

February 4, 2013

Office of the General Counsel
U.S. Copyright Office
James Madison Memorial Building, Room LM-401
First Street and Independence Avenues, S.E.
Washington, DC 20559-6000

Re: Docket No. 2012-12, Orphan Works and Mass Digitization

The Digital Media Association (“DiMA”) submits the following comments in response to the Copyright Office’s Notice of Inquiry (“NOI”) dated October 22, 2012, in connection with reviewing the problem of orphan works under U.S. copyright law, in continuation of its previous work on the subject, in order to advise Congress as to possible next steps for the United States. DiMA’s membership includes America’s leading providers of digital and online music and media services, including Amazon.com, Apple, Google, Microsoft, RealNetworks, Rhapsody and Sony. As distributors of copyrighted works, DiMA’s members are significantly affected by the problem presented by orphan works under U.S. copyright law.

DiMA has been actively involved in the Copyright Office’s (“the Office”) review of the problem of orphan works under U.S. copyright law and supports the Office’s continuation of the examination in order, we hope, to arrive at a workable solution to the important problem of Orphan Works. We have participated in discussions and commented about the uncertainties that arise out of the orphan works issue and how those uncertainties and potential liability not only undermine important elements of the fundamental principles underlying copyright – public access to creative works – but also stifle innovation, and economic and business growth. DiMA members have helped establish the market for legitimate, royalty-paying digital music and media services, and are committed to offering consumers the most complete and varied repertoire available. Accordingly, we are pleased that the Office is continuing its work examining these important issues.

I. The Current State of Orphan Works

As an initial observation, DiMA notes that the current state of play for orphan works still remains troublesome and unresolved. While certain proposals have been raised and various initiatives have been developed throughout the world, in the United States, not much of significance has changed with respect to the status of Orphan Works over the last four years. As the Office noted in the NOI, several attempts at private solutions, such as the Google Books settlement and the HathiTrust initiative, have been stalled (if not completely halted) by the judicial process. Legislation has been considered but thus far, not enacted. The problem of Orphan works – and as the Office has correctly observed, the necessarily correlated licensing difficulties – is still very much with us and completely unsolved. It is clear that the only likely

solution, and certainly the best and most comprehensive solution, will come from legislation on a national level.

The problem of orphan works has been brought to the fore by the emergence of ubiquitous digital media available to a significant number of Americans through the internet, wired and wirelessly. The development and popular adoption of technology that enables immediate, large-scale distribution of media (along with the predictable public expectation for that immediate delivery) has pointed up the problems associated with antiquated copyright, registration and licensing regimes that are the product of a bygone world in which only discrete physical reproductions of individual works were ever able to be distributed. Since the advent of digital technologies that allow for instant, ubiquitous digital media delivery, including only select portions of larger works, both the creators and owners of copyrighted works, as well as those that seek access to those works (either commercially or otherwise) have found themselves stymied by complex copyright registration, notice, licensing and reporting rules – systems that proved to be barely workable, at best, in the pre-digital, pre-internet age – and the related potential concerns.

As the Office has repeatedly noted, including most recently in the present NOI itself, the acceleration of the orphan works issue, an unavoidable result of the progress into the current age of mass utilization, has been further exacerbated by a series of changes in U.S. copyright law over the past half century. These changes have seen the United States Copyright Act modified with relaxed registration requirements, random exceptions and various, difficult-to-interpret extensions to copyright terms for works. These changes, both unilateral and as part of U.S. attempts to come into compliance with various obligations under international treaties, resulted in the removal of certain obligations for copyright owners to proactively assert and manage their rights. The removal of those formalities, which helped enable the public and copyright users to identify the creators and owners of copyrighted works, coupled with the various ever-increasing scope and term of copyrights, has made the issue of orphan works particularly important and something that must be dealt with immediately.

As the previous Register of Copyrights Marybeth Peters correctly observed:

“Protection has become automatic. The term of copyright, once tied to the affirmative act (and dates) of publication, registration and renewal, has been extended twice, in 1978 and 1998, and was prospectively reconfigured to track the less obvious period of life-of-the-author-plus-70-years. In 1989, Congress removed the condition that published works must contain a copyright notice. In 1992, it removed the last vestiges of the renewal registration requirement. In 1994, many foreign copyrights were extracted from the public domain. The net result of these amendments has been that more and more copyright owners may go missing. To be sure, such revisions were enacted to protect authors from technical traps in the law and to ensure United States compliance with international conventions. But there is no denying that they diminished the public record of copyright ownership and made it more difficult for the business of copyright to function.”¹

¹ Letter of Marybeth Peters, Register of Copyrights, U.S. Copyright Office (Sept. 25, 2008), available at <http://www.copyright.gov/orphan/>. 5 See Orphan Works Report at 93–120.

In 2006, the Office prepared a report which it delivered to Congress on orphan works (“Orphan Works Report”). The Orphan Works Report included findings and recommendations to address this issue. The conclusions announced in Orphan Works Report were that:

- The orphan works problem is real.
- The orphan works problem is elusive to quantify and describe comprehensively.
- A few orphan works situations may be addressed by existing copyright law, but many are not.
- Legislation is necessary to provide a meaningful solution to the orphan works problem as we know it today.

The report concluded with a recommendation that the orphan works issue should be addressed by an amendment to the Copyright Act, specifically by amending the remedies available following good-faith uses of works reasonably believed to be orphaned. Following the issuance of the Orphan Works Report, legislation was introduced in both the 109th and 110th Congresses adopting many of the Office’s recommendations. In 2008 Congress came very close to adopting a consensus bill that incorporated many of these suggestions; unfortunately however, these efforts ultimately stalled and legislation addressing orphan works was never passed.

A comprehensive approach to the orphan works problem, including the establishment of guidelines for a “reasonable” or “duly diligent” search for a copyright owner and reasonable remedies in the case of copyright owners being identified after use commences, will be a benefit to everyone: copyright owners, subsequent creators, the public, the Library of Congress and the Copyright Office, public libraries, innovators (both public and private) and certainly the American economy.

We applaud the Copyright Office’s special technical projects to update the Office’s record systems in an effort to help users to locate copyright owners and the effort to develop a plan for improving the registration process and the searchability of the Office’s public databases. The development of effective, transparent databases of known copyrighted works – or in the alternative, at least a database of those works deemed orphaned - is a necessary component of the effort to address orphan works. The establishment and maintenance of such a database available to the public would vastly improve copyright owners’ ability to locate and confirm ownership of their works that are publicly available, and at the same time, it would also enable potential users to investigate and help to determine the copyright status of works, identify and locate copyright owners and engage in more efficient licensing that is more suitable to the digital age.

DiMA encourages the continued exploration and work to resolve the orphan works problem in any number of ways. Orphan works present a very real concern, one which stifles technological advancement, limits consumer choices and slows overall economic growth - for both copyright owners and users, alike. Orphan works frustrate the fundamental, balanced approach that is the explicit goal of our copyright system; to balance the creative and economic interests of copyright producers with the public interest in access to those created works. As the 2005 letter from Sens. Hatch and Leahy initiating the Copyright Office’s inquiry into the matter said, the orphan works situation “places an unnecessary burden on those who wish to use orphan

works: They cannot reduce the risk that their use of the work might result in copyright infringement, and therefore would likely choose not to use the work. This would be unfortunate and inconsistent with the purpose of the Copyright Act, because in such cases it would seem that although no one objects to the use, the public nevertheless is deprived of access to that work.”²

II. Occasional or Case-by-Case Orphan Works

a. The General Approach Followed in the 2008 Legislation is Sound

The 2008 proposed legislation on Orphan Works was an admirable attempt to address the issue of orphan works on a case-by-case basis. As the Office’s present NOI observed, the legislation would have applied to all kinds of copyrighted works, published or unpublished, from photographs to manuscripts to music and books. The legislation included several key components aimed at addressing the concerns over how best to determine if a work is truly “orphaned,” along with a well-considered approach to dealing with those works, compensation for their use, and potential liability associated with their use, as the status of the works might change. The legislation incorporated some elements to address the requirement for a good faith, diligent search for the copyright owner; attribution when possible and appropriate and reasonable limitations on remedies against good-faith actors. In addition, the Copyright Office was suggested as a repository to proffer best practices to be continuously developed by both copyright owners and users.

As the Office noted in the Orphan Works Report in 2006, the system that the Copyright Office recommended to deal with orphan works was designed to provide three important benefits: to make it easier and more likely to find the owner of copyrighted works, in any instance; to permit the user to use the work when the copyright owner cannot be identified after a reasonably diligent search (subject to provisions to resolve issues if the owner is identified after the use has commenced); and to promote efficiency and impose the least burdensome conditions on all the relevant stakeholders, including copyright owners, users and the federal government. Indeed, as the Orphan Works Report relayed, throughout the many comments received by the Office in submissions and discussions, there was a clear consensus that these goals were appropriate objectives in addressing the orphan works issues.³

DiMA continues to support the basic approach that was recommended by the Office in 2006. The direction the Office laid out and which Congress began to further was fundamentally sound. The framework recommended by the Office addressed the concerns of copyright owners and users alike, by creating a workable set of guidelines under which particular works would be subject to a rigorous yet attainable and efficient search for the copyright owner before they could be deemed “orphaned,” and even after such designation and subsequent use of the work, fair remedies available to copyright owners who might later be found – including the ability to “re-claim” ownership of the work - as well as limitations on liability for good-faith users of those works.

² Hatch-Leahy Letter, January 5, 2005.

³ 2006 Orphan Works report, page 8.

The wisdom of this approach is further borne out in the adoption of essentially this very framework in recent years by several initiatives specifically aimed at dealing with the orphan works problem in various jurisdictions across Europe and parts of Asia. The European Council formally approved the Orphan Works Directive (“Directive”) in late 2012. Closely following the approach that was proposed in the U.S. legislation, the Directive requires the establishment of an exception and limitation to the rights of reproduction and “making available” for certain permitted uses of orphan works. Like the U.S. approach that has been considered, the Directive requires a diligent search and provides that once a work is deemed orphaned, it may be used and accessed. The Directive also calls for a single registry to maintain data on all works that are deemed orphaned pursuant to the Directive, and permits a rights holder to reclaim ownership of a work once deemed orphan and claim fair compensation for the use of the work. Similar measures have already been adopted in Canada, France and Hungary and have been proposed in the United Kingdom.

While some of these plans limit the use of orphan works to certain types of works (i.e. excluding photographs) and allow use only to public entities such as libraries, educational establishments or museums, archives, heritage institutions and public service broadcasting organizations or their commercial partners, a consistent hallmark of each of these initiatives is the establishment of a requirement for a diligent or good-faith effort to locate the copyright owner which, if unsuccessful, thereafter provides for the use of the work, along with a continued ability for the rights-owner to come forward and claim reasonable compensation for the use.

1. Reference to the Specifics of a Reasonable Search is Necessary

The details regarding exactly what would constitute a “diligent, good-faith” search to find the owner of a copyrighted work should be reasonable, and could include a provision, as was incorporated in the 2008 legislation, for the standards to be developed and continuously updated, as circumstances prove necessary and as technologies to make broader, more effective and efficient searches become available.

One important shortcoming of the Office’s recommendations in the 2006 Report and the subsequent draft legislation was the lack of a definitive formal guideline for a “reasonable search” to be followed in trying to determine if a work is orphaned. The absence of any objective criteria that can be referred to when considering what a reasonable search is, and a basis for what constitutes a good faith search in particular cases was an omission that greatly limited the effectiveness of the proposal to address the problem of orphan works.

Without some level of certainty over exactly what entails a reasonable search (perhaps giving the Copyright Office the authority to define reasonable search specifically in regulations), any effort to address the orphan works issue will provide only limited relief. Leaving each potential use of a suspected orphan work subject to a completely ad-hoc determination as to whether the user reasonably searched for the individual owner of that particular work in the specific case will not solve the uncertainty surrounding use of orphan works.

Failing to establish any formal guidelines to be followed in trying to determine if a work is orphaned will leave each use that might occur to the vagaries of litigation, with any such uses

necessarily retaining the potential for full liability for infringement. No aspiring user of a work would ever be comfortable proceeding without knowing they were free from full liability in using any particular work. In contrast, providing some specific criteria as to what a reasonable search should at the least entail (even if it is deemed advisable to develop differing standards, depending on the type of work or the type of use intended) would help to a) confer certainty with respect to whether or not an individual could feel comfortable in moving forward with a use, when faced with an apparent orphan work and b) provide some guidance to courts who will be charged with adjudicating claims under the standard.

The standard of what a reasonable and good faith search is should incorporate some clear minimum requirements of a reasonable search, in every case. We understand the primary purpose of an orphan works system is not to allow users to merely run through a pre-determined list of minimal requirements before any use can be made with a guarantee of limited liability. The purpose is and should be to provide potential users with a way to find copyright owners and for copyright owners to locate and claim their works when others who wish to use the works have been unable to find them. The isolated concerns of a limited number of stakeholders should not deter the Office from continuing to recommend legislative action to establish such a system, including basic guidelines, nor should it deter Congress from enacting legislation aimed at establishing parameters for use of orphan works following such a search.

Establishing criteria for a reasonable search for the owner of a copyrighted work will empower copyright holders to know where and how they should publicize their copyright ownership in their works. Copyright owners doing so will render those works no longer orphaned (and also preclude any future “reasonable search” defense). In addition, the establishment of such criteria would allow copyright owners and courts to request proof of a reasonable search from alleged infringers who claim that their use should be protected. The reasonable search criteria established should include a clearly-defined set of practices recognized as reasonable *per se* under particular circumstances.

Recognizing minimum requirements that include efficient means for both copyright owners and prospective users to identify works that have been apparently orphaned (especially when those guidelines can be revised as a product of continued discourse between copyright owners’ and users’ groups) promotes greater transparency and certainty. DiMA proposes that a description of at least the general factors that would constitute a proper reasonable search in any case be included in any orphan works proposal or legislation, so that guidance is available to copyright owners and users and to the courts in determining cases.

2. Efficient, Automatable Searches of Updatable Databases Should Be Included in the Definition of “Reasonable Search”

Establishing a single (or perhaps a limited number of a few) centralized and automatically searchable database of works, perhaps including one held by the Copyright Office, would provide a significant basis for a reasonable search framework. A scalable database that would allow for the storage of a large amount of information and permit fast automated searches of a large number of works should be considered as the basis for developing a standard for a reasonable search. Such searchable, centralized database(s) would, as mentioned immediately

above, allow copyright owners a simple and efficient means to publicize their copyright ownership in their works, effectively eliminating those works from those deemed orphaned, and putting all potential users on notice of their ownership.

A database could also afford other benefits to both copyright holders and potential users of copyrighted works. Copyright owners could employ the database to include data on the work, such as their contact information, licensing availability (or even a link to licensing and payment terms that would enable an interested party to secure a license to the work). This type of use of a database would not only increase compensated uses, but also greatly reduce the transaction costs of licensing works. In addition, those searching for copyright holders through the database(s) could share the results of unsuccessful searches, including leads towards finding copyright holders and identifying orphan works.

For all of these reasons, the creation of and/or recognition of a centralized, searchable database(s) deemed appropriate for the basis of a reasonable search is recommended.

b. Orphan Works Are a Significant Impediment to Efficient Licensing, Especially in the Digital Age.

As is set forth in our introduction, the existence of orphan works creates a difficult situation for both licensors and licensees of copyrighted works. Legitimate businesses that are premised on the dissemination of copyrighted material cannot effectively develop, plan or budget for the copyright license component when faced with licensing uncertainties like those presented by orphan works. Uncertainty about the true status of a work's copyright ownership presents both significant cost and ultimately, considerable unknown risk.

As the Copyright Office's 2006 Report on Orphan Works made clear, copyright searches can prove to be costly, time-consuming endeavors. The comments that underpinned the report were full of examples of situations where copyright searches turned into a dead end or simply involved more time and money than the use contemplated would ever be worth, or the user was willing to spend. As the report correctly concluded, often the user can incur substantial costs without any guarantee that the search will produce information that provides a clear chain of title. Some searches turn into full-blown investigations. As a result, in many cases the mere perception that a search will become long and arduous is itself enough to discourage some potential uses. The nature of the planned use can also affect whether the potential user will even decide to engage in the search for the copyright owner, at all. In many cases of academic, scholarly, and other non-commercial uses, any search costs immediately outweigh the expected monetary return of the use. Even in the case of many intended commercial uses, the search costs outweigh the anticipated return.

The risk of potential copyright infringement liability for even a single work itself is a significant deterrent. Modern digital media services must offer entire libraries of copyrighted works to users in order to be competitive – yet that deterrent effect takes on a dimension that is literally paralyzing, when applied to the context of large-scale use of massive libraries of works, as is necessarily the circumstance for any modern digital media and music business, especially when coupled with minimum statutory damages assessed on a per-work, per-infringement basis.

Consideration of the potential copyright infringement liability for an unknown number of works within these necessarily-large-scale endeavors leaves managers and potential investors of these operations with few options but to scale back their offerings to omit orphan works, or perhaps, in some cases, not to launch at all.

A healthy, functioning licensing marketplace includes, as a necessary component, easily identified sellers (licensors) and buyers (licensees). The classic example of a competitive marketplace is several sellers offering comparable goods or services to several potential buyers seeking comparable goods. In this scenario, the sellers and the buyers are free to bargain with each other for the perceived value of the goods or services being offered. Copyright, and the licensing systems included in any advanced copyright regime (including statutorily imposed licensing systems) work on precisely this principle. Licensees agree to pay a negotiated (or set) price for certain licenses from known licensors. If however, the identity of a potential licensor is unknown, while the potential license remains in the marketplace with no known price or identifiable licensor from whom to acquire the license, that condition greatly upsets the entire balance of that marketplace. Potential licensees (and their customers, if they are consumer facing businesses) are now aware of licensable material, yet they are unaware of the specific price or terms of the license for that material. Potential licensees are forced to guess what the cost and terms of those licenses might be, depending on a myriad of potential factors, conditions and unknown circumstances. A reasonably conservative licensee will simply exit this marketplace as unstable and non-functional – or not even consider entering it.

As the previous Register of Copyrights noted in her letter to Congress supporting the pursuit of orphan works legislation in 2008, “there is no denying that [orphan works] diminished the public record of copyright ownership and made it more difficult for the business of copyright to function.”⁴

The existence of orphan works is anathema not only to basic principles of copyright, itself, but specifically to the licensing systems that are an inexorable part of any copyright system. As both the Librarian of Congress and the Register of Copyrights noted in their letter to Congress last year, and as the Register also noted within the report on Mass Digitization: “As a practical matter, the issue of orphan works cannot reasonably be divorced from the issue of licensing. The premise of the orphan works dilemma is that a user wants to exploit a copyrighted work in a manner that requires permission from the rights holder.”⁵

c. There Should Be No Limitations on Categories of Uses, or Users

In preparing the 2006 report on Orphan Works, the Office considered various proposals and justifications for limitations on certain categories of works that could be deemed orphaned, and also on categories of users and intended uses, that might warrant specific consideration, such as

⁴ Letter of Marybeth Peters, Register of Copyrights, U.S. Copyright Office (Sept. 25, 2008), available at <http://www.copyright.gov/orphan/>.

⁵ U.S. Copyright Office, *Legal Issues in Mass Digitization: A Preliminary Analysis and Discussion Document*, p.28 (2011), available at http://www.copyright.gov/docs/massdigitization/USCOMassDigitization_October2011.pdf.

providing preferential deference only to non-profit institutions, educational institutions, libraries, and/or archives. The Copyright Office correctly rejected such pre-ordained exceptions and classifications in its recommendations. Such distinctions should not be a component of a comprehensive plan addressing orphan works. A few very specific pre-determined distinctions have found their way into very specific provisions of the Copyright law for very specific reasons of public policy. But as the Office correctly concluded when recommending no such limitations on categories of works, types of uses or users in its Report on Orphan Works, the orphan works problem is one that cuts across all types of works, all types of potential uses and one that negatively affects all types of copyright owners and users. As a practical matter, the distinction between the activities of a library and its patrons is irrelevant. In addition, as the Copyright Office stated when recommending no such limitations on categories of works, types of uses or users in its Report on Orphan Works, it is commercial entities that are more likely to have the resources to conduct copyright searches, the results of which will help to establish and maintain data on what works have been searched, which search tools and avenues were employed and what the known status of any number of works actually is.

The Copyright Office should maintain the even-handed approach developed and proposed in 2006, recognizing the existence of orphan works is a serious concern that affects all types of works and one that negatively affects all types of copyright owners, as well as all types of potential copyright users. Accordingly, the Copyright Office should not establish any such limitations on categories of works, types of uses or users.

d. Other Approaches are Less Than Ideal

1. Fair Use and Other Exceptions May Not Be Adequate In All Circumstances

The section 107 “fair use” doctrine is a common law exception to copyright. The fair use provision in the 1976 Copyright Act was intended to codify the existing common law doctrine, and to continue the process of assessing fair use claims on a case-by-case basis. The fair use exception, however, does not define fair use, but rather merely sets out a list of nonexclusive factors that a court is to consider in determining whether a particular use is fair.

The case-by-case nature of fair use analysis and application is not an effective solution for all orphan works or intended uses. In the first case, many intended uses of apparently orphaned works do not, by their nature fall under fair use. They are uses for which a license should or would be available or necessary, but for the inability to locate the proper licensing party. In addition, making use of copyrighted materials based on the possibility of invoking a fair use defense to a potential claim of infringement is far too uncertain and costly to be a truly viable business practice.

Other exceptions to copyright protection are similarly limited and do not adequately address the orphan works problem in a comprehensive manner. Use of an orphan work by a library or archive might be covered by section 108, which contains other exemptions and limitations related to preservation, replacement and patron use, in addition to the “orphan works” provision in section 108(h). Other exemptions are specific and narrowly applicable, such as the section 110 exemption for educational and religious uses; section 117, which permits owners of a copy of a

computer program to make a copy or adaptation to the program, only in certain circumstances; or section 121, which authorizes certain entities to reproduce or to distribute copies in specialized formats exclusively for use by blind or other persons with disabilities.

These explicitly limited exceptions are intended only for very specific situations. These exceptions, like the fair use exception, are not intended to and do not apply to orphan works in many, if not most, cases, and for many, if not most potential users.

The Copyright Office should continue to pursue a more comprehensive remedy similar to the general framework that was recommended in 2006, acknowledging that the orphan works issue is a serious concern that affects many types of users and many types of works, for which existing narrow exceptions do not provide adequate relief. These explicitly limited exceptions are intended only for very specific situations and do not adequately address the orphan works problem.

2. Other Licensing Approaches Suggested Have Significant Disadvantages

Other possible approaches such as voluntary collective licensing, “quasi-statutory” or “extended collective licensing,” and other licensing schemes have significant disadvantages that, at the very least, would require considerable additional further exploration, if they could prove workable, at all. While DiMA is certainly willing to be a part of any such pursuit of these alternatives if they are seriously considered, given the existing framework discussed above - one that has already been recommended by the Copyright Office after much investigation, discussion and consideration and which has been seriously considered by past legislatures – DiMA is recommending that the Copyright Office continue with the pursuit of an orphan works policy that includes the components incorporated in previous proposals developed between 2006 and 2008. That approach is a comprehensive orphan works policy that can be implemented as soon as possible, and which adequately addresses all of the concerns of copyright owners, the public, copyright users and government concerns about efficiency and authority.

e. Practical and Legal Problems in Forming or Using Registries

1. Formal or Voluntary Owner Registries Are Not Advisable

As the Office’s 2006 Report on Orphan Works concluded, a formal approach that includes the establishment of a registry of copyright owners to be searched would result in the practical establishment of a requirement that all copyright owners list their work in this “owner registry,” lest the work could be subject to use as an orphan work. Such a mandatory owner registry would possibly violate the terms of the Berne Convention, which prohibit imposing formalities on authors and copyright owners as a condition of relief.

A voluntary owner registry was also apparently considered, but the practical effect of a voluntary owner registry is that it would necessarily not satisfy the orphan works problem. The very existence of orphan works is the result of the failure of copyright owners to pro-actively register and update records relating to their works. It is unrealistic to assume that requesting

voluntary registration of works, at this point, would result in any significant reduction of the number of works not registered.

2. Third-Party Information Resources are Too Disparate to Constitute a Useful Registry

Third-party or private resources play an important role in the accumulation and maintenance of copyright ownership information, and therefore serve as important resources to potential users. The databases of performing-rights organizations such as ASCAP and BMI, and other rights clearinghouses like the Harry Fox Agency, Royalty Logic and others all have collected considerable contact information for owners of copyright in musical works. These industry groups have had great incentive to collect and manage the information, as they administer collective rights for many copyright holders in the music industry. While these various third-parties tend to have good information about copyright ownership and these organizations understand that providing such information tends to reduce orphan works situations, they do not provide anything close to a solution to the orphan works problem, even when various groups have provided these resources to potential users.

In the first instance, the individual information held by these various third-parties is rights-specific, varied and proprietary. For instance, ASCAP and BMI have information that only relates to the performance right in musical compositions, and that is only for works owned by their constituent affiliates. They do not have information regarding master recording ownership or rights. Similarly, Harry Fox and others concerned with mechanical rights licensing in particular, have data only relating to the specific mechanical right, while other related rights, such as the performance right, can be owned or administrated by an entirely different entity. What is more, these organizations generally consider their information and their ability to service their specific clientele as proprietary and providing commercial advantage. Since this information is spread across several unique entities, for various unique rights, these repositories fall far short of providing a comprehensive registry or database of all owners of works, for all possible uses and users.

While orphan works situations may appear to be less likely in areas where rights may be administered collectively, there is still a significant orphan works problem in these areas because of the limitations just discussed and because many creators never opt in to collective groups in the first place. The problem is still significant enough to stifle innovation, discourage investment and leave significant portions of the catalog of works produced to be left unexploited by commercial media companies – and therefore the sole province of pirates and others that have no concern about, and accordingly no incentive to locate, copyright owners. Furthermore, outside of specific areas where resources like these have been developed, such as in the music business, or the book publishing business in the case of graphic works, photography and other visual mediums, similar resources do not yet exist.

3. The Copyright Office as Registry

a) The Copyright Office's Records of Copyrighted Works are Necessarily Incomplete or Unavailable

The Copyright Office is undoubtedly a primary resource of information about copyright ownership. While the Office maintains extensive records related to copyright registrations and ownership and the office continues to update its records and the format in which they are kept and made accessible, those records are incomplete, largely unaccessible and necessarily voluntary. Of the Copyright Office's public records, many are incomplete and not all are efficiently searchable. As discussed above, in compliance with various international treaties that prohibit things like registration and recording requirements as a condition of copyright protection, there is no requirement for copyright owners to even file any type of registration of works that come under copyright protection with the Copyright Office. Of the limited registrations that have been filed with the Copyright Office, many of those records are incomplete and a vast number of them are not efficiently searchable within the Copyright Office. For example, only after 1982 were registrations from 1978 to the present recorded in an automated catalog that is available online. From 1891 to 1982, the Copyright Office published a catalog of copyright entries (CCE), but those records are, again, necessarily incomplete and they are only available to the public for review at the Copyright Office itself, during normal business hours. Similarly, recorded documents related to copyright ownership, such as assignments, transfers, and security interests are maintained in large part in a physical microfiche format and are only available to the public during regular business hours.

We acknowledge and appreciate the Copyright Office's diligent efforts to digitize the Office's pre-1978 records. Having those records available and easily searchable would certainly facilitate efforts to locate copyright owners and would also certainly reduce the scope of the orphan works problem, however, doing so involves significant expenditure of time and resources and cannot eradicate the concerns over orphan works, in any event.

In addition to the problems associated with digitizing and making available existing Copyright Office records, those records are necessarily incomplete and this fact alone means that a Copyright Office registry of copyright owners could never resolve all potential orphan works situations. Even when the efforts to completely digitize and make those records available for public search are complete, the incomplete scope of records means that they will never constitute a complete registry or a total solution to the concerns about orphan works.

Even the Copyright Office's own instructions on how to search the Office's records, and for conducting copyright searches generally, include recommendations that people searching for copyright owners should use various Internet-based information resources maintained by third parties, as those resources often have additional information about copyright ownership. The Copyright Office also suggests that people searching for copyright owners can use the Office's fee-based searches of Copyright Office records, or private search firms that offer similar for-fee searches of Copyright Office records. The Copyright Office's own circular explicitly warns that the absence of information about a specific work in the Copyright Office's records does not mean that the work is unprotected. None of these options is complete, efficient, or a reasonable solution to concerns over copyright ownership. These incomplete and difficult to search records do not solve, but indeed in many ways contribute to, the orphan works problem.

While the Copyright Office would seem like a logical place to have or establish a registry of all copyrighted works, thereby giving guidance as to what works are orphaned, the fact that the

Copyright Office's records are admittedly incomplete and largely unsearchable means that is not a realistic solution for people faced with potential orphan works, today.

b) The Importance of Copyright Office Records Going Forward

There is the possibility that, in addition to providing guidance and "best practices" with respect to how to determine the copyright or orphan status of a work, as part of a comprehensive plan to establish an orphan works policy going forward, the Copyright Office could become the repository for information on apparently orphaned works, search processes and results, subsequent uses, etc. and therefore effectively become the de-facto registry of works deemed orphaned. Perhaps a private institution would seem to be more efficient, and better able to absorb the costs of establishing and maintaining a registry of orphan works, but some of those benefits may not stand up to closer inspection.

The Copyright Office is a long-enduring governmental entity charged with the administration of copyrights within the United States. No one can guarantee that any private entity will exist decades from now and entrusting the development and maintenance of such an important component to the United States copyright regime seems, at once both in complete keeping with the Copyright Office's function and also something not to be left vulnerable to changing commercial interests or market forces. In addition, establishing such a function within the Copyright Office would seem to be a much more achievable and much less economically burdensome goal than other, more global efforts.

The development of such a registry or database would be on a going-forward basis, and would therefore not involve cost and project-scale concerns about homologating various forms of historical physical or electronic records. The development of the database would be entirely electronic, from inception. In addition, the work of populating the registry database would be largely borne by copyright users and owners, as prospective users continue to search for copyright owners and report the results, and copyright owners come forward to claim ownership, respectively.

III. Orphan Works in the Context of Mass Digitization

The Office's 2006 Orphan Works Report did not analyze the issue of mass digitization in detail. The subsequent 2008 proposed legislation on orphan works also did not directly address the possibility of systematic or *en-masse* digitization, copying, display, or distribution. The Copyright Office's subsequent publication, "Legal Issues in Mass Digitization: A Preliminary Analysis and Discussion Document," issued in 2011, focused on this issue, primarily with respect to the digitization of book libraries.

DiMA suggest that mass digitization of various works, including but not limited to literary works, is something that should be pursued. The establishment of open and publicly-available databases of large libraries of digital works will not only benefit the public, but they will facilitate copyright owner identification as well as satisfy the basic principles of copyright: creator remuneration and incentivization, balanced with public access to culturally important

works. The development of these libraries and databases will also stimulate technological advancement and business and economic growth.

The many issues attendant to the topic of mass-digitization, such as how to define the term “mass digitization,” what the appropriate legal framework to apply specifically to mass digitization projects should be, and others have not been fully addressed by the Office or any of the participants in this inquiry, to date, as the Office has grappled with the general issue of orphan works over the past few years. Consideration of the complex issues that are unique to the situation of mass-digitization should be addressed in a careful manner, especially in the present environment, where we currently lack any comprehensive orphan works provision.

The Copyright Office should explore specific orphan works provisions that are applicable in the context of large scale digitization projects, such as specific search requirements within a mass digitization project, further limited remedies that might be assessed when a work is consumed within a mass digitization project, and other considerations.

DiMA stands ready to participate in any discussion and pursuit of such applications of orphan works policy specifically to mass digitization projects. As set forth above, DiMA supports the continued pursuit of the basic framework that was recommended by the Copyright Office in 2006, but also including guidelines defining a “reasonable search” that includes efficient, automatable database searches, as a solution for case-by-case orphan works. To the extent that the Office’s inquiry here leads to additional considerations aimed specifically at issues of mass-digitization, DiMA would like to actively participate in resulting discussions.

IV. Conclusion

The marketplace for copyrighted works is expanding rapidly. Individuals, commercial entities, libraries and others have made clear their desire to have access to entire libraries and catalogs of a vast array of copyrighted works, from books, magazines and newspapers to photographs, paintings, film and TV programs, music and other media. The gap in U.S. copyright law that allows for the existence of (and indeed the continued rendering of certain works as) orphan works is counter-productive to the interests of all: copyright owners, individuals, copyright users, public institutions, private entities and the national economy alike. The need for a comprehensive orphan works solution is well known and long overdue. The emergence of mass digitization efforts only makes the need that much more acute.

DiMA appreciates the Copyright Office’s intention to re-invigorate the discussion about this important topic and we and our members are ready to engage with other stakeholders and the Copyright Office, as well as Congress, to ensure that this important issue is addressed in a well-thought-out manner that resolves all of the concerns of all interested parties.

Respectfully submitted,

/s/ Lee Knife
Executive Director