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U.S. Copyright Office

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To the Librarian of Congress and/or Registrar of Copyrights;

Having shared my comments as a consumer with the U.S. Department of Justice in its music licensing study pertaining to ASCAP-BMI to determine whether any additional oversight is still needed and if so should the existing consent decree be extended as is or with changes I would like to express my concerns on the music industry as a consumer now with you.

I would like to start off by stating that I've always found it kind of funny and yet frustrating as a consumer that when the music industry sells me a CD or mp3 they feel cheated they don't get a royalty payment every time I listen to their music and provide some background before answering any of the Copyright Office's questions. For the DOJ music licensing study I suggested some oversight should continue that is the consent decree should not be allowed to expire or to lapse - it should be renewed (i.e. extended) but will leave the issue of how much oversight is needed to the consumer groups who are more aware of the legal jargon for these proposals. Should some regulations be allowed to lapse in some areas while in other areas regulators can apply more oversight of the music companies. Again I will leave that to the

consumer groups to propose and the Copyright Office can review their comments and that of the music companies themselves and make the best determination.

I would just like to reflect on what's happened so far with music, where we are now and how we got here:

At the dawn of the 21st century album sales peaked and the peer 2 peer file sharing revolution started with the birth of the original Napster, which led to the free culture movement with activists saying information should be free. I agree that in general our information should be free of restrictions like region locks on media and anti piracy DRM controls that do more harm to legitimate consumers buying media than to actual pirates.

That being said Apple Computer Inc., which was working on its new digital hub strategy for Mac OS X and first worked on a consumer film editing application based on their professional Final Cut Pro package for QuickTime authoring was alarmed by the Napster revolution. They thought they had more time and were doing video first. When Apple's Steve Jobs saw Napster bring about the digital music revolution he worried Apple might miss the music party. Jobs was late to release a digital music product but not late to the legal digital music distribution business. He had a chance to catch up, first he appealed to the music companies hating Napster to license their music to Apple to sell via iTunes.

Apple which did not even have the time to develop iTunes in house had acquired SoundJam MP and transformed it into a simple music player and digital store called iTunes. Apple also got the labels to agree at least reluctantly to allow consumers to individually buy the songs they want starting the revolution for selling digital singles. The music companies were able to get enough people pirating music online to instead start buying music as they build up their digital collection of songs. Apple also released the iPod music player late to the mp3 player market but it became a big seller. The intention from the start was to operate the iTunes Store at a loss to promote sales of Apple's iconic iPods.

So the iTunes Store was created to provide a legal avenue for music content to be acquired and stored on Apple hardware. All songs originally would sell for 99 cents - the price was fixed and the RIAA wanted after some time to be able to raise prices and/or for Apple to offer a subscription music service to pay them each time a user listens to music. Apple refused to offer anything like iTunes Radio or its iTunes Match subscription service for a good long while. Apple also refused to share iPod revenues with the music companies when they asked Apple for a cut of iPod sales.

The RIAA likely assumed iTunes would permanently be Mac only and didn't realize that Apple could/would eventually open the iTunes ecosystem up to Microsoft Windows the dominant PC operating system on the market in terms of market share. When Apple gained significant market power after coming to Windows and began to be able to dictate terms to them the RIAA labels didn't like that one bit. However, the RIAA had no one but themselves to blame for this as I'll explain below.

Apple's control of their industry and refusal to accept their demands on variable pricing angered the corporate record labels. Some even contemplated leaving the iTunes Store. Most though realized they couldn't and the foolishness in doing so and losing the revenue they were getting. The Recording Industry Association of America upset with singles undercutting album sales and unable to offer individual songs at higher price points didn't know what to do. Consumers didn't need to use iTunes to acquire their music they could still use less legit options like pirating music on file sharing networks which though still came with the risk of accidentally downloading a virus to a computer; or consumers could even rip their album CDs they legally bought into their computers, import music into their iTunes library and sync or copy the music to their iPods.

However, consumers wanting to legally purchase and download music had to use iTunes if they wanted their music to play on the iPod. The reason was DRM which the labels insisted Apple wrap their music tracks in when a user bought music from the iTunes Store and

downloaded a musical track or an album. Other digital music stores including Microsoft's ill-fated MSN Music and Yahoo's Yahoo Music came up using some other form of DRM (usually it was Microsoft Plays for sure DRM no matter what other digital store you bought music from with the exception of Apple and Sony's digital music stores) which similarly could only play on protected windows media based mp3 players. In the case of Plays for sure the tracks were protected Windows Media Audio files in contrast to Apple's protected AAC files with the .M4P extension.

Apple eventually convinced the music companies they could sell more music by removing DRM and created iTunes Plus. The draw anyone who purchased DRM music before from Apple must now pay again for their music to become DRM free. This was a way to force consumers to pay for the same music twice. However, the labels would not all willingly allow Apple to just drop DRM on their existing music without a new contract permitting variable pricing. To put pressure on Apple they partnered with the online retail giant Amazon (amazon.com) permitting Amazon to sell DRM free music via its mp3 store. This way consumers could legally buy digital music from another seller and it will play on any device including Apple iPods, and Plays for sure certified devices.

Eventually Apple relented on variable pricing and got to upgrade all the music in its store to iTunes Plus. Meanwhile Microsoft which realized its Plays for Sure strategy wasn't working killed its MSN Music Store and the Plays for Sure DRM for other digital music storefronts and went into competition with some of its former partners in the hardware business creating the Zune brand of music players, Zune music store and Zune software to copy the success of the iPod and iTunes.

However, after a few short years they would kill the Zune to focus on their Windows Phone business and replace Zune music with their current Xbox Music offering which along with Xbox Video and Xbox Games is available to users of Microsoft's game consoles and on PCs smartphones and tablets running Windows 8/8.1, Windows Phone 8/8.1 etc. The Apple iTunes

Store which still exists and has over the years expanded to sell other digital media including movies and TV, plus apps for Apple's latest iOS devices and the Mac has actually become a profit generator for Apple. What started out as a loss leader became a profitable business over time for Apple thanks to the launch of the iTunes Store.

From the start Apple has always maintained a 30 percent commission of every song sold on iTunes with most of the money going to the record label and peanuts (11 or 12 cents) going to corporate musicians. It is likely other digital music sellers like Amazon, Microsoft and Google have similar terms. Since iTunes was originally only selling music and most of it were singles it was a loss leader for Apple but with the development of the App Store the category of iTunes software and services is now a revenue generator for Apple.

Yet even as iTunes software and services have become a revenue generator for Apple (largely due to the App Store) consumer spending patterns and behaviors have clearly shifted. We buy less music now at least digitally and less movies or TV shows via the iTunes Store than we did a few years back. This sales decline is not due to consumers shifting to other digital storefronts. Overall digital music sales are in a rut, a state of decline and companies like Apple are trying to bolster digital movie sales as DVD and Blu Ray sales decline. To that end Apple has introduced iTunes Match a subscription music service that lets users match their non iTunes purchased music they have in their iTunes library with music in the iTunes Store and when matching works as it should lets users store their non iTunes purchased tracks via iTunes in the cloud. For each iTunes Match subscriber Apple pays a royalty to music companies each time iTunes Match users listen to their music.

Apple also introduced iTunes Radio as a way to help users discover new music (its an online music promotion service) and encourage them to buy music they like. iTunes Radio is more about bolstering declining music sales than satisfying listeners whose musical desires have shifted from owning music to streaming digital music from subscription services. To rectify falling movie sales Apple has finally updated its iTunes Extras feature for HD movies. iTunes

Extras was a feature Apple created a few years ago to offer digital movie buyers digital extras like they get with a DVD or Blu Ray movie purchase but it only ever worked on the 1st generation Apple TV or a Mac or Windows PC via iTunes and in SD.

Now Apple is bringing iTunes Extras to the 2nd and/or 3rd generation Apple TV and to iOS devices with iOS 8 to similarly bolster digital movie sales. The point is the digital content market is changing as consumers rely more on streaming music and movie services like Pandora Radio, Netflix Inc.,'s Watch Now, Amazon's Instant Video etc with Prime and so we are buying less digitally and just paying for subscription services offering unlimited access (rental based) to our content.

The music industry will have us believe buying music is over with and the future is subscription music services. Music sales like movie sales will continue to exist but the dominant way to access media will be rentals. To an extent they are correct about consumers wanting the ability to rent content but if they ever think buying is over with they are wrong. Just look at the music industry, despite declining digital music sales consumers are buying vinyl LPs and records again. Yes album CD sales are still down but consumers are preferring to buy a few singles on vinyl format again making the vinyl record popular once more.

Apple which also offers free and pro music creation tools like the free GarageBand and premium LogicBand and MainStage is seeking as I mentioned to compete with Pandora Radio and other streaming services like Spotify. Once when Apple was king of music the RIAA felt bullied by Apple so partnered with Amazon to sell unprotected DRM free mp3s. Now the RIAA is bullying Pandora Radio for higher royalties that Pandora given its small size and limited product selection despite its growing popularity are unable to afford.

I would again like to stress the shift from primarily buying music to streaming here: Yet while streaming may have had a role to play in the decline of recorded music sales it is not the only factor. Now variable pricing could have offered some benefits for consumers by

enabling cheaper music to be sold. Most of my music purchased on iTunes since variable pricing went into effect was for 69 cents a track or 99 cents.

Pandora Radio for free listeners tries to make money by displaying advertising to them but the amount they make in advertising is peanuts compared to how much the labels and ASCAP want for music producers, songwriters and artists. Once all of these individuals and the organizations representing them get paid Pandora has nothing left for itself. Pandora Media Inc., has few subscribers paying for its ad free Pandora One version and is operating at a loss the way Apple's iTunes Store initially did. The trouble is they don't have other products that are profitable they can survive on even if their streaming service operates at a loss. I was reading that someday Pandora (P) could become a penny stock. Pandora's advantage as it spent the last decade mapping what it calls the music genome. It now has a huge lead over other companies in music discovery making its music recommendation service better than anything Apple can provide.

Even if Apple were to start doing what Pandora did today it would take them a decade to catch up. I support artists right to make a living from their work and have long favored Voluntary Collective Licensing systems where a consumer can use a peer 2 peer file sharing service to freely download music and then give the artist a buck or however much the consumer is willing to pay. As such most corporate artists are underpaid and the iTunes Store only served to continue their exploitation. It is interesting how things have changed over the past decade.

Originally, the RIAA labels paid radio stations (whether terrestrial radio, satellite radio or online it didn't matter) to only play their music. This was a pay to play system which prevented independent artists from getting on the radio and being heard. The great thing about file sharing was by depriving the RIAA of more revenues it did not have the money to continue to bribe the radio stations. Peer 2 peer kills pay for play music activism groups like Downhill Battle chanted. Yet services like iTunes could serve to continue that exploitation while on the other hand be

good for independent musicians wanting to sell their music online. A free and Open Internet cuts out the middleman and lets musicians, book authors you name it self distribute their own works if they so choose. For corporate musicians they don't have the right to distribute their own works even online but for the independents it's possible.

Today the RIAA and ASCAP are trying to shake down Pandora. Even worse organizations like ASCAP have been responsible for increasing prices for content on digital stores like iTunes as they demand to be paid twice for musical performances. They say if a consumer buys a song from iTunes and then a movie and the song they bought is played in the movie they should be paid from proceeds of the movie sale too each time a consumer buys the movie from iTunes. While I think artists should be fairly compensated and ASCAP is supposedly looking out for their artists that's not always the case and as a consumer I have to find value also.

Region locks also prohibit innovative startups wanting to offer music services or other type of content services from sometimes getting started. A internet radio firm gets started in the U.S. and wants to be able to stream European music to U.S. listeners but due to region restrictions and unavailability of that content in U.S. cannot legally do it. In Europe the firm's European listeners may be able to hear it but not in U.S. Content availability is subject to location or region in this case. The example above could even apply to a movie streaming company wanting to stream movies for which the rights are only available in other countries. I support Pandora Media's right to operate well financially, and believe just and reasonable compensation should be made by Pandora as it is currently doing to artists and songwriters and labels. Pandora cannot be expected to pay the same amount in royalties to the music companies and artists as say Google Play Music All Access, Microsoft's Xbox Music Pass, Amazon Prime Music, or Apple's iTunes Match does.

Considering Pandora does not even sell digital music like Amazon, Apple, Google or Microsoft they cannot be expected to offer the same amount in royalties as their bigger

competitors. Pandora only makes money through advertising and selling Pandora One subscriptions and it does not make enough from either to pay so much for their music service and still be profitable. How can Pandora be expected to offer the same or similar amount in royalty payments as these other companies? Forcing the same terms on Pandora would be just wrong and the RIAA and ASCAP's bid to change music licensing rules in their favor to force Pandora to pay ever higher royalties to them without limit is unacceptable to me as a consumer.

I do feel for the artists who say they only got 2 or 3 cents from each time their song played on Pandora and a solution is needed but the solution is not to gouge Pandora for ever higher royalty payments that not only keep going up and up. Pandora has already been forced to axe their annual or yearly subscription offering and to raise their fee for Pandora One subscriptions for new members from \$3.99 a month as it was last year to \$4.99 a month this year = \$60.00 yr.

Fortunately, for existing Pandora One subscribers who initially subscribed last year they can lock-in their existing \$3.99 a month = \$47 yr plan at least for now but as mentioned the one time a year payment plan is out. Apple on the other hand has more flexibility and has enough profitable market segments it competes in that it can afford to charge \$24.99 a yr for an iTunes Match subscription and still make money in other areas. How can Pandora possibly pay the same amount in royalties as Apple? They don't make money in other areas, they have already slightly increased their pricing and want to keep prices low enough for their consumers to be willing to subscribe. Quite a few Pandora One subscribers upset about the removal of the annual plan have already canceled their subscriptions finding a monthly plan less affordable. If Pandora raises the cost of the monthly subscription too high they may lose even more Pandora One subscribers. The amount they can make through online advertising is limited at best, and during recessionary periods in which the online ad market overall may struggle it would become harder still for them to make money.

After Pandora has paid the artists and songwriters and labels for each performance or play it does not have much in terms of revenue for itself. Pandora as a company is operating at a loss currently - its existing business model over the long term is not sustainable unfortunately and the greedy labels and ASCAP want to put Pandora even deeper into red. Music licensing is indeed complex and frustrating but the solution is not to empower the middle-men RIAA and ASCAP with more influence over the payment system. The Copyright Royalty Board, the Copyright Office and the U.S. Department of Justice should all intervene and from time to time help mediate some form of necessary cease fire or agreement over royalty payments. The amount of royalty payments Pandora should pay should be capped at a reasonable level - what is deemed reasonable unfortunately each party will have its own ideas.

Best way is to fairly hear all sides and make an unbiased objective decision. Smaller firms including startups that want to compete with the established online radio services should pay less in royalties than the bigger players. They should only pay what they can afford for music licenses to stream music. If royalty payments are to be increased there should be a cap that says you can only increase the royalty payments by this amount (by this much money) to the capped amount and after that no hiking up the royalty payment unless the firm can afford it. Now firms like Pandora may have to argue in court how much their service is worth, what they can afford etc and have facts on their side to prove this hike could damage our business. Yes businesses should not in principle make money by stealing content from other businesses to distribute to their customers (i.e. this is equivalent to Pandora stealing music from labels to give to Pandora listeners) but Pandora is not stealing music or encouraging users to steal music.

While Pandora does not itself sell music it has a link in its iOS app to the iTunes Store to buy music you hear on Pandora from Apple's iTunes. It is likely Pandora on Android has a similar buy button for Google Play Music, on Amazon devices to buy music from Amazon Mp3, and on Windows Phone from Xbox Music. So Pandora does promote music sales it just doesn't sell music itself. I humbly request the Copyright Office to not take special sides Pandora or

RIAA or RIAA or Pandora but to fairly try to help settle such matters with the interest of being unbiased and fair to all sides and then making an objective decision.

Perhaps I'm biased in favor of Pandora because I think it's a great service but even then my point remains valid and I'll say this without a bias services like Pandora cannot pay the same amount in royalties as larger firms. This is a logical and valid argument. The RIAA has said music licensing is arcane and broken and proposed its fixes. My proposed solution is to fix it in a way that works for everyone not just the music producers and record labels. Fix it for the fans and fix it for smaller firms like Pandora giving them a fair shake.

Thank you for taking the time to read my comments and take them into consideration and for the opportunity to comment on this music licensing study, I will leave any formal questions I don't know the answers too, or know how to answer to other consumers and to consumer groups to comment on. You can review those and the comments of the industry players including Pandora, the RIAA, ASCAP, Apple Inc., Microsoft, Google any and all parties that participate in this proceeding on music licensing for specific answers. I just wanted to share my thoughts on the state of the industry, and while yes I agree with the RIAA that the music licensing system is arcane and dysfunctional it is for other reasons. I believe it is arcane because of them not because of Pandora.

Here are my closing arguments they end the same way they opened:

Back in 2006 the Recording Industry Association of America was feeling bullied by Apple which refused for a long time to offer variable pricing for music downloads sold on its popular iTunes Music Store which has since expanded to sell music videos, movies, TV shows and other media including apps.

The RIAA for a long time felt cheated that they could only make money once from iTunes Store sales while Apple was making money off iPod sales. The RIAA numerous times tried to get Apple to share a percentage of its hardware sales with them but Apple resisted.

They even tried to press Apple to launch an internet radio service to rival Pandora Radio from which they could make recurring revenues. Yet for the longest time Apple which offered liberalized music rights favoring consumers refused their demands.

Only when Apple was able to get the labels to dump DRM or copy protection in their music did they consent to variable pricing. The main reason the labels wanted variable pricing was to experiment with selling songs for more than 99 cents. Since variable pricing was enacted music sales have steadily declined as prices for songs that were once 99 cents have gone up to \$1.29 a track. Some songs became cheaper with variable pricing reducing in price to 69 cents a track but most went up. So the real culprit in declining sales may have more to do with the greed of the labels in jacking up the price.

A decade of iTunes singles killed album sales and jacking up the price of singles and starting to offer album only exclusives may have helped initially in improving some album sales but in the long term consumers have been put off by higher prices and a selection of music that no longer matches their unique tastes. Cookie cutter recorded music is boring.

As iTunes music sales have in the last year have steadily declined Apple finally agreed to the labels earlier request to offer a streaming internet radio service providing music labels, songwriters and artists a recurring revenue stream.

The RIAA made the mistake of not offering legal music downloads sooner than they did and not offering its own online distribution platform enabling Apple to dominate its industry - in fact before Apple came along they allowed peer 2 peer file sharing on the early Napster to take off. Apple was smart to insist on allowing 99 cent song sales initially and to allow music to be sold per track. Album CDs always came bundled with filler songs. There were only 1 or 2 good tracks in an album. iTunes popularized the purchasing of digital singles. As a result the music industry once used to making hundreds of millions of dollars on album sales is now making less money.

Also it was not too long ago the RIAA used its massive profits to bribe radio stations to only play corporate owned music. This payola or pay to play system benefited musicians and labels associated with the RIAA but made it harder to discover new independent music. For many years the RIAA has even been under paying most artists. Sure there are a few wealthy musicians like Madonna but most are in debt to the labels.

Why continue to perpetuate their exploitation? Better some say to download and share music freely and then send the artist a buck - cutting out the middle man.

After dozens of lawsuits against music labels over payola and some music activists pushed greater peer 2 peer file sharing as a way to breakup payola the music industry has seemingly abandoned payola. Now they want internet radio stations to pay them royalties.

Unlike Apple Pandora makes no money on hardware or song sales. They only make money delivering ads to users streaming music for free and from paid subscribers paying \$4.99 a month for ad free higher quality audio with more number of skips.

As such U.S. District Judge Denise Cote recently ruled that Pandora could not and should not have to pay significantly higher royalty payments to ASCAP and the RIAA. As such Pandora recently had to increase the subscription fee for Pandora One subscribers from \$3.99 a month to \$4.99 a month to absorb higher royalty payments. Pandora also ended its yearly subscription plan and now charges on a month to month basis. Pandora cannot afford to pay substantially higher royalties without drastically raising the cost of their subscription. Furthermore, as most people listen to internet radio for free most of these internet radio services are actually losing money.

Pandora is yet to make a profit for its shareholders. How can they be expected to pay as much as Apple which offers other products/services both hardware and software related when Pandora only makes money on ads and Pandora One subscriptions.

Thank you again for the opportunity to comment on this proceeding.

Sincerely,

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To the Librarian of Congress & Registrar of Copyrights:

A Voluntary Collective Licensing system for peer 2 peer music distribution in which users freely download music and then pay the artist however much they want could work out for the music fans and artists but cut out the middlemen scared of the Internet's effect on their business. Similarly, the advent of self publishing online thanks to Amazon.com and its Kindle is scaring traditional print publishers who for years made money by exclusively releasing new titles in hardcover and then re-releasing on paperback later. No longer are artists or authors dependent on the record labels or authors etc.

This is what scares the entertainment and publishing industry the most. However, it's a natural shift. Consumers want what they want when they want it. It's about convenience and impulse buying now. Content companies discovered sometimes consumers are willing to pay for content when it's available electronically. Piracy has had a detrimental effect on the entertainment industry but not as badly as they make it sound. In fact, in some cases independent filmmakers have said piracy has helped their sales and grow their TV audience. The latest shift in the music industry is increasingly away from digital music sales in general towards subscription based streaming services like Pandora (P) and Spotify prompting Apple Inc., to launch iTunes Radio, Amazon.com to launch Prime Music, Microsoft to release Xbox Music Pass etc. While all of these companies still sell music digitally they also offer online radio services with subscription offerings.

Pandora has fewer Pandora One subscribers for its ad free service than it would clearly like and makes pennies on ads displayed to its free listeners. So how can it pay the huge fees demanded of it by the RIAA and ASCAP? The music companies like the movie companies are scared of digital libraries emerging for sharing information and culture. The free culture movement scares these big companies and so does losing control of their products. Something the RIAA has already seen happen with Apple's control of music distribution via iTunes. As fewer song sales are being made now through iTunes and fewer movie sales due to more people streaming audio and video via services like Pandora, Spotify, Amazon and Netflix companies like Apple are launching subscription services of their own to catch up.

Meanwhile open source non-profit groups like Creative Commons are providing tools to artists, songwriters, and authors etc., to protect their works while allowing fair use. Creative Commons licensed works encourage users to share the work as long as credit is given to the creator. This is how they prevent theft of creative works. Meanwhile the corporate music and movie industry and book industry seek to limit fair use with the shift to digital distribution. Like them I believe in open access, interoperability and protecting the public commons while respecting copyright. Reclaim the public domain!

Creators who are interested in using orphan works are often unwilling to do so for fear that they will have to pay a huge amount of money in damages if the owner ever emerges.

Libraries, museums and archives are carrying out small, medium and massive digitization projects and providing public access to the resulting digital collections. Google, Amazon, Yahoo, and Microsoft, among others, are partnering with cultural institutions to increase the pace at which these collections are brought to the public. Foundations are providing needed financial support as well. These projects now number in the millions! For too long copyright law has been expanded to give copyright owners more powers at the expense of the public domain. Copyright owners should not be granted indefinite copyrights or patents on works. They should be required every few years to apply for a new license to renew their copyright. The same rule should apply to the Federal Communications Commission in renewing licenses to companies to use the public airwaves for radio, TV or wireless Internet use.

A few years ago radio stations had to apply for renewal of their license every three to four years but now the license period has expanded to 8 years. In ECFS proceedings I have made clear to the FCC the requirement for public interest obligations be met by TV broadcasters, wireless carriers and even radio stations using public airwaves.

That being said I submit the following for consideration (from the text of an online petition to reclaim the public domain) this is background:

We, the undersigned, while believing in the importance of copyright, also believe in the importance of the public domain. We believe the public domain is crucial to the spread of knowledge and culture, and crucial in assuring access to our past. We therefore write to petition you to reconsider major changes that you have made to the copyright system.

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These changes unnecessarily threaten the public domain without any corresponding benefit to copyright holders.

In 1998, Congress passed the Sonny Bono Copyright Term Extension Act (CTEA). That Act extended the term of all existing copyrights by 20 years. But as Justice Breyer calculated, only 2% of the work copyrighted during the initial 20 years affected by this statute has any continuing commercial value at all. The balance has disappeared from the commercial marketplace, and, we fear, could disappear from our culture generally.

For example: The vast majority of film created during the 1920s and 1930s is not commercially available. Because of the CTEA, much of it remains under copyright. Yet because it is often impossible to track down the copyright owners for these films, commercial and noncommercial preservationist and distributors cannot safely restore and distribute these films. And because these films were made from nitrate-based stock, by the time the copyright to these films expire, most of them will have dissolved.

The same is true with many other copyrighted works that are no longer commercially available. Though the Internet could facilitate the distribution of this work if the copyright owners could be identified, the costs of locating these copyright owners is wildly prohibitive. Schools and

libraries are thus denied access to works that otherwise could be made available at a very low cost.

Such burdens on access to work that has no continuing commercial value serves no legitimate copyright purpose. It certainly does not "promote the Progress of Science" as the Constitution requires. We therefore ask Congress to consider changes to the current regime that would free unused content from continued regulation, while respecting the rights of existing copyright owners.

One solution in particular that we ask Congress to consider is the Public Domain Enhancement Act. See <http://eldred.cc> This statute would require American copyright owners to pay a very low fee (for example, \$1) fifty years after a copyrighted work was published. If the owner pays the fee, the copyright will continue for whatever duration Congress sets. But if the copyright is not worth even \$1 to the owner, then we believe the work should pass into the public domain.

This legislation would strengthen the public domain without burdening copyright owners. It would also help clarify rights over copyrighted material, which in turn would enable

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reuse of that material. The law could thus help restore balance to the protection of copyright, and support the public domain.

We therefore call upon Congress to introduce this legislation, and to hold hearings on the benefits that it might have to reviving a vibrant public domain.

When technologists have given us a tool that could spread knowledge universally, we should not allow the law to get in the way. The law does so now. This Congress should change it.

End Background
Public Knowledge's Position

Now Public Knowledge and many other organizations have proposed that the law should allow use of an orphan work if the user searched for the copyright owner in good faith and with reasonable diligence but failed to find the owner to ask permission.

Unfortunately groups of copyright holders, mainly photographers, illustrators, graphic artists, and textile designers have opposed any attempts to permit use without consent.

Public Knowledge and other proponents of an orphan works policy (including myself) are hopeful that, working with other copyright holders, we can work toward a common policy goal of making sure orphan owners are found. I support Public Knowledge's proposals (below) in order to facilitate the use of orphan works:

- 1) Users should be able to use the work after a reasonably diligent search for the owner.
- 2) A search would be reasonably diligent if it was conducted in good faith with resources

and technology reasonably available to the user.

3. 3) Reasonableness of the search would have to be decided on a case by case basis.
4. 4) Industry groups could establish a guideline of best practices for conducting searches.
5. 5) The user should provide attribution
6. 6) The user would have to provide attribution to the owner to the extent possible based on

the information obtained during the course of the reasonable search.

7. 7) The attribution information would have to be updated if more information became available to the user.
8. 8) If the owner emerges after the use has commenced, the user's liability should be limited.

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9) The user would only be required to pay to an emerging owner a fee capped at a maximum amount; for example \$200.

10. 10) A court would not give an injunction against the use of a work
11. 11) In cases of web-based uses, the user would not be required to take down the work.
12. 12) The owner would not be entitled to attorney's fees or statutory damages.
13. 13) The user should be allowed to continue with the use of the work.
14. 14) Uses that commenced before the owner emerged should be allowed to continue.

For example, if an author used certain orphan illustrations in his book, he could continue to use these illustrations after the owner emerged. The use would include subsequent editions of the book

15) New uses would require permission from the owner. In the above example, the author would not be able to use the same illustrations in another book.

In May 2008 the U.S. House and the Senate both **introduced new legislation** to allow for greater use of so-called "**orphan works**" -- books, music, photos, movies or other works whose owners can't be found. Why are these bills important? Because there are literally millions of works in existence that are currently under copyright protection but for which the copyright owner cannot be easily found. Because if you use a copyrighted work without permission, you could be on the hook for statutory damages of up to \$150,000 per work, orphans go unused. Think of a diary kept by someone during the second world war and recovered from an attic. Think of a box of old photographs happened upon at a yard sale. Think of an illustration used in an advertisement but not clearly attributed. At the moment, these works are unavailable to publishers, filmmakers, collage artists and many other creative professionals who would like to use them and gladly pay

for the privilege, but can't because of the potential for massive penalties if the original copyright owner does emerge.

The newly introduced bills allow artists to use orphan works as long as that user makes a diligent effort to find the original copyright owner. In the unlikely event that the original owner does emerge, the compensation that a user pays should be reasonable. The two bills currently on the table -- **S. 2913, the Shawn Bentley Orphan Works Act of 2008 (PDF link)** and **H.R. 5889: The Orphan Works Act of 2008 (PDF link)** -- go a long way to address these issues and if passed, would grant the public access to millions of previously inaccessible works of art.

Specifically, there are key differences between the House and Senate bill that deserve to be scrutinized. While the Senate bill can be seen as a "base bill" of sorts, the House bill tacks on a number of provisions for copyright owners. These provisions include:

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- A "Notice of Use Archive" (NUA), a repository to which users will have to formally submit their diligent effort searches. In the House bill, the Copyright Office is given a great deal of discretion as to how this archive will be structured. What fee will users have to pay in order to formally file with the NUA? Will the archive be open for anyone to view? If so, what will prevent copyright "trolls" and identity thieves from menacing users who file with the NUA?
- A "useful articles" exemption that would make any work with commercial or use value--for example, mousepads, T-shirts and mugs printed with an image--exempt from orphan works legislation. This exemption could discourage the creation of **derivative works that blur the lines between art piece and commodity**.
- A provision that grants courts the discretion to take into account the value of a copyright registration when considering reasonable compensation. This provision is designed to "reward" copyright owners for having filed for a copyright registration in the first place. However, this would also reward owners who failed to maintain their copyright registration, which would have allowed their copyright to be easily found in the first place.

While the Senate bill contains few, if any, questionable provisions like those above, it does fail to specify that the visual copyright registries that will be established under the bill be free for public searches and machine readable. These registries could be setup by industry groups (i.e. professional photographers associations) or by adapting existing services already available on the Internet, but they may not be subject to public access unless specified in the bill.

Finally, the House and Senate bills have different effective dates for photographs, illustrations, graphic and textile designs. For the House, the effective date for these works could be delayed till as late as 2013 and for the Senate it could be delayed till 2011. We'd rather that the dates on the two bills match and as far as we're concerned, the sooner orphan works legislation goes into effect, the sooner artists can start taking advantage of existing works.

Copyright reform is desperately needed and I think copyright laws and copyright directives and policies from the Copyright Office need to make accessing electronic media or other content more easily accessible for lawful fair use and to encourage more orphaned works on which the copyright expired to be able to enter the public domain.

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