Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of	)	**Docket No. 2012-12**
Orphan Works and Mass Digitization	)	**Submitted February 4, 2013**

COMMENTS OF THE

MOTION PICTURE ASSOCIATION OF AMERICA, INC.

The Motion Picture Association of America, Inc. ("MPAA") is pleased to provide these comments in response to the Federal Register Notice ("FRN") on Orphan Works and Mass Digitization (Docket No. 2012–12) appearing at 77 Fed. Reg. 64,555 (Oct. 22, 2012).

The MPAA is a not-for-profit trade association founded in 1922 to address issues of concern to the motion picture industry. The MPAA's member companies are: Paramount Pictures Corp., Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corp., Universal City Studios LLC, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc. These companies and their affiliates are the leading producers and distributors of filmed entertainment in the theatrical, television, and home-entertainment markets. The MPAA's members are both major owners of copyrights and major users/licensees of others' copyrights, enabling them to offer a unique and balanced perspective on issues related to orphan works.

A. Orphan Works – Salient Recent Developments

MPAA participated actively in the Copyright Office's process for studying the orphan works issue in 2005-2006, beginning with comments filed on March 25, 2005, in response to a Notice of Inquiry. *See* http://www.copyright.gov/orphan/comments/OW0646-MPAA.pdf. We direct the Office's attention to those and subsequent comments for our general views on the issue.

The current FRN seeks views on "what has changed in the legal and business environments that might be relevant to a resolution of the [orphan works] problem." 77 Fed. Reg. at 64560. Taking this question as referring mainly to changes since orphan works legislation was last under active consideration in 2008, we believe that at least two trends merit investigation and consideration before embarking upon additional legislative proposals. First, the availability and accessibility of reliable information to identify and locate copyright owners has significantly

improved since 2008; this trend may mean that fewer works overall fit the definition of "orphan," and could also shape any future legislative or administrative initiatives that may be deemed necessary. Second, other jurisdictions, most notably the European Union, have moved forward on orphan works legislation since 2008. Their experiences may hold lessons for U.S. policymakers.

1. **Identifying and Locating Copyright Owners: Recent Developments**

The FRN defines an "orphan work" as one "for which a good faith, prospective user cannot readily identify and/or locate the copyright owner(s) in a situation where permission from the copyright owner(s) is necessary as a matter of law." 77 Fed. Reg. at 64,555.[1] Leaving to one side whether "readily" is the appropriate adverb in this definition,[2] whether legislative changes are needed to allow the use of "orphan works" turns to a considerable extent on factual questions about the capabilities of prospective users to identify and locate copyright owners. In general, those capabilities have been significantly enhanced since 2008. The improvements have come in three areas: the greater accessibility of U.S. Copyright Office data; the growth of voluntary registries and other data sources, including the launch of several ambitious new projects; and the overall acceleration in the quality and ubiquity of online tools for finding individuals and companies, including in the context of finding copyright owners.

a. Copyright Office Records

The Copyright Office makes available to the general public the best and most extensive records anywhere of initial copyright authorship, ownership, title of works, date and country of creation and/or publication, and, where undertaken, recorded assignments, transfers, new corporate (owner) names and other related materials. Further, this material is or will be available, for free, online, in the most reliable database of this material anywhere in the world. The Office's efforts to digitize its "historical records," and to improve the accuracy and searchability of all its public databases, are briefly summarized in the FRN (77 Fed. Reg. at 64,558). There are certainly difficulties and challenges in this process, but the results so far are impressive, and the future prospects are exciting. This goal, when achieved, should make a significant contribution to reducing the population of orphan works, particularly in categories (such as motion picture rights) where use of the Office's registration and recordation systems has long been routine, and where works can readily be identified by title. Accordingly, addressing the technological, operational and resource challenges remaining in this project should be a high priority and a focus of efforts among all parties – public and private sector, commercial and not-for-profit – concerned about orphan works.

[1] We take it that "copyright owner" in this definition is defined as the holder of the particular exclusive Section 106 right implicated by the proposed use of the work. This is consistent with the definition in the 2008 legislation.

[2] The critical issue, as reflected in the proposed legislation from the 110th Congress, is whether the user "undertakes a diligent effort that is reasonable under the circumstances to locate the owner" of the copyright before making the use. This does not necessarily equate to the more subjective test of whether the owner can "readily" be identified and located.

b. Private Voluntary Registries and Other Data Sources

The past five years have also seen considerable progress in the development of other publicly accessible registries and databases consisting of information about works, authors, copyright owners and other data that could make it significantly faster, cheaper and easier to identify accurately copyright owners in a wide range of works. While resources such as the following will never be a *substitute* for a search of the official records of the Copyright Office (both physical and online), their use to *supplement* such a search could increase the likelihood that the copyright owner may be found. [3]

MPAA is familiar with three examples focused specifically on the motion picture sector. The UC Berkeley Art Museum and Pacific Film Archive (*see* http://www.mip.berkeley.edu/cinefiles/) has recently provided free, online public access to its CINEFILES database of more than 200,000 documents covering the entire history of American film, much of which is useful in identifying copyright owners. CINEFILES centralizes a trove of data previously not accessible online, and now is consulted 100,000 times a year, a 20-fold increase from its use levels as an offline collection.

Even more recently, the Media History Digital Library (*see* http://mediahistoryproject.org/), launched in 2011, makes available hundreds of thousands of pages of classic media periodicals that include considerable information on film titles, producers, and copyright owners. As yet more publications are added to this database, it will become an increasingly valuable resource for identifying rightsholders in films that might otherwise be considered orphan works.

Finally, the *Field Guide to Sponsored Films,* which recently became accessible online (*see* http://www.filmpreservation.org/dvds-and-books/the-field-guide-to-sponsored-film), contains descriptive entries with production credits and other identifying information on hundreds of industrial and other films used prior to 1980 to sell products, explain public programs, train employees, and argue social causes. This compendium will certainly be useful – especially in conjunction with Copyright Office records – to documentarians and others seeking permission to use these materials in their works.

More broadly, the increased level of attention to orphan works issues over the past several years has galvanized a number of other projects to compile and make publicly available ownership and licensing information for all kinds of copyrighted works that might otherwise be treated as orphans. At the same time, a number of stakeholders have begun to collaborate in the development of standardized protocols for the communication of rights and licensing information in copyrighted content. The following list is certainly not intended to be comprehensive, but rather indicative of some of these initiatives, and their potential to shrink the legitimate population of any copyright "orphanage":

[3] In addition to the newly accessible specialist resources summarized in the text, a plethora of other general interest online databases offer access to information that could be helpful in finding copyright owners in audio-visual works, such as imdb.com, which provides a variety of information (release date, producers, directors, writers, cast, etc.) about thousands of films and TV programs.

- Global Repertoire Database (www.globalrepertoiredatabase.com): the GRD's goal is "to provide, for the first time, a single, comprehensive and authoritative representation of the global ownership and control of musical works." The GRD will provide a centralized, once-only registration mechanism for claims to musical works, agreements, and repertoire mandates. Music publishers and performing rights societies are collaborating with music service providers and several global associations to drive this project forward. A parallel effort, the Global Recording Database, sets out similar objectives with respect to sound recordings.

- ARROW (Accessible Registries of Rights Information and Orphan Works) (www.arrow-net.eu): ARROW aims to operate a distributed network of sources for copyright status and data about European literary works, and explicitly includes tools for discovering rightsholders, for facilitating rights clearance on out-of-print works, and for creating a European registry of orphan works. Libraries, publishers associations, reproduction rights organizations, and other collecting societies are collaborating along with technology providers and others.

- PLUS Registry (www.plusregistry.org): This registry seeks to enable users to find rights and descriptive information for any photographic or other visual arts image, and to find current contact information for related creators, rightsholders and institutions. To facilitate contactability, unique ID's have been assigned for every image creator, rightsholder, distributor, licensor, licensee, and archive in the registry. The registry is operated "by and for all communities engaged in creating, distributing, using and preserving images."

- Linked Content Coalition (www.linkedcontentcoalition.org): this ambitious project, launched by the European Publishers Council and now embracing partners in music publishing, broadcasting, sound recording, and software as well as book and journal publishing, aims to "enable more effective solutions for discovering, licensing, and delegating IP rights, allowing potential users better information and access, and enabling creators and rightsholders of all kinds to be properly rewarded for their efforts." Building on the recognition that myriad new registries of information on rights ownership are being created (exemplified by those listed above), this coalition aims to provide standardized communications protocols so that these registries can interoperate with one another and with exchanges that users will query in order to determine who owns rights in a particular work and whether licensing terms are available.

MPAA provides this indicative listing[4] of registry and related initiatives outside the audio-visual sector, not to endorse or vouch for any of them specifically, but simply to underscore the level of constructive activity across the copyright world in making information about the identity and contact points for rightsholders more broadly and expeditiously available,

[4] In addition, a number of the organizations listed in the Office's compilation of collective licensing organizations in Appendix E of its Mass Digitization report, *see* http://www.copyright.gov/docs/massdigitization/USCOMassDigitization_October2011.pdf, also maintain publicly accessible databases of rightsholders and their works.

and in facilitating identification and licensing of works in the digital environment. This activity has evidently accelerated and broadened in the years since orphan works legislation was last under active consideration. A more in-depth investigation and assessment of the status and potential of these and other projects should be undertaken, in order to make a better-informed decision about whether to revive, modify, or defer such legislative proposals going forward.

c. "Contactability" on the Internet

Most of the new or enhanced online resources summarized above increase the likelihood that relevant copyright owners of a particular work can be identified by potential users of that work. But in order to avoid orphan status, a work's owners must not only be identifiable but must also be locatable (or more precisely, contactable). Some of the changes in the landscape on this point have more to do with the availability and ubiquity of more powerful Internet tools for locating people, companies, and other organizations than they do with copyright interests specifically; but their impact can certainly be felt whenever a user seeks to locate an identified copyright owner.

Widely accessible services such as Pipl (www.pipl.com) and Spokeo (www.spokeo.com) can be used to search the "deep web," social networking services, public records, and professional community sites for individuals; and far more extensive tools are available through commercial services. Importantly, public records such as court documents, bankruptcy filings, probate records, and many other sources for finding both individuals and businesses (including heirs, successor corporations, acquirers of assets, and trustees in bankruptcy) are increasingly accessible to all interested users. Long-standing publicly available online portals to a wealth of information relevant to tracing corporate lineages and locating both companies and individuals have significantly expanded their reach in recent years. Commercial databases such as Westlaw and LexisNexis contain vast amounts of information useful in tracking down individuals and corporations, including corporate filings, news archives, and court records. Even genealogical records – key to both identifying and finding rights owners in older works whose individual authors are deceased – have become dramatically more accessible. In sum, through the use of these improved and ever more powerful tools, many searches for copyright owners that might have reached a dead end as recently as four or five years ago have now become viable. Consequently, no search that fails to take advantage of these resources can be considered "reasonably diligent" today.

* * * * *

Even with these changes, there remain some number of works whose owners simply cannot be identified or found through reasonably diligent efforts on the part of potential users.[5] These trends do suggest, however, that this number may be proportionally smaller than it was seven years ago, when the Office issued its orphan works report, or five years ago, when Congress last considered orphan works legislation. It would be worthwhile, in the first instance, for the Office to study the current scope of remaining orphan works. To the extent legislation continues to have appeal following such a study, we would urge that any such proposal take

[5] With regard to films, the copyright orphanage might still include some non-commercial independent titles, avant garde or experimental films, and home movies, for example.

these trends into account in defining "reasonably diligent search." Similarly, the likelihood that business and technology trends will further reduce the population of the copyright orphanage and change the mix of that population (*e.g.*, through the faster development of stronger voluntary registry systems in some sectors than in others) should also be factored in.

Enactment of orphan works legislation, even if still justified, is not an end in itself. The goal should be to reduce the frequency of situations in which copyright owners cannot be identified or found, as well as to provide mechanisms to facilitate particular uses in those situations. Policymakers should therefore give serious consideration to what steps they may take to advance the first of these goals, while at the same time considering how to achieve the second. With regard to improving access to U.S. Copyright Office records, these steps could include devoting increased resources to digitization and searchability, as well as facilitating appropriate public-private partnerships to advance this objective and to promote cross-referencing of these records with private and academic databases. With regard to the development of registries and other sources of valuable data to help bring potential user and copyright owner into contact, the Office should consider whether there are public policy impediments to accelerating such development, and whether further incentives to do so might be practical. In any case, we encourage the Office to continue to inform itself about all these developments, as a critical first step in assessing the "current state of play" regarding orphan works.

2. **Recent International Developments**

A second area in which the landscape has changed significantly since the initiation of the orphan works legislative debate during the last decade involves the international dimension. When the Copyright Office launched the orphan works initiative in 2005, and even during the 2006-2008 period when U.S. legislation was under active consideration, the U.S. was on the forefront of the issue. While the copyright statutes of a few other countries included provisions for managing requests for licenses to use works whose authors or rightsholders could not be located, few of these provisions were of recent vintage or could credibly be considered as adapted to the realities of the digital networked environment. But given recent developments, we now have the benefit of learning from the experience of other jurisdictions as they have grappled with the orphan works issue in the intervening years.

The most significant legislative development in this arena in the past five years was the approval, on October 4, 2012, of a European Union Directive "on certain permitted uses of orphan works." Directive 2012/28/EU, 2012 O.J. (L 299) 5, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:299:0005:0012:EN:PDF. While the FRN briefly discusses this measure, *see* 77 Fed. Reg. at 64,559, it is certainly worth a somewhat more intensive analysis.

Of course, the Directive simply provides a framework which must then be implemented in national law by the EU Member States; in this regard, it is not directly comparable to proposed U.S. legislation, past or future. Despite this caveat, there are notable differences between the approach embodied in the EU Directive and that proposed in earlier U.S. legislation. MPAA has serious concerns about the European decision to cast orphan works provisions as a limitation on the exclusive rights of copyright holders, rather than as remedial limitations, as proposed in the U.S. We believe that structuring orphan works status as a defensive limitation to a copyright

claim creates a more efficient, market-oriented, and meaningful solution to the orphan works problem than can be gained from a construct which imposes limitations on a (possibly unaware) copyright owner's rights. Other provisions worth noting include:

- The EU Directive applies only to a limited category of uses of orphan works, and a defined set of potential users. Beneficiaries of the instrument are limited to libraries, educational institutions, museums, archives, "film or audio heritage institutions," and public broadcasters.[6] The uses which public service beneficiaries would be authorized to make of orphan works are similarly limited to making the work publicly available, and to reproducing the work for one of a finite list of permitted purposes.[7] Even these activities would be limited to those needed "in order to achieve aims related to their public-interest missions, in particular the preservation of, the restoration of, and the provision of cultural and educational access to, works and phonograms contained in their collections."[8] Permissible revenues from using orphan works are strictly limited to offsetting the user's costs for digitizing and making them available, and any agreements with commercial partners for the digitization and making available of orphan works cannot grant the partner any rights to use or control the use of the works.[9] By contrast, the U.S. legislation in 2008 could have been invoked by any type of user for any sort of use, whether commercial or non-commercial.

- The Directive applies only to a subset of copyrighted works, and only to certain copies of those works. Essentially, only printed works, audiovisual works, or sound recordings are covered, and only the titles already contained in the collections or archives of the beneficiary institutions may be used.[10] This approach excludes, *inter alia*, most of the photographic and visual arts materials that proved so problematic in the legislative debate in the U.S. (except to the extent that such images are embodied in covered works).

- The Directive spells out that digitization and subsequent dissemination of a work "necessitates the prior consent of rightholders," thus erecting a firewall against claims that mass digitization should be allowed regardless of such consent.[11]

- The Directive excludes works for which any co-rightsholder is located. If any rightsholder in a work is identified and located, the work is not an orphan, and no such rightsholder is empowered to consent to uses on behalf of any unlocated or unidentified rightsholder.[12]

- The Directive generally applies only to works first published or broadcast in the territory of the Member State under whose standards for "diligent search" the

[6] Directive, Art. 1(1).
[7] *Id*. at Art. 6(1).
[8] *Id*. at Art. 6(2).
[9] *Id*. at Art. 6(2), Recital 22.
[10] *Id*. at Art. 1(2).
[11] *Id*. at Recital 6.
[12] *Id*. at Recital 17.

determination of orphan status is made.[13] To this extent, foreign works are ineligible for orphan status in Europe, an outcome explained as "for reasons of international comity."[14] By contrast, any work, regardless of its provenance or nationality, could potentially have been treated as an orphan under the U.S. legislation, a fact that: 1) complicated the delineation of standards for defining a reasonably diligent search, and 2) raised serious questions about how other countries might determine the asserted "orphan" status of U.S. works.

- A later-emerging rightsholder can "put an end to orphan work status," meaning that ongoing uses of the work to which the rightsholder does not consent must be terminated.[15] In addition, a single publicly accessible online database will be established to record any change in orphan work status, and rightsholders are entitled to fair compensation for uses of their works while they were properly classified as orphans.[16] Of course, the extent to which injunctive relief would have been available to prevent further uses of orphan works once a rightsholder had emerged to claim them was hotly debated throughout the U.S. legislative process.

- The standards for a qualifying "diligent search" are to be spelled out in national law, subject to minimum standards contained in the Directive.[17] The diligent search standards must take into account the specific resources available with respect to different categories of works,[18] and the search itself must be carried out in good faith and with respect to each work sought to be used.[19] The definition of diligent search standards was also controversial throughout the consideration of the U.S. legislation. As noted above, a full comparison with U.S. legislation on this issue must await national implementation of the EU Directive in the Member States.

In general, and apart from the threshold decision to proceed on the basis of a limitation of exclusive rights rather than of remedies for infringement, it is fair to say that the EU opted for a more focused, incremental, and limited approach to the orphan works issue, and one that made a sharp delineation between case-by-case determinations of true orphan status, and initiatives for mass digitization of huge collections of copyrighted materials, without regard to whether copyright owners could even be contacted to obtain consent. MPAA believes that both the pros and the cons of this approach should be taken into account by U.S. policymakers as a significant intervening development.

[13] *Id*. at Arts. 1(2), 1(3); Recital 12.
[14] *Id*. at Recital 12.
[15] *Id*. at Recital 18.
[16] *Id*. at Arts. 3(5), 6(5).
[17] *Id*. at Art. 3(2).
[18] The Annex to the Directive contains separate lists for published books; newspapers, magazines, journals, and periodicals; visual works; and audiovisual works and sound recordings.
[19] *Id*. at Art. 3(1).

B. **Mass Digitization Is a Separate Issue**

Throughout the long process of drafting and consideration of orphan works legislation summarized in the FRN, the focus has always been on the user who makes a good faith effort to identify and locate the copyright owner, and to seek in good faith that party's authorization before making the intended use of the work. In no way was either the process, or the resulting proposed legislation, designed to accommodate a party who seeks to make complete copies of a work – or of thousands, tens of thousands, or millions of works – without any regard to whether the copyright owner can be identified or located, or whether the owner's authorization can be obtained. For this reason, MPAA strongly agrees with the Office that "the issues at the heart of mass digitization are policy issues of a different nature" than those involved in consideration of orphan works. 77 Fed. Reg. at 64,557.

We question, however, whether the FRN accurately captures what are "the issues at the heart of mass digitization." The Notice states that in these cases, "the works may in fact have copyright owners, but it may be too labor-intensive and too expensive to search for them, or it may be factually impossible to draw definitive conclusions about who the copyright owners are or what rights they actually own." *Id*. These facts do not necessarily take the situation out of the orphan works context. Depending on what is necessary to conduct a reasonably diligent search for the owners of a set of works, a particular user may conclude that it is too expensive or time-consuming to do so in order to make the use he or she intends. That does not mean that the user should be free to make the use anyway, on the basis of some "mass digitization" exception.[20] Similarly, when a reasonably diligent search leads to the conclusion that one of two or three persons or entities may hold the rights in question, the lack of a "definitive conclusion" on that score does not make the work an orphan, and should not relieve the user of the obligation to seek to contact those likely owners for permission to make the use.[21]

Furthermore, those who wish to carry out mass digitization often do not rely on the policy justifications identified in the FRN as "issues at the heart of mass digitization." Consider the facts underlying the recent court decision discussed in the FRN – *Authors Guild Inc. v. Hathitrust*, No. 11 CV 6351 (HB), 2012 WL 4808939 (S.D.N.Y. Oct. 10, 2012). Nothing in the decision suggests that the universities that decided to enter into a collaboration with Google to make up to twelve complete copies of ten million volumes (three-quarters of them still under copyright) did so because they thought it would be "too labor-intensive and too expensive" to identify, locate and contact the copyright owners, and for that reason did not seek any authorization to make the copies. Nor does it appear that the universities omitted to seek permission because they were in doubt as to who owns what rights in these works. Instead, the universities believed that, because of the social benefit their massive copying would assertedly produce, the copyright law made their conduct non-infringing, and thus no authorization was necessary to make the tens of millions of complete copies involved. While MPAA believes it is unfortunate that a U.S. District Judge has evidently agreed with this analysis of copyright law, it

[20] We leave to one side the applicability of section 108 of the Copyright Act to mass digitization projects undertaken by libraries or archives solely to preserve fragile or deteriorating items in their collections.

[21] Similarly, it is worth re-emphasizing that a copyright owner's refusal to license a work – or even to respond to a request for permission to use it – does not make the work an orphan. In this context, there is no place for any presumption that silence is consent.

is clear that, in this case at least, mass digitization had nothing whatever to do with whether a reasonably diligent search for the copyright owners had been or could be made. It follows that "potential orphan works solutions" do not apply "in the context of mass digitization." 77 Fed. Reg. at 64,561. The mass digitization conflict between copyright owners and institutional users needs to be resolved in some other way, whether through the courts or through legislation unrelated to orphan works.

Accordingly, MPAA declines to comment at this time on the questions posed at the end of the FRN regarding "possible solutions for mass digitization projects." *Id*. We urge the Office to continue to approach orphan works and mass digitization as the separate and distinct issues they are.

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The MPAA appreciates this opportunity to provide its views in response to the Federal Register Notice. We look forward to reviewing the other comments submitted, and, if appropriate, providing reply comments. We would also welcome the chance to participate in any roundtables or formal hearings that the Office decides to convene, and to respond to any further Notices of Inquiry which may be issued. *See* 77 Fed. Reg. at 64, 561.

Respectfully submitted,

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