

**Statement of Doculink,
Film Independent, International Documentary Association, Independent Feature Project, National Alliance
for Media Arts and Culture, Public Knowledge, and Tribeca Film Institute**

**Subcommittee on Courts, the Internet, and Intellectual Property
Committee on the Judiciary
U.S. House of Representatives
March 20, 2008**

Re: Orphan Works

Chairman Berman, Ranking Member Coble and Members of the Subcommittee,

Thank you for this opportunity to submit this statement for the record on the issue of orphan works. We are submitting this statement on behalf of the hundreds of thousands of independent and documentary filmmakers and other independent media producers who are members of, or represented by members of: Doculink; FIND (Film Independent); International Documentary Association; IFP (Independent Feature Project); National Alliance for Media Arts and Culture; Public Knowledge; and Tribeca Film Institute.

As a whole, we represent individuals and organizations that produce, exhibit, distribute, collect, preserve, and educate through independent film and media. Our group includes or represents filmmakers, video artists, production facilities, community technology centers, film festivals, media distributors, film archives, after-school programs, community-access television stations and individuals working in the field of film and media arts. We are creators and artists, who rely on our copyrights to protect our creations. In creating our works, we are also users of copyrighted material, and we encounter works that cannot be cleared on a regular basis. Orphan works reform is a critical need for us. As such, we are grateful for the opportunity to express the viewpoint of independent and documentary filmmakers and other independent media producers, and are delighted to offer our perspective on the important issue of orphan works.

Introduction

Independent and documentary filmmakers create without the benefit of sustained, large-institution backing. Like many artists in the United States, we work with very limited resources, but with great passion and energy, in order to make films and other cultural products that nourish the unique American marketplace of ideas. We rely on our copyrights to protect our vision and allow us to monetize a labor of love, and believe in strong and clear copyright protection. At the same time, many artists and supporting organizations are affected by the uncertainty surrounding the use of copyrighted works for which the owner cannot be found. This is an issue that affects all artists; for small filmmakers, however, the ensuing risk can simply be crippling. Films—even with the exciting advent of digital and other new technologies—are expensive to make. The independent filmmaker must marshal all of his limited resources to raise funds; find locations; rent or purchase equipment; cast actors; hire the many workers needed to produce a film; obtain permits; search archives; license music and footage; travel; edit; obtain insurance and legal representation; pay out funds to secure distribution channels for his work . . . and the list goes on.

When a filmmaker cannot clear an orphaned work, she is left with two choices under the present system: 1) proceed, using the work, with the knowledge that unknown liability costs—or even an injunction—may lie ahead; or 2) refrain from using the work. For the independent or documentary filmmaker today, there is no real choice. Without a large institution to help spread the monetary risk, with the knowledge that she will have to compete aggressively to sell her film to often risk-averse distributors and obtain insurance, and with the possibility of an injunction that could silence her film forever, she simply cannot use the orphaned work. As such, the creative work that she has conceived and would like to present to the public is compromised, and the orphaned work languishes in obscurity and silence.

For these reasons, we are delighted that Chairman Berman and Ranking Member Coble have held this hearing to address the important issue of orphan works. It has been three years since this Committee, along with the Senate Judiciary Committee, asked the Copyright Office to submit a report on orphan works. Broad support has

emerged for orphan works relief, significant progress has been made, and we can now bring our collective efforts to fruition. We remain grateful to the Copyright Office for its sound effort to understand and address the issue and for its thorough work in gathering information from affected parties across the user and copyright holder spectrum to produce its comprehensive, careful, and thoughtful *Report on Orphan Works*, and for its continuing efforts. As do others involved in this discussion, we agree with many of the *Report's* findings and suggestions, and believe they provide a highly effective framework for formulating effective legislation to address this issue. We also appreciate H.R. 5439, *The Orphan Works Act of 2006*, also provides an effective model for solving the orphan works problem.

We would like to take this opportunity to highlight issues that are crucial for Congress to consider in drafting a meaningful orphan works bill. In doing so, we will also share our perspective on some recent suggestions for legislation that have arisen since the *Report's* publication. Orphan works legislation should have the following features:

- “Reasonably diligent search” should be defined in a flexible manner to account for differences that users in different industries, using different media platforms, and searching for owners of very different types of works, are likely to face in the search process.
- If “best practices” are desired to aid the user in his or her search, they should be guidelines generated by stakeholders and made available to the public through the website of the Copyright Office. Any best practice guidelines should be true guidelines and not legally determinative.
- “Reasonable compensation” to a surfacing owner should be defined as the amount upon which a reasonable willing buyer and a reasonable willing seller in the positions of the infringer and the owner would have agreed with respect to the infringing use of the work immediately prior to the commencement of the infringement.
- Injunctive relief should not be available against qualified orphan works users if the orphan work is adapted for or incorporated into another work that includes separate substantial expression.
- The scope of orphan works relief should include all categories of works and types of uses, with no distinction between “commercial” and “non-commercial” works or uses.
- If necessary to address the copyright registration problem, the Copyright Office should identify publicly accessible recognition-based registries that are technologically open and developed in the marketplace.
- The effective date of orphan works legislation should not be delayed inordinately pending development or identification of registries or best practices.

Finally, further clarification is needed as to what constitutes a legitimate attribution and when users would be eligible for the limitations on remedies when they appropriately rely on the results of a previous third-party search.

Requirements for a Reasonably Diligent Search and Use of Best Practices Guidelines

We support the requirement of a good faith, reasonably diligent search, and advocate for standards of diligence that are flexible and not rigidly defined by statute. As copyright holders ourselves, we believe strongly that no copyright holder should be deprived of full remedies because a follow-on user cannot be bothered to engage in a reasonable search. At the same time, we believe it is critical that the law define “reasonable search” in a manner that reflects the fact that no two searches for missing copyright owners are identical. The law must flexibly account for differences that artists in different industries and different media platforms are likely to face when engaging in the search process. Using the objective “reasonableness” standard is the best way to meet this goal.

The following scenarios illustrate the need for flexibility. In one example, a filmmaker has obtained home video footage from a garage sale that she intends to incorporate into a documentary film. In a second example, the filmmaker has obtained an obscure commercial film, for which the original production company is long defunct. Although a reasonable search in the latter scenario might involve the use of a database for commercial film sources,

no reasonable search in the former scenario should involve the use such databases because it is very unlikely that they could provide information about home videos. At the same time, the filmmaker who bought the home video at the garage sale may have very specific, if limited, pieces of information about the film: perhaps the subject family's name, perhaps a sense of time-period or place, perhaps even a home address or neighborhood captured in the film. A reasonable search for this filmmaker would instead involve situation-specific investigatory work.¹

Factors that determine whether a search is reasonably diligent not only depend on the circumstances surrounding the orphan work, but should also take into account the circumstances of the user. In specifying the steps an artist must undertake in order to qualify for orphan works protection, reform legislation should not make such protection contingent upon the use of fee-based search resources—especially where the same result could be obtained via use of free resources. Although such fee-based search mechanisms may sometimes be reasonable under the circumstances of a particular search, fee-based resources may not be appropriate for all searches, or for all budgets. For example, a small artist who conducts a good faith search should not be statutorily compelled to expend scarce financial resources on a search when non-fee-based means would also be reasonable.

Congressional staff have raised concerns about certainty for users, for which we are grateful. Without some level of certainty, filmmakers will never know when the search is “enough,” rendering orphan works reform practically unusable. We understand that the use of “best practices” may be required as a component of the reasonably diligent search. Although we think that best practices have the potential to provide useful guidance to artists searching for missing copyright owners, the need for flexibility requires that best practices standards should be only advisory, and in no case should orphan works relief be denied merely because a user did not adhere to a rigid checklist of best practices. As the examples above illustrate, legislative relief that fails to take into account the individualized nature of searches may force artists to undertake unnecessary, duplicative, or impertinent steps, solely to fulfill a rigid statutory checklist. At the same time, a set checklist of guidelines may leave out entirely steps objectively reasonably required in any given search for an owner. As such, any legally determinative checklist would inevitably be both over- and under-inclusive, unintentionally harming both copyright owners and follow-on users. We agree with Register Peters and with the Copyright Office's finding that a reasonably diligent search standard must remain flexible and dependent upon individualized circumstances, rather than rigidly bound to a best practices checklist.²

With respect to developing best practices guidelines that will be useful and flexible, we support the Copyright Office acting as a repository of guidelines that would be independently compiled by individual industry groups. There are many different user and owner communities that have an expertise in conducting searches and could easily develop these techniques into best practices. In addition, industries could recommend visual registries and include them in best practices guidelines. A Copyright Office repository of these industry and user community guidelines would help by making this information easily available, would engender intra-industry communication, and would facilitate the dissemination of best practices information within disciplines.

Beyond acting as a repository, the Copyright Office should not be asked to formulate or compile its own original best practices guidelines. Given the immense diversity of industries and search practices for each kind of work and user, the Copyright Office staff would have to evaluate and translate each into meaningful guidelines. Such a task would be inevitably time-consuming and practically impossible—tantamount to defining what is

¹ June Cross described a similar situation in her statement at an April 6, 2006 Senate hearing on orphan works. Ms. Cross found home video footage about her own father in a video archive. *See Orphan Works: Proposals for a Legislative Solution Before the Subcomm. on Intellectual Property of the Sen. Comm. On the Judiciary, 109th Cong. 3 (2006)* (statement of June Cross Assistant Professor of Journalism Columbia University Documentary Journalist).

² In its *Report*, the Copyright Office explains that such flexibility is necessary “because of the wide variety of works and uses [such that]...[i]t is not possible at this stage to craft a standard that can be specific to all or even many of these circumstances. Moreover, the resources, techniques, and technologies used to investigate the status of a work also differ among industry sectors and change over time, making it hard to specify the steps a user must take with any particularity.” (*Report on Orphan Works*, United States Copyright Office, p.15). At the March 13 hearing, in response to Representative Johnson's question regarding whether a best practices checklist was being developed, Register Peters reiterated that freezing in place a best practices checklist would be problematic in light of changing technology.

“reasonable” for every case-by-case circumstance, while remaining both workable and general across industries. Were the Office to be required to take on such a Sisyphean task, the results inevitably would be inapplicable to some unconsidered copyright work or user group and cause unreasonable delays in an effective date of orphan works legislation. The alternative approach, through which industries would individually determine their own best practices, would result in workable industry-tailored solutions, while freeing Copyright Office resources for other uses.

Determining “Reasonable Compensation”

Users of orphan works want to compensate copyright owners for use of their works. Orphan works reform is needed because, when owners cannot be found, the risk of injunctions, as well as statutory damages and other enhanced remedies, creates a chilling effect on the use of these works. Though the chance that an owner of an orphan work will resurface and sue for infringement is small, the risk to small filmmakers of an injunction or high remedies is just too great for them to move forward: small filmmakers need some certainty that their films will not be shut down in the future. Although we have previously suggested that a statutory cap on damages would provide the most certainty to users, we also believe that limiting remedies to “reasonable compensation,” properly defined, would effectively balance users’ need for certainty with owners’ right to be paid for the use of their works. Defining “reasonable compensation” such that, in the rare situation that the unlocatable owner resurfaces, the payment made to the owner closely approximates the payment that would have been made had the work not been orphaned, would allow follow-on users to move forward with orphaned works, while ensuring that copyright owners will be paid if they exist and resurface.

In order to provide the necessary level of certainty to independent artists regarding the financial risks of using an orphaned work, it is essential for “reasonable compensation” to be clearly defined in the statutory language. The *Report* offers some clear and sensible guidance here: the term “reasonable compensation” is intended to represent “the amount the user would have paid to the owner had they engaged in negotiations before the infringing use commenced.”³ Register Peters reiterated this view at the March 13, 2008 hearing. We agree with this approach, and recommend adopting the statutory language proposed in H.R. 5439, *The Orphan Works Act of 2006*: “the owner of the infringed copyright has the burden of establishing the amount on which a reasonable willing buyer and a reasonable willing seller in the positions of the owner and the infringer would have agreed with respect to the infringing use of the work immediately before the infringement began.”⁴

H.R. 5439 specified that the burden is on the copyright owner to establish what the fair market value of the work had been immediately before the infringement occurred. Placing the burden on the copyright owner is sensible, as the owner is in the best position to have or obtain information about the amount paid in similar situations, and a new bill should follow H.R. 5439 in making this clear. This follows the logic of Judge Pierre Leval’s opinion in *Davis v. The Gap, Inc.*⁵ There, Judge Leval decided that the actual amount of the reasonable compensation should be determined based predominantly by reference to evidence of comparable marketplace transactions.⁶ The burden should be on the copyright owner to demonstrate that his work had the proposed fair market value, and the owner should prove this by presenting evidence that he or similarly situated copyright owners have actually licensed similar uses for the specified amount. Similarly, the statutory language should also indicate that “reasonable compensation” may, in appropriate circumstances, be found to be zero, or a royalty-free license, if the comparable transactions in the marketplace support such a finding. As Ms. Coe from the U.S. Holocaust Museum pointed out in her oral testimony at the March 13 hearing, many orphan works that the museum acquires exist in a “small and limited market,” and a reasonable payment must take this into account. We agree that “reasonable compensation” must be determined in the context of the orphan work.

In addition, the legislative history of orphan works reform should include examples of what might constitute reasonable compensation. In the legislative history, particular attention should be paid to independent artists and filmmakers and other non-institutional follow-on users, who will rely heavily on clear limitations on remedies in order to move forward with the use of an orphaned work. For example, it should be unmistakably clear

³ *Report on Orphan Works*, United States Copyright Office, p.12.

⁴ Orphan Works Act of 2006, H.R. 5439, 109th Cong. § 2(a) (2006).

⁵ 246 F.3d 152 (2d Cir. 2001).

⁶ *Id.* at 161.

that an independent filmmaker's "reasonable compensation" to a surfacing owner of an orphan work should not be compared to what major motion picture studios pay owners of highly-managed works. Again, the goal is to approximate the payment that would have been made had the work not been an orphan. An illuminative legislative history, demonstrating that it is often the practice of independent filmmakers to negotiate royalty-free or significantly discounted royalty rates, is crucial for independent artists and creators to confidently use orphan works.

Injunctive Relief and Orphan Works Incorporated in Other Copyrighted Works

So long as there is a broad threat of a catastrophic injunction, artists will be forced to shun the use of orphan works. As the *Report* acknowledges, one of the worst nightmares for any filmmaker is a last-minute injunction brought right before the release of a film.⁷ Although takedown may in some cases be the best option in the face of a lawsuit to determine reasonable compensation, it will always be a second-best option for a filmmaker or other follow-on creator who has incorporated orphan works into new creations. As such, a meaningful limitation on injunctive relief is critical for filmmakers.

An orphan work may be used as an important part of a new creative work, and may be impossible to remove from the overall work. We greatly appreciate the *Report's* recognition that the fear of such a crippling injunction brought by a surfacing orphan works owner "provides enough uncertainty that many choose not use [sic] the work, even though the likelihood of such injunction is small."⁸ We agree with the *Report's* conclusion that injunctive relief should not be available against qualified users of orphan works except "where a user simply republishes an orphan work, or posts it on the Internet without transformation of the content."⁹

In that light, we support the approach taken in H.R. 5439 which provided a "Special Rule for New Works." This provision limited injunctive relief in cases where an artist "recasts, transforms, adapts, or integrates the infringed work with . . . original expression in a new work of authorship." The artist would qualify for protection against injunctive relief as to that new work, if the author paid reasonable compensation and provided reasonable attribution to the copyright owner. We believe that a provision akin to this "Special Rule for New Works" is an essential element of any forthcoming orphan works reform legislation.¹⁰ Ultimately, protection from the fear of an injunction should be assured if the orphan work is adapted for or incorporated into another work that includes separate substantial expression.

An Option to Cease Infringement Should Be Available, Regardless of "Direct or Indirect Commercial Advantage"

As noted, it is in many cases impossible for a filmmaker to cease a use in a film that has already been finished. In some instances, however, "takedown" (removing the infringing work from the film) may be the better choice. Independent filmmakers have very sensitive budgets and work on projects where the unique fair market value for a particular use might be hard to know in advance, especially where there are few useful market transaction guidelines, as in the case of experimental and avant-garde films or other new types of art. In some cases, if filmmakers had been able to find the copyright owner and had known what the cost would be, they may not have ever used the work. As such, they should be able to preserve the right to take down, after conducting a reasonably diligent search, being unable to find the owner, and taking the risk to use the work.

The *Report's* proposed legislation (§ 514(b)(1)) grants users who have conducted a reasonably diligent but unsuccessful search the option to cease use rather than pay reasonable compensation when the use is "without any purpose of direct or indirect commercial advantage." Though independent filmmakers are individual artists not endowed with great financial resources, to the extent our art is our livelihood, our use of orphan works is indeed commercial. For this reason, § 514(b)(1) would exclude independent filmmakers, and many other small artists, from

⁷ *Report on Orphan Works*, United States Copyright Office, p. 119

⁸ *Id.* at p.120

⁹ *Id.*

¹⁰ Filmmakers are not alone in our need for meaningful limitations on injunctions. At the March 13 hearing, Ms. Coe from the U.S. Holocaust Memorial Museum also expressed the need for an option to continue use of the work in exchange for paying reasonable compensation in light of the fact that the museum's orphan works are often already published or embedded in "collective works," making it impossible to immediately stop use.

the option to cease use. Yet, takedown is a sensible option for all users left with no answer after a reasonable search, and it is an especially important option for those with limited budgets.

In light of the false dichotomy between commercial and noncommercial use, the option to cease an infringing use rather than pay monetary damages should be available to all users, especially those who are least likely to have institutional funds to pay damages or defray risk. Dividing between commercial and non-commercial uses, as the *Report* attempts to do when it parses between uses that have “direct or indirect commercial advantage” and those that do not, is challenging and problematic. This difficulty is reflected in the *Report*’s explanation.¹¹ A bright line still evades us, especially so in the context of media created by individuals who lack institutionally “non-profit” status, but who operate without a pure profit motive. For instance, what would be made of a film project undertaken by a filmmaker and submitted to a school-run film festival that goes on to garner awards at national festivals? There are simply too many areas that are technically commercial, but operate with such limited budgets and for the public good that the distinction fails. Likewise, there are not-for-profit organizations that are so large and successful that their ability to respond to damages and undertake risk mirrors their commercial counterparts. The option to take down should not be based on such a murky distinction.

To be balanced and effective, and in order to guard against fictitious claims, a takedown provision should require that owners bear the burden of substantiating their ownership, and that users respond in a prompt manner. Accordingly, owners should be required to provide written notice that includes, at a minimum, the name of the copyright owner, the title of the infringed work (or a complete and accurate description in sufficient detail to identify it), contact information for the owner, and information from which a reasonable person could conclude that the owner of the infringed copyright’s claims of ownership and infringement are valid. The user should then have an opportunity to conduct an expeditious good faith investigation into the claim to confirm infringement, and then should be required to, promptly under the circumstances, cease the infringement or negotiate reasonable compensation.

Both Commercial and Noncommercial Works and Uses Should Be Covered by Orphan Works Relief

Orphan works relief should be simple, straightforward, and should not discriminate based on categories of works and uses. We strongly agree with Chairman Berman’s observation at the March 13 hearing that “as a general matter, it does seem good policy to avoid special carve-outs.” Exclusions of certain classes of works from relief would overly complicate the legislation, would require drawing distinctions that are arbitrary or otherwise untenable, and would significantly weaken the benefits of orphan works legislation.

As a threshold matter, Ms. Kevorkian’s suggestion at the March 13 hearing that orphan works relief should not be available for any “pictorial or graphic work that was initially created for commercial exploitation or was at any time commercially exploited”¹² is unworkable. Such an exclusion is not a mere limitation; it removes great numbers of works, perhaps most orphaned pictorial or graphic works, from being made available, eviscerating orphan works reform altogether. For example, a documentary filmmaker making an historical film about a company may very well wish to use advertising copy from the company’s long-defunct competitor. Under this rule, even though the work is truly orphaned—probably no one exists to license it, and its economic value is minimal or zero—the filmmaker could not rely on orphan works relief because the work was created for commercial exploitation.

Simply determining whether a work was initially created for commercial exploitation could be an impossible task, further chilling socially-valuable uses of orphaned works. For example, scenic photographs could be part of a professional collection, or simply be pictures taken during a family vacation; a portrait could have been commissioned, or created as a gift to the subject; and, a rug could have been a high-end, hand-knitted commercial product or hand-knitted by a hobbyist; video footage can be made commercially into a film or be part of a home video...the list is endless. Even if a follow-on user could tell that a work was not initially created for commercial exploitation, it would be extremely difficult to ascertain whether it was commercially exploited at any later time. As

¹¹ *Report on Orphan Works*, United States Copyright Office, p. 119 note 385.

¹² See *Balancing the Interests of Copyright Owners and Users: Hearing on Promoting the Use of Orphan Works Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. On the Judiciary*, 110th Cong. 12 (2008) (statement of Corinne P. Kevorkian, President and General Manager, Schumacher, A Division of F. Schumacher & Company).

Congressman Feeney noted during questioning at the hearing, a photograph not originally intended for commercial purposes could later be published in a local newspaper and potentially become commercial. Such uncertainty would prevent filmmakers from filming a wide variety of works because we would be unable to tell whether we are protected by orphan works reform, or not.

The problem of distinguishing commercially exploited works from others is also not solved by presuming that all works embodied in useful articles were created for exploitation.¹³ A user cannot necessarily tell whether a vase was made for commercial profit or hand-blown as personal art. Regardless, the cultural value of the orphaned work remains the same from the perspective of the filmmaker. When an independent filmmaker films a scene, the surrounding works in the background are integral in telling the story and setting the mood—our art depends on these subtle nuances. Our sets can include useful articles embodying pictorial or graphic works, such as wallpaper, rugs, curtains, photographs, paintings, vases, or furniture. An independent filmmaker would gladly buy a license to film these objects, where a license is required. But if the copyright owner cannot be found after a reasonable search, the filmmaker would be prevented from using the objects that best support a true and detailed story for fear that the copyright owner of a vase in the background might resurface and sue for a crippling injunction or statutory damages. The fact that the wallpaper, rug, or curtain, may have once been commercially exploited does not change the orphan works problem presented.

Similarly, there should be no distinction between commercial and non-commercial uses. Legislation limiting orphan works relief to noncommercial uses of works, as suggested by Mr. Perlman at the March 13 hearing, would provide little help to documentary and independent filmmakers, among many other types of follow-on users of copyrighted works. Not every commercial user is a large movie studio: the vast majority are small artists whose work is at some level commercial, even though it is not highly profitable. Moreover, thinking of orphan works in terms of profit versus nonprofit uses or revenue-generating versus non-revenue-generating uses¹⁴—even if these differences could realistically be defined—sets up a false dichotomy: both “commercial” and “noncommercial” uses of orphan works can create valuable public access to cultural materials that are languishing and unusable as orphans.

Mr. Perlman also suggested limiting orphan works relief to a small subset of categories or uses, such as non-fiction works, documentaries, educational works or works made by 501(c)(3) organizations. We very much appreciate Mr. Perlman’s attempt to meet the needs of documentarians. Unfortunately, however, this proposal is unworkable in practice. First, there seems to be no clear basis for these distinctions. We agree with Mr. Adler of the Association of American Publishers’ observation at the hearing that it would be “ironic” to offer relief to non-fiction works while giving no relief to more expressive fictional works. A parallel irony exists for documentary versus narrative films. Such a distinction seems counter to the principles of copyright law, which is intended to encourage creativity of all stripes. We see no policy reason to grant relief for uses of orphan works in documentary films but not other films. The purpose of orphan works legislation is to remove barriers to the use of abandoned works that would go unused due to high risks of liability; this purpose would not be furthered by drawing arbitrary distinctions between various classes of follow-on creativity.

Second, it would be difficult—if not impossible—to draw bright lines between categories of uses, in the first place. For example, what would be the legal definition of a documentary? At what point does a work become entertainment rather than educational? Even the line between fiction and non-fiction is blurry. It seems awkward for orphan works relief to depend on such subtleties. More importantly, the inevitable uncertainty such distinctions would create would eliminate the benefits of orphan works legislation for filmmakers struggling to understand whether their films would be seen as belonging in one category or another.

The proposals to consider the commercial exploitability of an orphan work and the commercial/noncommercial uses of the follow-on work in the testimony of Ms. Kevorkian and Mr. Perlman respectively make it clear that owners of visual works have sincere concerns. Ms. Kevorkian also expressed legitimate concerns about the misuse of an orphan works exception, mainly dealing with “bad faith” infringers (as

¹³ See *id.*

¹⁴ See Balancing the Interests of Copyright Owners and Users: Hearing on Promoting the Use of Orphan Works Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. On the Judiciary, 110th Cong. 8 (2008) (statement of Victor S. Perlman, General Counsel and Managing Director, American Society of Media Photographers, Inc.).

opposed to the orphan works users who are “good faith” infringers under the legislation). Textile manufacturers fear that an orphan works bill will limit their remedies against these bad faith infringers, and photographers and textile manufacturers have both voiced concerns about the practical difficulties small artists face in enforcing their copyrights due to the high cost of litigation. As copyright holders ourselves, we know that these problems pervade copyright law and that they are serious. They are not, however, side effects of properly-crafted orphan works reform. First, orphan works relief requires a good faith, reasonably diligent search—something a bad faith infringer will not do. Second, orphan works reform only limits enhanced remedies; reasonable compensation is still required. Further, we support a provision like §514(b)(1)(B)(ii) of H.R. 5439 requiring a user to negotiate reasonable compensation with a resurfacing owner in good faith. For legitimate orphan works users, a reasonable license fee would thus be reached efficiently and without the need for litigation. Litigation costs should only arise in the case of the bad faith infringer who refuses to negotiate—in which case full remedies can be brought to bear.

Finally, the causes of Ms. Kevorkian’s and Mr. Perlman’s overall concerns do not lie with orphan works policy, but rather with a general inability to be found. We propose visual registries (please see below) to specifically address visual artists’ needs—to help owners be found and their works lawfully exploited.

Recognition Technology Can Be Used to Address Visual Artists’ Concerns

The orphan works record shows that visual artists have long claimed that their objection with an orphan works solution is that it exacerbates the problem of being disassociated with their works. As explained by Ms. Gura from PicScout at the hearing on March 13, current visual recognition technology would allow a user to submit a photograph and digitally match it against an existing set or database of images. Unfortunately, the current Copyright Registry only allows a user to conduct text-based queries and recent updates were not designed to return visual search results. Applying visual recognition technology to a copyright registry would ensure that visual artists stay associated with their work, help those users who want to locate these owners, and help owners exploit their creations.

Through discussions with the Copyright Office and testimony by Register Peters at the March 13 hearing, we have learned that the Office does not have the technical expertise with recognition technology to create such a visual registry, and its creation would come at considerable time and expense. The market may be better equipped to provide solutions in the form of publicly accessible recognition-based registries of copyrighted works that are technologically open and developed in the marketplace.

To adequately address the concerns of owners and users, we have proposed the following guidelines for market-based registries to follow: 1) each registry must ensure that each work have with it data that keeps the work associated to the owner and any copyright registration number; 2) queries of the registry must be freely accessible to the public and include the ability to match a sample to the registry’s database as well as allow users to limit results based on descriptions, keywords, and other identifying characteristics; 3) access to the registry database should be technologically open and machine readable; and 4) unless otherwise permitted by the owner, the public’s search results should be limited to matches of lower resolution, but still identifiable to avoid concerns of infringement.

There are a number of services available to the public, like the aforementioned PicScout, that today address owners’ concerns. Online photo websites like Flickr.com allow photographers and users alike to upload, categorize, describe, and maintain their photo collections in an openly searchable image database that can be queried based on user, keyword, type of license, and even color. Riya.com and its service Like.com take search further and apply visual object and facial recognition to help users organize and find images of specific people or objects that look like one another.

To the extent these recognition-based registries are formally contemplated by any orphan works legislation, visual works such as photographs, illustrations, textiles, paintings, and drawings, should not be exempted (temporarily or otherwise) from use by a would-be orphan works user. To bifurcate the application of orphan works policy based on the kind of work would inequitably limit the orphan works policy to a small group of users. The creation of these registries, nor any Copyright Office granted statutory capacity to certify these registries, should not inordinately delay the effective date of an orphan works bill.

“Chain of Interest” Protection and the Attribution Requirement

We agree with the *Report*'s recommendation that an attribution requirement can function as a way to advertise the use of orphan works to potential owners, thus encouraging them to step forward. More generally, artists appreciate and follow the general convention of crediting authors and other creative contributors to a project, and we expect others to do the same for us. However, when an attribution is “appropriate under the circumstances” must be clarified in statutory language and legislative history so that the steps required to meet it are not unnecessarily complicated or vague. Unless the attribution requirement is clear, the validity of the attribution might become a target for attack by an emerging owner seeking to disqualify the use of an orphan work from the purview of this proposed legislation.

We also would like orphan works legislation to provide some clarity as to when a user can reasonably rely upon the results of a third party's search. The mechanisms of many media industries require a downstream user to rely on the reasonable search efforts undertaken by another party, but still within the context of a single “use” of an orphaned work. For example, a film's distributor should not be required to conduct a brand new search, after the filmmaker has already done so, in order to obtain protection. Indeed, the *Report* mentions that it might be reasonable under certain circumstances for a user to rely on the search conducted by another.¹⁵ At the same time, we agree with Mr. Adler of Association of American Publishers that “the responsibility to conduct a reasonably diligent search . . . attaches to each use of the work,” and that subsequent users in unrelated matters should not necessarily qualify for reduced remedies simply by referring to a prior user's search.¹⁶ However, without further clarification on this matter, it remains unclear when a user can rely upon the results of a previous third party search.

Conclusion

In conclusion, we would like to thank Chairman Berman, Ranking Member Coble and members of the Subcommittee for the opportunity to address these important matters surrounding orphan works legislation. We would also like to thank the Copyright Office for its efforts and valuable insights, and all the stakeholders with whom we have been working toward the important goals of mapping and solving the loss of valuable cultural products caused by the orphaning of copyrighted works.

Providing the public with broader exposure to valuable works from our cultural heritage is truly within reach. We commend the Subcommittee's efforts to bring parties together to collectively craft working legislation. We look forward to working with other stakeholders toward a mutual solution to meaningful and effective orphan works legislation.

Coalition Organizations:

Doculink: an association of Los Angeles documentary filmmakers that meets regularly to review the projects and problems of local filmmakers. (<http://www.doculink.org>)

FIND (Film Independent): a non-profit membership organization that is home of the Spirit Awards and the Los Angeles Film Festival. FIND offers some 500 programs, seminars, screenings, and other events each year. (<http://www.filmindependent.org>)

International Documentary Association (IDA): a non-profit organization representing the interests of documentary filmmakers. IDA represents nearly 3000 members in 50 countries around the world. (<http://www.documentary.org>)

¹⁵ *Report*, p. 9.

¹⁶ See Balancing the Interests of Copyright Owners and Users: Hearing on Promoting the Use of Orphan Works Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. On the Judiciary, 110th Cong. 5-6 (2008) (statement of Allan Robert Adler, Vice President of Legal and Governmental Affairs, Association of American Publishers, Inc.).

IFP (Independent Feature Project): a not-for-profit membership organization designed to foster a more sustainable infrastructure that supports independent filmmaking and ensures that the public has the opportunity to see films that more accurately reflect the full diversity of the American culture. Founded in 1979 and headquartered in NYC, there are IFP organizations in Chicago, Minneapolis/St. Paul, Seattle, and Phoenix. It is the largest membership organization in the United States dedicated to independent film. (<http://www.ifp.org>)

National Alliance for Media Arts and Culture (NAMAC): a non-profit association dedicated to the support and advocacy of independent film, video, audio, and online/multimedia arts. NAMAC represents over 350 member organizations, which in turn represent at least 400,000 media artists and others working in the media field. (<http://www.namac.org>)

Public Knowledge is a public-interest advocacy organization dedicated to fortifying and defending a vibrant information commons. Public Knowledge works with wide spectrum of creative artists, including filmmakers, musicians, creative writers, dancers, and visual artists to ensure that their interests are represented in copyright and communications policy debates. (<http://www.publicknowledge.org>)

Tribeca Film Institute: an organization dedicated to innovation in film and media, the enrichment of audiences, and the promotion of education, understanding, and creativity through the media arts. Tribeca Film Institute represents over 350 Media Artist Fellows in the United States, and its programs have been used in over 400 public libraries in 48 states. (<http://www.tribecafilminstitute.org>)