawsuit, crippling damages, and an injunction makes the risk of using an orphan work just too high. In fact, because of this risk, distribution, broadcast, and film festival admission is often impossible for films that include orphan works.

Many uses of orphan works will likely be protected by fair use, particularly in the documentary filmmaking context. However, documentary filmmakers often seek to use third party materials in ways that are not fair use, such as in adaptations, sequels, or remakes. Filmmakers must license third party materials in many such instances, but are unable to do so when the rightsholder to those materials cannot be identified or located. In many cases, filmmakers cannot even begin their projects; in more cases, the projects cannot be as rich as they should be; valuable information may have to be omitted; and important illustrative content cannot be used.

The orphan works problem has gotten worse since 2008 for documentary and independent filmmakers. Valuable historical materials are being unearthed and digitized every day, creating enormous opportunity for new film projects—and vast numbers of new orphan works.

The problem has become particularly pressing for documentary and independent filmmakers because we are on the cusp of a golden age in independent and documentary film production: digital production, distribution, and marketing technologies are revolutionizing how we create new works, access third party materials, fund projects, and show, market, and distribute our films. The orphan works problem is perhaps the single greatest impediment to these changes, and the United States desperately needs a solution.

The Copyright Office took the right approach when in 2006 it recommended a solution that would provide relief for those who wish to use orphan works after conducting a diligent search, provide reasonable compensation in the rare instance when a rightsholder resurfaces after the project has commenced, and limit other remedies. We continue to support such an approach because it provides the best way to balance the need for a solution that allows filmmakers to make use of orphan works that may be of critical historical or cultural significance without facing the risk of catastrophic monetary damages or a total loss of their investment—while ensuring that resurfacing rightsholders still obtain fair and reasonable compensation for those uses. The Copyright Office should urge Congress to take the same approach now.

An approach based on a diligent search requirement, reasonable compensation, and limitations on other remedies is preferable to other proposed alternative solutions because it builds on the predominant tradition in American copyright law of transactional licensing and allows fair use practices and jurisprudence to continue to evolve. For example, we do not support extended collective licensing regimes such as have been implemented in Europe, because such regimes are incompatible with fundamental principles that are at the core of our copyright laws. Such regimes are also unfair and unworkable in the American system: they charge fees that do not reflect the true value of the works in question; deprive rightsholders of control over the use of their works; are susceptible to administrative inefficiencies and abuse; and would presumably channel licensing fees to third parties that have no relationship with the actual rightsholder.

## **II. THE ORPHAN WORKS PROBLEM PERSISTS AND MUST BE ADDRESSED**

The orphan works problem continues to be a significant impediment to documentary and independent filmmaking. Even when an occasional filmmaker can stomach the risk of litigation, statutory damages, and an injunction that could stop the project completely, he or she generally cannot obtain insurance coverage, distribution deals, or broadcast deals. In many cases, even film festivals will refuse to screen films containing orphan works. In fact, the problem has grown since 2008, in the face of changes in the documentary and independent filmmaking business including growth in the use of third party content, greater availability of source materials, and new avenues for funding and distributing projects.

### **A. The orphan works problem threatens to undermine opportunities for increased use of third party materials in documentary and independent filmmaking**

Since the *Documentary Filmmakers' Statement of Best Practices in Fair Use* was developed in 2005, there has been an explosion in the number of documentary film projects that make fair use of third party content. Filmmakers are now routinely able to obtain errors and omissions insurance for films that make fair use of third party materials, and these policies are essential for agreements with distributors and broadcasters. Today more filmmakers understand how to apply fair use better than ever before. As a result, filmmakers are also more aware of the wide range of ways in which third party content can illustrate, enrich, and deepen their work.

As it stands now, however, if filmmakers cannot identify and locate the rightsholder, in many cases they effectively cannot use the work. This problem prevents significant historical and cultural stories from reaching the public, especially where projects rely on older works and those from minority groups that often have less reliable

records of ownership.<sup>1</sup> If an appropriate solution to the orphan works problem is enacted, documentary and independent filmmaking will continue to evolve in ways that use the treasure trove of newly available archival material to explore and illuminate our heritage; or, a significant portion of important works will tragically remain hidden from the public, depriving all of us of countless opportunities to explore and reconnect with our heritage.

**B. The orphan works problem threatens new, unprecedented opportunities to access and explore third party materials both online and through digitization initiatives**

The internet is an increasingly valuable source of third party content for documentary and independent filmmakers. Video-hosting websites, blogs, social media services, and digital libraries and archives are making material available at an astonishing rate. As but one example, seventy-two hours of video content is uploaded to YouTube *every minute*.<sup>2</sup> Unfortunately, however, as more material becomes available, more orphan works are made or unearthed. Many videos are uploaded to the internet by people who are not themselves rightsholders to that work<sup>3</sup>, and a great deal of material does not come with clear rightsholder information; thus it is often difficult or impossible to identify and locate the true rightsholder. As a result, a significant percentage of newly available works on the internet are orphan works.

Numerous initiatives aimed at preserving audiovisual and audio materials are underway, which promise to unlock an incredible amount of content for use by documentary and independent filmmakers. For example, many universities including the University of Southern California,<sup>4</sup> Indiana University,<sup>5</sup> and University of Maryland<sup>6</sup> are currently leading digitization and archiving projects of various audiovisual works. The University of California, Los Angeles recently launched the UCLA Library Broadcast NewsScape, a digital archive of nearly 200,000 news programs.<sup>7</sup> Many of these projects are managed in collaboration with third-party non-profit organizations such as the Internet Archive<sup>8</sup> and the Paley Center for Media.<sup>9</sup> Public television stations are

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<sup>1</sup> See Brianna Dahlberg, *The Orphan Works Problem: Preserving Access to the Cultural History of Disadvantaged Groups*, 20 S. Cal. Rev. L. & Soc. Just. 275 (2011).

<sup>2</sup> YOUTUBE STATISTICS, [http://www.youtube.com/t/press\\_statistics](http://www.youtube.com/t/press_statistics) (last visited Feb. 3, 2013).

<sup>3</sup> See *id.*

<sup>4</sup> USC DIGITAL REPOSITORY, <http://repository.usc.edu/> (last visited Feb. 3, 2013).

<sup>5</sup> INDIANA UNIVERSITY DIGITAL LIBRARY PROGRAM, <http://www.dlib.indiana.edu/> (last visited Feb. 3, 2013).

<sup>6</sup> SPECIAL COLLECTIONS AT THE UNIVERSITY OF MARYLAND, <http://www.lib.umd.edu/blogs/special/?p=62> (last visited Feb. 3, 2013).

<sup>7</sup> THE UCLA LIBRARY BROADCAST NEWS SCAPE, <http://newsscape.library.ucla.edu/> (last visited Feb. 3, 2013).

<sup>8</sup> Download & Streaming: Moving Image Archive, INTERNET ARCHIVE, <http://archive.org/details/movies> (last visited Feb. 3, 2013).

digitizing their own archives and some have made them accessible for free via the internet,<sup>10</sup> and the Corporation for Public Broadcasting's American Archive Content Preservation Project aims to catalog, preserve, and digitize tens of thousands of hours of material in the coming years.<sup>11</sup> Commercial entities are also engaging in the digitization and archiving of audiovisual materials; HBOarchives.com facilitates the use of third party content, and T3Media even offers its technology for sale as a platform for rightsholders to create and maintain a digital video library.<sup>12</sup> Fortunately, even when the rightsholder has not expressly authorized digitization and archiving of its work, the doctrine of fair use as well as Section 108 of the Copyright Act establishes that mass digitization of materials for preservation purposes (as well as for certain other users<sup>13</sup>) is permissible.<sup>14</sup> Consequently, we expect more large-scale projects aimed at digitizing audiovisual and audio materials to launch in the near future.

The undeniable cultural and historical potential of this vast body of digital content highlights the importance of the orphan works problem because a large portion of these digitized materials will be orphan works for which no authorization for use in filmmaking can be obtained.<sup>15</sup> Rightsholders have often not actively contributed their works to an archive; many works contain little or no identifying information; and even where rightsholders are known, they often cannot be found. Such works should not be locked away from the public.

For this reason, it is our view that any comprehensive orphan works reform should provide archives, libraries, museums, and similar institutions the opportunity and incentive to make orphan works available while giving resurfacing rightsholders the right to remove their works from public display.

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<sup>9</sup> THE PALEY CENTER FOR MEDIA, <http://www.paleycenter.org/icolection-for-colleges-and-universities> (last visited Feb. 3, 2013).

<sup>10</sup> OPEN VAULT, <http://openvault.wgbh.org/> (last visited Feb. 3, 2013).

<sup>11</sup> AMERICAN ARCHIVE CONTENT INVENTORY PROJECT, <http://americanarchiveinventory.org/project/about-2/> (last visited Feb. 3, 2013).

<sup>12</sup> T3 MEDIA, <http://www.t3media.com/> (last visited Feb. 3, 2013).

<sup>13</sup> *E.g.*, Kelly v. Arriba Soft Corp., 336 F.3d 811, 822 (9th Cir. 2003) (concluding that creating thumbnail images of copyrighted images for purposes of facilitating access to images on the Internet is fair use because thumbnails serve a purpose unrelated to the purposes of the original works); *see also* Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1165 (9th Cir. 2007) (holding search engine's use of thumbnails is highly transformative and constitutes fair use).

<sup>14</sup> Authors Guild, Inc. v. HathiTrust, 2012 U.S. Dist. LEXIS 146169 (S.D.N.Y. Oct. 10, 2012) (holding that mass digitization of books by libraries is permissible under fair use). *See generally* Jennifer Urban, *How Fair Use Can Help Solve the Orphan Works Problem*, 27 BERKELEY TECH. L.J. (forthcoming 2013).

<sup>15</sup> *See generally* John P. Wilkin, *Bibliographic Indeterminacy and the Scale of Problems and Opportunities of "Rights" in Digital Collection Building*, RUMINATIONS, available at <http://www.clir.org/pubs/ruminations/01wilkin/wilkin.html/wilkin.pdf> (2011) .

**C. The orphan works problem is undermining new digital business models in documentary and independent filmmaking**

The emergence of new business models and improvements in technology over the last several years has made funding, creation, and distribution of films available to many more filmmakers than ever before. For example, many filmmakers have had enormous success using “crowd funding” services such as IndieGoGo and Kickstarter to finance their creative projects. Crowd funding allows individuals and fans to each pledge anywhere from one dollar to many thousands of dollars in hopes that the project will be realized. In fact, the IndieGoGo platform is being used to underwrite more than one hundred thousand creative or entrepreneurial campaigns,<sup>16</sup> and continues to grow rapidly. IndieGoGo’s average campaign raised 20% more money in 2012 than it did in 2011, with its most successful campaign earning a record \$1,370,461 in total funding.<sup>17</sup> Similarly, 2,394 documentary filmmakers have collectively raised over \$42 million through Kickstarter between April 2009 and January 2013.<sup>18</sup> These services are quickly becoming a favorite of both filmmakers and the filmgoing public because they make projects possible that would otherwise likely not be viable.

Filmmakers also enjoy new digital distribution channels such as Netflix, Hulu, Fandor, DailyMotion, and YouTube. Until just a few years ago, digital distribution channels could not support high-quality content streaming for even a small amount of users. However, technological advances such as the recent expansion of content delivery networks (or CDNs, large distributed systems that consist of hundreds of thousands of servers) allow unprecedented amounts of high-quality content to be streamed simultaneously around the world. Similarly, third-party plug-ins such as Microsoft Silverlight and Apple HTTP integrate with any web browser to facilitate uninterrupted high-quality streaming.<sup>19</sup>

This transformation has enabled these new digital distribution channels to expand their audiences massively with large subscriber bases and advertising-supported streaming to levels thought to be impossible just a few years ago. As but one example among many, Netflix offers hundreds of documentary films in twelve different, easily-searchable subgenres that can be watched any time for less than ten dollars a month. Netflix also continues to gain new subscribers and showed an increase of approximately

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<sup>16</sup> Matt Petronzio, *A Look Back at IndieGoGo’s Successful Year in Crowdfunding*, MASHABLE (Jan. 11, 2013), <http://mashable.com/2013/01/11/indiegogo-crowdfunding-2012/>.

<sup>17</sup> *Id.*; Nic Baddour, *12 Insights for 2012* (Jan. 11, 2013), INDIEGOGO BLOG, <http://blog.indiegogo.com/2013/01/12-insights-for-2012.html>.

<sup>18</sup> *\$100 Million Pledged to Independent Film* (Jan. 3, 2013), KICKSTARTER BLOG, <http://www.kickstarter.com/blog/1133>.

<sup>19</sup> S. Shunmuga Krishnan, Ramesh K. Sitaraman, *Video Stream Quality Impacts Viewer Behavior: Inferring Causality Using Quasi-Experimental Designs* (Nov. 16, 2012), [http://people.cs.umass.edu/~ramesh/Site/HOME\\_files/imc208-krishnan.pdf](http://people.cs.umass.edu/~ramesh/Site/HOME_files/imc208-krishnan.pdf).

sixteen million subscribers worldwide from 2009 to 2011 and reported over 24 million global streaming subscribers who watched over 1 billion streaming hours in 2012.<sup>20</sup> And of course, new relatively inexpensive digital cameras and editing technologies have made filmmaking accessible to more people than ever before.

The crowd funding model and digital distribution channels have helped a remarkable number of documentary filmmakers realize their projects by allowing the audience to fund projects they want to see and to access smaller, niche films that cater to more dispersed audiences with unique tastes. These exciting new models, together with the vast third party source materials now available through the internet, mean that documentary and independent filmmakers can now produce films on obscure or marginalized subjects that would not have been possible in the past. But obscure and marginalized subjects are precisely the kind of projects that suffer most from the orphan works problem. Documentary and independent filmmakers are therefore especially concerned about the negative impact that the orphan works problem is having on this field and how the problem will shape these new opportunities in the near term.

### **III. A CASE-BY-CASE SOLUTION BASED ON A DILIGENT SEARCH REQUIREMENT, REASONABLE COMPENSATION, AND LIMITATIONS ON REMEDIES FOR RESURFACING RIGHTSHOLDERS IS THE PROPER APPROACH TO THE ORPHAN WORKS PROBLEM IN THE UNITED STATES**

The goal of any orphan works solution is to enable the American people, including documentary and independent filmmakers, non-profit libraries, archives and museums, to make use of orphan works while respecting and protecting rightsholders that can be found. The Copyright Office took the right approach in its 2006 *Report on Orphan Works* when it recommended solutions that require the potential user of an orphan work to conduct a reasonably diligent search and pay reasonable compensation to resurfacing rightsholders, and that limit money damages and injunctions against the user of the orphan work under certain circumstances.<sup>21</sup> That approach strikes the appropriate balance between rightsholders, other creators, and potential users.

#### **A. Protecting resurfacing orphan works rightsholders**

The approach we recommend will not affect the normal exploitation of rightsholders' works, and can be configured to impose requirements on potential users

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<sup>20</sup> *Netflix Delivers 1 Billionth DVD*, MSNBC, Feb. 25, 2007, available at <http://www.nbcnews.com/id/17331123/>; see also Joseph Tartakoff, *The paidContent 50: The Most Successful Digital Media Companies In The U.S.*, July 19, 2011, available at <http://web.archive.org/web/20110719173326/http://paidcontent.org/list/page/the-most-successful-digital-companies/P4/>.

<sup>21</sup> REGISTER OF COPYRIGHTS, REPORT ON ORPHAN WORKS 95-125 (2006).

that are sufficient to protect rightsholders. Potential users should be required to conduct a reasonably diligent search following procedures rigorous enough to ensure that the user made a good faith and reasonable attempt to engage the rightsholder. Such procedures may vary based on the type of orphan work (e.g., film, photography, books) such that diligent search efforts are reasonable in light of the type of work in question. We are confident that such procedures can be designed to ensure both that locatable and identifiable rightsholders are found, and that the search requirements are not so burdensome that they discourage users from utilizing this reform.

In addition, we urge the Copyright Office to consider the impact that the *Documentary Filmmakers' Statement of Best Practices in Fair Use*<sup>22</sup> and subsequent statements of best practices have had on various communities of practice, and whether the process of developing such statements can serve as a model for the development of diligent search guidelines. Developed in 2005, the *Statement* (like subsequent statements) was created through a process that began with fact-finding about how clearance and fair use impact the field in question; continued with input from a community of practitioners in that field, who make fair use regularly and understand the critical role it plays in documentary filmmaking; and ended with drafting best practices based on a community consensus, which was reviewed by a panel of legal specialists.<sup>23</sup> The *Statement* immediately provided much-needed clarity as to what types of uses are acceptable in documentary filmmaking, and quickly led to a sea change in documentary filmmaking as insurers, broadcasters, and distributors began to accept projects containing fair use material.<sup>24</sup> Since 2005, there have been no allegations of misuse of the *Statement*, and in fact it has been widely lauded.<sup>25</sup> Our experience with the *Statement*, as well as the experience of other communities with statements of best practices, demonstrates that it is possible to develop industry-specific best practices that will yield responsible and workable diligent search norms.

In addition to a diligent search standard that would ensure rightsholders are protected, for the very rare instances in which a rightsholder resurfaces, such rightsholders should be entitled to reasonable compensation. This approach would therefore not deprive them of royalties they would have received had they been identifiable and locatable. Documentary and independent filmmakers have a strong interest in such measures, as they too are rightsholders who are entitled to the exploitation and enjoyment of their creations.

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<sup>22</sup> *Documentary Filmmakers' Statement of Best Practices in Fair Use*, CENTER FOR SOCIAL MEDIA, <http://www.centerforsocialmedia.org/fair-use/best-practices/documentary/documentary-filmmakers-statement-best-practices-fair-use>.

<sup>23</sup> PATRICIA AUFDERHEIDE & PETER JASZI, *RECLAIMING FAIR USE: HOW TO PUT BALANCE BACK IN COPYRIGHT100* (The University of Chicago Press 2011).

<sup>24</sup> Patricia Aufderheide & Peter Jaszi, *Fair Use and Best Practices: Surprising Success*, *Intellectual Property Today*, Oct. 2007, available at <http://www.iptoday.com/articles/2007-10-aufderheide.asp>.

<sup>25</sup> *Id.*

## **B. Creating protections that allow filmmakers and others to use orphan works**

The current system heavily discourages filmmakers from using orphan works outside of fair use, as it leaves filmmakers exposed to crushing liability and the threat of injunctions that could close down a project entirely. Statutory damages can reach \$150,000 plus litigation costs<sup>26</sup>, and an injunction can mean that an investment of time, effort, and money into a project was all for naught—a risk simply too great for many filmmakers. In contrast, an orphan works solution that limits remedies—provided the user completes the required search—provides more certainty as to the risk to which filmmakers are exposed when using orphan works. We urge the Copyright Office to resume the approach it recommended in its 2006 report: in the rare instance when the rightsholder of an orphan work surfaces after the work is being used, he or she is entitled to reasonable compensation from the user, but cannot get an injunction against the user's work if, after the user has transformed, adapted, recast, or otherwise integrated the orphan work into a new work that employs a significant amount of original expression.<sup>27</sup> This balancing approach reduces the risk that filmmakers who have made substantial investments into their creations will be denied the ability to share their work with the public.

In addition, any comprehensive orphan works solution should permit wider latitude for uses made without any purpose of commercial advantage.<sup>28</sup> Such a provision will encourage libraries, archives, and other institutions to make orphan works available to the public, as well as to filmmakers who can appropriately and responsibly explore the vast wealth of orphaned material for use in their films.

## **IV. OTHER PROPOSED ORPHAN WORKS SOLUTIONS ARE UNSUITABLE FOR THE UNITED STATES**

Orphan works reform that imposes a diligent search requirement, guarantees reasonable compensation, and limits remedies in appropriate circumstances will create an efficient and equitable avenue by which users can responsibly use orphan works, while still protecting the rights of owners who resurface. Other solutions that have been suggested would not work as well to address the problem. In particular, we do not support extended collective licensing, a prospective alternative scheme that has been adopted in some European Union member states. An extended collective licensing regime would be unfair, costly and inefficient, would clash with the American copyright tradition, and would create an unnecessary conflict of interest.

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<sup>26</sup> 17 U.S.C. § 504(c)(2) (2006).

<sup>27</sup> *See, e.g.*, Orphan Works Act of 2006, H.R. 5439, 109th Cong. § 2(a) (2006).

<sup>28</sup> *Id.*

In most extended collective licensing schemes, a collective management organization (CMO) is authorized by legislative or administrative mandate to grant blanket licenses for large quantities of works, even if the rightsholder has no relationship with the CMO—effectively giving the CMO rights to all works in that jurisdiction.<sup>29</sup> In most cases, orphan works owners who resurface may opt out of the licensing regime. In such cases, a diligent search is not required before a license to an orphan work may be granted.<sup>30</sup>

An extended collective licensing regime is ill-suited to address the orphan works problem in the United States, for several reasons. First, an extended collective licensing regime makes more sense in Europe because it is the only viable policy avenue by which mass digitization of orphan works, as well as other uses, can take place. In contrast, here in the United States the case law is clear that the doctrine of fair use together with other provisions such as Section 108<sup>31</sup> permit many uses that are not available in Europe,<sup>32</sup> such as digitization for preservation purposes among other purposes.<sup>33</sup> A European-style extended collective licensing scheme in the United States would create an entirely new regime for activity that should not need advance permission.

Second, such a scheme would be inconsistent with our copyright system's tradition emphasizing rightsholders' exclusive control over their creations, a case-by-case approach to fair use, and notions of transactional licensing. Exceptions to that tradition have been rare, and controversial. Extended collective licensing has been implemented in countries that have fundamentally different legal traditions from the United States.

Third, a flat license fee will rarely be commensurate with the value of the work, which depends on many factors including the way the work is used, how much of it is used, and the extent to which it is integrated into a new work; users will inevitably be forced to underpay or overpay. The approach we recommend, in contrast, provides for reasonable compensation on a case-by-case basis.

Fourth, forcing a user to obtain a license through a CMO will likely be costly and inefficient; because many independent and documentary films are on tight budgets and time constraints, this system would deter users from exploring orphan works and would likely be significantly more expensive than conducting a search.

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<sup>29</sup> COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS 290 (Daniel Gervais ed., Kluwer Law International 2d ed. 2010) (2006).

<sup>30</sup> Daniel Gervais, *Application of an Extended Collective Licensing Regime in Canada: Principles and Related Issues to Implementation*, June 2003, available at [http://works.bepress.com/daniel\\_gervais/29/](http://works.bepress.com/daniel_gervais/29/).

<sup>31</sup> 17 U.S.C. § 108 (2006).

<sup>32</sup> See, e.g., HathiTrust, *supra* note 14. See also Cambridge Univ. Press v. Becker, 863 F. Supp. 2d 1190 (N.D. Ga. 2012).

<sup>33</sup> See Arriba Soft Corp., *supra* note 11.

Fifth, an extended collective licensing scheme would be unfair to users and rightsholders alike. If past experience is any guide, exceedingly few rightsholders of orphan works will resurface to collect royalties; under an extended collective license regime, however, users of orphan works would be required to pay a license fee to a CMO even though that CMO in many cases will have no relationship to the true rightsholder other than that its members have created works in the same format as the missing rightsholder. The Copyright Office rejected an escrow requirement in its 2006 report because such a system would be “highly inefficient” and, because “in a vast majority of cases, no copyright owner would resurface to claim the funds, which means the system would not in most cases actually facilitate payments between owners and users of orphan works.”<sup>34</sup> The same would be true in an extended collective licensing regime.

Sixth, unlike many European countries, there is no existing CMO in the United States with the necessary institutional relationships, member base, and administrative capacity to license the vast body of audio-visual orphan works for all possible uses. To design an entirely new rights management infrastructure for an extended collective licensing regime would be costly, time-consuming, and require cooperation from multiple organizations and rightsholders. In addition, rights management and government oversight of such an organization would be burdensome given the large number of U.S. orphan works; such a burden would create a risk of administrative inefficiency and payment delays.

Seventh, it is unwise to vest so much responsibility with CMOs when a suitable case-by-case alternative is available because many CMOs here and abroad have been criticized for administrative inefficiencies, failure to pay royalties, lack of transparency, and self-dealing.<sup>35</sup> CMOs have also been known to take anticompetitive measures to control the marketplace for creative works.<sup>36</sup>

Lastly, a regime requiring CMOs to perform diligent searches for rightsholders would present a stark conflict of interest. Comprehensive searches can become very expensive and fees collected from users will likely be retained by the CMO if a rightsholder is not found. A CMO in an extended collective licensing system would therefore have little incentive to expend the extra resources to perform thorough diligent searches for rightsholders. In contrast, under the case-by-case approach we recommend,

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<sup>34</sup> REGISTER OF COPYRIGHTS, *supra* note 21 at 11.

<sup>35</sup> *See, e.g., Resnick v. Copyright Clearance Center, Inc.*, 422 F. Supp. 2d 252 (D. Mass. 2006) (nonmember-photographers alleged that defendant-CMO implied that users could reproduce their photographs for free); *see also* Glenn Peoples, *Accounts Viewable: Music Publishing Moves Toward Greater Transparency And Accountability*, BILLBOARD, Jan. 28, 2012 at 21 (CMO members complain of lengthy payment delays).

<sup>36</sup> *See, e.g.,* Ivan Reidel, *The Taylor Swift Paradox: Superstardom, Excessive Advertising and Blanket Licenses*, 7 N.Y.U. J.L. & Bus. 731 (2011) (arguing that blanket licenses offered by ASCAP and BMI reduce air-time for lesser-known songwriters through “supracompetitive cartel pricing,” and eliminate price competition between songwriters).

the filmmaker seeking to use an orphan work would have a strong incentive to conduct a diligent search because the limitation on remedies would only attach after such a search had been completed.

Finally, the Copyright Office has observed that an ECL regime will require administrative government oversight that could lead to further inefficiencies.<sup>37</sup>

A statutory licensing scheme, in which a user can obtain a license after satisfying statutory conditions, was also considered as a solution to the orphan works problem, but such a solution has traditionally been “viewed . . . as a mechanism of last resort.”<sup>38</sup> The scheme’s faults are demonstrated by Canada’s statutory licensing approach, in which a potential user must seek permission to use orphan works from the Copyright Board after the Board approves their diligent search efforts.<sup>39</sup> Numerous commentators and participants have criticized this system as inefficient, and it is not commonly used (125 licenses have been granted between 1990 and 2005). Critics of this system also note that lengthy delays deter users from applying for a license and the administrative costs often outweigh the value of the use.<sup>40</sup>

We urge the Copyright Office to renew its 2006 recommendation for a case-by-case solution imposing limitations on remedies against users of orphan works,<sup>41</sup> and to discourage implementation of extended collective licensing schemes in the United States.

## V. CONCLUSION

The orphan works problem is impairing our cultural and social progress by preventing the public from accessing a vast amount of works, and by preventing independent and documentary filmmakers from doing their part to fulfill the promise of the digital revolution. Orphan works of critical historical and cultural significance continue to be out of the reach of many filmmakers in light of the risk of lawsuits, injunctions, and catastrophic damages if used. As a result, many works may never be exposed to the public.

A case-by-case approach for filmmakers based on a diligent search requirement, reasonable compensation for rightsholders, and a limitation on remedies is best suited to address the orphan works problem in the United States. Such an approach is most consistent with our copyright tradition and the principles upon which it is based, and

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<sup>37</sup> REGISTER OF COPYRIGHTS, *supra* note 21 at 95.

<sup>38</sup> Orphan Works and Mass Digitization Notice of Inquiry, 77 Fed. Rgtr. 64,559 (Oct. 22, 2012).

<sup>39</sup> Copyright Act, R.S.C. 1985, c. C-42, s. 77 (Can.).

<sup>40</sup> REGISTER OF COPYRIGHTS, *supra* note 21 at 83.

<sup>41</sup> *Id.* at 95-125.

strikes the appropriate balance between users of orphan works and rightsholders. We urge the Copyright Office to endorse this approach.

## APPENDIX A

### ABOUT THE COMMENTERS

This comment is submitted on behalf of a coalition of organizations and filmmakers whose work supports independent and documentary filmmakers.

**The International Documentary Association (IDA)** is a non-profit 501(c)(3) organization that promotes nonfiction filmmaking, and is dedicated to increasing public awareness for the documentary genre. At IDA, we believe that the power and artistry of the documentary art form are vital to cultures and societies globally, and we exist to serve the needs of those who create this art form. At IDA, we help advocate for, protect and advance the legal rights of documentary filmmakers. Our major program areas are: Advocacy, Filmmaker Services, Education, and Public Programs and Events. IDA also has a long history of protecting documentary filmmaking as a vital art form, and we continue to seek ways to ensure that the artists who make documentaries receive the funding that they deserve. For almost 30 years, IDA has worked to support the documentary art form.

**Film Independent** is a non-profit arts organization and our mission is to champion the cause of Independent film and support a community of artists who embody diversity, innovation and a uniqueness of vision. We help independent filmmakers tell their stories, build an audience for their projects and diversify the voices in the film industry, supporting filmmakers at every experience level with a community in which their works can be appreciated and sustained. With over 200 annual screenings and events, Film Independent provides access to a network of like-minded artists who are driving creativity in the film industry. Our free Filmmaker Labs for selected writers, directors, producers and documentary filmmakers and year-round educational programs serve as a bridge from film school to the real world of filmmaking – one with no defined career ladder. Project Involve is Film Independent's signature program dedicated to fostering the careers of talented emerging filmmakers from communities traditionally underrepresented in the film industry. We also produce the weekly Film Independent at LACMA film series, the Los Angeles Film Festival in June and the annual awards programs for the finest independent films of the year—the Film Independent Spirit Awards.

**The Independent Filmmaker Project (IFP)** is one of the nation's oldest and largest not-for-profit advocacy organizations for independent filmmakers. Since its debut at the 1979 New York Film Festival, IFP has supported the production of over 7,000 films and offered resources to more than 20,000 filmmakers, providing an opportunity for many diverse voices to be heard. IFP believes that independent films enrich the universal language of cinema, seeding the global culture with new ideas, kindling awareness, and fostering activism. The organization has championed early work by pioneering, independent filmmakers, including Charles Burnett, Edward Burns, Jim Jarmusch, Barbara Kopple, Michael Moore, Mira Nair and Kevin Smith.

In 1966, **Kartemquin Educational Films** began making documentaries that examine and critique society through the stories of real people. Their documentaries, such as *The Interrupters*, *Hoop Dreams* and *The New Americans*, are among the most acclaimed of all time, leaving a lasting impact on millions of viewers. Most recently, *As Goes Janesville*, a co-production with 371 Productions, aired on PBS Independent Lens and is now available on DVD. In 2013, they expect to have their busiest year ever, with releases including *The Trials of Muhammad Ali*, *Cooked*, and *Life Itself*, about film critic Roger Ebert, among others. Kartemquin Films is a home for independent media makers who seek to create social change through film. With a noted tradition of nurturing emerging talent and acting as a leading voice for independent media, Kartemquin is building on over 45 years of being Chicago's documentary powerhouse. Kartemquin is a 501(c) 3 non-profit organization.

**The National Alliance for Media Arts and Culture** (“NAMAC”) consists of 225 organizations that serve over 335,000 artists and media professionals nationwide. Members include community-based media production centers and facilities, university-based programs, museums, media presenters and exhibitors, film festivals, distributors, film archives, youth media programs, community access television, and digital arts and online groups. NAMAC’s mission is to foster and fortify the culture and business of the independent media arts. NAMAC believes that all Americans deserve access to create, participate in, and experience art. NAMAC co-authored the Documentary Filmmakers’ Statement of Best Practices in Fair Use and has long been an advocate for orphan works reform.

*In the Matter of Orphan Works and Mass Digitization*, No. 2012-12  
Comment of International Documentary Association and Film Independent

**APPENDIX C**

**IN THE MATTER OF  
ORPHAN WORKS AND MASS DIGITIZATION**

**DOCKET NO. 2012-12**

**REPLY COMMENT OF**

**INTERNATIONAL DOCUMENTARY ASSOCIATION  
FILM INDEPENDENT  
NATIONAL ALLIANCE FOR MEDIA ARTS AND CULTURE  
KARTEMQUIN EDUCATIONAL FILMS, INC.  
GLEN PITRE  
TALLGRASS FILM ASSOCIATION**

**MARCH 6, 2013**

*Before the*  
**United States Copyright Office**  
**Library of Congress**

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In the Matter of	)	
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Orphan Works and Mass Digitization	)	Docket No. 2012-12
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**REPLY COMMENT OF**  
**INTERNATIONAL DOCUMENTARY ASSOCIATION**  
**FILM INDEPENDENT**  
**NATIONAL ALLIANCE FOR MEDIA ARTS AND CULTURE**  
**KARTEMQUIN EDUCATIONAL FILMS, INC.**  
**GLEN PITRE**  
**TALLGRASS FILM ASSOCIATION**

Submitted By:

**Jack I. Lerner**

USC Intellectual Property and Technology  
Law Clinic  
University of Southern California  
Gould School of Law  
699 Exposition Boulevard  
Los Angeles, CA 90089

**Michael C. Donaldson**

Donaldson & Callif, LLP  
400 South Beverly Drive  
Beverly Hills, CA 90212

With the participation of clinical interns  
Minku Kang and Christopher Mastick

**March 6, 2013**

## **I. Introduction**

We respectfully submit this reply comment in order to elaborate on the proposed orphan works solution that we support, and clarify the effect we believe this solution will have on stakeholders throughout the copyright system. We are pleased to observe support among a wide range of stakeholders for the Copyright Office’s 2005 approach, and we remain convinced that this approach—a diligent search requirement before use, a limitation on remedies beyond reasonable compensation for rightsholders who later resurface, exceptions for non-commercial uses in some circumstances, and a savings clause that preserves fair use—is the optimal solution for the United States. In our view, this approach is the most likely to help users make valuable uses of orphan works, enhance the market for licensed works, and reduce the number of orphan works going forward.

## **II. A robust and workable diligent search requirement will effectively protect rightsholders and appropriately limit the scope of eligible orphan works.**

As we see it, the purpose of a diligent search requirement is to protect rightsholders by requiring potential users to make a good faith, reasonable effort to locate the rightsholder. There is broad agreement that the user should not benefit from the other components of this solution until he or she has determined that it is not reasonably possible for them to identify and locate the rightsholder.

### **a. Communities of practice can develop workable diligent search best practices that adequately protect rightsholders.**

Some commenters have suggested that it is not feasible to develop diligent search best practices that would adequately protect their copyrights.<sup>1</sup> Such concerns are premature—and misplaced. We firmly believe that it is possible to develop reasonable, workable, and accessible best practices that will adequately protect rightsholders while still being practicable for creators and other members of the public to use.

In developing diligent search best practices, the overwhelming success of the Documentary Filmmaker’s Statement of Best Practices in Fair Use, and other statements of best practices in fair use, should point the way forward.<sup>2</sup> Experience shows that best

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<sup>1</sup> See, e.g., comment of Science Fiction and Fantasy Writers of America, Inc.; comment of National Writers Union, comment of National Press Photographers Association; comment of Artists Rights Society; comment of ArtistsUnderTheDome.org; comment of Atlantic Feature Syndicate; comment of Abbott Waring.

<sup>2</sup> REPORT ON ORPHAN WORKS CHALLENGES FOR LIBRARIES, ARCHIVES AND OTHER MEMORY INSTITUTIONS 13 (January, 2013) (describing that best practices for documentary filmmakers has “reduced the uncertainty surrounding fair use”, is “now well-tested” and has been “widely adopted and used by community members” because of its “community-based methodology”).

practices for diligent searches can be developed by communities of practice, individuals and organizations familiar with licensing and clearance practices in a given field. Those who regularly obtain clearances for copyrighted material are in the very best position to know where identifying information can be found, how to find rightsholders, and so on—in short, what works and what doesn't.

In the fair use context, the Statement has revolutionized documentary filmmaking<sup>3</sup> with zero controversy and no allegations of misuse, and took very little time to be integrated into existing business practices in the documentary filmmaking industry in ways that add further protections for rightsholders.<sup>4</sup> Within weeks of the Statement's release, three documentary filmmakers used it to obtain clearance approval for screening at the Sundance Film Festival, and their films were subsequently picked up by television programmers because the films adhered to the Statement.<sup>5</sup> Shortly thereafter, Errors and Omissions (E&O) insurers began for the first time to issue fair use endorsements on policies covering documentary films after concluding that the Statement dramatically lowered the risk of copyright infringement liability.<sup>6</sup> Today, film festivals regularly accept films containing uncleared material that adheres to the best practices articulated in the Statement; E&O insurers regularly issue fair use endorsements based on compliance with the Statement<sup>7</sup>; and television programmers routinely broadcast films containing uncleared material that has been used in accordance with the practices set forth in the Statement.<sup>8</sup>

Many other industries have since developed statements of best practices in fair use, also with notable success.<sup>9</sup> Research libraries, poets, open courseware providers, dance archivists, communications scholars, media literacy teachers, and others have

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<sup>3</sup> See Elaine Dutka, *Legendary Film Clips: No Free Sample?*, N.Y. Times, May 28, 2006; see also, Michael C. Donaldson, *Fair Use: What a Difference a Decade Makes*, 57 J. Copyright Soc'y U.S.A. 331, 332 (2010). Where fair use made pursuant to the Statement has been challenged in court, such use has been upheld. See *Lennon v. Premise Media Corp.*, 556 F. Supp. 2d 310 (S.D.N.Y. 2008).

<sup>4</sup> Anthony Falzone & Jennifer Urban, *Demystifying Fair Use: The Gift of the Center for Social Media Statements of Best Practices*, 57 J. Copyright Soc'y 337, 346-47 (2010).

<sup>5</sup> PATRICIA AUFDERHEIDE & PETER JASZI, RECLAIMING FAIR USE: HOW TO RESTORE BALANCE IN COPYRIGHT 101 (2011).

<sup>6</sup> *Id.* at 103-105.

<sup>7</sup> See Statement of Joanne Richardson, Hiscox USA in Errors & Omissions Insurance, *Comment of International Documentary Association et al.*, In the Matter of Exemption on Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies (2011), available at [http://www.copyright.gov/1201/2011/initial/IDA\\_Mark\\_Berger.pdf](http://www.copyright.gov/1201/2011/initial/IDA_Mark_Berger.pdf); see also Donaldson, *supra* note 3, at 2.

<sup>8</sup> See also Pat Aufderheide & Peter Jaszi, *Fair Use and Best Practices: Surprising Success*, Intellectual Property Today, Oct. 2007, available at <http://www.iptoday.com/articles/2007-10-aufderheide.asp>.

<sup>9</sup> Falzone & Urban, *supra* note 4, at 344-347; see also REPORT ON ORPHAN WORKS CHALLENGES FOR LIBRARIES, ARCHIVES AND OTHER MEMORY INSTITUTIONS, *supra* note 2.

developed best practices in fair use that are specific to their respective fields.<sup>10</sup> By setting forth clear, workable practices that identify what is fair use and what is not, these statements have added much-needed clarity and certainty to an area that had been thought to be as murky as any in copyright. In the process, they have enabled countless uses—performances and broadcasts, research projects, educational initiatives, lesson plans, historical inquiries, and innovative modes of criticism and commentary—that would have been unworkable if not unthinkable just a few years ago.

The successes of the best practices statements in the face of deep uncertainty surrounding fair use can be attributed to the process in which they were developed. In the documentary filmmaking community, the Statement was developed by filmmakers themselves—those making the use—who not only sought to provide a resource for their peers, but also had an interest in protecting their own copyrights in their films. In addition, the communities that have developed statements of best practices have an obvious interest in developing practices with legitimacy that are practical, lasting, and will satisfy gatekeepers and the courts. In the documentary filmmaking context, such gatekeepers include insurers, distributors, and broadcasters; prior to the Statement, such entities seldom embraced films incorporating fair use.<sup>11</sup> The communities that developed statements of best practices accomplished these goals in large part by looking to existing practices and acknowledging those that had long been recognized as appropriate—while at the same time cautioning against those not seen as legitimate.<sup>12</sup>

Our experience with the Documentary Filmmaker’s Statement of Best Practices in Fair Use, shows that, as with the other statements, communities of practice can develop best practices that are flexible and accessible, while still rigorous enough to withstand the scrutiny of insurers, broadcasters, rightsholders, and the courts. We think that the same can be true with respect to a diligent search requirement, and we urge the Copyright Office to explore this approach.

Finally, it is worth pointing out that a workable orphan works solution implementing a robust diligent search requirement will not only help users make valuable contributions through the use of orphan works, but will also help reduce the overall number of orphan works going forward. The development of diligent search best practices will yield new services, institutions, educational programs, and other avenues dedicated to locating and identifying rightsholders. In addition, when rightsholders who had been difficult to find do resurface, they will then be easier to find for future users. To

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<sup>10</sup> See *Fair Use Codes & Best Practices*, AM. UNIV. CTR. FOR SOCIAL MEDIA, <http://www.centerforsocialmedia.org/fair-use/best-practices/fair-use-codes-best-practices> (last visited Mar. 4, 2013).

<sup>11</sup> Falzone & Urban, *supra* note 4, at 346.

<sup>12</sup> Michael Madison, *A Pattern-Oriented Approach to Fair Use*, 45 Wm. & Mary L. Rev. 1525, 1629 (2004) (postulating that patterns in fair use jurisprudence can be understood in context of normative expectations).

be clear, no one is suggesting that rightsholders would have any obligation to issue licenses to their works under the proposed solution; nothing prevents them from saying no or even declining to respond to requests. They only have to make themselves *locatable*. That is an exceedingly low burden.

**b. Diligent search best practices can adequately accommodate the unique challenges inherent in visual art.**

While we appreciate that searching for images presents unique challenges, that does not mean that the Copyright Office's approach would harm rightsholders. Even now, new and readily accessible technologies are available that help users find rightsholders. For example, Google's Image Search, including its "Search by Image" feature, utilizes metadata information and content-based image retrieval technology to help users find images from all across the web.<sup>13</sup> Along with a burgeoning number of similar tools,<sup>14</sup> this technology can be used to locate rightsholders who make their works available on the internet. Such tools can greatly facilitate the location of rightsholders, given that many working artists have online presences in which they showcase their work, such as on Flickr, Picasa, Facebook, websites and blogs, and other photo sharing sites and services. These sites usually require users to create a username and profile where they can display their contact information or can be contacted directly through the site. In addition, multiple registries designed to facilitate licensing also already exist, such as the PLUS Coalition<sup>15</sup>, Artists Rights Society<sup>16</sup>, and others.<sup>17</sup> With the use of these tools and registries, together with registries likely to be developed in the future, we are confident that an orphan works solution that incorporates diligent search best practices will adequately protect rightsholders' copyright interests, while facilitating and improving users' attempts to find rightsholders.<sup>18</sup>

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<sup>13</sup> Search by Image – Inside Search, <http://www.google.com/insidesearch/features/images/searchbyimage.html> (last visited Mar. 5, 2013).

<sup>14</sup> See Wikipedia, *List of CBIR Engines* [http://en.wikipedia.org/w/index.php?title=List\\_of\\_CBIR\\_engines&oldid=539882734](http://en.wikipedia.org/w/index.php?title=List_of_CBIR_engines&oldid=539882734) (list of publicly available image search engines capable of retrieving images based on visual features; i.e., visual content) (as of Feb. 23, 2013, 12:21 GMT).

<sup>15</sup> PLUS, <http://www.useplus.com> (last visited Mar. 5, 2013).

<sup>16</sup> About Artist Rights Society, <http://arsny.com/about.html> (last visited Mar. 5, 2013).

<sup>17</sup> REGISTER OF COPYRIGHTS, LEGAL ISSUES IN MASS DIGITIZATION: A PRELIMINARY ANALYSIS AND DISCUSSION DOCUMENT (Appendix E) (2011).

<sup>18</sup> We agree with commenters who have suggested that if registries are incorporated into diligent search best practices, making oneself available on a registry should be voluntary for all rightsholders. There should be no presumption that absence from the registry deems a work orphaned, just as there should be no hard and fast requirement certain registries must be consulted in order for a search to be deemed diligent. Registries, technologies, and industries change over time, and therefore diligent search best practices should be flexible enough to accommodate such changes.

**c. A diligent search certification requirement would render any orphan works solution unworkable.**

While various communities of practice should develop rigorous diligent search best practices that fit the practices within that community, we disagree with the notion that diligent searches should be “certified.” A certification requirement would insert needless expense, delays, and bureaucratic hurdles that are simply unwarranted, and would render any orphan works solution inefficient and unworkable. Our experience with best practices statements in the fair use context shows that communities of practice can develop responsible best practices on their own without requiring a third party’s certification or government involvement.

A diligent search certification requirement would create a burdensome bureaucratic process that would discourage use. This is especially true for filmmakers, who may only wish to use a few seconds of a film clip, or a few photographs, often for a project that requires clearance of many works. Additionally, because many documentary and independent filmmakers work with low budgets and short time constraints, waiting for a certification could impede their ability to meet rigid awards and film festival entry deadlines, prevent them from using the works at all, or even mean that the filmmaker must abandon the project. Furthermore, regardless of what effect a certification is given, the requirement would create significant costs in administering the certifying body, some of which would likely be shifted onto users.<sup>19</sup> Looking at the copyright system as a whole, it is wildly unrealistic to think that a certification apparatus could be built that could accommodate in an affordable and timely fashion all the ways that users would seek to explore the vast mass of orphan works that exists today.<sup>20</sup>

Aside from the high cost to users and barriers to use, a certification requirement would not introduce meaningful improvement to the Copyright Office’s 2006 approach. If the certification were to prevent the rightsholder from litigating the sufficiency of the search, then the requirement would effectively turn the orphan works solution into a licensing model, which would be unwieldy at best.<sup>21</sup> In addition, where the administrative body errs, the quality of the search or certification would still have to be determined in court.

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<sup>19</sup> U.S. Copyright Office – Fees, <http://www.copyright.gov/docs/fees.html> (last visited Mar. 5, 2013).

<sup>20</sup> Cf. Statement of Maria Pallante, *Library of Congress: Ensuring Continuity and Efficiency During Leadership Transitions*, Statement before the Subcommittee on Oversight Committee on House Administration, United States House of Representatives, 112th Congress 2d Session (Apr. 18, 2012), available at <http://www.copyright.gov/regstat/2012/regstat041812.html> (At the end of the 2011 fiscal year, 185,000 claims were in awaiting processing at the Copyright Office).

<sup>21</sup> JEREMY DE BEER & MARIO BOUCHARD, CANADA’S “ORPHAN WORKS” REGIME: UNLOCATABLE COPYRIGHT OWNERS AND THE COPYRIGHT BOARD 31-36 (2009), available at <http://www.cb-cda.gc.ca/about-apropos/2010-11-19-newstudy.pdf> (describing that the Canadian Copyright Board granted 230 licenses between 1990 and 2008; Board decisions took between fourteen days and over one year from when applications were first received; approximately half of the decisions took eight weeks).

Finally, the question of who would certify diligent searches presents another difficult problem. It would be difficult for one body to certify searches across various industries, given that only experts in each field would be in the position to certify the comprehensive quality of the search; meanwhile, experts in a particular field, who are already likely very busy, would need to be compensated for their time and could exhibit bias either for rightsholders or for potential users.

The Copyright Office declined to recommend this type of requirement in its 2006 Report and should not pursue it now.

**III. A limitation on remedies and reasonable compensation are critical components of a workable orphan works solution.**

A limitation on remedies in conjunction with the requirement of reasonable compensation for resurfacing rightsholders is the linchpin of a workable solution because these provisions will enable users to make use of orphan works and incentivize them to conduct a diligent search for the rightsholder. Copyright is a strict liability regime. If no limitation on remedies is available to users who conduct a diligent search, artists and creators will still be reluctant to use orphan works for fear of severe copyright infringement penalties<sup>22</sup> or an injunction. Without a limitation on remedies, there can be no workable orphan works solution.

Some commenters have indicated concern that a limitation on remedies would deprive rightsholders of revenue.<sup>23</sup> We believe that the risk that this would occur is minimal because the diligent search requirement, as discussed above, will protect rightsholders from being subject to the limitation. In fact, we believe that the overall effect of this provision will be to *increase* licensing opportunities for rightsholders because it will encourage users to search for rightsholders. Currently, would-be users of works that appear orphaned are deterred from investing in a search for the rightsholders because if the search is unsuccessful, they will not be able to use the work. The limitation on remedies provides users with the incentive to go forward with a search for the rightsholder, because even if they cannot locate the rightsholder they can proceed to make use of the works knowing that they will be shielded from statutory damages and injunctions should the rightsholder resurface. Of course, in such situations, the rightsholder would still be entitled to reasonable compensation.

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<sup>22</sup> See 17 U.S.C. §§ 502-504 (2006).

<sup>23</sup> See, e.g., comment of Professional Photographers of America; comment of SAG-AFTRA; comment of Artists Rights Society; comment of American Photographic Artists.

**IV. Rightsholders will maintain the full panoply of copyright remedies against those who do not conduct a diligent search or conduct a search in bad faith.**

Under the approach we support, bad faith users who perform sham searches or remove copyright information will not be able to rely on the limitation on remedies because they will not have complied with the diligent search best practices. Therefore, if an available rightsholder—i.e., one that could have been found through a diligent search—is not consulted, that rightsholder will have available all the remedies that the law provides. Such a situation would present a common copyright infringement case, and the rightsholder would maintain his or her right to be eligible for injunctive relief and full statutory damages.

Well-developed, rigorous diligent search best practices will likely identify what kinds of sources a user is customarily expected to search, and ensure that rightsholders have all available remedies at their disposal against bad faith would-be users. Rightsholders who know that they can be contacted through a well-established channel, for example, should be quite confident that the limitation on remedies will not apply to them.

**V. Conclusion**

We commend the Copyright Office for returning to the orphan works problem, and we appreciate the opportunity to submit our reply comment on this issue. The approach recommended in the Copyright Office's 2006 Report is still the most practical, fair, and comprehensive solution available. America desperately needs legislation that will allow orphan works to see the light of day. We respectfully urge the Copyright Office to continue moving forward toward such a reform.