



## **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.