

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

In the Matter of

Orphan Works and Mass Digitization

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**Docket No. 2012-12**

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**COMMENT OF**

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

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GILDA BRASCH  
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## **I. INTRODUCTION**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>23</sup> PATRICIA AUFDERHEIDE & PETER JASZI, *RECLAIMING FAIR USE: HOW TO PUT BALANCE BACK IN COPYRIGHT*100 (The University of Chicago Press 2011).

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>31</sup> 17 U.S.C. § 108 (2006).

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

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

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

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

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

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

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

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

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

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

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

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

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

## V. CONCLUSION

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

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

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

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

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

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

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

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

## APPENDIX A

### ABOUT THE COMMENTERS

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

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

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

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

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

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