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ORPHAN WORKS: PROPOSALS FOR A LEGISLATIVE SOLUTION

HEARING

BEFORE THE

SUBCOMMITTEE ON INTELLECTUAL PROPERTY

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

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ORPHAN WORKS: PROPOSALS FOR A LEGISLATIVE SOLUTION

THURSDAY, APRIL 6, 2006

U.S. SENATE,
SUBCOMMITTEE ON INTELLECTUAL PROPERTY,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:07 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Orrin G. Hatch, Chairman of the Subcommittee, presiding.

Present: Senators Hatch and Leahy.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Chairman HATCH. Well, good afternoon. We welcome all of you to today's hearing on orphan works. With the panel of experts we have before us today, the Subcommittee will be, in my opinion, in for a lively discussion on this important topic. It is very important, and we are finding that it is becoming more and more important as we continue to look into it.

I would like to begin by providing some context for the witness testimony, while reserving as much time as possible for a panel discussion. As most people interested in this hearing will already know, the term "orphan works" generally refers to copyrighted works for which the owner is either not known or cannot be found. With most forms of assets and physical property, an owner is typically easy to identify with reasonable efforts. For obvious reasons, identifying the owner of a copyrighted work is much more difficult in many cases, especially when information about the copyright holder is not publicly known or incorporated into the same end product that contains the work itself.

With very rare exceptions, many of which result in police intervention, whoever is living in a house or driving a car is either the property owner or someone with a personal or contractual relationship with the owner. The same is not true in the intangible world of copyrights, where the owner of an individual book, videotape or photograph generally does not hold the copyright to the underlying text or content.

Historically, copyright information has been included in the end product. For example, the copyright holder will frequently be listed in the movie credits, including album liner notes, or printed on the back of a photograph. However, with the advent of digital and Internet distribution models for copyrighted works, it has become

more difficult to attach such copyright information to the copyrighted work itself.

These problems have been exacerbated by two sets of changes in copyright law. First, because of the extension of the copyright terms, many works are protected by copyright for decades after the author has died and long after they cease to have any significant economic value. The second set of changes occurred as a result of our accession to the Berne Convention, which prohibits conditioning copyright protection on formalities such as registration or renewal. Because original works receive automatic copyright protection without the need for the owner to register the work, there is no centralized registry that can be used to identify copyright holders.

As a result of these difficulties, it appears that a significant number of works are protected by copyright without any reasonable or effective way for potential users to identify their owners. As a result, the public loses ongoing access to and use of these works, without any corresponding benefit to the author. As the Copyright Office concluded in its recent report on the subject, such an outcome is not in the public interest, particularly where the copyright owner is not locatable because he no longer exists or otherwise does not care to restrain the use of his work.

With respect to virtually every other type of property that receives legal recognition, there are either equitable doctrines in the law or statutory provisions addressing this type of problem. In other areas of the law, the rights of an owner are limited by things like adverse possession, salvage rights, found treasure doctrines and abandonment theories.

Many believe that a similar concept should be applied to copyright law and the Copyright Office has recommended something along these lines. Under their proposal, a user who performed a good-faith, reasonably diligent search for the owner prior to using a copyrighted work would in most instances have his or her damages liability limited to a reasonable royalty rate. In certain instances, equitable relief would also be limited.

I tend to believe that this type of approach would be beneficial to copyright law and would allow artists, consumers and academics the use of many works that have historical, cultural and economic value. However, I suspect that we have a range of opinions on the Copyright Office proposal, so I look forward to hearing the opinions of our panel of expert witnesses.

But, first, let us hear from the ranking Democrat member of the Subcommittee and the ranking Democrat member of the full Committee, Senator Leahy, whom I enjoy working with on these issues very, very much because of his own ability to cut through the maze and to come up with solutions that really have worked in the intellectual property fields for really the decades that we have been together.

[The prepared statement of Senator Hatch appears as a submission for the record.]

Senator Leahy, we will turn to you.

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Well, thank you, Mr. Chairman. As you know, you and I have been able to put together some significant bipartisan legislation in this area. As we find more and more in the Senate, it is only the bipartisan legislation that actually has a real chance of passing and getting signed into law.

We are blessed to live in a country with such deep creative roots. We have the best music industry in the world, the greatest film industry in the world, the largest publishing industry in the world, superb photographs, and we have millions of creative works that are born from that. But there are many works where no copyright owner can be found. These are the "orphans," as Senator Hatch said. You can't use them for reproduction, restoration, or adaptation because you can't find the lawful copyright owners.

Under current laws, if you can't find the photographer who took your great grandparents' wedding picture over 75 years ago, no matter how hard you search, you can't have that picture restored legally. In an example recently mentioned in the Wall Street Journal, a Civil War historian wrote an article which used several letters and diaries from soldiers. Although a magazine initially agreed to publish the article, the publisher pulled the piece because he feared litigation arising from the use of those works. They were 150 years old.

Orphan works problems have a particularly unfortunate effect on older films. Some of them are disintegrating and they will disappear because we can't find who the copyright owners are. I know the particularly vexing issues that confront the professional photographer or illustrator with a great number of works and the difficulty ensuring that others do not claim them for their own.

I have seen some of my own photographs show up suddenly in a magazine, not the one I had originally sold it to or given it to. I know what that means. I know the thrill when I see my son-in-law's photographs published, but I know he would not be as thrilled if the credit was not given either to him or to his organization.

This situation impacts copyright owners and potential copyright users in every industry, from an individual scrapbooker or illustrator to the largest corporation. Senator Hatch and I asked the Copyright Office to study orphan works and issue a report on the situation, as well as a suggestion for possible legislation. The report came out in January. It is clear that they spent a considerable amount of time, a tremendous amount of time on that, and I thank them for that. The multitude of comments, both those made to the Copyright Office and those made in the subsequent roundtable discussions, show how committed all the interested parties are to find a sensible and equitable solution to this conundrum of orphan works.

So I am glad we are having this opportunity to have this hearing. I think it opens up a dialog with representatives of all points of view on this issue. And it is not a uniform point of view. I am well aware of that, but it is an issue of vital importance. I think we can all agree on that.

I have no intention of crafting legislation that harms the creators who hold copyrights and who bring so much value to our culture and economy. But I would like to see the chance for social and cultural enrichment by enabling use of these orphan works by the public. I am afraid that at a time when we are growing so fast as a country and when there is so much going on that we miss some things that could really speak to what we are as a country, or speak to things that will actually enrich our lives.

So we have a lot of work to do, Mr. Chairman, but if past is prologue, you and I have been able to work through these things before and I think we will here.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Chairman HATCH. Well, thank you, Senator Leahy. I think we will.

Let me just say we have a great panel here today to discuss this issue, and before I introduce them I should note that we have departed from the more traditional hearing structure by not having separate panels for the Government and industry witnesses. We have done this in the hopes that it will allow for a more lively debate among the witnesses. In particular, because most of the discussion today will center around the Copyright Office proposal, I thought it would be appropriate to have a representative of that Office on the same panel so he could respond to both positive and negative comment on the proposal. With that explanation, let me introduce the witnesses here today.

First, we are going to hear from Jule Sigall, the Associate Register for Policy and International Affairs at the Copyright Office. I would like to thank Jule for all of the work the Office put into the orphan works report that Senator Leahy and I have requested.

Next, we will hear from Victor Perlman, Managing Director and General Counsel of the American Society of Media Photographers. We are grateful to have you here, Mr. Perlman.

Then we will have, after Mr. Perlman, Ms. June Cross, who is a documentary filmmaker and a professor at Columbia University. We are grateful to have you with us.

Next, we have Brad Holland, a founding board member of the Illustrators' Partnership of America. We are grateful to have all of you here. I will just quit repeating that each time, but we are grateful to have you here, Mr. Holland.

Senator LEAHY. So if we don't say it, we are still grateful.

Chairman HATCH. Yes, we are still grateful. Repetition doesn't always bring conviction here.

We will hear, after Mr. Holland, from Ms. Maria Pallante, Associate General Counsel and Director of Licensing for the Solomon R. Guggenheim Foundation.

After that, we will receive testimony from Thomas C. Rubin—good to see you again, Mr. Rubin—Associate General Counsel for Microsoft Corporation. He has got a tiger by the tail there in many respects in this area.

Last but not least, we will hear from Rick Prelinger, Board President of the Internet Archive.

I look forward, and I know Senator Leahy does, to hearing your testimony, and we want to thank each of you for taking the time

out of your schedules to be with us today. This is an important hearing and we are really interested in what you have to say.

So we will start with you, Mr. Sigall.

STATEMENT OF JULE L. SIGALL, ASSOCIATE REGISTER FOR POLICY AND INTERNATIONAL AFFAIRS, U.S. COPYRIGHT OFFICE, WASHINGTON, D.C.

Mr. SIGALL. Thank you, Mr. Chairman.

Chairman Hatch, Senator Leahy and members of the Subcommittee, I am pleased to appear today on behalf of the Copyright Office to testify about solving the orphan works problem. We would like to thank Chairman Hatch and Senator Leahy for their leadership on this issue and for commissioning the report on orphan works which we published in January. As always, we were very pleased to assist the Subcommittee in resolving important copyright issues.

As you summarized, Mr. Chairman, the term "orphan works" describes the situation where someone would like to use a copyright work, but cannot identify and locate the copyright owner. Even where the user makes a diligent effort to find the owner, if the owner is not found, the user faces a dilemma. She cannot determine whether the owner would permit the use.

Where the proposed use is infringing, the user cannot reduce the risk of copyright liability because there is always the possibility that a copyright owner could bring an infringement action after that use has begun. In this situation, a productive and beneficial use of the work may be forestalled, not because the owner has asserted exclusive rights or because the user and owner cannot agree on the terms of a license, but merely because the user cannot locate that owner.

For many users, the risk of infringement liability, even though remote, is enough to prompt them not to make use of the work. This outcome is not in the public interest, especially where the owner no longer exists or otherwise does not care to restrain the use of his work.

Based on our study of this issue, we concluded the following. The orphan works problem is real, but it is elusive to quantify and describe comprehensively. Some orphan works situations may be addressed by existing law, but many are not, and legislation is necessary to provide a meaningful solution to the orphan works problem as we know it today. The report recommends with specific legislative language an amendment to the Copyright Act's remedies section.

Our proposal is motivated by two primary goals. First, any system to deal with orphan works should seek to make it more likely that a user finds the relevant owner in the first instance and negotiates a voluntary agreement over the use of the work. Second, where the user cannot identify and locate the owner after a reasonably diligent search, then the system should permit that user to make use of the work, subject to the provisions that resolve issues that arise if the owner surfaces after the use has commenced.

Our proposed amendment follows the core concept that many participants favored an orphan works solution. If the user has performed a reasonably diligent search but does not locate the copy-

right owner, then the remedies for infringement by that user should be limited. Both our written testimony and the report go into the specifics of our recommendations, so I will not spend too much time on those details now. But I would like to focus my remarks today on the reactions that interested parties have given to our report.

By and large, that reaction has been quite positive. A diverse array of copyright owners and users, book publishers, authors, libraries, archives, museums, motion picture studios, record companies, educational institutions, documentary filmmakers and others all agree with our conclusion that the orphan works issue is real and needs to be addressed, and they agree with the basic concept and structure of our proposed legislation. Some of these groups have made constructive suggestions for changes to the specific provisions and we are confident that further discussion among the interested parties can resolve any remaining issues.

Certain groups representing individual copyright owners, however, such as photographers, illustrators and graphic artists, oppose our proposal. They argue that many of their works will be inaccurately labeled orphan works because it is often difficult to find the owner of a visual image, usually because the name of the creator is not on copies of the work.

The Copyright Office records are text-based and in most cases do not contain much, if any, description of the subject matter of the image, in part because we have eased the registration requirements for photographers at their request. So even if a photographer has registered his works, a user may not be able to locate that owner. In other words, these groups concede the very problem at the heart of the report. A user seeking to locate a photographer of an image that has no identifying information on it faces a daunting challenge.

Our proposal provides safeguards for this problem in a number of ways. First, in most cases, including all commercial uses, the user of the orphan work must pay the copyright owner reasonable compensation if the owner resurfaces. Also, the user will not be able to continue making use after the owner asserts his copyright, except in defined circumstances, and even in that case must pay reasonable compensation for that future use. So when critics say that our proposal would strip thousands of photographers and other visual artists of their rights, that is simply not true.

Photographers claim that bringing a lawsuit to collect reasonable compensation will be prohibitively expensive. We agree that legal actions to enforce copyright are expensive, just as any access to our court system is costly. However, this problem exists for visual images today, regardless of whether orphan works legislation is passed or not. Moreover, there are non-legal actions that photographers and others can take to protect their copyrights. These steps include consistently marking copies of their works, development of collective licensing mechanisms and deploying technology to allow effective searches where the user has only the image and no contextual information. Steps like these will also ensure that visual images are locatable and their works do not become orphan works.

Regarding the expense of litigation, we noted in the report that a new small claims procedure might also help individual owners

protect their copyright generally, and also allow to obtain reasonable compensation if their works fall into the orphan category. Last week, we offered to study this question in a report to the Subcommittee on potential solutions to that problem. However, the key to enhancing copyright protection in visual images is not increased litigation, but making it easier for owners and users to find each other, which our orphan works proposal encourages.

In conclusion, many users, especially cultural institutions like libraries, museums and archives, made clear that any orphan works solution must include photographs and other visual images, given the persistent orphan works problems that exist with these works. In fact, orphan works legislation may be the catalyst needed to prompt the non-legal, marketplace reforms that will most efficiently address the problems identified by these creators. For this reason and others, Congress should not delay its consideration and enactment of orphan works legislation.

Thank you for the opportunity to testify today and I look forward to answering any questions you might have.

[The prepared statement of Mr. Sigall appears as a submission for the record.]

Chairman HATCH. Well, thank you, Mr. Sigall.

Mr. Perlman.

STATEMENT OF VICTOR S. PERLMAN, MANAGING DIRECTOR AND GENERAL COUNSEL, AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, INC., PHILADELPHIA, PENNSYLVANIA

Mr. PERLMAN. Mr. Chairman, Ranking Member Leahy, distinguished members of the Subcommittee, thank you for the opportunity to present our views. I am speaking today on behalf of not just the American Society of Media Photographers, but for virtually every major trade association for freelance photographers and the Graphic Artists Guild for Commercial Illustrators and Artists.

We absolutely agree that true orphan works are a legitimate problem that requires a solution. However, the Copyright Office's proposal would have the practical effect of converting the majority of published photographs and illustrations to orphan works. For photographers and commercial artists, this proposal is a disaster of biblical proportions. It is based on at least two fundamental and erroneous assumptions.

One is that registered works will not be orphan works, and the other is that most copyright owners and authors can be found through text-based research. Both of those assumptions are one hundred percent wrong as to visual artworks. Many users will have in their hands only an image with nothing else to identify it. The Copyright Office's records are not searchable by anything but text nor or in the future, and that is not because of easing the registration requirements for photographers. That is a fact of the way the system is structured and will be structured in the future. So if you have no name, you have no search results.

Most photographs and illustrations are published without credit, attribution, or other way to identify the creator who, for freelance photographers and artists, is usually the copyright owner. There is virtually no attribution on the Web. In fact, we are told by industry

vendors that 90 percent of the uses of photographs and illustrations on the Web are unauthorized.

In print media, there are no credits given except for editorial uses, and that practice is shrinking. Context does not provide much help because the publishers and advertising agencies and corporate clients that publish these images have no incentive to retrieve and provide data when information is requested. Almost all search capabilities are limited to textual information. That doesn't help you if all you have is a copy of an image. Even the newest image recognition software will work only for digital images that are available on the Web, and that is a tiny percent of all copyrighted images. The result of all of this would be a de facto, retroactive confiscation of copyright for most photographs and illustrations.

There are other flaws in the Copyright Office's proposal that are set forth in my prepared statement. I urge the Subcommittee not to use the Copyright Office's proposed legislation as the starting point for addressing this problem. There are other, better proposals suggested in my prepared statement and also outlined in the Copyright Office's report.

Freelance photographers and artists are small business people of modest means. In the orphan works context, it is a case of them against an array of large, powerful organizations representing many larger, more powerful and more wealthy corporations and institutions. It is a case not of just David versus Goliath, but of David versus an army of Goliaths, and this time, Mr. Chairman, David really needs your help.

Thank you.

[The prepared statement of Mr. Perlman appears as a submission for the record.]

Chairman HATCH. Thank you, Mr. Perlman.

Ms. Cross.

STATEMENT OF JUNE CROSS, DOCUMENTARY JOURNALIST, AND ASSISTANT PROFESSOR OF JOURNALISM, COLUMBIA UNIVERSITY, NEW YORK, NEW YORK

Ms. CROSS. Thank you, Senator Hatch and Senator Leahy, for giving me the opportunity to speak to you today regarding the Copyright Office's report on how best to protect the rights of users and owners of so-called orphan works.

The Copyright Office has done a superb job of examining this issue from every angle and asking for public response. They have considered the ramifications of the various avenues that they have proposed. They and you are to be commended for taking so great an interest in helping copyright holders and those of us who use them find each other. And I am also a copyright holder, I should add, so we are all copyright holders.

We all want to find each other and arrange for fair credit and fair compensation. We are especially gratified that you have chosen to explore an issue that many might find arcane, the issue of how to proceed wisely when faced with work for which no registered owner can be found. That problem is not arcane to the majority of the thousands of people whom I represent here today. We tell stories using collages of pictures, words and music. We make films and documentaries.

As a producer, I have been making documentaries for some 20 years at PBS' "Newshour," for "Frontline" and at CBS News. Most recently, I have also been teaching at the Graduate School of Journalism at Columbia University. I depend on copyrights in my own work to help me earn a living. So does everyone who is represented by the coalition of groups that I speak for today and who are listed in my prepared statement.

We are not lavishly endowed studios, but the producers of independent films, the directors of scarcely funded after-school programs, and the community access directors are struggling to give citizens a voice. At a time when more and more information is available through more means than we can count, filmmakers find it harder and harder to put a sense of history and context into their work. Allow me to use as a worst-case example a film for which I am best known, "Secret Daughter," a documentary that I did back in 1996, the story of my own biracial family.

I was born 6 months before the *Brown* v. *Board of Education* decision in 1954. My parents separated when I was 18 months old, and part of my historical, contextual problem when making this documentary was how to find footage and stills that would adequately and accurately present the way the United States looked and felt at that point in time.

I found in an archive 2 hours of unidentified home movie footage taken on 125th Street in Harlem outside the Apollo Theater 1 day in June 1954. The archive was happy to well me the footage, but they did not know who the original photographer was and they would not help me find him.

I need to stop now and tell you what would have happened had I been working for a commercial station instead of at PBS. At a commercial station, I would have been under much more intense deadline pressure to find the original owner of that footage. I would have had to provide evidence that I had searched through registered data bases, talked to archivists who are familiar with that particular subset of Harlem film in the 1950's, find the families of people that I could have recognized on the street, and asked anyone I might have known who might have had a movie camera in 1954 to try to find the person who made this film.

I would have had to document every step of that way, documenting the e-mails, documenting the phone calls, documenting the letters. I would have had to show that I performed what we call due diligence, which is the record of those documented e-mails, phone calls and letters that we accumulate over time as we try to find the rightful registered owners of those copyrights.

Even with that paper trail, I would have had to indemnify the commercial outlet or distributor that I was working for after the work was aired. And then in order to protect myself, I have to get something called errors and omissions insurance. In today's litigious environment, the insurers are very reluctant to insure me if I have a piece of work for which I can find, identify and have written permission from a registered copyright owner.

In some outlets, even if I have proved that I have done due diligence, even if the errors and omissions insurer can be persuaded to take my word for it, the outlet itself will not air the piece with

that piece of footage in it. So it doesn't matter how much due diligence I do; in some cases, this piece could not air.

Were the legislative branch to pass a cap on the amount of damages a found copyright owner could receive, this risk would be quantified for the insurance companies, because this is what the problem is: We are all afraid that a copyright owner will emerge and sue us all for millions. Were there a provision for me to have a safe harbor by taking that piece of footage out of my documentary, that would increase the insurance company's confidence that an expensive settlement might be able to be avoided. If the distributor could be spared the threat of injunctive relief, we would all breathe much easier.

As it turned out in the case of the footage that I described and discovered, that footage on 125th Street in Harlem, I was able to find finally the original photographer of that footage. It took me the better part of 3 months, using the steps that I described earlier. I was able to take that long because I was working for PBS, but in the commercial arena no one gets that amount of time to do that kind of research.

That would have been a shame because in the footage that I found, I found several shots of my father, a man whom I had never known as a child and whom I only met when I was 30 years of age. In the shots in 1954, he was holding me when I was barely 6 months old.

I was lucky, as I have not been on other occasions and as many others have not been in other situations, to be able to put together my own history using footage and archive house-declared orphans. Shot by shot, others bits and pieces of our history are being lost because of the fear by insurers and the fear of cable outlets that they will face a lawsuit if so-called orphan works cannot be identified and the registered owners can't be found. It means that bits and pieces of our history are being lost. Future generations will never be able to know why they didn't see that history. They will just know that they never saw it and no one will ever know why.

I ask the Committee to consider giving every filmmaker more of a chance to tell the full story of all of our histories and have a chance to bring that history forward by considering deeply the value of the work that the Copyright Office has done in this regard.

Thank you.

[The prepared statement of Ms. Cross appears as a submission for the record.]

Chairman HATCH. Thank you, Ms. Cross.

Mr. Holland.

STATEMENT OF BRAD HOLLAND, FOUNDING BOARD MEMBER, ILLUSTRATORS' PARTNERSHIP OF AMERICA, MARSHFIELD, MASSACHUSETTS

Mr. HOLLAND. Chairman Hatch and Ranking Member Leahy, last year the Illustrators' Partnership filed a submission with the orphan works study which was endorsed by 42 national and international arts organizations representing a broad spectrum of popular artists; fine artists; medical, scientific and architectural illustrators; cartoonists; and educators. On behalf of these artists, I appreciate the opportunity to address you.

Our chief objection to the orphan works amendment is that it is not an orphan works amendment. An orphan works amendment would have applied to old work whose authors have abandoned their copyrights. This proposal would legalize the infringement of any work of art, past, present and future, regardless of age, country or origin, published or unpublished, wherever the rights-holder cannot be identified or located.

It would permit a user to appropriate the private property of rights-holders based on the user's own definition of a good-faith, reasonably diligent search. It would reimpose formalities by forcing rights-holders to rely on registries, meta data and notice as a condition of protecting their copyrights. It would be retroactive, affecting art done over the last 30 years when artists were told that their work would have the basic protections of copyright law, whether it was marked or not.

It would affect illustrations and photographs disproportionately because trade practice requires that images routinely be published without identifying information or because artists' signatures or marks may be illegible, or because information can be removed by others. It would remove any meaningful remedies for infringement, which are the only means that rights-holders now have of enforcing copyright. It would place an impossible burden of diligence on rights-holders because they would never have the resources to police infringement, which can occur anytime, anywhere in the world. It would interfere with the rights of artists to exploit their work in commercial markets, which would violate the three-step test of TRIPs. And it would harm foreign artists by making vast bodies of their work royalty-free in the United States.

For these reasons and for many others, and with all due respect, we do not believe the statutory language proposed by the Copyright Office is a solution to the real orphan works problem. Instead, it is a blueprint for a radically different copyright law.

The inability to distinguish between abandoned copyrights and those whose owners are simply hard to locate is the catch–22 of the orphan works project. To put it simply, if a picture is unmarked, it is impossible to source or date it. Therefore, this amendment would orphan millions of valuable copyrights that cannot otherwise be distinguished from true orphaned works, and that would open the door to cultural theft on an unprecedented scale.

In their submission to the orphan works study, Professors Jane Ginsburg and Paul Goldstein warned that orphan works legislation should precisely define the category of orphan works. The broader the category, they wrote, or the lower the bar to making requisite showing of due diligence, the greater the risk of inconsistency with our international obligations, which in turn reflect longstanding practices that have passed the test of time.

Many potential users of orphan works have asserted that these works have little or no commercial value. While this may be true of real orphaned work, it is not true of the numberless managed copyrights that would be caught in an orphan works net. Non-profits organizations which assert that only work of little or no commercial value will be affected have not documented their assertions, and other users who wish to exploit work royalty-free have

every incentive to minimize the value of the work that they would profit from selling access to.

We believe the orphan works problem can be and should be solved with carefully crafted, specific, limited exemptions. An exemption could be tailored to solve family photo restoration and reproduction issues without otherwise gutting artists' and photographers' copyrights. Usage for genealogy research is probably already covered by fair use, but it could rate an exemption if necessary.

Limited exemptions could be designed for documentary filmmakers. Libraries and archives already have generous exemptions for their missions, and if their missions are changing, they should abide by commercial usage of copyright instead of forcing authors to subsidize their for-profit ventures.

Therefore, we would respectfully urge this Committee to consider the negative effects that this proposed statutory language would have on free-market transactions, and we ask you to conduct further hearings to resolve this specific problem of providing public access to true orphaned works.

Thank you.

[The prepared statement of Mr. Holland appears as a submission for the record.]

Chairman HATCH. Thank you.

Ms. Pallante.

STATEMENT OF MARIA PALLANTE, ASSOCIATE GENERAL COUNSEL AND DIRECTOR OF LICENSING, THE SOLOMON R. GUGGENHEIM FOUNDATION (GUGGENHEIM MUSEUM), NEW YORK, NEW YORK

Ms. PALLANTE. Chairman Hatch, Senator Leahy, thank you for the invitation to testify on behalf of American museums. In fact, my comments today reflect the views of 18 non-profit organizations in the cultural and educational sectors, which in turn represent a combined 145,000 museums, libraries, universities and archives, more than 135,000 independent historians, educators and scholars, all of whom want to make productive use of orphan materials in conjunction with their missions.

We applaud the Copyright Office for its tremendous contribution to the copyright community in producing the report on orphan works. Although the report addresses many complex issues, including the need to include unpublished works, the need to provide a flexible work standard, the need to distinguish between commercial and non-commercial uses, we believe the Office got things fundamentally right. On the few points where we have concerns, we are extremely optimistic that clarifications can be made and that consensus can be reached with the other parties.

The importance of orphan works relief to our communities cannot be understated. We have in our possession millions of orphans, from personal photographs of ocean voyages, to documentation of historical artifacts, to letters of Holocaust victims. The Copyright Office approach, with certain clarifications and modifications, has the power to directly affect the intellectual, historical and cultural life of all Americans.

It will improve the work of individual artists, writers, filmmakers, as well as scholars, historians, librarians, archivists and curators, who everyday struggle to balance the rights of missing or unidentifiable copyright-holders with the mission of making these letters, manuscripts, photographs and other culturally significant material available to the public.

I would like to turn now to some recommendations that we believe are necessary to make the legislation truly responsive not only to the museum community and other users, but to the public. I will make just three points.

First, we believe the statutory language should define reasonable compensation. Reasonable compensation is a flexible formula that has not received extensive interpretation in case law, and to be honest it was not the first choice of museums. We wanted a safe harbor, a clear exemption; we wanted certainty. Nor was it the choice of many other users in the educational sector. Most wanted a clear cap on damages, a cap as to potential liability, certainty.

This said, we are willing to support the concept if it is defined in the statute and if clear examples are provided in the legislative history, including illustrations where the user is a non-profit institution or an independent scholar, and reasonable compensation is typically zero compensation. Indeed, it is not uncommon for the decision to use a particular work to turn on whether it is available for free.

Second, in its recommended statutory language, the Copyright Office has proposed a safe harbor from all monetary relief in certain limited instances where the use is made without any purpose of direct or indirect commercial advantage. This phrase is well-intended by the Office and it has been well received by us, but we think it requires clarification.

For example, organizing and publishing books is a core educational function of museums. It is no different than our function of organizing and presenting exhibitions. Publication of books furthers our central non-profit mission of education. In many cases, it is the only practical means by which we make our collections accessible to the public. The fact that we sell books does not make the sale for purposes of commercial advantage. We sell them for the same reason we charge admission fees, to defray the cost of operation and production. Our publications departments are cost recovery operations.

In truth, we do not even break even on our books. We do not recovered the many fixed costs—the salaries of our curatorial and editorial staffs, the cost of the exhibitions, the cost of the collections on which the exhibitions are based. We need confirmation that the creation and sale of mission-related publications are uses that are undertaken without any purpose of direct or indirect commercial advantage. On a related point, though independent scholars may sometimes earn royalties, this does not make scholarship a commercial activity.

Third, because orphan works will often, perhaps most often be incorporated into other works of authorship, we would like to see language that more clearly defines the circumstances under which a user may avoid an injunction in cases of books, films, artworks and websites. A user may well decide to incorporate the orphan

work based on having determined that there was no rights-holder. If the copyright owner later emerges and sues for infringement, an injunction would be disastrous for the user and the public. In our view, the right approach here is to allow the use to continue, but to require the user to pay the owner reasonable compensation.

In closing, we do recognize that orphan works is a complicated undertaking, but in our view an orphan works amendment has one ultimate goal. It should help to make cultural heritage more broadly available to the public. It must give users the confidence necessary to take works out of obscurity and to expend the resources to make them newly available. We believe this legislation is achievable, and on behalf of all American museums and our colleagues in the cultural and educational sector, we thank you for your leadership in making it happen.

[The prepared statement of Ms. Pallante appears as a submission for the record.]

Chairman HATCH. Well, thank you so much.

Mr. Rubin, we are pleased to have you here.

STATEMENT OF THOMAS C. RUBIN, ASSOCIATE GENERAL COUNSEL, MICROSOFT CORPORATION, REDMOND, WASHINGTON

Mr. RUBIN. Chairman Hatch, Senator Leahy, my name is Tom Rubin and I am Associate General Counsel for Copyrights, Trademarks and Trade Secrets at Microsoft Corporation. Thank you for providing Microsoft the opportunity to testify regarding possible legislative solutions to the issue of orphan works. We commend the Subcommittee for convening this hearing and thank Chairman Hatch and Senator Leahy for requesting the Copyright Office's detailed study and analysis.

Microsoft is the leading provider of software services and solutions used by hundreds of millions of consumers and businesses worldwide. We are a creator of valuable copyrighted works such as Windows and Office, as well as a user of copyrighted works created by others. For example, our interactive encyclopedia Encarta and our online service MSN contain both original and third-party content. Although we clear rights to any third-party content that appears in our products, we occasionally have run into difficulties locating the owners of works we wish to include.

Microsoft's interests in the orphan works issue thus coincide with those of both authors and users. We therefore support a balanced solution to the orphan works problem, one that respects the exclusive rights of creators while advancing the public's interest in obtaining broad access to works.

While there are several possible approaches to the policy issues raised by orphan works, the approach set out in the Copyright Office report is a promising start. As an initial matter, we believe that addressing the orphan works problem through a limitation on remedies offers a reasonable approach, one reflected elsewhere in the Copyright Act for promoting the dissemination of works while safeguarding the rights of copyright owners. We believe this approach is far preferable to one such as a registration system or similar regime that would impose formalities or other burdens on authors and the Copyright Office alike.

It is also preferable to a compulsory or other government-administered licensing or royalty scheme which could become mired in bureaucratic overhead while denying authors fair compensation for their works. A compulsory license is particularly inappropriate for the orphan works problem because if the work is a true orphan, there would be no one to receive the compulsory license fee. And if, by contrast, the work proves not to be an orphan, compensation to the copyright owner should match prevailing market-based royalty rates for the work.

We also believe that a use-based registration system in which users would enjoy limited liability simply by filing a notice with the Copyright Office before using a work would be unfair to authors, inefficient and difficult to implement.

With respect to the specifics of the Copyright Office's proposed legislation, we support the use of a good-faith reasonableness standard for evaluating whether a user has conducted a sufficiently diligent search to locate a work's owner. Given authors' exclusive rights to decide whether and how to make their works available to the public, it is vital that the proposed limitations on remedies be available only to users who have undertaken objectively reasonable and truly good-faith efforts to locate the work's owner. Merely perfunctory searches should never qualify for the limitation on remedies.

The nature of what constitutes a sufficiently diligent search is likely to vary considerably, depending upon a variety of factors. Given the fact-specific nature of the inquiry, we appreciate the difficulty of establishing specific statutory criteria for what constitutes a good-faith, reasonably diligent search. At the same time, we consider it essential that this standard not be interpreted in a manner that would weaken the ability of copyright owners to protect their works against misappropriation. We therefore support the ongoing efforts of various stakeholders to explore what might constitute a reasonably diligent search in various contexts.

In those cases where a copyright owner is entitled only to reasonable compensation for the use of her work, we support the notion that this amount should represent the amount the user would have paid to the owner had they engaged in negotiations before the infringing use commenced. Given its importance, clarifying this standard in the legislative text, in our view, would be useful.

In closing, I would like to emphasize the beneficial role that technology, and in particular software, can play in helping address the orphan works problem. As the Copyright Office report observes, any system to deal with orphan works should seek primarily to make it more likely that a user can find the relevant owner in the first instance. Technologies already exist that make it easy for authors to embed rights management information into their digital works and for users to locate and read this information.

As search technologies continue to improve—an area in which Microsoft is devoting substantial resources—the ability of users to locate copyright owners should likewise improve, thereby decreasing the number of cases in which a work is incorrectly considered an orphan.

Thank you once again for inviting Microsoft to testify at today's hearing. We commend the Subcommittee for giving its attention to

the orphan works issue and we look forward to working with the Subcommittee as it shapes and advances legislation in this area.

[The prepared statement of Mr. Rubin appears as a submission for the record.]

Chairman HATCH. Thank you, Mr. Rubin.

Mr. Prelinger.

STATEMENT OF RICK PRELINGER, BOARD PRESIDENT, INTERNET ARCHIVE, SAN FRANCISCO, CALIFORNIA

Mr. PRELINGER. Thank you, Mr. Chairman, for the privilege of addressing the Subcommittee today. I would like to begin by thanking you and the Ranking Member for your leadership in addressing the orphan works situation. The process that you have started has awakened broad public interest and we are very excited to see this problem being so actively and thoughtfully addressed.

I come to you today wearing two hats. First, as Board President of the Internet Archive, I would like to say a few words about our activities, especially our project to digitize the contents of America's great libraries and build an open digital library available to all. My second, and considerably smaller-size hat is as founder of Prelinger Archives, a small commercial film archive that specializes in historical footage of American life, culture and industry. I would like to talk about why clarifying the orphan works situation is especially critical for films.

So, first, the Internet Archive. We are a non-profit library that has collected billions of works and served millions of users since 1996. We collect books, music, moving images, Web pages and software programs. We work with the Library of Congress, the National Archives, the National Archives of the UK and many other institutions to find workable solutions to libraries' and archives' missions in the digital world.

Last October, we announced the formation of the Open Content Alliance, in partnership with five major technology companies and over 50 research and public libraries holding over 150 million books. The alliance seeks to digitize the holdings of key libraries and build a great joint collection online. Our members have all agreed to make their holdings openly available to all users, subject, of course, to the limitations of copyright law.

We believe that there are many hundreds of thousands, perhaps millions of orphan works which, if digitized and made available to all, would vastly add to our public storehouse of knowledge. We hope that we and our partners will be able to digitize and provide access to these books for non-commercial public purposes without fear of liability. Toward this end, we strongly support the Copyright Office's suggestion regarding limitation on remedies for non-commercial use and we advocate a simple request and removal procedure for libraries and archives that would respect the rights of copyright owners who come forward.

Let me switch hats and say a quick word about the Prelinger Archives. Most of our collection actually came here to the Library of Congress in 2002, but we are still collecting historical film, especially industrial advertising films and home movies. These are vivid documents of everyday life showing our country and its peo-

ple as they actually were, quite unlike Hollywood films or TV shows.

Our footage is in very high demand and we have made a business out of licensing stock footage. Most of our films are, in fact, orphan works because most small film producers are no longer in business. Contemporary audiences are fascinated by historical films. I recall the thrill of an audience in Britton, South Dakota, when I showed them Depression-era home movies from their own town. This coming August, archivists and members of the public will gather in at least 24 States to celebrate Home Movie Day, watch family films and select historically valuable items for preservation. We ourselves have put 2,000 of our own films online for free, and some 5 million have been downloaded.

Film is a peculiar creature in that it is quite fragile. It often decomposes more quickly than copyrights do. We therefore face a critical dilemma when it comes to preserving films. Non-profit archives like Northeast Historic Film and organizations like the National Film Preservation Foundation—by the way, I would like to thank you for your work in reauthorizing the National Film Preservation Board, the foundation's parent—need assurance that they can intervene to rescue deteriorating films without fear of liability. Small businesses like ours whose budgets are at non-profit levels also need to know that they can recover the costs of preservation through commercial licensing.

I am a member of the baby-boom generation. Much of my generation's history has passed into the public domain, but because of the peculiarities of copyright law, many of my younger friends lack the freedom to freely quote or reproduce key works from their own era. Easing access to orphan works would go a long way toward addressing this generational inequity.

I thank the Subcommittee for its attention and I look forward to answering any questions.

[The prepared statement of Mr. Prelinger appears as a submission for the record.]

Chairman HATCH. Well, thank you. This has been very interesting to me. I have to say a lot of people think it is a seemingly small issue, but it a whole raft of issues that are very complex and very interesting.

Conceptually, there appears to be at least three different proposals to address the orphan works problem, and I would just like to get the panel's view—and we will start with you, Mr. Sigall, from left to right—on the relative merits of each of these three approaches.

First, there is the Copyright Office proposal which simply limits the remedies available if an alleged infringer can demonstrate that he or she performed a good-faith, reasonably diligent search for the copyright owner prior to using the copyrighted work. Now, this is perhaps the simplest solution and it minimizes the ongoing involvement of the Copyright Office and other governmental entities in resolving disputes over orphan works.

Second, some have suggested the creation of a new statutory license that would impose the duty on a potential licensee to perform a more specific type of search and pay a statutory royalty before using any orphan work. If an owner of a work that was used subse-

quently emerged, he or she could then make a claim against the royalty pool and receive payment for the use of the work. Obviously, this proposal would require more involvement by the Copyright Office in terms of administering the license and distributing royalty payments.

Third, some have proposed instituting something similar to the renewal requirement that existed prior to our accession to the Berne Convention. Under this proposal, copyright holders would be required to comply with a formal review process that would be similar to registration in order to enjoy continued copyright protection near the end of the current copyright term. Now, as I understand it, to remain in compliance with our treaty obligations, we would have to limit such renewal formality just to U.S. copyright owners.

I think both of us would be interested in hearing from each witness about the relative merits and potential problems with each of these options, and we will start with you, Mr. Sigall.

Mr. SIGALL. Well, I will address the second and third options. We are fond of the Copyright Office proposal, as you might expect.

With respect to statutory license or a system where a user would have to both do a diligence search and pay into a fund that could be distributed to resurfacing copyright owners, we addressed that a little bit in our report. The main, I think, objection to that proposal where it is flawed in this context is that if most of us agree that most reasonably diligent searches will find owners, and those that don't truly are orphan work situations, you are setting up a system where people are paying into a fund where there is no owner to come back and collect the funds.

So you would have to set up a bureaucracy, as you mentioned, in the Copyright Office to collect the money. But in almost every case, maybe upwards of 95 to 99 percent of the time, that money doesn't get distributed to a copyright owner. It just sits there. It either goes back to the user in an inefficient way or gets distributed somewhere else.

This is not like the situation in other circumstances where a statutory license has been implemented where you know where copyright owners are and where the moneys can be distributed more efficiently. So we don't think that is the most efficient or effective way to address the problem with respect to orphan works because we think in most cases there will be no owner who resurfaces. So let's not set up a system to address a problem that won't actually arise in practice for the most part.

With respect to questions of a renewal requirement or an additional formality that might be imposed on copyright owners to maintain their copyright, in essence, as you mentioned, that raises the real potential of violation with our international obligations and the general prohibition against such formalities.

As a practical matter, we have experience with that kind of system under our old 1909 copyright law and the experience from that time is that those burdens, the burden of renewal and the burden of filing maintenance of your copyright, fall most heavily on individual copyright owners, like photographers and illustrators that are here today. And they end up being more a trap for the unwary

than they do actually help solve the problem of getting copyright owners and users together.

The other thing I think that is the flaw in those types of systems is they offer what I would call the illusion of certainty. There is a feeling that if there is a piece of paper that people can go find in the Copyright Office or somewhere that you will know who the owner is and resolve a lot of the questions. You may in several cases, but what you end up having is what we had under the 1909 Act. You end up having litigation over arcane definitions about when something was published or what exactly the piece of paper in the Copyright Office covers, instead of having more appropriate questions of what the person did to find the copyright owner and how much the copyright owner made themselves available.

So we think both in legal terms and in practical terms, a registration and renewal requirement really doesn't help solve the problem that we are trying to solve in the orphan works situation.

Chairman HATCH. Mr. Perlman, my time is up, so if you could answer in short verse, I would appreciate it.

Mr. PERLMAN. Like Jule, I won't comment on the orphan works proposal from the Copyright Office, but for the reason that I dislike it as much as he likes it.

The statutory license or something similar is already working in the music world. I think that that seems to be at least a good starting point for an approach. Jule doesn't like it because it is inefficient. I think inefficiency is better than confiscation.

The renewal requirement, I believe, would not really help users of images because whether it is registered or renewed, the user simply can't find the information the way the Copyright Office's records are currently searchable.

Chairman HATCH. Ms. Cross.

Ms. CROSS. I think we would tend to side with Mr. Sigall on the Copyright Office's proposal. PBS actually does use a version of a statutory royalty. We call it an escrow account. It might be something that is worth looking at if you choose to explore that.

I think where we stand generally is that we are in favor of some kind of cap on whatever amount would be charged should an orphan work registered owner emerge and stretching the take-down provisions to include we who make films.

Chairman HATCH. Mr. Holland.

Mr. HOLLAND. Well, briefly, the problem, I think, with a renewal requirement is it would create massive amounts of paperwork that would just—if you are photographer, you take hundreds of thousands of images that you have to start tracking and renewing. You are going to be swamped with paperwork. Artists and photographers would simply have to put on extra staff just to handle the renewals.

I would agree with Vic that inefficiency is better than confiscation, and I would think that the problem with formalities is that the Copyright Office proposal already imposes formalities. It just doesn't say so, but it does so by penalizing artists who don't impose formalities on themselves.

Chairman HATCH. Ms. Pallante.

Ms. PALLANTE. We support the Copyright Office proposal because it is the only one, in our view, that addresses the need to give us

some confidence to get things out of obscurity. It gives us a framework where we can look at millions of photographs and unpublished letters, and figure out how to invest in those and put them out in new formats available to the public in a way that is meaningful without the fear that at any point in the future somebody will come along and slam us with a lawsuit for an amount of money that we just can't handle.

So the practical respect of the other two proposals is that we just won't use that material and that is what is happening now. The reason we like the Copyright Office proposal is because it is fresh and innovative and would get us thinking about how we can make that stuff available, especially given the Internet and digital technology.

Chairman HATCH. Well, thank you.

Mr. Rubin.

Mr. RUBIN. We believe that the Copyright Office approach is an elegant approach to the competing concerns that are raised by the orphan works issue. The problem with the statutory license is that the best remedy is one that would approximate what the parties would have agreed to, given the work that is at issue. Coming up with a statutory fee will likely be either too little or too much, given whatever the work is. It will also create enormous overhead. And as Mr. Sigall said, in the vast majority of situations, particularly as time goes on and technology improves, there will be fewer true orphan works out there. So a whole structure will be set up with little benefit.

As for new formalities, those, too, would lead to tremendous overhead. It would create an inappropriate disparity between U.S. and foreign works, and it doesn't particularly or directly address the problem at issue.

Chairman HATCH. Thank you.

Mr. Prelinger.

Mr. PRELINGER. We believe that the Copyright Office proposal is thoughtful and takes these competing interests into account. Archives have two primary missions—preservation and access—and in the digital world both of these functions are handled on a scale that we haven't seen before. The Internet Archive, for example, has 55 billion Web pages, and we think that the framework that is advanced by the Copyright Office comprehends this new direction and will allow digital archives to function fruitfully.

Chairman HATCH. Thank you.

Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman. I am finding it interesting, obviously. The reason for this panel is there is not uniformity of opinion.

Mr. Sigall, let me first go to you. As I said, I appreciate the report and all the work your office did and I think that work was very, very helpful. But you have said photographers have objected to the proposed legislation because of the high cost of litigation, but then you say that already exists today. Of course, it does, but what also already exists is the possibility that the infringer, especially if he has a unique photograph, might have to pay a lot of money to the photographer. The orphan bill takes that away, so then the in-

fringer becomes more emboldened and a lawyer is certainly much less apt to take it on a contingency basis.

How about changing the bill to permit attorney's fees and costs and statutory damages if you have a case where an infringer couldn't show that he had reasonably sought to find the owner?

Mr. SIGALL. Well, that solution is a potential avenue to explore to address the situations where the user is truly intransigent and truly does not want to negotiate with the photographer or other copyright owner who resurfaces over what the reasonable compensation might be.

Senator LEAHY. It would also cover the case where they didn't do a reasonably diligent search because they didn't want to find the photographer, for example.

Mr. SIGALL. The difficulty that that proposal would raise is that what we heard from many in the user community is it is the prospect of statutory damages and attorneys' fees which is the major obstacle to them being able to use the work. So to the extent any proposed change to our proposal reintroduces that uncertainty, they might be concerned that no matter what they try to do, somebody down the road will say it wasn't enough or it wasn't an effort to find the owner. And then they are faced back with the same uncertainty that they have under the current system, which is always the possibility, even though it may be remote, of a statutory damages or attorneys' fees award against them.

And keep in mind that under the current system those remedies are only available if the photographer has, in fact, registered their work in advance of the infringement, or any copyright owner has registered their work in advance of the infringement.

So to the extent there is any consideration of reintroducing some of those remedies back into an orphan works system, it would have to apply only in a situation where the photographer or illustrator has done that in advance of the infringement. It shouldn't give them those remedies back.

Senator LEAHY. Well, what about a situation like this: Somebody takes a photograph today and the person sees it and says you can't use that? We had this happen recently on a book that is now currently on the bestseller list. I got one of the first copies that came out before they realized that. Then in the hundreds of thousands printed after that first run, they had to change the cover. That is easy. They said you can't use it. It stopped, and I assume they negotiate for what has been used.

But what if you have a case where, say, a singer sings a song and then it is used in a way they never expected, never could have anticipated, in a pornographic movie, for example? Now, they feel they really are damaged because if they get associated with that, it may well change where they can get concert fees, and so on. Or it is used in a way that would obviously cause great embarrassment to them because of their religion, their background, their family, or whatever.

Reasonable compensation, as we might define it, is kind of cold comfort, isn't it? Don't you have to have some way to handle something like that?

Mr. SIGALL. Well, under our proposal, the limitations on remedies don't come into play if the owner can be found through a rea-

sonably diligent search. So if a songwriter, for example, has their song, if they are registered with ASCAP or BMI or the Harry Fox Agency or any of the various clearinghouses and other information sources, I think it would be the very, very rare case that that would be considered an orphan work. So they would be entitled to the full remedies that the Copyright Act affords them right now. Even under our proposal, the availability of injunctive relief is possible if the work is simply republished.

Senator LEAHY. In an Internet age, injunctive relief isn't a great deal of comfort, is it?

Mr. SIGALL. Well, it is not, but again that is——

Senator LEAHY. I have taken several photographs here which I could have—I am not going to; I have my own collection, but they could be on dozens of websites before you are home for dinner tonight.

Mr. SIGALL. That is true, and that is a problem that is generally applicable to copyright.

Senator LEAHY. You look very good in the photographs. You don't have to worry.

Mr. SIGALL. That is true, and I think one of our suggestions that we made in the report and we have repeated is trying to develop ways for more efficient enforcement mechanisms that are less expensive and able to address infringement in a quicker way than with respect to Federal court litigation.

Senator LEAHY. Well, Mr. Perlman suggested some kind of an alternative dispute resolution; I guess a small claims court or something like that. Am I stating your position correctly, Mr. Perlman, to handle orphan works issues?

Mr. PERLMAN. I had several alternative proposals. Certainly, some sort of expedited handling of disputes relating to orphan works and copyrights generally would be a vast improvement over what we currently have. I think that having some sort of a licensing organization that would escrow funds would be preferable to that. Obviously, a lot of user communities don't like that because that means that they would have to pay for things that they want to use for free.

Senator LEAHY. I just realized the clock, Mr. Chairman. I am over my time.

Chairman HATCH. You are fine. Go ahead.

Senator LEAHY. You have two kinds of photographs here, as I see it: what I just took here, these digital photographs, which I have found as a result of which I will probably be able to contribute to my grandchildren's college funds because I won't have to pay so much for film that I would be spending otherwise. So those are easy to send over the Internet, but then you have got those of historical interest that you might find in an old family Bible or in a closet, attic or something like that. It would seem that those would be more apt to be orphaned, whereas with the more recent digital ones you could find the owner.

Am I wrong, or should there be any difference in the treatment of them?

Mr. PERLMAN. I think that at least as of the state-of-the-art today, you are probably not correct because some 90 percent of the

images that appear on the Internet right now are unauthorized. They obviously have no way of tracking the author.

One of the inherent problems, whether we are talking about print media or electronic media, is that at least for commercial photographs the publisher—and I use that term in the copyright sense—has total control over what information is available. Most of the time, they choose not to give any attribution to the copyright holder and creator.

Worse, the user community as a whole has a vested interest in not disclosing that information because it then creates a pool of orphan works from which the other users can then take works without any compensation with, at most, the risk of having to pay a reasonable licensing fee.

Senator LEAHY. In a digital age, what about the creative community setting up their own digital data banks? Wouldn't that make it a lot easier to match up an appropriate use?

Mr. PERLMAN. Absolutely, sir.

Senator LEAHY. That would make it more difficult for somebody to say I did a reasonable search and I couldn't find the person.

Mr. PERLMAN. Absolutely. We are currently working with technology providers to use image recognition software to create data bases that would absolutely be usable. But as you pointed out at the beginning of your questions, that would work for the current pool and future pool of digital images. It does not begin to address the 50 or 70 or more years of photographs that are currently under copyright that are in print media. And the cost and difficulty of taking these millions, perhaps billions of images and turning them into digital files is astonishing.

Senator LEAHY. Well, I am thinking, and it is sort of based on something Ms. Cross—and incidentally we are honored to have you here, with the work you do.

Ms. CROSS. Thank you.

Senator LEAHY. Putting these kinds of films together must be fascinating and it must be frustrating at the same time. What you said about seeing photographs related to your own life must have been almost overwhelming. I had somewhat of a similar feeling after my parents died, going through some of their old photographs and realizing who some of the people were.

If we had a real—and maybe I should ask this of all of you—a real orphan works bill, do you envision companies coming up or groups coming up to do data banks and that if a filmmaker like you went to that data bank and said here is a picture I want to use that that would be considered a reasonable search?

Ms. CROSS. No.

Senator LEAHY. No?

Ms. CROSS. No.

Senator LEAHY. What would you want?

Ms. CROSS. I have a fairly rigorous standard that I instruct all of my researchers to follow and it does not include one-stop shopping. I mean, even if there was a visual registry, I wouldn't trust a visual registry because I don't trust anything that is on the Internet. So I mean I would want to try to find whoever that picture was supposedly taken by, ask them did they, in fact, take it and send them a photocopy of it.

If I can't find that person through a data base, I am going to try to find out who were the other photographers that were present at the particular event. If I can't figure that out, I will begin to start calling people that I know were present at the event and who did they know that was there. It is really a sleuthing—it is a detective expedition that we go on.

The impact of an orphan works bill wouldn't be that I would do less of that, because I am still going to want to make sure that I am not opening myself up to litigation. I am going to want to still document. It would just make it easier for me to use things that otherwise cable companies and even PBS now in some cases are saying, no, we don't want to take the risk. We don't know who this is. We don't care that you can document making phone calls and sending e-mails two or three times a week for the better part of 6 weeks or two months. We still don't want to take the risk.

As a result of that, there are things—and I am not talking about the photographers that work for Magnum or Getty Images. Those guys, they are documented, but the history of this country that is documented by mom and pop and home movies is not by and large documented within the archives of Magnum and Getty, and that is when we need help.

Senator LEAHY. I just put together a photo show in Vermont, and all the photographs were mine except for two and I spent a lot of time and my staff spent a lot of time making sure that we had the permission of the two people who took those, even though there was no commercial involvement at all. It was at my alma mater and I wanted to use the two pictures because they were thematic to it, but I wasn't going anywhere with them unless we had permission.

Mr. Prelinger, you talked about digitizing orphan works for the public good and I am thinking about what Professor Cross just said. Would you feel comfortable using an orphan work under the proposed legislation?

Mr. PRELINGER. In many cases, if we are talking about digitizing books or published moving images, it is a little bit easier because there are a number of tools that we can use either to locate an author or copyright holder or rule out that such an entity really exists.

I think where it gets more complicated and what a lot of this discussion has been are unpublished works or works that are not attributed upon publication, such as an anonymous illustration. I would like to suggest that the attribution requirement that the Copyright Office is suggesting in its proposal goes a long way toward making sure that that work, if it is reused again as an orphan work, is identified and so there is the potential for the owner to come forward.

Senator LEAHY. I think we have got a lot of work ahead of us, Mr. Chairman, on this issue, but I think it is an extremely important one. On the one hand, Professor Cross has said you want to work very hard, but then you want a film where these things may be integral to the film, just as a book or something else.

I think of writers of a history book, how extraordinarily important that is. I mean, the photographs or a written letter or a fac-

simile of a contemporaneous account—how much that adds to the interest or verisimilitude of the book itself.

So on the one hand, I want to make sure that a writer, a documentary filmmaker or somebody else is not so gunshy they can't use these things which will make the final product more realistic. On the other hand, I don't want a situation where somebody can say, hey, I have got a great picture. Does anybody know where this comes from? You don't? OK, I can use it. And somebody who has worked extremely hard to get that picture or discover that letter isn't recompensed.

Mr. Chairman, I think we have a lot of work ahead of us on this.

Chairman HATCH. Well, I think we do.

Senator LEAHY. Thank you.

Chairman HATCH. It is certainly an interesting area.

Let me just ask one last question of Mr. Rubin and Mr. Prelinger. I would be interested in hearing your thoughts about the relevance of a solution to the orphan works problem now that it has been raised to the world of the Internet.

Let me ask you this: What type of impact would you foresee this having on the availability and diversity of online content? Let me go a little further than that. What types of things are not possible now that might emerge if orphan works were made more available?

I would also be happy to hear from other witnesses about the impact of Internet distribution and its relevance to this debate after first hearing from you, Mr. Rubin, and then Mr. Prelinger.

Mr. RUBIN. I think that, if enacted, there is likely to be greater uses on the Internet of a wider variety of historical images and works. One of the, of course, benefits, as well, of Internet use—while it has a downside in terms of the ability for infringing works to be propagated on the Internet, one of the benefits is to the extent an orphan work or what was mistakenly identified as an orphan work appears on the Internet and it turns out that it is not an orphan work, the damages can easily be mitigated and the work can be taken down. That is not to say there shouldn't be a remedy in that situation, but I believe that there would be greater accessibility to a wider diversity of works if the bill is enacted.

Senator HATCH. Mr. Prelinger.

Mr. PRELINGER. We think that if this legislation were enacted in substantially similar form to what we are seeing now that it would have a tremendous impact on the amount of cultural material that was widely available, and also on the reuse. Public authorship, whether it is scrapbooking or public television, really all along that spectrum we think would be tremendously helped.

It does raise some questions. It would mean that libraries and archives that are collecting digitally would probably need to be able to make digital copies of orphan works for preservation purposes. That is a complex issue. Also, many of the documents that we collect at the Internet Archive are ephemeral and transient. They are Web pages that come and go very, very quickly.

We have remedies, you know, the notice and take-down right now that is supplied by DMCA which is a very nice paradigm that we hope will be followed. In addition, there are technical means by which somebody can say don't collect my Web page. They can put a robot exclusion into effect, and that has been working very, very

well. For example, we don't collect the New York Times because the New York Times has an automatic exclusion there. So we can't save those pages. So to some extent this has been anticipated. We don't think the problems are insurmountable and we think the opportunities are great.

Chairman HATCH. Thank you.

Does anybody else care to comment?

Ms. PALLANTE. I would like to comment on that. I think for the museum and archive world, the impact would be tremendous. I couldn't agree more. I think if the Copyright Office proposal were to pass with just some minor modifications along the lines that we have suggested in our written statement, you will see in a very short time incredibly interesting and historically important and culturally significant materials put out in new formats—websites, books, scholarly journals. It would be tremendous.

Mr. HOLLAND. Could I comment? If something goes on the Internet, Senator Leahy said a few minutes ago that injunctive relief is cold comfort if something is put on the Internet. Once something is put on the Internet, it has been laundered throughout the world. I know of a painting of mine that is being infringed in Iran at this moment and there is not very much I can do about that.

If the Copyright Office proposal goes through—it is not this isn't happening already. Right now, it is called piracy. If the Copyright Office proposal is accepted, it is no longer piracy. It is a form of using orphan works. My picture in Iran right now is an orphan picture. Somebody is using it on their website. It is an orphan work because it is not attributed to me, and it creates a family tree of infringements because anybody who sees that unattributed is now able to pick that up and use it again.

Chairman HATCH. Sure.

Ms. CROSS. I think we should make a distinction between piracy and orphan works. I mean, that is not an orphan work. Somebody stole your work.

Mr. HOLLAND. But once that person has taken it, it is unattributed. On his site, it is an orphan because there is no attribution.

Ms. CROSS. But we know how to find the owner.

Mr. HOLLAND. No, I don't.

Ms. CROSS. You are findable, you are findable.

Mr. HOLLAND. He is in Iran.

Ms. CROSS. No. I am saying the person—I don't mean to start a direct conversation.

Mr. HOLLAND. I apologize.

Ms. CROSS. There is a distinction between stealing somebody's work and being able to find, if someone tried to find the person, and an actual orphan work. I think this would give great confidence to a lot of insurers and to a lot of commercial outlets now which refuse to allow a lot of materials to be used because we just don't know what they are.

Mr. PERLMAN. To give an example of the potential inequity of this proposal, there are already companies and individuals who have registered domain names using variations of the term orphan works with the plan of creating data bases of images that they could then turn around, and since they don't own the copyright, li-

cense them, but instead allow people for a fee to come in and access the data base and use the images, thereby converting orphan works into a commercial windfall at the expense of the illustrators and photographers.

Chairman HATCH. Well, under this proposal, though, you have a remedy anyway.

Go ahead, Mr. Sigall.

Mr. SIGALL. Let me also say none of this kicks in until the person does a reasonably diligent effort to find the owner and if the person in Iran or anywhere doesn't make any effort to find Mr. Holland, this doesn't apply. And to the extent that there are companies that might be planning to make a business out of this, to the extent they do a reasonably diligent search they still have to pay reasonable compensation to the owners. And at that point, the owners are surfacing. They can make themselves known to other users so that those users can't claim benefit of the orphan works proposal as well.

Chairman HATCH. Let me make a suggestion to you, Mr. Sigall, and other people there at the Copyright Office. Why don't you prepare what you consider to be a list of things that must be undertaken before it could constitute due diligence so people would know what they really should be doing?

Now, that is hard to do, and it is hard to do right, I understand, but at least it would be wonderful if we had some sort of a list of suggestions as to what would constitute due diligence in the eyes of the Copyright Office, and therefore maybe in the eyes of everybody. But if you would do that, I think that would be helpful.

Mr. SIGALL. We would be happy to undertake that, but the problem is we would like to hear from people who do searches, like Ms. Cross or other people who use these works.

Chairman HATCH. Well, sure, you would want to consult with Ms. Cross and others.

Mr. SIGALL. Those folks have the expertise. Depending on the sector in which they are working, they know where the resources are and how to do things like that.

Chairman HATCH. It seems to me you could be helpful to us here if we could come up with what would be at least minimal requisites for due diligence in looking for these things. Now, I know that there are an awful lot of products here, an awful lot of different types of venues here, but let's see if we can come up with something that might be of some assistance to us.

It is apparent, Professor Cross, that you do a lot of things, from your testimony, that you may not have to do.

Ms. CROSS. Not if I want insurance.

Chairman HATCH. In the interests of trying to be fair to copyright owners, you have done more than just say, well, I looked through the Internet and I couldn't find anything. And we might be interested in what you think constitutes a due diligence search. I think I have some ideas of what I think would constitute that, and I think there are extremes one way or the other that we would like to avoid, but if we go to legislation like this, have some sort of a basis whereby people feel confident that there has been at least some effort made to discover the copyright owners.

We would appreciate any other help you can give us. We will keep this record open. We don't have any desire to stick anybody with legislation that might not be as effective as it should be. We would like to do the best job we can here, and I in particular am extremely interested in history and in the documentation that we have from history.

Through museums like your own, we benefit tremendously from these types of materials if they can be disseminated widely, and we lose if we can't find some way of disseminating it. So we would be very interested. We can see that there is a lot of work to be done here and, like I say, we don't want to hurt anybody, but we would like to get this where it works to the best of our ability.

We have listened to you, Mr. Holland, and you, Mr. Perlman, in particular, about your real concerns. But I have listened to all of you and we would appreciate any further help you can give us. We will keep the record open so you can write to us.

This has been a very helpful hearing and I want to thank each of you for being here and participating. Although we may not in the end be able to accommodate all of the views and suggestions that have been made here today, please be assured that Senator Leahy and I will carefully consider them before moving forward with any orphan works bill, and the rest of the Committee as well. We welcome your ongoing participation as we move through the legislative process.

Now, we are going to hold this hearing record open for an additional 7 days, which is, we think, a pretty good time. If you need more time, please let us know because we will continue to work on this and we would love to have your expert advice.

With that, we want to thank you all for being here and the hearing stands adjourned. Thanks so much.

[Whereupon, at 3:33 p.m., the Subcommittee was adjourned.]

[Submissions for the record follow.]

SUBMISSIONS FOR THE RECORD

April 4, 2006

Mr. David Jones, Counsel for the Majority
Ms. Susan Davies, Counsel for the Minority
Subcommittee on Intellectual Property
Committee on the Judiciary
United States Senate
Washinton, DC 20510

Dear Mr. Jones and Ms. Davies:

On behalf of the Advertising Photographers of America and its members nation wide, we are submitting this letter and accompanying paper in advance of the April 6, 2006 Senate Judiciary Subcommittee on Intellectual Property Hearing on "Orphan Works: Proposals for a Legislative Solution" and respectfully request consideration of these documents for inclusion in the record.

Clearly, a dilemma exists with respect to orphan works. We do not oppose an orphan works amendment, but have grave concerns with the proposed language as it is currently written. We would support an amendment that provides access to verified orphaned works for certain uses, by way of procedures that are clearly defined in the statute or regulations, while retaining remedies for use by copyright owners in the event of abuse.

If this amendment is enacted into law without significant revisions, it has the very real potential to destroy the businesses and livelihoods of thousands of artists, cost thousands of jobs, and result in a massive wave of litigation related to the use of orphan works. In its current form, this amendment is a disaster in the making and will likewise have a chilling effect on our society's access to new works out of fear by creators that such works will become orphaned upon publication. As the Supreme Court ruled in 20th Century Music Corp. v. Aiken (1975), "The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good." The proposed orphan works amendment conflicts with both the aim and the desired effect of copyright law.

We believe, however, that with constructive participation by all stakeholders in the orphan works issue, a solution can and will be reached. Toward that end, we respectfully submit the attached paper, "The Orphan Works Dilemma: Challenges and Recommendations," detailing our concerns with the language of the amendment as proposed, together with recommendations for potential solutions.

Given the complexity of this issue and the potential domestic and international repercussions involved in the enactment of this significant amendment to

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copyright law, we implore the Subcommittee to allow a more appropriate time period for the representatives of all stakeholders to adequately discuss the amendment and arrive at a consensus.

We appreciate the opportunity to submit the attached paper detailing our concerns and suggestions, and thank you for your consideration.

Sincerely,

Jeff Sedlik
Chief Advisor on Licensing & Copyright, Advertising Photographers of America

George Fulton,
National President, Advertising Photographers of America

Constance Evans
National Executive Director, Advertising Photographers of America

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The Advertising Photographers of America (APA), a leading non-profit trade association representing the interests of professional photographers, promotes the highest standards and ethics in the photographic and advertising community, provides educational resources, and fosters an environment conducive to achieving success in the industry. The APA membership reflects the diverse creativity and extraordinary talent of advertising photographers from across the country.

APA ADVERTISING PHOTOGRAPHERS OF AMERICA

The Orphan Works Dilemma: Challenges and Recommendations

As Congress revisits the challenge of creating equitable orphan works legislation, the livelihoods of hundreds of thousands of artists and other creators are at stake. For most artists, the ability to create new works, to operate their businesses, and to support their families is inextricably tied to the rights and protections afforded them by Congress under copyright law. The Copyright Office faced a tremendous challenge in attempting to analyze and address this issue, and we appreciate the efforts of all concerned.

Most artists are not in the business of selling art. Their medium may be photography or illustration, but their business – and often their sole means of generating income, is the licensing of the copyrights in their creations. Among the smallest of this nation's small businesses, artists are particularly vulnerable to any legislation that might serve to weaken or remove their rights or protections. In this time of rampant corporate consolidation and rapid market globalization, artists are more vulnerable than ever. As you read this, many thousands of artists across this nation are struggling to pay their bills, fighting to earn enough revenue to keep their businesses afloat, to retain their employees, and for some - to simply earn enough so that they can afford to create new works.

Ironically, without the protections afforded creators by copyright law, artists could not afford to create new work, and the museums, libraries and scholars that have fought so hard to bring the orphan works issue to the fore would have no works to exhibit, no books to check out, and no art or literature to study. For many in Congress, the phrase "orphan work" might conjure up an image of a dusty, aged photograph of a long dead matriarch. But under the proposed amendment, works that are being created by artists working in their studios across this country right now, as you read this sentence, are destined to become "orphan works" under the law.

In recent years, and continuing this very day, there has been a torrent of legislation created expressly for the purpose of increasing the legal protection of the copyright interests of major corporations in the motion picture, music, and software industries. In that realm, there is an overwhelming legislative trend toward providing more and more protection, and greater and greater remedies for use by corporate giants in preventing the unauthorized copying of CDs, DVDs, screened films, and web downloads of songs and motion pictures. Anyone observing this never-ending festival of rights, watching bill after bill pass into law, year after year, closing every possible loophole that might allow a movie, song, or software program to be copied, could only conclude that the interests of copyright owners are held sacred.

Now, in a year in which Congress will consider and approve any number of enhancements to the copyright protections and remedies afforded to large corporate copyright owners, we have a proposed copyright law amendment on the table that will virtually eliminate all meaningful remedies afforded to individual artists in instances where an artist's name happens to be separated from an artwork, or where a search otherwise fails to locate the artist. The proposed amendment removes the remedies of actual damages, statutory damages, injunctive relief (for derivative works) and attorney's fees when an orphaned work is exploited without permission or license from its creator or owners. These remedies collectively represent the meaningful legal protections available to artists today and provide the protections that artists rely on to deter the unauthorized use of their works, encourage licensing, and generate the revenues on which they depend.

A Photograph, by any other Name, is an Orphan Work

The Copyright Office and others have suggested that artists and owners must bear the burden of identifying their works, and that artists are to be held accountable by the forfeiting of rights in the event that their names become separated from their works. The language of the proposed amendment conflicts with the both the spirit

and the letter of domestic and international copyright law, by not only requiring formalities as a condition for the enjoyment of property rights, but by effectively punishing artists when others remove attribution from their works.

Photographs, in contrast to most other protected works, are rarely published with credit to the author. With no author name attached, the vast majority of published photographs are destined to become orphan works immediately upon publication. Photographers have long been susceptible to the separation of authorship information from their works. Despite a photographer's best efforts, the author's name and contact information is frequently separated or removed from the photograph itself by parties handling the photographs after delivery of the work. This is particularly true with electronic copies of photographs, in which an author's name is often lost when the photograph is saved in various digital formats. Digital file names are frequently changed, and metadata bearing copyright information is often removed (intentionally or unintentionally), making the source of the files (along with the author's name) almost impossible to determine. Now more than ever, users combine (photo-compose) multiple photographs to create new works. One photograph of a couple on the beach may be combined with several other photographs of seagulls, a sunset, sand dunes, etc. to create a new composite photograph. In such instances, all attribution information from the individual photographs is lost, rendering each an orphan work.

A photograph delivered to a client in one format may eventually be distributed in a wide variety of electronic and printed media, and preservation of authorship information is the exception, not the rule. This is exacerbated by the fact that the United States is one of the few countries that recognizes intellectual property rights, but fails to guarantee all authors a right to attribution, as an element of moral rights. A review of published photographs reveals that the vast majority of photographs are printed today without authorship attribution. Even where a credit is provided in a

published work, the credit is rarely on the photograph itself, but is often in a separate location within the publication.

Over the protests of artists, the Copyright Office has ignored the fact that photography and illustration are particularly vulnerable to the loss of attribution information, and that after a work leaves an artist's hands, the retention of authorship information is entirely out of the artist's hands. The proposed amendment punishes artists when their names are separated from their works by others, even where artists religiously add their name to each and every work before distribution. The punishment is extremely severe and unjustified: i.e., the removal of all legal remedies for the unauthorized use of a work, and the removal of the artist's right to set the value of one's own work at his or her discretion. These measures are draconian when considered in the context of the trend toward increasing the rights and protections afforded other copyright owners – those owners of works that are not vulnerable to becoming orphans.

We suggest that Congress revise the amendment to impose severe penalties and enhanced remedies on those who willfully remove attribution from a photograph. The Digital Millennium Copyright Act (DMCA) provides the precedent, stipulating that statutory damages and attorney's fees are available in the event of the removal of copyright management information from digital files. We propose that the language of the DMCA remedies be applied to orphan works as well, whether digital or otherwise. We further propose that Congress treat anonymous works as a separate category of orphan works, and apply provisions specifically designed to address use of such anonymous works. Specifically, the right to exploit such works should be more restricted, and involve more significant deterrents against abuse, than the right to exploit works bearing attribution. Notwithstanding the need to provide access to orphan works, we suggest that Congress, in all good conscience, should not punish artists for the deeds of others.

There are a number of special interests involved in the orphan works discussion, but in determining the motivation behind the involvement of each group, we need only to follow the money. With respect to works of art subject to the orphan works amendment, there are essentially two groups:

(1) Those who earn their living by investing their skill, time, effort and funds in the creation of works that are most likely to be orphaned, and those who have acquired ownership or rights of agency in such works.
(2) Those who earn their living by exploiting, preserving, studying or otherwise making use of works created or owned by others, whether for benevolent purposes or for commercial gain, or both.

Group One: Includes photographers, illustrators and other artists, as well as the "stock" agencies engaged in creating and licensing artworks. We have addressed their motivation above.

Group Two: Includes libraries, educational institutions, scholars, researchers, museums, the motion picture industry and publishers, among others. While it is true that some of these entities, such as publishers, are also be copyright owners, most have minimal if any exposure to the "orphanization" of their works, and thus their primary motivation with respect to the promotion of orphan works legislation, is the use (benevolent or otherwise) of the works of others. For the publishers, it is true that orphan works legislation will permit publication of works that are not currently available for use and have historical value. However, the orphan works amendment will also make millions of works available for gratis use in all manner of publications, allowing publishers to avoid licensing works from artists and stock agencies, and thus generate a tremendous windfall of profits.

Libraries, museums, educational institutions, scholars and researchers provide invaluable service to our society and culture, and face tremendous challenges in

preserving deteriorating works, duplicating works for educational purposes and in making works easily accessible to the public. Without a doubt, these groups stand to benefit tremendously from an orphan works amendment, and rightfully so. However, it should be noted that while many museums and libraries operate under the IRS 501(c)(3) non-profit designation, these institutions are increasingly engaged in commercial activities typical of for-profit organizations, such as the packaging, publishing, and licensing of works in their collections, so as to generate sufficient revenues to pay staff salaries, maintain facilities, and acquire more works. We mention this in light of the fact that in some instances, the orphan works amendment will serve to allow these non-profit institutions the exploitation of artists' works for the purpose of generating operating funds, at the expense of artists' ability to pay themselves by licensing their works. We believe that the orphan works amendment should be structured to benefit libraries, museums, educational institutions, scholars and researchers, while limiting commercial use by those institutions and individuals.

In addition, group two includes others who will abuse the orphan works amendment by exploiting the loopholes that this legislation will create. With infringement remedies removed, there is no deterrent to unauthorized use, provided that a user fails to locate a copyright owner. The orphan works amendment creates an incentive to fail in searching for an artist. Rather than paying to license works, users will have every incentive not to find the artist, and can proceed to exploit the artist's work with abandon, knowing that even in the remote likelihood that the use is discovered, the artist will only be able to collect a minimal fee, and will have little means of enforcing payment, and no means of stopping the unauthorized use of the work, if the use is a derivative.

The Orphan Works Black Hole

The proposed amendment provides that, in the event that a search fails to find an artist, that artist forfeits the right to stop the unauthorized user from exploiting the artist's work in new works, if the new works transform, adapt or recast the original

work and represent a work of original authorship. While we understand the basis for this provision, the elimination of injunctive relief will serve to create a giant black hole allowing almost any user to bypass injunctive relief merely by transforming an orphan work before use. The proposed language sets up a legal quagmire over the thin line that separates a derivative work from a non-derivative work.

The threshold for original authorship under copyright law allows almost any fixed original expression to be deemed a protected work. While we support this threshold, its application to the determination of a derivative work as designated in the orphan works amendment is highly problematic. For example, one artist may acquire rights in another artist's work simply by failing to find that artist, and may then transform that work and offer it in competition with the original artist's work. The original artist will have no viable means of stopping such use. The amendment will thus force artists to compete with their own works.

A poster company may possess a box full of photographs previously submitted by artists for proposed publication, but separated from attribution in course of review. Under the proposed amendment, that poster company could then exploit the photographs on posters for commercial sale without limitation, and need only to manipulate the photographs prior to use so as to eliminate potential injunctive relief. We believe that the exemption from injunctive relief, while well intended, will be widely abused, and will allow any user to avoid the prospect of injunctive relief by simply transforming the work sufficiently to meet the minimum derivative threshold. We urge Congress to reconsider this exemption and to more expressly define the circumstances under which it may be applied, by setting a higher threshold for original expression in this instance, by providing enhanced remedies in the event of abuse, and by expressly limiting the use of derivative works based upon orphan works to non-commercial applications.

The "Come-And-Get-It" Factor

There is a viral component to the orphan works amendment that must not be overlooked in re-drafting the language. Once one user identifies and uses an orphan work, such use will serve as a "come-and-get-it" beacon to other users. Though we understand Congress intends to require each user to complete a diligent search for the owner of a work (this intent needs to be more expressly memorialized in the amendment), in reality, public use of an orphan work by any one user will serve to inform all other users that a diligent search for the owner has failed. It is reasonable to assume that when secondary users conduct their required searches, the owner is highly unlikely to be found. Thus, any public use of an orphan work will signal all other potential users that the work is ripe for the picking.

Without changes to the proposed amendment, we will soon see orphan works aggregators enter the marketplace, specializing in offering ultra-fast search and clearance services for orphan works. Commercial interests will develop large websites where anyone can browse through hundreds of thousands of works that have failed an ownership search, and select any number of works for unauthorized exploitation, knowing that their subsequently required search is certain to fail. Within two weeks of the issuance of the Copyright Office Report on Orphan Works, nearly all of the domain names associated with orphan works were registered by commercial interests, in preparation for the profit-taking that will result if the legislation is passed without significant revision. Among them: orphanart.com, artorphanage.com, orphanedphotos.com, findorphanworks.com, and dozens of others.

While neither the Copyright Office nor Congress intends the orphan works amendment to result in the rampant exploitation of works, it is a certainty unless exclusions to commercial use and protections are restored. We are aware that the proposed amendment requires each user to clear the work, but where there is profit, the market will find its way. Therefore, we suggest very stringent language prohibiting the aggregation or offering (whether direct or indirect) of orphan works

under the amendment, including but not limited to the offering of paid access (whether by one-time-fee or by subscription) to collections of "cleared" or suspected orphan works. We propose that Congress provide enhanced remedies in the event of such use, including actual damages, disgorged profits, statutory damages, attorney's fees and injunctive relief, notwithstanding the copyright registration status of the work, thereby establishing a reasonable deterrent and providing artists with appropriate remedies in the event of abuse.

Orphan Works Free-for-All

The Copyright Office has proposed that non-commercial users of orphaned works should pay no fee when such use is discovered by artists. This effectively removes any barrier to exploitation of use and will result in users capitalizing on, profiting from, and taking credit for the works of other creators. Further, the distinction between commercial and non-commercial use is especially problematic. It is quite possible for a user of an orphan work to reap significant promotional benefit from the use of a work, while claiming that the use is non-commercial because no offering was made, and no commerce transacted. The amendment sets the stage for considerable litigation on this topic. We therefore suggest that Congress edit the language of the amendment so as to apply the precedent set by the Fair Use provisions of copyright law. Specifically, the use of an orphan work should be prohibited where such use might affect the market for or value of the work. We further suggest that the amendment expressly define commercial use, and limit the commercial use of orphan works.

A Model for Litigation: Rights of Publicity and Rights of Privacy

By opening the floodgates to unauthorized use of protected works, the proposed amendment will result in a tidal wave of litigation as the result of rampant and widespread violation of the rights of publicity and rights of privacy of persons pictured in the orphan works. A photographer's right to exploit copyright in a photograph (and to grant licensed rights to others) is effectively limited by the right of any person

appearing in the photograph to control or otherwise limit the use of his or her likeness. State laws governing rights of privacy and publicity very often require that permission be obtained from pictured subjects prior to the exploitation of a photograph bearing likenesses of persons. Such permission is most often granted to photographers and their clients by execution of agreements known as "model releases." The terms and conditions of model release agreements often limit the use of the photographs, and may specify certain excluded uses. For example, some model releases prohibit commercial use or use related to tobacco or alcohol products, pornography, or political causes. When a photographer or copyright owner controls the use of a photograph, the photographer acts as a gauntlet through which all use of the photograph must be approved. In this way, photographers carefully control and limit such use so as to avoid the violation of rights of privacy and publicity of pictured persons. Under the proposed orphan works amendment, that gauntlet no longer exists, and that control goes out the window. Parties making use of orphan works will serially violate the rights of publicity and privacy of pictured persons. Photographers will be sued by models for allowing the works to "go orphan." This wave of litigation between models, photographers and the users of orphan works over publicity and privacy rights will be a particularly disastrous consequence of the proposed amendment. We therefore propose that the amendment be revised so as to expressly limit the use of any orphan work bearing the likeness of a person or persons to personal, non-commercial use only, and to exclude the right to distribute, perform or create derivatives of such works, unless express written permission is obtained from the pictured subjects in advance.

In the Art World, "Fair Market Value" is an Oxymoron

As in other markets, pricing in the photography and illustration marketplace is determined by the fundamental market forces of supply and demand. In this free market, scarce, high quality images garner the highest fees, while the most common images typically garner the lowest fees. The market value of a particular license for a given photograph by a given photographer is often based upon a number of

contributing factors, most notably the quality and scarcity of the image and the location of the photographer, but also in great measure the brand equity of the photographer. In the proposed amendment, the Copyright Office upsets the apple cart of free market forces by legally sanctioning the flooding of the market with free product, and then mandating that upon discovering unauthorized use of a work, the owners are only entitled to receive "reasonable compensation" based upon a mythical "fair market value" of the work. The imposition of such artificial price controls will corrupt the entire marketplace, and is another disaster in the making.

The Copyright Office suggests that a license fee paid for a particular photograph or photographs determines the fair market value of reasonable compensation for the use of another photograph. The Copyright Office overlooks the fact that all photographs are not equal, and that by extension, the fees associated with the use of any one photograph or group of photographs does not necessarily determine the fair market value of the fees associated with the use of any other photograph. The Copyright Office also assumes that one photographer would agree to provide a particular license to a client at a certain price, or even for free, just because other photographers have done so. This assumption is both incorrect and unreasonable.

In a given publication, if one photograph pictures a seventy-one year old Elvis Presley, relaxing in seclusion at a Palm Springs estate, while another photograph features an egg on white background, would the reasonable compensation for both photographs be identical? Further, would a portrait by well-known photographer Richard Avedon garner the same "reasonable compensation" as a portrait by Joe's Passport Photo Emporium or your Aunt Ida? While one photographer's reasonable fee for a certain license might be $25, another photographer's reasonable fee for that same license might be $2500, and yet another's fee might be $25,000 or even more. That amounts for a 100,000% variance in "fair market value" between licenses offered by different photographers, for different photographs. The Copyright Office proposal overlooks this considerable real diversity in fees.

The Copyright Office proposes that fair market value must be determined by the amount that a willing buyer would have paid a willing seller had they engaged in negotiations before the use commenced. In making this proposal, the Copyright Office relies heavily on Davis v. The Gap Inc 246 F 3d 152 (2d Cir 2001). We call your attention to Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977), later cited in Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc., 772 F.2d 505 (9th Cir. 1985), in which the court determined fair market value to be the amount that a seller would have "reasonably required" a user to pay before the use commenced. The distinction is all important – the court in both the Krofft and Frank matters established that it is the seller's reasonable requirement, and not the buyer's willingness to pay, that sets the standard for Fair Market Value.

The application of fair market value to orphan works is problematic. Under the proposed amendment, upon discovering an unlicensed use, a copyright owner is not a willing participant, has no accurate means of determining the relevant facts (the extent of the use) and is required to act. In addition, the copyright owner has few practical remedies, given that injunctive relief (for derivative works), statutory damages and attorney's fees are eliminated by the proposed amendment.

It seems that the Copyright Office is proposing that fair market value be determined by the prevailing lowest fees for a particular use. This proposal is inconsistent with the definition of Fair Market Value, and is anything but "fair" to copyright owners. Further, the determination of any prevailing fees would be problematic, as photographers are prohibited by anti-trust laws from discussing fees.

The proposed amendment effectively places all burden on the photographer to establish "reasonable compensation" based upon "fair market value." This requirement will force photographers to divulge confidential and proprietary information and financial records, such as income tax returns, past licenses to other

clients, accounting books, and contracts with third parties. Photographers will be required to do this for each and every party that uses a photograph under the proposed amendment. This places an undue burden on photographers, who have limited resources and whose clients often require confidentiality.

Notwithstanding these considerations, the provision for reasonable compensation is almost entirely useless to photographers, as photographers will have no leverage to collect such fees. Without the remedies of injunctive relief, statutory damages and attorney's fees, photographers cannot afford to retain legal representation or to otherwise pursue collections. The cost of a suit will far exceed the amount owed, invoices will go unpaid, and debts will be uncollectible. We have no viable suggestion for addressing this challenge, but stand ready to explore potential solutions with other industry groups.

A Court of Orphan Works?

We are aware of a proposal for the creation of a new small claims court system dedicated to litigation of orphan works matters, to address the storm of litigation that will, without question, result from the proposed amendment. This would be a classic example of the tail wagging the dog. We believe that it would be more fiscally appropriate to seek a solution to the orphan works issue that does not result in the need to create, operate and fund an entirely new federal court system, indefinitely. Further, we have significant doubt that copyright infringement matters can be adequately adjudicated in a small claims court environment. The federal rules of evidence and the discovery process are essential to determining the scope and circumstances involved in an infringement. The federal rules of evidence do not apply in small claims court matters. Without a discovery process, there can be no organized exchange of evidence, depositions, and information associated with the infringement. Nor can there be expert testimony as to industry standards and practices, or the fees that the seller would have reasonably required of the user under the circumstances. The court will have no means of making accurate determinations,

other than relying on hearsay and opposing statements and assumptions made by plaintiff and defendant.

In short, we believe that the proceedings will be a farce, and will place undue additional strain on an already overloaded court system. While small claims court may be an appropriate forum for landlord/tenant disputes and unpaid gardener's bills, intellectual property licensing issues based upon federal copyright law are far more complex, require considerable discovery and legal expertise, and have no place in such courts. We would, however, support the development of optional Alternative Dispute Resolution (ADR) for orphan works matters, only in situations where both the user and the owner agree to submit to ADR. This would avoid the need to establish a federal small claims court, and would provide a means of quickly and inexpensively resolving minor misunderstandings over small license fees associated simple uses of orphan works. If ADR is established for orphan works matters, artists must have the option of pursuing copyright remedies in federal court at the artist's sole discretion.

A Registry of Works and Authors

There are billions of photographs in existence, many of which have not been digitized, and millions of which have been published without attribution. There is no centralized registry of photographs or of photographers. The sheer numbers of photographs (both digitized and not) would almost certainly frustrate any effort to create a comprehensive registry allowing a meaningful search for the authors of anonymous orphaned works. The Copyright Office has no such database of images and to our knowledge has no plans to create such a database.

It has been proposed that centralized databases of orphan works inquiries be created, so that owners can monitor attempts to locate orphan works and connect with users. Most professional photographers have very limited resources, and to survive, must concentrate on creating and licensing photographs. At the same time, photographers must struggle to identify and police infringement of their works. This

challenge was difficult enough before the advent of the internet. Now that photographs may be easily scanned from printed matter and copied from the internet, the challenge is overwhelming. It is not reasonable to expect that photographers will dedicate precious limited resources to sift through huge numbers of orphan works inquiries in an attempt to identify their works and to reply before their works are exploited by third parties.

Imagine yourself a photographer. You create hundreds or thousands of images each month, tens of thousands of images each year. The Copyright Office proposes to remove copyright remedies unless you and your heirs undertake to monitor all requests for use of all of your many thousands of photographs, every day, for the rest of your life, and for 70 years after your death (the life of your copyright). Apparently the Copyright Office expects that you will wade through thousands upon thousands of such requests on a regular basis, with the hope that you might one day come across an inquiry that happens to describe one of your inventory of tens of thousands of photographs. Picture yourself scrolling through page after page of inquiries, including inquiries such as "I'm looking for the photographer who shot a picture of trees. Please call me at…" or "I'm looking for the author of a picture of a man in a blue suit." The fact is that as the author of hundreds of thousands of images during your lifetime, you might not recognize your own photograph in such a list, even if you happened upon the description.

Now imagine that you are a photography stock agency, with millions of images in your inventory. How can you possibly recognize a description submitted by a party seeking to identify the author/licensor of one of those millions of photographs? By memory?

The proposed amendment strips photographers of statutory damages and attorney's fees in the event of unauthorized use of orphan works, even where the artists have registered their works with the Copyright Office in advance of the unlicensed use.

We find it extraordinary that the Copyright Office would move to eliminate the benefits of registering with the Copyright Office. An artist who has diligently complied with legal formalities so as to best protect his rights should not lose those rights based solely upon an utter stranger's desire to exploit the artist's protected works. As justification, the Copyright Office Report on Orphan Works asserts that registered works are unlikely to become orphan works, because a search of copyright registration claimants by name will locate the author. Unfortunately, this assertion by the Copyright Office is not rooted in the facts. Arguably, in the vast majority of cases involving orphan photographs, the name of the author will be unknown. In such situations, a successful search of copyright registrations without the author's name would be impossible. Even if a name were known, the contact information in an archived registration may not be current, and thus may not lead to the author. Further, searches by title are also nearly useless in locating specific photographs, due to non-specific titles used on copyright registrations of hundreds of works. Ironically, the Copyright Office has proposed the elimination of the primary incentives for copyright registration.

Primary Types of Visual Arts Orphan Works:

(1) Attributed works (creator/owner name attached or known)
(2) Anonymous works (works with no creator/owner name attached)

The considerations in addressing these two types of orphan works are entirely different, and should be treated separately under the amendment.

Regarding attributed works, a registry of authors/owners may be established using current technology and at minimal cost and burden to authors and owners. While such a registration requirement may be in conflict with international treaties, the benefits clearly outweigh the costs.

For anonymous works, the technology exists today that allows a search by image. The technology is currently imperfect and often requires human intervention. Thus, technology is not the answer to the current problem, and its usefulness should not be relied upon in drafting this amendment, as it does not allow for large scale/widespread mission-critical use at this time. Even if the technology were ready for such use, the burden on copyright owners would be far too great. Such a directory of works would by necessity need to include all works of all artists and copyright owners. Each copyright owner would need to digitize and upload many thousands of artworks, and to continue doing so on a continual basis. Even if the cost of registration were minimal, the costs in terms of preparation and registration would bankrupt most artists. Some artists, particularly photographers, have tens of thousands of works in undigitized form, and create works at such a pace that one or more full time employees would be required just to upload works to the registry.

We would support the creation of a registry of authors and owners by name, to allow users to locate authors/owners of attributed works. This, however, does not address the issue of locating the authors/owners of anonymous works, which is a very different and far more challenging task. We suggest that if Congress is to amend copyright law in such a way as to force the creation of registries so as to comply with the law, Congress should appropriate necessary funds for the creation and maintenance of the registry.

International Issues – A Pandora's Box

With respect to this nation's participation in international intellectual property treaties and agreements and our obligation to all other signatories, a Pandora's Box of international conflict and bad faith dealing will be opened by exposing foreign works to exploitation under the orphan works amendment. The orphan works amendment conflicts with both the spirit and the letter of the Berne Convention, and will directly violate Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Specifically, the removal of copyright owner protections for orphan

works is a "limitation and exception to the exclusive rights" of copyright owners, and will both "conflict with the normal exploitation of the work," and "unreasonably prejudice the legitimate interests of the rights holder." In addition, by creating the expectation or requirement that owners of foreign and domestic works place attribution on their works and register themselves and their works so as to enjoy their exclusive rights, the orphan works amendment clearly violates both Berne and TRIPS. In the two following sections, we explain the effect of orphan works on the exclusive rights of the owner.

Loss of Exclusive Rights

Under copyright law, artists own the exclusive rights to copy, distribute, display, transform, and perform their works. Most artists earn their living by licensing elements of those rights to others, on an exclusive or non-exclusive basis. By allowing anyone to use a protected work simply by failing to locate the author, the proposed amendment effectively prohibits the granting of an exclusive license. When artists lack the ability to control and monitor use of their works, they will have no means to determine the use status of a work, and thus no means of guaranteeing or offering exclusivity to any customer. Without the ability to guarantee exclusivity to customers, the value of an artist's works is significantly diminished. This proposed elimination of the most fundamental rights of a certain class of copyright owners is not only inequitable, but is a travesty.

Unauthorized Use of an Orphan Work Diminishes its Value

The proposed amendment will allow users to exploit orphaned works without limitation, and without the owner's knowledge or permission. Each such unauthorized use will serve to diminish the value of the copyright in the work, by imposing limitations on the exclusive rights of the copyright holder. If an orphaned photograph were to be used on the cover of a book, it is highly unlikely that the copyright owner could ever interest another publisher in licensing the right to use that photograph on the cover of a book. In addition, certain objectionable uses of an

orphan work may damage or destroy the residual value of the exclusive rights in a work over its entire copyright life, leaving the owner with a worthless work. In such instances, and in many others, the limitations on rights and remedies imposed by the orphan works amendment conflict with the owner's normal exploitation of the work, and prejudice the legitimate interests of the owner, in direct violation of TRIPS.

Objectionable Use

Under the proposed amendment, an artist's work may be used by anyone, for any purpose, to promote any product, company or cause.

- A photographer whose wife died of lung cancer might discover that his photograph of a cowboy was used as an orphan work in tobacco company advertising to promote cigarette use.
- A photographer whose grandfather is a holocaust survivor might discover that his photographs were used under the orphan works amendment by the Aryan Nation to promote hatred of Jews.
- A mother's photograph of her infant daughter might be used under the orphan works amendment on an abortion website promoting pro-life or pro-choice, in opposition of the mother's views.

The orphan works amendment has no provision preventing the use of orphan works in a manner that might be held to be reprehensible by the owner. Thus, the orphan works amendment conflicts with the owner's enjoyment of his exclusive rights in his property -- another violation of TRIPS.

What Exactly is a "Good Faith, Reasonably Diligent Search?"

The Copyright Office proposes that users desiring to exploit a potential orphan work perform a "good faith, reasonably diligent search" to locate the owner. This description, if left unchanged, will mire both users and owners in litigation for years to

come. Specific procedures and requirements must be expressly defined for the required search. We look forward to working with all interested parties to arrive at an acceptable search. We further propose that a user's responsibility to locate the owner must not end with a single search prior to use. Rather, if the user is to acquire the right to exploit the work at no cost, we believe it is reasonable to expect that users will continue the search throughout the period of use of the work. We suggest that users be required to repeat the search every six months, indefinitely, until such time as the user locates the author, or ceases use of the work. We suggest that failure to comply with the search requirements should allow the author enhanced remedies in the event that the use is eventually discovered. Such enhanced remedies should include statutory damages, actual damages, profits, and injunctive relief, regardless of the copyright registration status of the work.

Mandatory Attribution

The Copyright Office has suggested that authors must bear the burden of including attribution in their works, so as to prevent their works from being orphaned. We discuss the problems with this suggestion elsewhere in this document. Setting Berne and current copyright law aside, if Congress is to amend copyright law in such a way as to create the expectation or requirement that artists must provide attribution on their works so as to avoid such works being orphaned, then it follows that to ensure the integrity of that attribution, Congress must also amend copyright law so as to require all users of all works (not just orphan works) to reproduce that attribution wherever works are copied, published, distributed, displayed, transformed or performed. We encourage Congress to provide artists with the remedies of statutory damages actual damages, profits, and attorney's fees in the event that a work is used without attribution. If Congress elects not to create such a burden on the users of works, then Congress cannot in good conscience pass the orphan works amendment, which leaves artists works completely exposed to being orphaned when works are used without attribution. We believe that the time has come to memorialize

the right of attribution in this nation, not just for limited edition works made for exhibition, but for all works.

Loss of Jobs

As an unintended result of the orphan works amendment, artists and other independent creators will suffer a significant loss of revenues, due to a preponderance of readily available of free orphan works on the marketplace. We expect that in this already challenging economy, the orphan works amendment will be the last straw for many of these small business owners. Many will be forced to lay off their employees and fold their businesses. While these small businesses typically employ between one and three staff members, the collective effect of numerous small businesses shedding their employees will have a significant impact on local economies. This unfortunate consequence will increase unemployment across this nation.

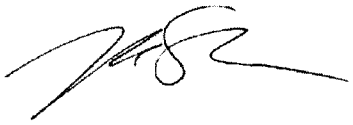
Conclusion

Clearly, the proposed orphan works amendment will require significant revision. In light of the aforementioned issues, we request your consideration in providing a suitable time period for all interested parties to discuss and explore the challenges presented by the proposed amendment, and to collectively arrive at a mutually acceptable solution. We request at minimum a six month period to address this very complex issue. We pledge to work steadfastly and in a cooperative spirit to resolve all issues.

Artists and their businesses hang by a thread, and that thread is copyright law. On behalf of thousands of artists across this nation, we implore you to leave the scissors on the table, and urge you to work with all parties towards the creation of an equitable orphan works amendment that provides access to certain works for certain use, while respecting the rights of artists and other copyright holders. Let's not kill the parents to save the orphans!

We thank you for your consideration, and request the opportunity to speak before any committees considering this amendment and any associated legislation.

Respectfully,



Jeff Sedlik
Chief Advisor on Licensing & Copyright, Advertising Photographers of America

Edited by Constance Evans,
National Executive Director, Advertising Photographers of America

Jeff Sedlik serves as the Chief Advisor on Licensing and Copyright for the Advertising Photographers of America (APA). A past National President of the APA, Sedlik is a working professional photographer with twenty years experience, creating photographs for advertising and editorial use.

Constance Evans, National Executive Director of the Advertising Photographers of America, is also a working artist.

The Advertising Photographers of America (APA), a leading non-profit trade association representing the interests of professional photographers, promotes the highest standards and ethics in the photographic and advertising community, provides educational resources, and fosters an environment conducive to achieving success in the industry. The APA membership reflects the diverse creativity and extraordinary talent of advertising photographers from across the country.

April 6, 2006

Honorable Orrin G. Hatch
Chairman, Senate Judiciary Intellectual Property Subcommittee
104 Hart Office Building
Washington, DC 20510

Honorable Patrick Leahy
Ranking Member, Senate Judiciary Committee and Intellectual Property Subcommittee
433 Russell Senate Office Building
Washington, DC 20510

Re: Orphan Works; Proposals for a Legislative Solution

Dear Chairman Hatch and Ranking Member Leahy:

The American Federation of Television and Radio Artists (AFTRA) deeply appreciates your commitment and leadership on copyright and intellectual property issues of such crucial importance to our members, and thanks you for conducting this hearing on "Orphan Works."

AFTRA is a diverse national union representing over 70,000 recording artists, professional performers, and broadcasters throughout the country. AFTRA's membership includes approximately 14,000 recording artists and singers who make their living creating and performing on sound recordings. The ongoing royalty revenue stream from these sound recordings is vital to the financial well-being of our artist members. Consequently, any proposed legislation that alters the treatment of sound recordings will greatly impact our membership.

While the statutory language recommended by the United States Copyright Office on orphan works focuses primarily on the impact that a new orphan works regime will have on constituencies in the publishing sector, such as publishers, photographers, and illustrators, the purpose of this letter is to address the profound impact it will have on the unique constituency of sound recording artists. Indeed, the designation of sound recordings as orphan works could have a potentially adverse affect on the ability of sound recording artists to approve, and collect royalties from, the exploitation of their work.

The Copyright Office has recommended that after a prospective user of a copyrighted work has conducted a "good faith, reasonably diligent search" to find the owner of the work, and is unable to locate that owner, the prospective user should be allowed to exploit the work without fear of being held liable for infringement in an action brought by the copyright owner should he or she later emerge, except to the extent reasonable compensation would be due the owner. The proposed bill does not provide any payment to the artist.

While AFTRA supports the important goals of making intellectual property available to the widest possible audience to foster artistic development and a richer culture, we assert that additional steps to protect sound recording artists should be followed before a prospective user

who has no relationship to the creation of the work, obtain the right to exploit the work, especially for commercial purposes.

Specifically, AFTRA supports legislation that would require the prospective user of a copyrighted work to conduct a "good faith, reasonably diligent" search for the original author (i.e., the original sound recording artist(s) who created the work) if the copyright owner cannot be found, and that, if found, the author would stand in the shoes of the absent copyright owner. This approach would protect the party with the next greatest interest in the copyrighted work with respect to assuring proper use of the work and appropriate compensation for the exploitation of the work.

Small and independent record labels regularly go out of business and as a consequence, it is not uncommon for the copyright owner (i.e., the label) to be lost or missing. On the other hand, the author of a sound recording (the recording artist) is often readily locatable and could preserve the property interest in the creative work. This is particularly appropriate in the case in which the original author has a contract with the missing copyright owner pursuant to which the author would otherwise benefit in the event of future publication of the work or of any derivative works.

A potential user of a copyrighted sound recording should not be able to avoid paying a royalty to the author of a copyrighted work simply because the copyright owner is now lost or the owner's business is bankrupt or closed. The sound recording artist(s) who created the original copyrighted work should be entitled to receive reasonable compensation and attribution for the use of the work, even where the absence of a record label renders the work "orphaned." Furthermore, the non-featured artists on a sound recording should be entitled to compensation for any future commercial exploitation of the "orphaned work" in accordance with the terms of a collective bargaining or other written agreement with the missing copyright owner.

In addition to the right of attribution and reasonable compensation, any orphan works legislation must protect locatable recording artists by granting them the right of approval over any potentially disparaging or damaging use of their sound recordings, such as pornographic movies or violent video games. A recording artist's reputation, and indeed, career should not be subject to ruin because of a missing owner.

Finally, AFTRA asserts that given the often prohibitive cost of mounting an orphan works challenge, any orphan works legislation should provide the challenger of an orphan works designation with the ability to recover attorney's fees in a successful action.

AFTRA is grateful for the careful review you are giving to the complex issue of orphan works and respectfully requests that you take these comments into consideration as you move forward on this important legislation.

Respectfully submitted,

Kim Roberts Hedgpeth
National Executive Director

Before the Subcommittee on Intellectual Property
Committee on the Judiciary
United States Senate

COMMENTS OF
THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS
ON LEGISLATIVE PROPOSALS REGARDING ORPHAN WORKS

April 13, 2006

The American Society of Composers, Authors and Publishers ("ASCAP"), on behalf of its more than 230,000 members, thanks the Subcommittee for the opportunity to comment on the legislative proposals offered by the Copyright Office in its Report on Orphan Works and discussed at the April 6, 2006 hearing "Orphan Works: Proposals for a Legislative Solution."

Introduction

ASCAP commends the Copyright Office for its diligent and thorough work in examining the "orphan works" issue, and the Subcommittee for its timely hearing.

It is important at the outset to recognize a distinctive feature of the orphan works issue. Unlike many other copyright issues, the extent of any problem here varies widely depending on the type of copyrighted work involved. In simple illustrative terms, while it may be necessary to address the issue for graphic works like photographs and illustrations, that necessity is not present when addressing the issue for musical works—this because of the different ways in which the artistic and commercial communities dealing with these different types of works have developed and operate. Therefore, as detailed further below, any legislation addressing the issue must be flexible enough to account for the differences in copyright sectors.

The Report includes proposed legislative language, which, as drafted, would affect all types of copyrighted works. For our purposes, however, ASCAP limits its comments to the

impact of the proposed legislation on musical works, which are written and owned by ASCAP's composer, lyricist, songwriter and music publisher members, and on the nondramatic public performances of these works that ASCAP licenses.

The Need for Legislation

ASCAP does not actively seek the enactment of orphan works legislation because, in ASCAP's experience, there is no substantial orphan works problem with regard to musical works or their nondramatic public performance.

When the clearance of nondramatic public performance rights is involved, very few, if any, musical works can be considered "orphaned." ASCAP's repertory contains millions of musical works, and licenses from ASCAP and the other United States performing rights organizations ("PROs") cover nondramatic public performance rights in, for all intents and purposes, every copyrighted musical work. ASCAP (like the other PROs) issues a bulk, collective license, which gives access to the entire repertory for one fee, and importantly, does not require music users to contact individual copyright proprietors for permissions. A music user who holds licenses from ASCAP, BMI, and SESAC is certain to have cleared the nondramatic public performance rights to virtually all copyrighted musical works, without needing to locate or identify the authors or copyright proprietors.

Moreover, music users face relatively few difficulties in obtaining clearance information. The PROs maintain extensive databases of information about the musical works in their respective repertories, which creators and music users can freely access at any time and without charge to determine where to obtain rights and clearances.

ASCAP, for example, offers such information through its ACE database, located at http://www.ascap.com/ace. ACE contains all musical works in the ASCAP repertory that have

appeared in any of ASCAP's domestic performance surveys since January 1, 1978, and all works registered with ASCAP since January 1, 1991, whether surveyed or not. It also includes copyrighted arrangements of public domain works and foreign compositions licensed by ASCAP in the United States. For each title, ACE maintains records of the identity of the ASCAP composers, lyricists and songwriters, including co-writers who are either affiliated with other PROs or not affiliated with any organization; the names, contact persons, addresses, and phone numbers of publishers or administrators of the works; and even the names of some of the performers who have made commercial recordings of the works. If a title or information is not available on ACE, music users can contact ASCAP's Repertory Clearance staff by telephone, e-mail, or traditional mail for additional information and assistance.[1] Each year, ASCAP processes thousands of such requests. ASCAP is also continually innovating and enhancing its information database. For example, ASCAP members recently gained the ability to register and update information about their works online—further ensuring that the database remains reliable and up-to-date. Together, the musical works databases of the PROs and other music organizations are an invaluable resource that provide useful ownership information on virtually all copyrighted musical works.

Despite these reservations, ASCAP welcomes certain aspects of the drafted legislation. ASCAP commends the Copyright Office and the drafters for properly defining an orphan work as a work whose copyright owner cannot be located, rather than one whose owner does not

[1] Indeed, as the Subcommittee knows, ASCAP operates under an antitrust consent decree, the Second Amended Final Judgment entered in United States v. ASCAP, Civil Action No. 41-1395 (WCC) (S.D.N.Y. 2001) ("AFJ2"). Section X of AFJ2 requires ASCAP, upon written request, to inform any music user whether any work identified by title and writer is in the ASCAP repertory, or make a good faith effort to do so if other information is provided, and to make the ACE system available. ASCAP will also forward requests for licenses for individual works to the members-in-interest.

respond to requests for permission. (Orphan Works Report at 97.) The proposed legislation also rightly refuses to divest copyright owners of all their rights as a consequence of a work becoming orphaned.

Moreover, ASCAP does not oppose the basic premise of the proposed legislation—preserving the exclusive rights of copyright owners, and merely limiting damages in certain circumstances. This favorable approach contrasts to other options discussed at the April 6 hearing: statutory licensing and requiring copyright renewal. The former proposal—compulsory licensing—is a remedy warranted only in the most extraordinary circumstances. Such licenses encumber copyright owners' exercise of their statutory rights, and tend to diminish the full and fair market value of copyrighted works. Indeed, as an organization whose members create and own musical works subject to various statutory licenses under the Copyright Act, ASCAP is keenly aware of the heavy burdens that compulsory licensing imposes on composers, lyricists, songwriters and music publishers. With regard to the latter proposal, renewal is a formality that would unfairly prejudice all copyright owners and run afoul of our nation's international obligations under the Berne Convention and the TRIPs Agreement. (Id. at 104-05.) Such legislation would also reverse generations of progress, given that Congress has deliberately and consistently reduced and eliminated formalities as a precondition for copyright protection over the last decades.

Safeguards for Writers and Publishers of Musical Works

Given the lack of a substantial problem in connection with musical works and their nondramatic performance, it is essential that any orphan works legislation not unfairly prejudice the rights of composers, lyricists, and music publishers. Accordingly, ASCAP recommends that, if the draft legislation is to be introduced, Congress clarify it in two respects.

1. Reasonably Diligent Search

ASCAP commends the suggestion raised at the April 6 hearing that the Copyright Office prepare a list of examples of what would constitute a reasonably diligent search. As currently drafted, the legislation proposed by the Copyright Office fails to define a "reasonably diligent search." ASCAP believes the legislation—or at least the legislative history—should include some practical examples, or at least order the promulgation of regulations concerning the definition of a reasonably diligent search.

To that end, a "reasonably diligent search" by a user of musical works must include a search of publicly-available ASCAP resources, as well as those offered by BMI, SESAC, and other music organizations like HFA. And such a search should not merely require the use of online resources, but also a direct inquiry of the organizations if the online inquiry is unavailing. As explained above, ASCAP and these entities maintain and provide a crucial service for anyone who wants to use musical works—free, readily accessible, and easily searchable databases and "editing" services on virtually all copyrighted musical works in existence. These resources should form the backbone of any reasonable search. Indeed, the Copyright Office has endorsed this approach:

> One of the most important factors in determining whether a search was reasonable is the extent to which information about the copyright owner's identity and location are available in publicly available registries, databases, or other sources.
>
> . . .
>
> [T]here currently exist other non-governmental resources with author and ownership information, which would likely be part of any reasonable search. For example, ASCAP and BMI are two primary resources for information about musical works . . . . [I]t would seem necessary that a reasonable search would include consulting these organizations for information about the work at issue.

(Id. at 103.) Consistent with the Copyright Office's stance, the draft legislation, or at the very least the legislative history, should clarify that a work is not orphaned if the user has not reasonably searched both the online (i.e. ACE database) and offline records of ASCAP and the other PROs and music organizations.

If more detailed examples are necessary, ASCAP supports the formation of industry-specific guidelines. ASCAP looks forward to participating with the Copyright Office and other creators, owners, and users of musical works to craft appropriate guidelines for what constitutes a reasonably diligent search for musical works.

2. Monetary Relief

In an action against the user of an orphaned musical work for its unauthorized nondramatic public performance, the legislation should clarify that monetary relief be in an amount no less than the music user would have paid for the appropriate licenses. As drafted, the proposed legislation requires that "no award for monetary damages (including actual damages, statutory damages, costs or attorneys' fees) shall be made [against the user of an orphan work] other than an order requiring the infringer to pay reasonable compensation for the use of the infringed work . . . ." Draft 17 U.S.C. § 514(b)(1)(A) (emphasis added). Under the consent decree that governs ASCAP's activities, ASCAP already grants music users access to its repertory for reasonable fees. See AFJ2 § IX. By definition, then, music users already benefit from reasonable fees, and their use of orphan works should not occur at a discount.

Conclusion

In its experience, ASCAP does not believe orphan works legislation is necessary for musical works or their nondramatic public performance, and consequently neither supports nor opposes enactment of such legislation. It is crucial, however, that any orphan works legislation

provide adequate safeguards to ensure the Copyright Act continues to protect the rights of composers, lyricists, and music publishers.

ASCAP stands ready to assist the Subcommittee and the Copyright Office in whatever way it can.

Statement of June Cross
Assistant Professor of Journalism
Columbia University
Documentary Journalist

Before the
Committee on the Judiciary
Subcommittee on Intellectual Property
United States Senate

on
"Orphan Works: Proposals for a Legislative Solution"

Washington, DC
April 6, 2006

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Chairman Hatch, Ranking Member Leahy and Members of the Subcommittee, my name is June Cross. I am an Assistant Professor of Journalism at Columbia University and a documentary journalist. For nine years I worked as a reporter and correspondent for the NewsHour and have also worked for CBS News and Frontline. I worked with Blackside, the makers of Eyes on the Prize, on their last project, entitled "This Far by Faith: African-American Spiritual Journeys." I am also well-known for an autobiographical documentary about my own life called "Secret Daughter." I thank the Subcommittee for inviting me to testify on the issue of orphan works.[1]

My comments today represent the view of a wide variety of independent and documentary film and independent media organizations, including: Association of Independent Video and Filmmakers; Doculink; Film Arts Foundation; FIND (Film Independent); International Documentary Association; IFP (Independent Feature Project); National Alliance for Media Arts and Culture; National Video Resources; and Public Knowledge. Together, these organizations represent hundreds of thousands of independent and documentary filmmakers, video artists, production facilities, community

[1]I would like to thank Jason Kakoyiannis and Kaveh Shakeri, students in Professor Jennifer Urban's Intellectual Property Clinic at the University of Southern California Gould School of Law, and the staff of Public Knowledge for their work in preparing this statement.

technology centers, film festivals, media distributors, film archives, after-school programs, community-access television stations and individuals working in the field of film and media arts.

We rely on our copyrights to protect our vision and allow us to monetize a labor of love, and believe in strong and clear copyright protection. At the same time, artists and supporting organizations are affected by the uncertainty surrounding the use of copyrighted works for which the owner cannot be found.

Introduction

I think the best way to put the orphan works debate into perspective is by telling stories – stories about how the inability to find copyright holders has affected my and my fellow filmmakers' work.

A friend of mine was trying to clear rights recently to use footage of Martin Luther King accepting the Nobel Peace Prize. As King enters the auditorium, trumpets play a celebratory fanfare.

The composer who was identified had died; the work was not registered on either BMI or ASCAP. Further research revealed that the fanfare is derived from a traditional Nordic song. The song has no composer. The composer who arranged the fanfare had never registered it, although other works appear under his name. It was the filmmaker's opinion that the composer had never meant to copyright this work.

Whether or not he'd be allowed to get away with this depends on the outlet. PBS uses an exemption for music that allows filmmakers to pay into an escrow account. Most commercial networks and all cable channels would force the filmmaker to delete the music from the scene. It may seem like a small thing, but it has a chilling effect on a

filmmaker's ability to create mood and nuance, and to tell a true story – the very things that make television so compelling.

Ten years ago I made a film about my own multi-racial family, a family that lived in New York and split apart during the 1950s. I did not even meet my biological father until I was nearly thirty. As part of the research, I acquired hours of footage of the streets of Harlem from one of the various archive houses that sells it, but doesn't claim to own the underlying rights. In one of the reels and reels of tape, I stumbled across a picture of my own father holding me when I was barely six months old. After weeks and weeks of searching, I was able to find the owner of that footage, an elderly home movie buff who had sold all his raw material to an archive house. I was able to spend those weeks searching because the film was for PBS. Under the time frame most commercial networks work, it would have been impossible to find the owner before air. I shudder to consider what might have happened had I not found him – a key piece of my own puzzle would have gone missing.

I have had to deal with the problem of orphaned works on two other occasions: once when trying to find footage of Billie Holiday singing; again when trying to find footage that documents the Black Panther Party during the sixties. The best footage of Billie Holiday singing comes from an unknown TV show that is thought to be in the public domain. However, no one is sure, and that is why so few outside of the world of archivists have ever seen it.

One piece that has escaped scrutiny is the often seen footage of the Black Panther Party going through their paces in Oakland during the sixties. Associates of mine have spent months trying to find the person who shot that footage, to no avail. We have no

idea where it came from. When we use it, we claim it is public domain, cross our fingers, and hope for the best. We try not to use too much of it, lest the grandchild of the person who shot it comes after us.

Filmmakers sit around and talk about archived material that will never be seen because we can't document its origination. These are jewels of our culture; pieces of our history that are lost; hidden from view as surely as if we were censured. The need to document the source, obtain the rights, and assume the risk of liability when we cannot find the source, has the affect of limiting our First Amendment right to free speech.

This subcommittee, and the Congress, have before them a tremendous opportunity to inject new vitality into our culture and our democracy by ensuring that forgotten orphan works find new audiences, and that those artists seeking to use such works are able to do so without the fear of great monetary liability. For independent and documentary filmmakers in particular, a solution to the orphan works problem is critical. Particularly for works that do not lie within established archives, finding the true copyright owner is a labor fraught with difficulty. When a filmmaker cannot clear an orphaned work, she is left with two choices under the present system: 1) proceed, using the work, with the knowledge that unknown liability costs—or even an injunction—may lie ahead; or 2) refrain from using the work. Without a large institution to help spread the monetary risk, with the knowledge that she will have to compete aggressively to sell her film to often risk-averse distributors, indemnify them, and obtain insurance, and with the possibility of an injunction that could squelch her film forever, she simply cannot use the orphaned work. As such, the creative work that she has conceived and would like to present to the public is compromised, and the orphaned work languishes in obscurity.

This very same problem affects all artists, big and small, publishers, libraries, museums and many others. That is why so many of these individuals, companies and organizations have agreed that Congress must act to give protection for those users of orphan works who make a good faith effort to find the copyright holder. For filmmakers, that protection can best be achieved with a cap on damages should the copyright holder appear – this would make the extent of the risk known to those who must insure us, and to those who force us to indemnify them, and would give them a measure of certainty about orphan works that will permit the creative process to move forward.

The Copyright Office Report

The filmmakers that I represent here today wish to express their deepest appreciation to Chairman Hatch, Ranking Member Leahy and your counterparts in the House, Representatives Smith and Berman, for asking the Copyright Office to address the issue of orphan works. We believe that the Copyright Office undertook the task you gave them with great seriousness and respect for the views of parties across the spectrum of users and copyright holders. The result is a thoughtful and comprehensive report that evidences great understanding of the problems faced by individual artists seeking to make use of copyrighted works for which the author cannot be found.

What has made this process and this *Report* so rare is that there is much agreement both about the need for a solution to the orphan works problem and about what that solution should be. Like many of the large and small copyright holders and users who have participated in this process, we agree with many of the *Report*'s findings and suggestions.

First and foremost, we support the requirement of a good faith, reasonably diligent search and agree that standards of diligence should be flexible and not rigidly defined by statute. As copyright holders ourselves, we believe strongly that no copyright holder should be deprived of full remedies because a follow-on user does not undertake a reasonable search; as users of works, we understand that a reasonable search differs from medium to medium and from industry to industry.

However, we are concerned about the *Report*'s recommendations in three main areas:

1. *Remedies.* Providing remedies of "reasonable compensation" without setting a statutory limit is unlikely to provide much certainty to distributors and insurers about the potential financial risks of a film that includes an orphaned work. This lack of certainty will prove too great a disincentive for independent artists, and they will continue, as is the case today, to avoid using orphaned works. A clear statutory cap on damages will provide certainty for all parties, and is superior to a "reasonable compensation" scheme.

2. *Safe Harbor.* Millions of small individual artists may make uses of orphan works, but because that is how they make their living, those uses will have a "commercial purpose." Under the Copyright Office's proposal, those artists would not have the benefit of the safe harbor which permits them to cease a use in order to avoid paying monetary damages. The necessity of a safe harbor for individual artists is critical, particularly if Congress adopts a "reasonable compensation" standard rather than a cap on damages.

3. *Injunctive Relief.* We are concerned that the proposed Section 514(b) (2), which exempts qualified works from injunctive relief, is ambiguous, and may be interpreted in a way that would unduly limit the intended protection. We applaud the Copyright Office's effort to clarify this language, but we believe that clarification should be codified. A clear, broad definition of a follow-on work that qualifies for this protection is crucial to filmmakers and other media artists.

In addition, we seek three other clarifications and changes, including:

1) clarification as to when it should be appropriate for a limitation on remedies when a user relies on the results of a previous third-party search; 2) clear, unambiguous requirements for what constitutes a legitimate attribution; and 3) elimination of the proposed sunset provision.

A Cap on Damages is Essential to Ensuring Certainty for Orphan Works Users

The *Report* best frames the heart of the challenge in fashioning an effective orphan works solution: how can orphan works owners' rights be preserved while encouraging the use of culturally valuable materials? From our point of view, the answer to this question is to: 1) award compensation to recompense owners; and 2) be as clear as possible about setting limits on the compensation so that users know their potential liability in advance.

Thus, we agree with the *Report* and the vast majority of proposals that a meaningful solution to the orphan works problem calls for "clear limitations on the statutory damages and attorneys' fees remedies in cases involving orphan works."[2] However, the *Report's* proposed general remedy of "reasonable compensation" would not provide the necessary level of certainty or clarity to many orphan works users.

In order to give independent filmmakers the needed certainty to use orphan works, *a statutory damages cap is imperative.* The *Report* recognizes that the prospect of a large monetary award for an infringement claim, regardless of its likelihood, is a substantial deterrent for any user of orphan works. It is understandable that "reasonable compensation" may be a meaningful option for some users, particularly those with the institutional ability to spread risk. For most independent artists, however, spreading risk

[2] *Report on Orphan Works*, United States Copyright Office, at p. 115.

across a larger organization or a multitude of projects is not an option, and neither is budgeting for the potential financial costs of adjudicating a claim. This greater risk is exacerbated by the fact that independent filmmakers and other small artists operate in a market where cost is relative and difficult to ascertain in advance. As such, greater certainty of potential financial risk is critical to their ability to use a work. Overall, the small filmmaker needs to be confident that her decision to make use of an orphan work will not lead to unanticipated costs that could derail her project. Without the certainty provided by a cap, many users simply could not properly measure their potential exposure, preventing them from using orphan works

Importantly, *a statutory damages cap will benefit both users and owners*. A cap facilitates the transaction between orphan works owners and users by eliminating the need for costly litigation. When a user can properly budget for an orphan works' use, she will be in a better position to pay an emerging owner. Both the user and owner can avoid the costs and uncertainties of litigation, ensuring a monetary return to the owner. Indeed, under the "reasonable compensation" standard proposed by the Copyright Office, which looks to other comparable marketplace transactions, it is possible that the owner will receive little or no payment. Moreover, if litigation is necessary, it is possible, if not likely, that the owners' legal costs will far exceed what "reasonable compensation" he receives. The certainty of a cap provides clear incentives for owners to emerge to collect their awards (and reduces the number of orphan works overall). It also invites users to create with advance knowledge of what the cost of use will be. This is critically important for independent filmmakers and other media artists, who operate under very tight budget constraints.

We understand that there is some concern that a cap does not allow for situations where a copyright holder appears and can only recover an amount that is substantially less than she would have gotten through an arms-length license negotiation. However, this situation is likely to be exceedingly rare, as the follow-on user has already searched for the copyright holder and not found her. Though such instances may *rarely* occur, and would be unfortunate, the fact that independent users would otherwise not have the certainty to use *any* orphaned work seems the far greater harm. Additionally, the fact that the proposed limitation on remedies extends only to one use allows a copyright holder to extract value from his copyright (including any value added by attention to the follow-on user's work) beyond the limited remedies. It bears notice that filmmakers and other artists are copyright holders, and certainly do not want to undermine the rights of those who wish to exploit their copyrights. But an orphan works scheme that is unusable for large numbers of artists would extract a far dearer price from our cultural heritage than one that, in rare situations, may not fully compensate a surfacing copyright holder.

We also understand concerns that a damages cap—or other remedy limitation—could cause some users to refuse to make any payment because the user would know that the costs of pursuing a damages award by the owner would greatly exceed the amount of the capped damages. One way to address this concern is to provide for an exception to the limitation of remedies in cases where a user refuses "to negotiate in good faith." This was suggested by Associate Register for Copyrights Jule Sigall at the March 8, 2006 Oversight Hearing on orphan works before the House Subcommittee

on Courts, the Internet and Intellectual Property. Assuming that such an exception would be reserved only for cases of bad faith, we would support the idea.[3]

Regardless of the form the remedies limitation takes, an exception to that limitation would solve this economic incentive problem by preserving the right of an owner to claim attorneys' fees, actual, and statutory damages against individuals who act in bad faith. Coupled with a statutory cap, a "bad faith" exception would encourage the user to negotiate in good faith and pay compensation in the form of capped damages, while at the same time providing a level of certainty essential to orphan works legislation.

Certainty regarding potential future costs is fundamentally important to filmmakers' and other independent media artists' ability to use orphaned works. With a cap in place, neither party would have the ambiguity and expense associated with litigation. Further, clarity creates the added benefit of generally limiting the costs and burdens to the judicial system.

Should Congress Adopt a "Reasonable Compensation" Standard, it Must Define that Standard in the Law

All three of the Copyright Office's goals for an orphan works solution are facilitated by the certainty of a cap: reducing the number of orphan works; permitting use of existing orphan works; and reducing costs and burdens on all stakeholders dealing with an orphan works scenario. Although we strongly believe that a statutory cap is essential to a workable orphan works solution for many independent artists, should Congress nonetheless adopt a "reasonable compensation" remedy, there are important clarifications that can be made to the *Report*'s definition of "reasonable compensation"

[3] In fact, under proposed Section 514(a)(1), bad faith would vitiate the threshold test of a reasonable, good faith effort to find the owner. Such a victimized copyright owner would qualify for statutory damages and a judge should take the fraudulent conduct into consideration in setting such damages.)

that would provide some needed comfort to an independent filmmaker or other artist using an orphan work. Most notably, we support the addition of statutory language that makes clear how "reasonable compensation" is determined.

Although the Copyright Office's recommended statutory language does not define the term "reasonable compensation," the *Report* provides noteworthy guidance on its parameters.[4] The *Report*'s explanation that, "the burden is on the copyright owner to demonstrate that his work had fair market value," and that, "he must have evidence that he or similarly situated copyright owners have actually licensed similar uses for such amount" should be incorporated into the statute. Similarly, the *Report* states that, "it should be clear that 'reasonable compensation' may, in appropriate circumstances, be found to be zero, or a royalty-free license, if the comparable transactions in the marketplace support such a finding." We urge that the best way to ensure a clear standard is to include corresponding language in the statute. We support the addition of statutory language proposed by Maria Pallante-Hyun of the Solomon R. Guggenheim Foundation in her testimony before the House Subcommittee on Courts, the Internet and Intellectual Property:

> The copyright owner has the burden of establishing by competent evidence what a reasonable willing buyer and a reasonable willing seller in the positions of the owner and the infringing user would have agreed with respect to the infringing use of the work immediately prior to the commencement of the infringement.[5]

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[4] "Reasonable compensation would equal what a reasonable willing buyer and reasonable willing seller in the positions of the owner and user would have agreed to at the time the use commenced, based predominantly by reference to evidence of comparable marketplace transactions." *Report* at 116.

[5] *Oversight hearing on "The Report on Orphan Works by the Copyright Office, Before the House Subcommittee on Courts, the Internet and Intellectual Property, Committee on the Judiciary*, 109th Cong., 4 (2006) (statement of Maria Pallante-Hyun, Associate General Counsel and Director of Licensing, The Solomon R. Guggenheim Foundation)

In addition, the legislative history of orphan works legislation should include examples of what might constitute reasonable compensation. Particular attention should be paid there to independent artists and filmmakers and other non-institutional follow-on users, who will rely heavily on clear limitations on remedies in order to move forward with the use of an orphaned work. For example, it should be unmistakably clear that an independent filmmaker's "reasonable compensation" to a surfacing owner of an orphan work should not be compared to what major motion picture studios pay owners of highly-managed works. An illuminative legislative history, demonstrating that it is often the practice of independent filmmakers to negotiate royalty-free or significantly discounted royalty rates, is crucial for independent artists and creators to confidently use orphan works.

The "Safe Harbor" Should Be Available Both for Commercial and Noncommercial Uses

The Copyright Office's proposed legislation (§ 514 (b)(1)) grants users the option to cease use, where possible, rather than pay reasonable compensation when the use is "without any purpose of direct or indirect commercial advantage." These users are fortunate: they have a measure of control over what compensation they pay to the copyright holder, and can decide on the best option in the context of their particular project. While we do not advocate for this "safe harbor" as an overall solution to the orphan works problem, we believe that it becomes increasingly important if the monetary risk to follow-on users is more uncertain. Filmmakers and other users, regardless of whether the purpose of the use is commercial or non-commercial, should benefit from the option to "take down" an infringing work, particularly if the less-certain "reasonable compensation" payment is their only other option.

By limiting the safe harbor to non-commercial uses, the Copyright Office excludes the millions of small artists, including independent film and media artists, who are by no means rich, but whose art is their livelihood. Not every commercial user is a large movie studio or rich author. Smaller artists need the option to cease an infringing use rather than pay monetary damages because they are least likely to have institutional funds to pay damages or defray risk.

Moreover, differentiating between uses that have "any purpose of direct or indirect commercial advantage," as the *Report* attempts to do, and those that do not, is challenging and problematic. This is reflected in the *Report*'s explanation and was captured at the Summer 2005 roundtables, as well.[6] A bright line is elusive, especially so in the context of media created by individuals who lack institutionally "non-profit" status, but who operate without a pure profit motive. For instance, what would be made of a film project undertaken by a filmmaker and submitted to a school-run film festival that goes on to garner awards at national festivals? There are simply too many areas that are technically commercial, but operate with such limited budgets and for the public good that the distinction fails. Likewise, there are not-for-profit organizations that are so large and successful that their ability to respond to damages and undertake risk mirrors their commercial counterparts. The option to cease infringement should not be based on such a murky distinction.

In many cases, of course, it is impossible for a filmmaker to cease a use in a film that has already been finished, but in some cases, "takedown" may be a better choice for the filmmaker. Since independent filmmakers have such sensitive budgets and work on

[6] *Report on Orphan Works*, United States Copyright Office, p. 119 note 385.

projects where the fair market value for a particular use might be hard to know in advance, the option of taking down the work is critical. This is especially important in the case of experimental and avant-garde films or other new types of art, where there are few useful market transaction guidelines. For other types of artists, such as artists whose canvas is the World Wide Web or those working in other multi-media platforms, the option to take down may be even more important.

To be effective, a safe harbor provision should require that owners meet certain evidentiary thresholds to make a valid notice of infringement. This would guard against fictitious claims. Orphan works owners should bear the burden of substantiating their ownership before a user is expected to comply with the notice in an "expeditious" manner. We agree with proposal put forth by Ms. Pallante-Hyun of the Guggenheim Museum, which calls for the user to be held to a reasonable standard and cease the infringement "as expeditiously as is possible under the circumstances after receiving notice of the claim for infringement."[7]

Injunctive Relief Should Be Limited

So long as there is a broad threat of an injunction, artists will be forced to shun the use of orphan works. As the *Report* acknowledges, one of the worst nightmares for any filmmaker is a last-minute injunction brought right before the release of a film.[8] Although takedown may in some cases be the best option in the face of a lawsuit to determine reasonable compensation, it will always be a second-best option for a filmmaker or other follow-on creator who has incorporated orphan works into new creations. *As such, a meaningful limitation on injunctive relief is critical for filmmakers.*

[7] Statement of Maria Pallante-Hyun, p. 6.
[8] *Report on Orphan Works*, United States Copyright Office, at p. 119

An orphan work may represent a small or large part of a new creation, and may be impossible to remove from the overall work. We greatly appreciate the *Report*'s recognition that the fear of such a crippling injunction brought by a surfacing orphan works owner "provides enough uncertainty that many choose not use [sic] the work, even though the likelihood of such injunction is small."[9] We agree with the *Report*'s conclusion that injunctive relief should not be available against qualified users of orphan works except "where a user simply republishes an orphan work, or posts it on the Internet without transformation of the content."[10]

Although the *Report* thoughtfully speaks to the issue of limiting injunctive relief, the recommended statutory language is presently somewhat confusing and restrictive. A properly drafted and expanded notion of what types of work can be protected from injunction is an important recognition of the risk and reliance undertaken by a user who wants to make use of an orphan work. *It should be enough that the orphan work is adapted for or incorporated into another work that includes separate substantial expression.*

We understand that the Copyright Office is presently undertaking a review of proposed Section 514(b)(2)(A) with the intent of addressing any confusion. We are grateful for this effort and look forward to the results, and to working with stakeholders on any remaining concerns.

The Attribution Requirement and the Chain of Interest Standard Should Be Clarified

We agree with the *Report*'s recommendation that the attribution requirement can function as a way to advertise the use of orphan works to potential owners, thus

[9] *Id.* at p.120
[10] *Id.*

encouraging them to step forward. More generally, artists appreciate and follow the general convention of crediting authors and other creative contributors to a project, and we expect others to do the same for us. However, when an attribution is "appropriate under the circumstances" must be clarified in statutory language and legislative history so that the steps required to meet it are not unnecessarily complicated or vague. Unless the attribution requirement is clear, the validity of the attribution might become a target for attack by an emerging owner seeking to disqualify the use of an orphan work from the purview of this proposed legislation.

We are similarly concerned that the Report does not adequately address instances where a user could reasonably rely upon the results of a previous third party search. The mechanisms of many media industries require a downstream user to rely on the reasonable search efforts undertaken by another party, but still within the context of a single "use" of an orphaned work. For example, a film's distributor should not be required to conduct a brand new search after the filmmaker has already done so in order to obtain protection. Indeed, the *Report* mentions that it might be reasonable under certain circumstances for a user to rely on the search conducted by another.[11] We agree with the recommendation of Allan Adler, Vice President for Legal and Government Affairs for the American Association of Publishers that

> it should be made clear that any person who engages in a related infringing use of the same work as the user who conducted a reasonably diligent search, should be able to qualify for the limitations on remedies based on the user's search where the related infringing use occurs pursuant to a license from the user or the users licensee. For example, if the original user of the "orphan work" is an author who incorporates the work into a new work pursuant to conducting a search that meets the statutory standard, then the publisher of the new work, as well as the publisher's distributors and licensees, would also qualify for the limitations on

[11] *Report*, p. 9.

remedies without having to each conduct their own search for the copyright owner of the original work.[12]

Thus, we urge this committee to permit such "piggybacking" in any orphan works legislation, and to provide legislative history that includes examples of situations in which a downstream user can rely on a good faith search.

Allowing the Orphan Works Law to Sunset Would Create Confusion and Disruption

We join the seemingly broad consensus that permitting the orphan works solution to sunset would not benefit the progress of the legislation but instead create more confusion and disruption. As we move toward an orphan works paradigm that provides more certainty for owners and users, a sunset provision that would repeal the law in the future would fundamentally undermine the goal of these collective efforts. Before she can change the way she works and creates *vis a vis* orphan works, a filmmaker, like any user, would have to know that protections granted by any new legislation are enduring.

As an alternative, we support the Copyright Office undertaking a review of the effect of the orphan works legislation, perhaps every three or four years. Understanding the relative successes of the legislation as it is applied, and gathering additional feedback from creators and owners will permit fine-tuning or substantial changes as needed.

Conclusion

We who are documentary filmmakers work with bits and pieces of film, fashioning collages of visual material from found objects and the objects we create. But we can't provide a sense of context, or give the history behind any one subject – without using archived materials. In today's litigious environment, commercial television and

[12] Allan Adler, testimony at *Oversight Hearing on the Report on Orphan Works by the Copyright Office*, March 8, 2006.

other distributors have become risk averse. Even if I feel I've done due diligence to document that an owner can't be found, I will most likely not be able to use the footage. This is so because when I get money to make a film, I, like most independent and documentary filmmakers, sell it to a television company or distributor (meaning that I will never see a dime beyond the initial fee). In the contract, I have to guarantee the company that I will indemnify them from any claims. Further, I have to pay for Errors and Omissions insurance. The insurance companies require documentation that I know the owner, and have paid the owners, for every scrap of footage, stills, and music that I did not create myself. We filmmakers provide this assurance in books we call Bibles – an appropriate term, because whether our work is seen depends on the care with which we approach their compilation; and whether we get paid is determined by the networks or other distributors accepting their contents. Because those final contract payments are dependent on that acceptance, we also, in a very real sense, survive depending on how well we make those Bibles. It's the drudgery behind the glamour of this business.

I have been a television journalist for over thirty years. At a time when everyone complains about information overload and the vast ability of programs to be sent over virtually any platform, I feel as though the real education of the public is being hampered because of the onerous burden of researching and paying for rights for every scrap of footage I find. The public's ability to understand its own history, and to place that history in the context of those who have gone before, in part depends on our ability to present a coherent and nuanced view. We can't do that by presenting snapshots of the present. We need access not only to the documented versions of the past, but the strips of home video, movies, still photographs and even music which remain largely undocumented. As the

country becomes more diverse the need to present the historical context for points of view that rely on materials whose origin may remain unknown cannot be chilled. Our ability to hold informed discourse in the public square depends on all of us understanding where we've been, and how we got there.

I would like to again thank Chairman Hatch, Ranking Member Leahy and members of the Subcommittee for the opportunity to address the important issues surrounding orphan works and their effect on the creative process. Providing the public with broader exposure to valuable works from our cultural heritage is truly within reach. We look forward to working with other stakeholders toward a mutual solution and are confident that under your leadership we can achieve meaningful and effective orphan works legislation.

Coalition Organizations:

Association of Independent Video and Filmmakers (AIVF): a non-profit membership organization with 5,000 members serving local and international film and videomakers—from documentarians and experimental artists, to makers of narrative features—by providing a variety of informational services and other resources. (http://www.aivf.org)

Doculink: an association of Los Angeles documentary filmmakers that meet regularly to review the projects and problems of local filmmakers. (http://www.doculink.org)

Film Arts Foundation: a non-profit membership service providing comprehensive education, equipment, information, consultations, and exhibition opportunities to independent filmmakers. (http://www.filmarts.org)

FIND (Film Independent) (formerly IFP/Los Angeles): a non-profit membership organization that is home of the Spirit Awards and the Los Angeles Film Festival. (http://www.filmindependent.org)

International Documentary Association (IDA): a non-profit organization representing the interests of documentary filmmakers. IDA represents nearly 3000 members in 50 countries around the world. (http://www.documentary.org)

IFP (Independent Feature Project): a not-for-profit membership organization designed to foster a more sustainable infrastructure that supports independent filmmaking and ensures that the public has the opportunity to see films that more accurately reflect the full diversity of the American culture. Headquartered in NYC, there are IFP organizations in Chicago, Minneapolis/St. Paul, Seattle, and Phoenix. IFP is also part of an international network of organizations, each supporting their own national filmmaking efforts. (http://www.ifp.org)

National Alliance for Media Arts and Culture (NAMAC): a non-profit association dedicated to the support and advocacy of independent film, video, audio, and online/multimedia arts. NAMAC represents over 350 member organizations, which in turn represent at least 400,000 media artists and others working in the media field. (http://www.namac.org)

National Video Resources (NVR): an organization that provides grants to filmmakers and creates educational programming using film and video. NVR represents over 350 Media Artist Fellows in the United States, and its programs have been used in over 400 public libraries in 48 states. (http://www.nvr.org)

Public Knowledge is a public-interest advocacy organization dedicated to fortifying and defending a vibrant information commons. Public Knowledge works with wide spectrum of creative artists, including filmmakers, musicians, creative writers, dancers, and visual artists to ensure that their interests are represented in copyright and communications policy debates. (http://www.publicknowledge.org)

FOR IMMEDIATE RELEASE
April 6 2006

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Statement of Senator Orrin G. Hatch
Subcommittee on Intellectual Property,
U.S. Senate Judiciary Committee
"Orphan Works: Proposals for a Legislative Solution"

As most people interested in this hearing will already know, the term "orphan works" generally refers to copyrighted works for which the owner either is not known or cannot be found. With most forms of assets and physical property, an owner is typically easy to identify with reasonable efforts. For obvious reasons, identifying the owner of a copyrighted work is much more difficult in many cases, especially when information about the copyright holder is not publicly known or incorporated into the same end product that contains the work itself.

With very rare exceptions – many of which result in police intervention – whoever is living in a house or driving a car is either the property owner or someone with a personal or contractual relationship with the owner. The same is not true in the intangible world of copyrights, where the owner of an individual book, video tape, or photograph generally does not hold the copyright to the underlying text or content. Historically, copyright information has been included in the end product. For example, the copyright holder will frequently be listed in the movie credits, included album liner notes, or printed on the back of a photograph. However, with the advent of digital and internet distribution models for copyrighted works, it has become more difficult to attach such copyright information to the copyrighted work itself.

These problems have been exacerbated by two sets of changes in copyright law. First, because of the extension of the copyright terms, many works are protected by copyright for decades after the author has died and long after they cease to have any significant economic value. The second set of changes occurred as a result of our accession to the Berne Convention, which prohibits conditioning copyright protection on formalities such as registration or renewal. Because original works receive automatic copyright protection without the need for the owner to register the work, there is no centralized registry that can be used to identify copyright holders.

As a result of these difficulties, it appears that a significant number of works are protected by copyright without any reasonable or effective way for potential users to identify their owners. As a result, the public often loses ongoing access to – and use of – these works,

without any corresponding benefit to the author. As the Copyright Office concluded in its recent report on the subject: *such an outcome is not in the public interest, particularly where the copyright owner is not locatable because he no longer exists or otherwise does not care to restrain the use of his work.*

With respect to virtually every other type of property that receives legal recognition, there are either equitable doctrines or statutory provisions addressing this type of problem. In other areas of law, the rights of an owner are limited by things like adverse possession, salvage rights, found treasure doctrines, and abandonment theories. Many believe that a similar concept should be applied to copyright law, and the Copyright Office has recommended something along these lines. Under their proposal, a user who performed a good faith, reasonably diligent search for the owner prior to using a copyrighted work would – in most cases – have his or her damages liability limited to a reasonable royalty rate. In certain instances, equitable relief would also be limited.

I tend to believe that this type of approach would be beneficial to copyright law, and would allow artists, consumers, and academics the use of many works that have historical, cultural, and economic value. However, I suspect that we have a range of opinions on the Copyright Office proposal, so I look forward to hearing the opinions of our panel of expert witnesses.

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Statement of Brad Holland
Founding Board Member
Illustrators' Partnership of America

Subcommittee on Intellectual Property
Committee on the Judiciary
U.S. Senate

Hearing on "Orphan Works: Proposals for a Legislative Solution"
April 6, 2006

Chairman Hatch, Ranking Member Leahy, distinguished members of the Subcommittee: Last year, the Illustrators' Partnership filed a submission to the Orphan Works Study which was endorsed by 42 national and international arts organizations, representing a broad spectrum of popular artists, fine artists, medical, scientific and architectural illustrators, cartoonists and educators. On behalf of these artists, I appreciate the opportunity to address you.

Our chief objection to the proposed Orphan Works amendment is that it is not an orphan works amendment.

An Orphan Works amendment would have applied to old work whose authors have abandoned their copyrights. This proposal would legalize the infringement of any work of art, past, present and future, regardless of age, country of origin, published or unpublished, wherever the rights holder cannot be identified or located.

It would permit a user to appropriate the private property of rights holders based on the user's own definition of "a good faith, reasonably diligent search."

It would re-impose formalities by forcing rights holders to rely on registries, metadata and notice as a condition of protecting their copyrights.

It would be retroactive, affecting art done over the last 30 years, when artists were told that their work would have the basic protections of copyright law, whether it was marked or not.

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It would affect illustrations and photographs disproportionately because trade practice requires that images routinely be published without identifying information, or because artists' signatures or marks may be illegible, or because information can be removed by others.

It would remove any meaningful remedies for infringement, which are the only means rights holders now have of enforcing copyright.

It would place an impossible burden of diligence on rights holders, because they will never have the resources to police infringement, which can occur anytime, anywhere in the world.

It would interfere with the rights of artists to exploit their work in commercial markets, which would violate the Three-step test of TRIPs.

And it would harm foreign artists by making vast bodies of their work royalty-free in the U.S.

For these reasons and for many more – and with all due respect - we do not believe the statutory language proposed by the Copyright Office is a solution to the orphan works problem. Instead it's a blueprint for a radically new copyright law.

The inability to distinguish between abandoned copyrights and those whose owners are simply hard to find is the Catch 22 of the Orphan Works project. Put simply, if a picture is unmarked, it's impossible to source or date it. Therefore this amendment would orphan millions of valuable copyrights that cannot otherwise be distinguished from true orphaned works - and that would open the door to cultural theft on an unprecedented scale.

In their submission to the Orphan Works Study, Professors Jane Ginsburg and Paul Goldstein warned that orphan works legislation should precisely define the category of "orphan" works. "The broader the category," they wrote, " or the lower the bar to making the requisite showing of due diligence, the greater the risk of inconsistency with our international obligations" which in turn reflect "longstanding practices that have passed the test of time."

Many potential users of orphan works have asserted that these works have little or no commercial value. While this may be true of real orphaned work, it is not true of the numberless managed copyrights that will be caught in an orphan works net. Non-profit organizations which assert that only work of little or no commercial value will be affected have not documented their assertions. And other users, who wish to exploit work royalty-free, have every incentive to minimize the value of the work they would profit from selling access to.

We believe the orphan works problem can be and should be solved with carefully crafted, specific limited exemptions. An exemption could be tailored to solve family

photo restoration and reproduction issues without otherwise gutting artists' and photographers' copyrights. Usage for genealogy research is probably already covered by fair use, but could rate an exemption if necessary. Limited exemptions could be designed for documentary filmmakers. Libraries and archives already have generous exemptions for their missions. And if their missions are changing, they should abide by commercial usage of copyrights, instead of forcing authors to subsidize their for-profit ventures.

Therefore we respectfully urge this committee to consider the negative effects that this proposed statutory language would have on free market transactions. And we ask you to conduct further hearings to resolve the specific problem of providing public access to true orphaned works.

Statement of Senator Patrick Leahy
Ranking Member, Judiciary Committee
Intellectual Property Subcommittee
Hearing on "Orphan Works – Proposals for a Legislative Solution"
April 6, 2006

We live in a country with deep creative roots. We have the best music industry in the world, the greatest film industry in the world, and the largest publishing industry in the world, to name a few, from which millions of creative works are born. Yet, there are many works for which no copyright owner can be found. These so-called "orphans" are unavailable for any use – reproduction, restoration, adaptation – because it is impossible to gain permission from their lawful copyright holders.

Under current copyright laws, if you cannot find the photographer who took your great-grandparents' wedding picture over 75 years ago, no matter how hard you search, you still cannot have that picture restored. Or, in an example recently mentioned in the *Wall Street Journal*, a Civil War historian wrote an article which used several letters and diaries from soldiers. Although a magazine initially agreed to publish the article, the publisher pulled the piece because he feared litigation arising from the use of those 150-year-old works. Orphan works problems have a particularly unfortunate effect on older films – some of these films are literally disintegrating because their copyright owners cannot be determined. I am something of a photographer myself, and I know the particularly vexing issues that must confront the professional photographer or illustrator, with their great number of works and the difficulty of ensuring that others do not claim them for their own.

This situation impacts copyright owners and potential copyright users in every industry, from the individual scrapbooker or illustrator to the largest corporation. So I, along with Chairman Hatch, asked the Copyright Office to study orphan works and issue a report on the situation, as well as a suggestion for possible legislation. The Report came out in January, and it is clear that the Copyright Office spent a tremendous amount of time and effort on it, and for that I thank them. The multitude of comments, both those made to the Copyright Office and those made in the subsequent public roundtable discussions, show how committed all the interested parties are to finding a sensible and equitable solution to the orphan works conundrum, and I am just as grateful to hear all of those voices.

I want to take the opportunity during this hearing to have an open dialogue with representatives of all points of view on this issue. This is an issue of vital importance. I have no intention of crafting legislation that harms the creators who hold copyrights, and who bring so much value to our culture and our economy. I would like to see, though, the chance for social and cultural enrichment by enabling use of these orphan works by the public. I thank all the witnesses, and I look forward to working with Senator Hatch and all of you to come to a constructive solution to this problem.

Guggenheim MUSEUM

Statement of Maria Pallante
Associate General Counsel and Director of Licensing
The Solomon R. Guggenheim Foundation (Guggenheim Museum)

Subcommittee on Intellectual Property
Committee on the Judiciary
United States Senate
April 6th, 2006

Re: "Orphan Works: Proposals for a Legislative Solution"

Chairman Hatch, Ranking Member Leahy and Members of the Subcommittee:

Thank you for the invitation to testify on orphan works, an issue of paramount importance to the museum community and our colleagues in the cultural and educational communities.

I am Associate General Counsel and Director of Licensing of the Solomon R. Guggenheim Foundation in New York, a nonprofit, education corporation which oversees five art institutions and is commonly and collectively referred to as the "Guggenheim Museum." Like most museums, the Guggenheim has both an educational and charitable purpose: to educate the public about art, architecture and other manifestations of visual culture; to collect, preserve and research art objects; and to make them accessible to scholars through our museums, educational programs and publications. The Guggenheim is a 501(c)(3) tax-exempt organization.

My comments are based on the statement I presented on March 8, 2006 before the Committee on the Judiciary, U.S. House of Representatives, Subcommittee on Courts, the Internet and Intellectual Property, which statement was endorsed by 18 organizations representing more than 145,000 cultural and educational institutions and more than 135,000 individual creators, artists, educators and scholars, including: *the American Association of Law Libraries; the American Association of Museums; the American Council of Learned Societies; the American Historical Association; the American Library Association; the Art Libraries Society of North America; ARTstor; the Association of American Universities; the Association of Research Libraries; the College Art Association; Ithaka-Habors; JSTOR; the Medical Library Association; the Museum Computer Network; the National Humanities Alliance; the Society of American Archivists; the Special Libraries Association; and the Visual Resources Association.*

General Support and Observations

My colleagues and I would like to applaud the Copyright Office for its tremendous contribution to the copyright community in producing the Report on Orphan Works. The staff's extensive work on this issue (including its collection and synthesis of public comments, facilitation of round-tables and informal meetings, legal study and

written analysis) is commendable. Although the Report addresses many complex points --- including the need to include unpublished works, the need for a flexible search standard, and the need to distinguish between commercial and noncommercial uses, among others --- we have remarkably little disagreement with its findings.

The importance to our communities of crafting an amendment to facilitate uses of orphan works cannot be understated. The Copyright Office approach, if clarified and modified along the lines discussed below, will directly affect the intellectual, historical and cultural life of all Americans. It will improve the work of individual artists, writers and filmmakers, as well as scholars, historians, librarians, archivists and curators, who regularly struggle to balance the rights of missing or unidentifiable copyright holders with the mission of making letters, manuscripts, photographs and other culturally significant material available to the public. We have discussed our view of legislation with the publishers and the Copyright Office, and we have participated for the past several weeks in the negotiations sponsored by Representatives Lamar Smith and Howard Berman. We are heartened that so many people recognize the problem of orphan works and want to craft a fair solution, and we are optimistic that the right solution will be forthcoming.

We do recognize that some owners, particularly photographers, face fundamental challenges relating to their ability to enforce copyrights and receive the full measure of protection accorded by the law. We are not unsympathetic. In fact, we recognize that individual copyright owners of all genres, from music to books to screen writers, have faced similar challenges since the inception of copyright law and that it is for this reason that collective associations, such as membership organizations, guilds, and unions are necessary. Nonetheless, we believe it is possible to address the legitimate needs of photographers without dismantling the broader, legislative relief that is so sorely needed by those of us in the user community.

We also understand that some stakeholders have expressed concern about the issue of state sovereign immunity. As we understand it, the issue relates to how state institutions' immunity to suit under the Eleventh Amendment would interact with the terms of orphan works legislation. Again, we believe a solution is achievable. In some statutory contexts, the duty to pay reasonable compensation to a late-emerging copyright owner may be better characterized as a voluntarily assumed obligation, in the nature of a compulsory license, than as an award of damages. The associations representing state higher education institutions have begun to work with us and the publishers to develop a reasonable solution to this concern, and we are confident one will be forthcoming.

In the final analysis, we believe that orphan works legislation should have one principal goal: it should provide certainty to users who wish to make cultural heritage more broadly available to the public. To accomplish this, the legislation must be fresh and innovative: it must move users forward --- move us away from risk-aversion and toward a sense of confidence. We believe this is possible and that it can be done without prejudicing the legitimate rights of bona fide copyright owners. Our specific recommendations appear below.

Specific Recommendations

1. Reasonable Compensation.

"Reasonable compensation" is a flexible formula that has not received extensive interpretation in case law and was thus not the first choice of museums (who wanted a clear exemption) or of many other users (who wanted an express cap on damages).

That said, we are willing to support the concept because we note that the [illegible] Office provides some persuasive guidance in the Report. Specifically, the [illegible] emphasizes that the "burden is on the copyright owner to demonstrate that his work had fair market value," and that it "is not enough for the copyright owner to simply as[illegible] amount for which he would have licensed the work *ex post*; he must have evidence that he or similarly situated copyright owners have actually licensed similar use for such amount." The Report draws on a useful and applicable opinion of Judge [illegible] *Davis v. the Gap, Inc.*, and suggests a standard of reasonableness. We think that w[illegible] standard written into legislation, much of the uncertainty introduced by the concept of "reasonable compensation" would be eliminated.

[illegible] clarity's sake, we also urge the Committee to include detailed examples of [illegible] constitute reasonable compensation in the legislative history of orphan works [illegible] with particular emphasis on situations where the user is a nonprofit library, [illegible] archive or university, or an independent scholar, artist or small publisher. [illegible] others things, such examples would demonstrate that it is often the practice of nonprofits and users of works for scholarly purposes to negotiate royalty-free usage. (Indeed, it is not uncommon for the decision to use a particular work to turn on whether it [illegible] available for free.) This fact was not lost on the Copyright Office. In its discussion of [illegible], the Report states, "it should be clear that "reasonable compensation" may, in appropriate circumstances, be found to be zero or a royalty-free license…"

This point is of utmost importance to the user community, including libraries, archives and museums, as well as the individual working artist or hobbyist. It is critical not only in situations involving the use of a single orphan, but also in those characterized by large-scale use of multiple works. Large-scale use might include efforts by the Scripps Archives at the University of California to publish hundreds of personal photographs taken by people on oceanic voyages, or efforts by the United States Memorial Holocaust Museum to publish hundreds of personal letters sent from Nazi concentration camps. The Nation's great nonprofit archives, libraries and museums have in their possession vaults of culturally and historically important orphan works like these. As custodians, they care for these works for years at their own expense. In order for institutions to have the confidence to take these works out of storage and put them into the hands of the public, they need a clear indicator that establishing reasonable compensation is not only a responsibility of the copyright owner, but also that it is context-specific; that is, it is tied to specific industry practices.

In particular, legislative history must clarify that the proper calculation of reasonable compensation must encompass the standards of the specific industry in which the use of the orphan work is being made, as well as the market history of the particular work at issue. We do not believe that "reasonable compensation" should be based on the market history of a different, widely-licensed work in the same medium or on the price that was paid for another work that is being used in the same context as the orphan work. For example, reasonable compensation for 50 orphaned photographs from a private family photo album will differ drastically from the value of works by Ansel Adams, and if all of those photographs and Mr. Adam's works were published in the same book, there should be no suggestion that the licensing fee that might have been paid for the Ansel Adams works is relevant to "reasonable compensation" for the orphaned photographs.

2. Commercial Advantage

In its recommended statutory language, the Copyright Office has proposed a safe harbor from all monetary relief in certain limited instances where the use is made "without any purpose of direct or indirect commercial advantage" and the user "ceases the infringement expeditiously after receiving notice of the claim for infringement." We strongly endorse the intent to offer users complete immunity in certain, publicly-important circumstances. But, we have serious concerns with the phrase "without any purpose of direct or indirect commercial advantage" on which this immunity is conditioned. We therefore require assurances that it will not unduly exclude from the safe harbor the normal use of orphan works by this Nation's libraries, archives, museums, educators, historians, scholars and artists.

The phrase "without any purpose of direct or indirect commercial advantage" already appears several times in the Copyright Act -- somewhat inconsistently. We therefore think it is critical for Congress to provide some clear guidance on what it means in the orphan works context. In our view, the most analogous use of the phrase (and the one that has the most established case law) appears in section 110(4), where it is used to define the exemption for certain public performances of nondramatic literary or musical works. The House Report that accompanied section 110(4) makes clear that the general motivation of the user is the proper perspective in assessing whether the motive is to secure commercial advantage. *Even a performance or exhibition where admission is charged may be exempt provided the amounts left "after deducting the reasonable costs of producing the performance" are used solely for bona fide educational, religious or charitable purposes.* By contrast, courts have disqualified entities that are primarily commercial in purpose, even where the proceeds of the activity at issue may be for charitable purposes.

Museums, libraries, archives, educational institutions, nonprofit publishers, academics and independent scholars are expected to educate the public. They do this by studying and writing about artworks, objects and historical material and by publishing their scholarly findings. The publications departments of nonprofit institutions are staffed with underpaid writers and editors whose efforts are as critical to those

institutions' nonprofit purposes as the exhibitions they display -- arguably more so because they reach many more people.

Nonprofits also sell publications for the same reason they charge admission fees: to defray the cost of operations and production. Nonprofit institutions in every state are under increasing pressure to be fiscally fit. We do not believe that these institutions should be disqualified from availing themselves of the certainty provided by the safe harbor if they both manage to achieve their missions and cover the expenses of their mission-fulfilling activities.

In its Report, the Copyright Office appears to disregard these circumstances, and characterizes the concept of "commercial advantage" in a way that appears inconsistent with existing provisions like section 110(4). The Report states that where a "museum essentially acts like a publisher and the infringement consists of selling books, DVDs or other materials," the conduct would not qualify for the exemption and would require the museum to pay reasonable compensation. If allowed to stand, this characterization could have far-reaching consequences for nonprofit institutions and individuals who engage in activity that is essentially scholarly, educational and not undertaken for a commercial motive.

In light of this, we seek reassurances of what we would have hoped was obvious: that the creation and sale of mission-related publications by a museum (or for that matter, the sale of copies by a film archive or journal subscriptions by a nonprofit organization such as a learned society) are uses undertaken "without any purpose of direct or indirect commercial advantage." This can be accomplished by removal of the clause "such as through the sale of copies or phonorecords of the infringed work" from section (b)(1)(A), and the inclusion of clear, illustrative examples of normal nonprofit activities, including mission-related publications and sales, in the legislative history of any amendment to the Copyright Act addressing orphan works.

3. Orphan Works Incorporated in Other Copyrighted Works.

Orphan works will often, perhaps most frequently, be used in other works. A photograph or letter may be used in a book or a documentary motion picture. A museum may include all types of copyrighted works in connection with an on-line exhibition or on a website demonstrating the breadth of its archives.

In these situations, a user may well decide to incorporate the orphan work into another work based on having determined that there was no identifiable rights owner and that the work has been orphaned. If the copyright owner should emerge and sue for infringement, an injunction prohibiting such uses after that decision is made – barring the distribution of the book or motion picture or the maintenance and availability of the website – would often be disastrous for the user and the public. For this reason, we support the Report's conclusion that the availability of injunctions against qualified users who incorporate orphan works into other works of authorship should be very limited. On the one hand, users here have relied on the availability of the orphan work. On the other

hand, they have invested resources to create the larger work of which the orphan is one part. The only injunction that should be available is one that would require the payment of "reasonable compensation," as discussed above.

In delineating this limitation on injunctive relief, it also is important to avoid any restrictive characterization of what new work can qualify or of how the orphan work must be transformed or recast. It should be enough that the orphan work is adapted for or incorporated into another work that is itself copyrightable.

Conclusion

Mr. Chairman, in closing, I wish to thank you and the Subcommittee members for the opportunity to share my views on orphan works legislation. Your leadership on the issue is greatly appreciated by the museum community and our colleagues in the cultural and educational communities.

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SUBCOMMITTEE ON INTELLECTUAL PROPERTY

COMMITTEE ON THE JUDICIARY

U.S. SENATE

HEARING ON "ORPHAN WORKS:
PROPOSALS FOR A LEGISLATIVE SOLUTION"

APRIL 6, 2006

SUPPLEMENTARY SUBMISSION
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SUPPLEMENTARY HISTORY

Comments from the Copyright Office's representative at the Subcommittee's April 6, 2006 hearing, along with some of the statements in the Copyright Office's Report on Orphan Works, suggested that photographers and illustrators needed to consider models for collective licensing such as ASCAP and to create such systems. Other comments suggested that photographers needed to consider establishing registries and to register their works in order to avoid orphan work status. There seems to be an urban legend, or at least a completely inaccurate impression, that these steps have not already been taken. We hope that the following information will help to correct that misimpression.

Licensing Collectives

Starting in the mid-to-late 1980's, ASMP began studying the future options for commercial photographers, with particular consideration of the likely impact of digital technology and the internet and of the industry trend towards consolidation on the client side. It was decided that the creation of a collective licensing agency for creators made the most sense. ASMP spent years consulting with representatives of ASCAP, BMI, CCC, the Harry Fox Agency, and others. For a variety of reasons, including antitrust law issues, the Harry Fox Agency was deemed to be the best and safest model for a collective licensing agency for photographers. ASMP then spent hundreds of thousands of dollars to create in 1993 the Media Photographers Copyright Agency (MP©A), a wholly-owned for-profit subsidiary. It also came to be known as Mira, the trade name under which it later operated and is currently known. For a number of years, its back-office operations were run on a cooperative basis with CCC.

Around 1999-2000, ASMP again addressed the need for a cohesive organization of independent photographers and other creators of visual artworks. In 2001, it initiated and partially funded the separate creation of an independent cooperative for photographers and illustrators, owned and operated by photographers and illustrators, which is known as the Creative Eye Co-op (http://www.creativeeyecoop.com). ASMP transferred the licensing agency Mira to Creative Eye.

Although still in existence, neither Mira nor Creative Eye can be considered successful. Both required hundreds of thousands of dollars to create and run, but that funding has not been anywhere near the amount of money necessary to fund a successful start-up business of almost any kind. The National Co-op Bank had initially provided the primary funding of Creative Eye, with the commitment of additional funding over time. However, the Bank reneged on its guarantees, and Creative Eye/Mira has not been able to obtain significant funds from any other source. The photographers' organizations simply do not have the additional resources required to fund these initiatives.

Efforts at collective licensing in the portrait and wedding markets have also been unsuccessful. In 2000, Professional Photographers of America hired an executive from the general licensing division of ASCAP to develop the Professional Photographers Licensing Service (PPLS). In its most basic form, the program would have licensed third party retailers to reproduce photographic prints bearing the PPLS mark. PPLS would then collect the funds and distribute them to participating photographers.

Unfortunately, the problems in applying the ASCAP model to portrait and wedding photography market proved insurmountable and the program was scrapped approximately three months after rollout. Problems and issues leading to the program's demise: concerns regarding the accuracy of data compiled by participating stores, the program's inability to reach the growing home and online copying markets, and problems determining an appropriate per photographer compensation rate from the pool of licensing fees.

By all measures, photographers have expended considerable resources in attempts to study and create collective licensing operations, and by all measures, unfortunately, those efforts have been consistently unsuccessful.

Photographer Registries

There is also an apparent perception that photographers have not tried to make themselves easy to find. That is untrue and totally illogical: photographers can make a living only if and when they are found. Both ASMP and PP of A have spent substantial amounts of time, money and effort to create registries of their members and to drive potential users of photography and photographic services to those tools. They can be found at http://www.asmp.org/findaphotographer/ for ASMP and http://www.ppa.com/i4a/pages/index.cfm?pageid=126 for PP of A.

In addition, over the last year or two, ASMP arranged with Adobe to have its photographer database incorporated into Adobe's Photoshop Creative Suite (CS). After the initial population of that database with ASMP members, Adobe opened it up to other photographers to register. Anyone who uses Photoshop CS has access to it and can identify and locate professional photographers by a number of search fields.

Image Registries

In addition to registries of photographers, ASMP has invested large amounts of time, effort and money in building a system known as Find a Photo http://findaphoto.org/. It includes many search criteria, plus a link to send a text inquiry to ASMP's website, in response to which ASMP's members can perform their own searches and provide responses. ASMP is currently working with service providers on expanding both the search capabilities and the contents of that system.

The members of PACA have huge databases of images on line, and most of those members depend heavily on those on-line databases for their revenues. For example, see http://creative.gettyimages.com/source/home/home.aspx and http://pro.corbis.com/.

There is a database that is in the discussion stage that will potentially be more useful than all of the others. ASMP, PACA and other organizations have been exploring the possibility of creating a database of images that will be searchable by images, not just by text. Picscout http://www.picscout.com/ , Idee http://ideeinc.com/, and some other companies have technologies that scan digital images, assign a digital "fingerprint" to each image and then search for images showing the same digital fingerprint. While not perfect, these systems work fairly well right now and will only continue to improve in the future. ASMP, PACA and other trade organizations are currently in discussions for creating and populating a huge database of images that could be searched using this technology by anyone in possession of a digital image (or print image and scanner).

Credits and Copyright Notices

There appears to be a notion that photographers and illustrators do not currently use or wish their clients to supply credits and/or copyright notices. Nothing could be farther from the truth. Virtually every standard business form approved by every major creators' organization has language that calls for the provision of a credit and/or copyright notice and that provides penalties for the failure to supply the same. The reality is, however, that in the advertising, corporate, and other commercial marketplaces, attribution credit is very rarely provided. While photographers and illustrators are not responsible for this custom and practice of the trade, it is nearly universal and is a fact that any orphan works regime must take into account.

Copyright Registration, etc.

With regard to copyright registrations, we had previously requested statistical information from the Copyright Office. Unfortunately, that information has not yet been received and does not appear likely to be available before the record for this hearing closes.

In addition, ASMP was already in discussions with the Copyright Office concerning possible technological approaches to automating the registration process when the Orphan Works report was issued. We are facilitating discussions between the Copyright Office and major third-party software developers to upgrade existing systems to allow fast and simple on-line registrations of photographs and other digital works of visual art. That work was and is on-going, irrespective of the Orphan Works issue.

We hope that the above information will help to correct any misimpressions relating to the history of the creation of collective licensing systems and registries by the creators of visual artworks.

Respectfully sumbitted,

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STATEMENT OF RICK PRELINGER,
BOARD PRESIDENT, INTERNET ARCHIVE,
AND FOUNDER AND PRESIDENT, PRELINGER ARCHIVES, SAN FRANCISCO, CALIF.

Thank you for the privilege of addressing the Committee today. I would like to begin by thanking the Chairman and Ranking Member for their leadership in addressing the orphan works situation. The process you have started has awakened broad public interest, and we are excited to see this problem being actively and thoughtfully addressed.

I come to you today wearing two hats.

First, as Board President of the Internet Archive, I would like to say a few words about our activities, especially our project to digitize the contents of America's great libraries and build an open digital library available to all.

My second (and considerably smaller-sized) hat is as Founder and President of Prelinger Archives, a small commercial film archive specializing in historical footage of American life, culture and industry. I'd like to talk about why clarifying the situation of orphan works is especially critical for films.

First, the Internet Archive. We are a nonprofit library that has collected billions of works and served millions of users since 1996. We collect books, music, moving images, web pages, and software programs. We work with the Library of Congress, the National Archives and Records Administration, the National Archives of the UK and many other institutions to find workable solutions to libraries' and archives' missions in the digital world.

Last October, we announced the formation of the Open Content Alliance in partnership with five major technology companies [Adobe, Hewlett-Packard, Microsoft, Xerox and Yahoo!,] and over 50 research and public libraries holding over 150 million books. The Alliance seeks to digitize the holdings of key libraries and build a great joint collection online. Members have all agreed to make their holdings openly available to all users, subject of course to the limitations of copyright law.

[We are encouraging others to develop new ways to use the materials and help the books to reach greater audiences. Our users range from university mathematics professors seeking rare classic texts to middle-school children whose school libraries could use more books. The Internet offers us an unprecedented opportunity to build a great online library, not a library to replace physical libraries, but an organized collection of millions of books in all disciplines.]

We believe there are many hundreds of thousands, perhaps millions of orphan works which, if digitized and made available to all, would vastly add to our public storehouse of knowledge. We hope that we and our partners will be able to digitize these books for noncommercial public purposes without fear of liability. Toward this end, we support the Copyright Office's suggestion regarding limitation on remedies for noncommercial use.

Let me switch hats and say a quick word about Prelinger Archives. Most of our collection came here to the Library of Congress in 2002, but we are still collecting historical film, especially industrial films, advertising films and home movies. These are vivid documents of everyday life showing our country and its people as they actually were, quite unlike Hollywood films or TV shows. Our footage is in very high demand by producers of films, television and educational media, and we have made a business out of licensing stock footage. Most of our films are orphan works, because most small film producers are no longer in business.

Contemporary audiences are fascinated by historical films. I recall the thrill of an audience in Britton, South Dakota when I showed them Depression-era home movies from their own town. And this coming August, archivists and members of the public will gather in at least 24 states to celebrate Home Movie Day, watch family films, and select historically valuable items for preservation.

Now, film is a peculiar creature in that it is quite fragile. It often decomposes more quickly than copyrights do. We therefore face a critical dilemma when it comes to preserving films. Nonprofit archives like Northeast Historic Film and organizations like the National Film Preservation Foundation need assurance that they can intervene to rescue deteriorating films without fear of

liability. Small businesses like ours, whose budgets are at nonprofit levels, also need to know that they can recover preservation costs through commercial licensing.

(Thanks to Senators Hatch, Leahy, Cornyn and Feinstein for their work to reauthorize the NFPB, the parent organization of the NFPF.)

I'm a member of the baby-boom generation. Much of my generation's history has passed into the public domain. But because of the peculiarities of copyright law, many of my younger friends lack the freedom to freely quote or reproduce key works from their own era. Easing access to orphan works would go a long way towards addressing this generational inequity.

I thank the Committee for its attention, and look forward to answering any questions.

STATEMENT OF

RECORDING ARTISTS' COALITION

Before the

SENATE INTELLECTUAL PROPERTY SUBCOMMITTEE OF
THE SENATE COMMITTEE ON THE JUDICIARY
109th Congress, 2nd Session

Hearing on

ORPHAN WORKS: PROPOSALS FOR
A LEGISLATIVE SOLUTION

April 6, 2006

Recording Artists' Coalition
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Statement on behalf of the Recording Artists' Coalition
Before the Senate Intellectual Property Subcommittee
Of the Senate Judiciary Committee,
United States Senate
April 6, 2006

Chairman Hatch, Mr. Leahy and distinguished Members of the Subcommittee,

Thank you for holding a hearing on the important issue of "orphan works," and for the opportunity for the Recording Artists' Coalition ("RAC") to present our views to the Subcommittee. RAC is a non-profit recording artist advocacy organization representing over 130 well-known featured recording artists, including Don Henley, Sheryl Crow, Jimmy Buffet, Natalie Maines, Billy Joel, Stevie Nicks, Bonnie Raitt and Bruce Springsteen. RAC is primarily concerned with political, legal, and business issues affecting the interests of recording artists on a federal and state level.

RAC's testimony today sets forth our continuing concerns with the proposed legislation. While RAC's main concern is with the designation of sound recordings as orphan works and how that designation could adversely affect recording artists, many of our comments can also be applied to other categories of copyrighted works.

1. Artists as Owners of Future Interests in Copyright: In their comprehensive report on orphan works, the Copyright Office refrained from commenting on the "work for hire" issue, concluding that it is outside of the scope of their report. We believe this omission to be a fundamental flaw, as the issue directly relates to the question, "Who is the owner?" Arguably, a recording artist or any other non-work for hire author capable of exercising a right of termination should be recognized as an owner of a future interest in the copyright.

If a corporate owner of a sound recording cannot be found after a good faith due diligence search, but the original recording artist can be found, the owner of the unvested termination right (i.e., the recording artist) should be treated in all respects as the owner of the orphan work, and all rights and obligations of the missing owner should inure to the recording artist. The recording artist should be given the right to negotiate a license with the orphan work's user, and to have the option to stop the usage. This should certainly be the case if the original recording artist has a fully enforceable, bona fide contract with the missing owner.

Even if the original artist is bound by a work for hire agreement, if the corporate owner cannot be found and the artist can be found, then the original artist should at least receive compensation for commercial exploitation of their work -- especially if the artist and missing corporate owner are still bound by an enforceable, bona fide contract.

One of the main goals of copyright is to provide incentive to the artist. What could provide more of a disincentive than to place the original artist in an inferior position to a prospective orphan works user in the event a corporate owner cannot be found? An artist should step into the shoes of the missing owner if the artist can readily be found. If the artist is not found but emerges later, then the artist should also have the right to seek reasonable compensation for the use of their work.

2. The Artist's Right of Integrity: While the vast majority of anticipated uses of orphan works will be for non-commercial archival, educational, or historical purposes, there is a possibility that an orphan work will be used in a way that disparages or damages the integrity and personality of the artist.

Recording artists, even those signing work for hire agreements, have fought hard for years to secure approval rights from their record labels and publishers whereby artists must pre-approve use of their music or performance in, for example, a pornographic, violent, or misogynistic movie. If a record label disappears and cannot be found, and the sound recording is deemed an orphan work, artists lose these important contractual protections.

Most uses of orphan works will never cross this line of propriety. But an artist only has one career and one reputation. An artist should have the right to stop any disparaging, defamatory, or injurious use of their original work when used in an orphan works context, no matter who owns or controls the copyright. It is simply unacceptable for a user of an orphan work to have an unfettered right to harm the integrity of the copyright or the artist.

Congress has consistently refused to adopt a comprehensive moral rights regime. Instead of taking that giant step, perhaps Congress can consider taking a small step by adopting a limited "right of integrity" provision in the orphan works bill.

3. Attorney Fees: The Copyright Office legislative proposal does not include attorney fees as an available remedy for an emerging owner. However, the hardest copyright owners to find will most likely be artists who have the least resources to contest an orphan works designation, whether the artist is the original copyright owner or has acquired the rights through a reversion or termination of copyright. Without granting legal fees as a remedy, the artist may not be able to secure legal counsel to contest the designation.

Artists and other owners with limited resources should have the opportunity and ability to contest an orphan works designation if they believe the search did not meet the statutory requirements. Granting legal fees as a remedy will provide that resource to an artist. If this is not possible, then the Copyright Office proposal of establishing a small claims court providing a simple and inexpensive means to contest the designation should be seriously considered.

4. Accountability: One conceptual problem with the Copyright Office proposal is the perceived lack of accountability of a prospective user during the initial phase of the search process. A prospective user is expected to engage in a good faith, reasonably diligent search for the copyright owner. The problem with this leap of faith is that it is in the best interest of the user to fail. The user will arguably be in a better position if the copyright is orphaned, so even the most honorable user is placed in a compromising position as a result of this built-in pressure to fail.

The Canadian orphan works system, which requires a prospective user to secure approval from an independent copyright board or tribunal, brings some sense of checks and balances. However, the Copyright Office is seeking adoption of a flexible and non-formalistic system, and adoption of a system requiring administrative approval would not bring flexibility to the process.

As a potential compromise to address the concerns of all involved parties, RAC favors adopting a requirement whereby a prospective user of an orphan work (especially a sound recording) must employ a professional copyright search company. This option is not mentioned in the Copyright Office report. If a prospective user employs an experienced copyright search firm, more accountability will be brought to the process.

We understand that this may not be viable for large scale clearances of photographs by libraries and academic institutions, so perhaps this requirement should be limited to smaller scale commercial uses of sound recordings. And at a minimum, there should be a "best practice" requirement whereby prospective users must search the Copyright Office records, established databases like SoundExchange, and other designated databases which may be created in the future.

We thank you again for this opportunity to provide the Subcommittee with our comments.

Testimony of
Thomas C. Rubin
Associate General Counsel
Microsoft Corporation

"Orphan Works: Proposals for a Legislative Solution"
Before the
Subcommittee on Intellectual Property
Committee on the Judiciary
United States Senate

April 6, 2006

Chairman Hatch, Senator Leahy, Members of the Subcommittee, my name is Tom Rubin, and I am Associate General Counsel for Copyrights, Trademarks and Trade Secrets at Microsoft Corporation. Thank you for providing Microsoft the opportunity to testify regarding possible legislative solutions to the issue of "orphan works." We commend the Subcommittee for convening this hearing and thank Chairman Hatch and Senator Leahy for requesting the Copyright Office's detailed study and analysis.

Microsoft is the leading provider of software, services and solutions used by hundreds of millions of consumers and businesses worldwide. In this role, we are a creator of valuable copyrighted works – such as our Windows operating systems and Microsoft Office System – as well as a user of copyrighted works created by others. For example, our interactive encyclopedia Encarta and our online service MSN contain both original and third-party content. Although we have a policy of clearing rights to any third-party content that appears in our products, we occasionally have run into difficulties in locating copyright owners for works that we wish to include in these products.

Microsoft's interests in the orphan works issue thus coincide to a significant degree with those of both authors and users. Accordingly, we support a balanced solution to the orphan works problem, one that fully respects the exclusive rights of creators while advancing the public's interest in obtaining broad access to works consistent with those rights.

At the outset, we wish to make clear that we agree with the Copyright Office's characterization of an "orphan work." The Copyright Office uses the term to refer to the situation in which the owner of a copyrighted work cannot be located by someone who wishes to use the work in a manner that requires permission. A work is not an "orphan" if the copyright owner declines a request to use the work or insists on terms that the user views as unsatisfactory.

While there are several possible approaches to the policy issues raised by orphan works, in our view, the legislative framework set out in the Copyright Office report is a promising start in achieving the right balance. As an initial matter, we believe that addressing the orphan works problem through a qualified limitation on remedies offers a reasonable approach for promoting the dissemination of orphan works while safeguarding the rights of copyright owners. Similar remedies-based approaches have been adopted in other areas of the Copyright Act to balance the competing interests of authors and users, for instance with respect to restored works (sect. 104A) and innocent infringement (sect. 504(c)(2)). That a remedies-based approach has proven over time to be fair in these contexts should provide some comfort that it could succeed here as well.

We believe a remedies-based approach is far preferable to one – such as a registration system or similar regime – that would impose formalities or other burdens on

authors. The creation of new and untested formalities could have the counterproductive effect of inhibiting the dissemination of works and could impose enormous burdens on authors and the Copyright Office alike without necessarily creating corresponding benefits.

The remedies-based solution recommended by the Copyright Office is likewise preferable to a compulsory or other government-administered licensing or royalty system, which could become mired in bureaucratic overhead and might be vulnerable to challenge under the WTO Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS) or other trade agreements. A compulsory licensing system would be a particularly inappropriate solution to the orphan works problem because, if the work is a true orphan, there will be no one to receive the compulsory license fee. If, by contrast, the work proves not to be an orphan, compensation to the copyright owner should match prevailing market-based royalty rates for the work.

We also agree with the Copyright Office that a use-based registration system, in which users would enjoy limited liability simply by filing a notice with the Copyright Office before using an orphan work, would be unfair to authors, inefficient, and difficult to implement. Such a system could impose significant burdens on all relevant parties, including: (i) on users – to list each purportedly orphan work prior to each covered use; (ii) on copyright owners – to monitor the system constantly for references to their own works; and (iii) on the Copyright Office – to develop and administer the filing system, a task that could prove particularly challenging with respect to photographs and other works that often are not accompanied by sufficient authorship or rights ownership information.

With respect to the specifics of the Copyright Office's proposed legislation, we support the use of a "good faith reasonableness" standard for evaluating whether a user has conducted a sufficiently diligent search to locate a work's owner prior to using the work. Given authors' exclusive rights to decide whether and how to make their works available to the public, it is vital that the proposed limitations on remedies be available only to users who have undertaken objectively reasonable and truly good-faith efforts to locate the work's owner. As this standard is applied and developed in practice, it will be important to ensure that it is interpreted to bar merely perfunctory or superficial searches from benefiting from the limitation on remedies. A robust application of this standard is particularly important in the case of photographs and other non-literary works, which are particularly vulnerable to infringing use simply because the identity of the copyright owner might not be apparent nor a written description of the work helpful in ascertaining its owner.

The nature of what qualifies as a sufficiently diligent search is likely to vary considerably depending on a variety of factors, including the type of work, its age, where it was found, the amount and nature of any copyright-related information found with the work, and the nature of the use of the work. Given these many factors, we appreciate the difficulty of establishing specific statutory criteria for what constitutes a "good faith, reasonably diligent search." At the same time, we consider it vital that the open-ended nature of this standard not weaken the ability of copyright owners, as a practical matter, to protect against misappropriation of their works. We therefore support the efforts of a number of stakeholders to explore, among other things, what might constitute a reasonably diligent search in various contexts.

In those cases where a copyright owner is entitled only to "reasonable compensation" for the use of her work, we support the notion that this amount should "represent the amount the user would have paid to the owner had they engaged in negotiations before the infringing use commenced." In other words, courts awarding "reasonable compensation" under this section should always strive to impose damages equal to the amount that the parties would have agreed to in arms-length, market-based negotiations before the infringement began. A standard that resulted in copyright owners receiving below-market compensation or a standard that effectively resulted in the imposition of a statutory, non-market-based royalty rate would significantly deter copyright owners from enforcing their rights in court and thus would have the practical effect of restricting the exclusive rights of authors. Given its importance, clarifying the "reasonable compensation" standard in the legislative text in our view would be useful.

In closing, I'd like to emphasize the beneficial role that technology, in particular software, can play in helping address the orphan works problem. As the Copyright Office report observes, "any system to deal with orphan works should seek primarily to make it more likely that a user can find the relevant owner in the first instance." A wide range of companies already offer low- or no-cost technologies that make it very easy for authors to embed rights management information into their digital works, and for users to locate and read this information. For our part, Microsoft works hard to ensure that our products and services maintain the integrity of such information as works are edited using various programs and distributed online. While these technologies provide a more limited solution for works that already are in circulation, greater reliance on them by authors in the future could help make the orphan works

problem diminish over time. Furthermore, as search technologies continue to improve – an area in which Microsoft is devoting substantial resources – the ability of users to locate copyright owners should likewise improve, thereby decreasing the number of cases in which a work is incorrectly considered an orphan.

Thank you once again for inviting Microsoft to testify at today's hearing. We commend the Subcommittee for giving its attention to the orphan works issue, and we look forward to working with the Subcommittee as it shapes and advances legislation in this area.

Testimony
United States Senate Committee on the Judiciary
"Orphan Works: Proposals for a Legislative Solution"
April 6, 2006

Mr. Jule Sigall
Associate Register for Policy & Internation Affairs , U.S. Copyright Office

UNITED STATES COPYRIGHT OFFICE
LIBRARY OF CONGRESS
WASHINGTON, D.C.

Statement of Jule L. Sigall,
Associate Register for Policy & International Affairs,
before the
Subcommittee on Intellectual Property
of the Senate Committee on the Judiciary
on
"Orphan Works: Proposals for a Legislative Solution"
April 6, 2006

Chairman Hatch, Senator Leahy, and Members of the Subcommittee, I am pleased to appear before you on behalf of the Copyright Office to testify about the issue of "orphan works." We would like to thank you, Mr. Chairman, and Senator Leahy for your leadership on this issue and for commissioning our Report on Orphan Works, published in January of this year. We were pleased to respond to your request to study this important issue.

In this testimony, we provide a description of the orphan works issue and the contents of the Report, as well as a discussion of some of the reactions to the Report we have received from interested parties since its publication. By and large the reaction has been quite positive. A broad and diverse array of interests from both copyright owner and user communities including book publishers, authors, libraries, archives, museums, motion picture studios, record companies, educational institutions, documentary filmmakers and others agree with the Copyright Office's conclusion that the orphan works issue is real and needs to be addressed, and they also agree in basic concept and structure with the legislative solution proposed by the Report. Some of these groups have made constructive suggestions for changes to specific provisions of our proposal, and we are confident that issues raised by these comments can be resolved with further discussion among the interested parties.

Some individual authors and creators, however, primarily in the photography and visual image industries, are opposed to our effort to solve the orphan works problem, despite the fact that the proposal does not remove copyright for orphan works, and requires, in most cases, that the user pay the copyright owner reasonable compensation for the use of the work. Their concerns stem mostly from the fact that legal action to enforce their copyrights is expensive, often prohibitively so. As described below and in the Report, the enforcement problems faced by these creators are real and should be addressed, and we are willing to conduct a study addressed at those problems. But they exist whether or not orphan works legislation is passed. As a result, these concerns do not justify any delay in addressing the orphan works problem. In fact, enactment of orphan works legislation may be the catalyst necessary to prompt the non-legal, marketplace reforms that will most efficiently address the problems identified by photographers and creators of visual images.

I. Description of the Report

A. Introduction and Background

The Report addresses the important issue of "orphan works," a term used to describe the situation where the owner of a copyrighted work cannot be identified and located by someone who wishes to make use of the work in a manner that requires permission of the copyright owner. Even where the user has made a reasonably diligent effort to find the owner, if the owner is not found, the user faces uncertainty – she cannot determine whether or under what conditions the owner would permit use. Where the proposed use goes beyond an exemption or limitation to copyright, the user cannot reduce the risk of copyright liability for such use, because there is always a possibility, however remote, that a copyright owner could bring an infringement action after that use has begun.
Concerns have been raised that in such a situation, a productive and beneficial use of the work is forestalled – not because the copyright owner has asserted his exclusive rights in the work, or because the user and owner cannot agree on the terms of a license – but merely because the user cannot locate the owner. Many users of copyrighted works have indicated that the risk of liability for copyright infringement, however remote, is enough to prompt them not to make use of the work. Such an outcome is not in the public interest, particularly where the copyright owner is not locatable because he no longer exists or otherwise does not care to restrain the use of his work.

The Copyright Office has long shared these concerns, and considered the issue of orphan works to be worthy of further study. As noted above, the Office was pleased that Chairman Hatch and Senator Leahy asked us to study the orphan works issue in detail, and to provide a report with the Office's recommendations.

After that request, in January 2005, the Office issued a Notice of Inquiry initiating this study. We received over 850 written initial and reply comments from the public, and held three days of roundtable discussions in late July in Washington, D.C. and Berkeley, California. The Office subsequently met informally with various organizations separately, in an effort to explore more specific issues raised in the comments and roundtables; they were also invited to further express their individual concerns. Our Report is the culmination of those efforts.

II. Description of Orphan Works Situations

Section III of the Report catalogs and organizes the various situations described in the comments as "orphan work" situations. The written initial and reply comments, most of which were authored by individuals, described an enormous variety of problems and proposed uses. It is difficult, however, to quantify the extent and scope of the orphan works problems from these comments for several reasons. First, about 40% of the comments do not identify an instance in which someone could not locate a copyright owner, and another significant portion identified situations that were clearly not orphan work situations.

Still, about 50% of the comments identified a situation that could fairly be categorized as an orphan works situation, and even more instances were collected in comments filed by trade associations and other groups. Thus, there is good evidence that the orphan works problem is real and warrants attention, and none of the commenters made any serious argument questioning that conclusion.
The Report describes the most common obstacles to successfully identifying and locating the copyright owner, such as (1) inadequate identifying information on a copy of the work itself; (2) inadequate information about copyright ownership because of a change of ownership or a change in the circumstances of the owner; (3) limitations of existing copyright ownership information sources; and (4) difficulties researching copyright information. It then describes other situations raised by commenters that were alleged to be "orphan work" situations but upon closer inspection were outside the scope of the inquiry. These included situations where the user contacted the owner, but did not

receive permission to use the work, either because the owner did not respond to the request, refused the request, or required a license fee that the user felt was too high. Other such problems included general difficulties determining the status of copyright protection for a given work, and problems related to the legal protection accorded pre-1972 sound recordings.
Finally, the Report catalogs the proposed uses that the commenters indicated were most affected by the orphan works situations. In our view these uses fall into one of four general categories: (1) uses by subsequent creators who add some degree of their own expression to existing works to create a derivative work; (2) large-scale "access" uses where users primarily wish to bring large quantities of works to the public, usually via the Internet; (3) "enthusiast" or hobbyist uses, which usually involve specialized or niche works, and also appear frequently to involve posting works on the Internet; and (4) private uses among a limited number of people.

III. Legal Background

Section IV of the Report provides the legal backdrop for consideration of the orphan works issue. First, it sets out the historical factors that affect the orphan works problem by describing how the issue is, in some respects, a result of the omnibus revision to the Copyright Act in 1976. Specifically, the 1976 Act made obtaining and maintaining copyright protection substantially easier than the 1909 Act. Copyrighted works are protected the moment they are fixed in a tangible medium of expression, and do not need to be registered with the Copyright Office. Also, the 1976 Act changed the basic term of copyright from a term of fixed years from publication to a term of life of the author plus 50 (now 70) years. In so doing, the requirement that a copyright owner file a renewal registration in the 28th year of the term of copyright was essentially eliminated.

These changes were important steps toward the United States' assumption of a more prominent role in the international copyright community, specifically through accession to the Berne Convention, which prohibits formalities like registration and renewal as a condition on the enjoyment and exercise of copyright. Moreover, there was substantial evidence presented during consideration of the 1976 Act that the formalities such as renewal and notice, when combined with drastic penalties like forfeiture of copyright, served as a "trap for the unwary" and caused the loss of many valuable copyrights. These changes, however, exacerbate the orphan works issue, in that a user generally must assume that a work he wishes to use is subject to copyright protection, and often cannot confirm whether a work has fallen into the public domain by consulting the registration records of the Copyright Office.

Section IV of the Report then goes on to describe existing provisions of copyright law that might address the orphan works situation in certain circumstances. While U.S. copyright law does not contain an omnibus provision addressing all orphan works as such, it does contain a few provisions that permit certain users to make certain uses of certain classes of orphan works, and other provisions that reduce the risk in using an orphan work. These provisions include section 108(h), section 115(b), section 504(c)(2), and the termination provisions (sections 203, 304(c), and 304(d)). These existing sections provide models that may be useful in the development of an omnibus orphan works provision.

This discussion demonstrates that the current Copyright Act does not contain a provision designed to address the orphan works situation that is the subject of the Report. While some provisions, like section 108(h), might address the question for some users in certain situations, in general a user faced with an orphan works situation will not find a specific section or other provision of the Act on which he might rely to make use of the work.

Nevertheless, we believe that the focus on developing legislative text to address orphan works should

not obscure the fact that the Copyright Act and the marketplace for copyrighted works provide several alternatives to a user who is frustrated by the orphan works situation. Indeed, assessing whether the situations described to us in the comments were true "orphan works" situations was difficult, in part because there is often more than meets the eye in a circumstance presented as an "orphan works" problem.

For purposes of developing a legislative solution we have defined the "orphan works" situation to be one where the use goes beyond any limitation or exemption to copyright, such as fair use. However, in practice, most cases will not be so neatly defined, and a user may have a real choice among several alternatives that allow her to go forward with her project: making noninfringing use of the work, such as by copying only elements not covered by copyright; making fair use; seeking a substitute work for which she has permission to use; or a combination of these alternatives. Indeed, evidence presented to us indicates that users in the orphan works situation make exactly these types of choices. Section IV of the Report describes some of those alternatives and how they might be applicable to different scenarios described in the comments.

Finally, Section IV of the Report sets out the international law context for consideration of an orphan works solution. Specifically, it describes the obligations that the various international copyright treaties impose on the United States with respect to imposition of formalities to copyright, limitations and exceptions to copyright and copyright remedies.

IV. Description of Proposed Solutions.

Numerous comments received in the orphan works proceeding proposed solutions to the orphan works problem, and Section V of the Report catalogs and describes them. These solutions can be grouped into four categories:

• Solutions that already exist under current law and practice. These were usually noted only in passing; commenters (even commenters opposed to any orphan works provision) did not take the position that the existing law is sufficient to solve the orphan works problem.

• Non-legislative solutions. An example of a solution in this category is a proposal for improved databases for locating owners of works. These solutions were also usually noted only in passing, and were not advanced as sufficient to fix the problem.

• Legislative solutions that involve a limitation on remedies when a user uses an orphan work. The most substantive comments fell into this category, and most of the comments by professional organizations or academics fell into this category.

• Other legislative solutions. Examples of proposed solutions in this category are deeming all orphaned works to be in the public domain, or changing the tax or bankruptcy codes to reduce the factors that cause orphan works to come into existence in the first place.

As explained in Section V, most of the comments focused on various aspects of the third category, legislative proposals involving a limitation on remedies. Almost every commenter who advocated a limitation-on-remedies system agreed that a fundamental requirement for designation of a work as orphaned is that the prospective user have conducted a search for the owner of the work, and that the search results in the owner not being located. The commenters differed in the types of searches they would consider adequate.

Many commenters were in favor of determining whether a search was reasonable on an "ad hoc" or case-by-case basis, whereby each search is evaluated according to its circumstances. This approach was offered as having the advantage of flexibility to cover the wide variety of situations that depend on the type of work and type of use involved. Several others were in favor of a "formal" approach, whereby the copyright owner is required to maintain his contact information in a centralized location, and a user need only search those centralized locations to perform a reasonable search. That approach was offered as being more certain than the "ad hoc" approach.

The commenters also discussed the role that registries would play in an orphan works system. Some proposed a mandatory registry for owner information, which was opposed by several commenters as reinstating the problematic features of the pre-1976 copyright law, and might violate international obligations related to formalities. Many commenters expressed support for voluntary registries of owner information that could be consulted by users in performing their reasonable searches. Some copyright owners expressed concern about even voluntary registries as not offering much efficiency in certain cases, such as photographs. Some commenters proposed that user registries be established in which a user would file a notice that he intends to use a work for which he cannot locate an owner. Both voluntary and mandatory user registries were proposed. Concerns were raised as to whether user registries were unnecessarily burdensome on owners, who might have to consult the registry frequently to monitor use of their copyrights.
Other issues discussed by the commenters and described in Section V include whether the orphan works system should be limited based on the age of the work, on whether the work is unpublished, and on whether the work is of foreign origin. Many commenters expressed the view that none of these characteristics should disqualify any particular work; rather, these aspects of a work should be considered in the determination of whether the search for the owner was reasonable. Some commenters also proposed that the use of orphan works be limited to non-profit educational or cultural institutions.

Once a work has been designated as an orphan work, several comments addressed whether the user would have to pay any fees for the use of the work. A common suggestion was that the user be obligated to pay a reasonable license fee if the copyright owner surfaced after use began. Others proposed a low fixed statutory fee, such as $100 per work used, and another suggestion was the actual damages caused by the use be limited by a low statutory cap. Some participants favored the use of an escrow that users would pay into upon use of the orphan work, with that money distributed to owners if they surfaced.

If an owner does appear and claim infringement, most commenters agreed that some limitation on the remedies for infringement is essential to enabling the use of the work. Most agreed that statutory damages and attorneys fees should not be available, because those remedies create the most uncertainty in the minds of users. With respect to injunctive relief, many commenters proposed that the orphan work user be permitted to continue the use he had been making before the owner surfaced, but that new uses of the work remain subject to injunction and full copyright remedies.

V. Conclusions and Recommendations

Section VI of the Report contains the Copyright Office's conclusions and recommendations. Our conclusions are:

• The orphan works problem is real.

• The orphan works problem is elusive to quantify and describe comprehensively.

• Some 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 recommends that the orphan works issue be addressed by an amendment to the Copyright Act's remedies section. The specific language we recommend is provided at the end of the Report.

In considering the orphan works issue and potential solutions, the Office has kept in mind three overarching and related goals. First, any system to deal with orphan works should seek primarily to make it more likely that a user can find the relevant owner in the first instance, and negotiate a voluntary agreement over permission and payment, if appropriate, for the intended use of the work. Second, where the user cannot identify and locate the copyright owner after a reasonably diligent search, then the system should permit that specific user to make use of the work, subject to provisions that would resolve issues that might arise if the owner surfaces after the use has commenced. In the roundtable discussions, there seemed to be a clear consensus that these two goals were appropriate objectives in addressing the orphan works issues. Finally, efficiency is another overarching consideration we have attempted to reflect, in that we believe our proposed orphan works solution is the least burdensome on all the relevant stakeholders, such as copyright owners, users and the federal government.

The proposed amendment follows the core concept that many commenters favored as a solution to the orphan works problem: if the user has performed a reasonably diligent search for the copyright owner but is unable to locate that owner, then that user should enjoy the benefit of limitations on the remedies that a copyright owner could obtain against him if the owner showed up at a later date and sued for infringement. The recommendation has two main components:

• the threshold requirements of a reasonably diligent search for the copyright owner and attribution to the author and copyright owner; and

• the limitation of remedies that would be available if the user proves that he conducted a reasonably diligent search.

The details of the recommendation are set out in Section VI, followed by a discussion of some other proposals that we considered carefully, but ultimately decided not to recommend.

A. The Reasonably Diligent Search Requirement
Subsection (a) sets out the basic qualification the user of the orphan work must meet – he must perform a "reasonably diligent search" and have been unable to locate the owner of the copyright in the work. Such a search must be completed before the use of the work that constitutes infringement begins. The user has the burden of proving the search that was performed and that it was reasonable, and each user must perform a search, although it may be reasonable under the circumstances for one user to rely in part on the search efforts of another user.

Several commenters complained of the situation where a user identifies and locates the owner and tries to contact the owner for permission, but receives no response from the owner. They suggested that works in these situations should be considered orphan works. We have concluded that such a solution is not warranted, as it touches upon some fundamental principles of copyright, namely, the right of an author or owner to say no to a particular permission request, including the right to ignore permission requests. For this reason, once an owner is located, the orphan works provision becomes

inapplicable.

The proposal adopts a very general standard for reasonably diligent search that will have to be applied on a case-by-case basis, accounting for all of the circumstances of the particular use. Such a standard is needed because of the wide variety of works and uses identified as being potentially subject to the orphan works issues, from an untitled photograph to an old magazine advertisement to an out-of-print novel to an antique postcard to an obsolete computer program. It was not possible for our Report to craft a standard that could be specific to all or even many of these circumstances. Moreover, the resources, techniques and technologies used to investigate the status of a work also differ among industry sectors and change over time, making it hard to specify the steps a user must take with any particularity.

Section VI contains a discussion of several factors that commenters identified as being relevant to the reasonableness of a search, including:

• The amount of identifying information on the copy of the work itself, such as an author's name, copyright notice, or title;

• Whether the work had been made available to the public;

• The age of the work, or the dates on which it was created and made available to the public;

• Whether information about the work can be found in publicly available records, such as the Copyright Office records or other resources;

• Whether the author is still alive, or the corporate copyright owner still exists, and whether a record of any transfer of the copyright exists and is available to the user; and

• The nature and extent of the use, such as whether the use is commercial or noncommercial, and how prominently the work figures into the activity of the user.
Importantly, our recommendation does not exclude any particular type of work from its scope, such as unpublished works or foreign works. Section VI explains why we believe that unpublished works should not be excluded from this recommendation, and how the unpublished nature of a work might figure into a reasonable search determination.

Our recommendation permits, and we encourage, interested parties to develop guidelines for searches in different industry sectors and for different types of works. Most commentators were supportive of voluntary development of such guidelines. When asked whether the Copyright Office should have authority to embody guidelines in more formal, binding regulations to provide certainty, we were surprised to hear that most user groups – whom we thought would desire more certain rules for searches – opposed the Copyright Office issuing rules related to search criteria. Based on our desire to maintain flexibility in the reasonable search standard and this expressed opposition to formal rulemaking, we have not proposed that the orphan works legislation provide the Office with any rulemaking authority.

B. The Attribution Requirement

We also recommend one other threshold requirement for a user to qualify for the orphan works limitations on remedies: throughout the use of the work, the user must provide attribution to the author and copyright owner of the work if such attribution is possible and as is reasonably appropriate

under the circumstances. The idea is that the user, in the course of using a work for which he has not received explicit permission, should make it clear to the public that the work is the product of another author, and that the copyright in the work is owned by another. While only a handful of commenters proposed a requirement along these lines, we found several good reasons to support this requirement, described in Section VI, including the notion that attribution is critically important to authors, even those who consent to free use of their works. The requirement of attribution should be a flexible rule, and should not be interpreted in a strict way to create unnecessarily another obstacle to the use of orphan works.

C. Other Alternatives Considered

There were two other mechanisms proposed to help address the orphan works issue that we considered but ultimately concluded would not be appropriate to recommend at this time. First, as noted above, some commenters suggested that users should be required to file with the Copyright Office some public notice that they have conducted a reasonable search and intend to use an orphan work. While a centralized registry of user certifications or notice of intent to use sounds promising on the surface, upon closer examination there are potential pitfalls that outweigh the benefits at this time, for reasons that we describe in
Section VI.

The other mechanism proposed by some commenters is a requirement that orphan works users pay into an escrow before commencing use. In our view, an escrow requirement in an "ad hoc" reasonable search system like we recommend would be highly inefficient. Every user would be required to make payment, but in the 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. We are sympathetic to the concerns of individual authors about the high cost of litigation and how, in many cases, the individual creator may have little practical recourse in obtaining relief through the court system. We believe that consideration of new procedures to address this situation, such as establishment of a "small claims" or other inexpensive dispute resolution procedure, would be an important issue for further study by Congress.

D. Limitation on Remedies

If a user meets his burden of demonstrating that he performed a reasonably diligent search and provided reasonable attribution to the author and copyright owner, then the recommended amendment would limit the remedies available in that infringement action in two primary ways: First, it would limit monetary relief to only reasonable compensation for the use, with an elimination of any monetary relief where the use was noncommercial and the user ceases the infringement expeditiously upon notice. Second, the proposal would limit the ability of the copyright owner to obtain full injunctive relief in cases where the user has transformed the orphan work into a derivative work like a motion picture or book, preserving the user's ability to continue to exploit that derivative work. In all other cases, the court would be instructed to minimize the harm to the user that an injunction might impose, to protect the user's interests in relying on the orphan works provision in making use of the work.

1. Monetary Relief

A vast majority of the commenters in our study agreed that the prospect of a large monetary award from an infringement claim, such as an award of statutory damages and attorneys' fees, was a substantial deterrent to users who wanted to make use of an orphan work, even where the likelihood

of a claim being brought was extremely low. Most of the proposals for addressing the orphan works problem called for clear limitations on the statutory damages and attorneys' fees remedies in cases involving orphan works. Our recommendation follows this suggestion by limiting the possible monetary relief in these cases to only "reasonable compensation," which is intended to represent the amount the user would have paid to the owner had they engaged in negotiations before the infringing use commenced. In most cases it would equal a reasonable license fee, as that concept is discussed in recent copyright case law.

While many commenters supported a general remedy like "reasonable compensation," some expressed concern about the impact that any monetary remedy at all might have on their ability to go forward and use orphan works. For example, museum representatives explained that they would like to use hundreds or even thousands of orphan works in their collections, so the potential of even a minimal monetary award for each work would, in their view, be prohibitive. Libraries and archives made similar observations, noting their desire to make large collections of orphan works accessible.

In our view, a general standard of reasonable compensation is the right solution to this problem, for several reasons. First, with respect to the concern about a chilling effect of any monetary remedy, it must be noted that in nearly all cases where a diligent search has been performed, the likelihood of a copyright owner resurfacing should be very low, so that no claim for compensation is ever made. Second, it should be clear that "reasonable compensation" may, in appropriate circumstances, be found to be zero, or a royalty-free license, if the comparable transactions in the marketplace support such a finding. Our discussions with museums, universities and libraries indicated that in many orphan works situations a low or zero royalty is likely to be the reasonable compensation.
In addition, to make absolutely sure that the concerns of nonprofit institutions like libraries, museums and universities about monetary relief are assuaged, we recommend an additional limitation on monetary relief where the user is making a non-commercial use of the work and expeditiously ceases the infringement after receiving notice of the infringement claim. In that case, there should be no monetary relief at all. Libraries, archives and museums indicated that posting material on the Internet was a primary use they would like to make of orphan works, and that they would take down any material if a copyright owner resurfaced. This additional provision provides certainty about their exposure in that circumstance. If the organization wishes to continue making use of the work, it would have to pay reasonable compensation for its past use, and, as described below, for future use of the work.

2. Injunctive Relief

In addition to the limits on monetary relief, several commenters in this proceeding suggested that limitations on injunctive relief were needed as well. Specifically, users who would like to create derivative works based on orphan works, most notably filmmakers and book publishers, stressed that the fear of an untimely injunction – brought just as the book was heading to stores, or just before release of the film – provides enough uncertainty that many choose not use the work, even though the likelihood of such injunction is small.

In light of these comments, we recommend that injunctive relief for infringement of an orphan work be limited in two ways. First, where the orphan work has been incorporated into a derivative work that also includes significant expression of the user, then injunctive relief will not be available to stop the use of the derivative work, provided the user pays reasonable compensation to the copyright owner. Second, in all other cases, full injunctive relief is available, but the court must account for and accommodate any reliance interest of the user that might be harmed by an injunction. For example a full injunction will still be available where a user simply republishes an orphan work, or posts it on

the Internet without transformation of the content.

E. Administrative Provisions

We also recommend two other administrative provisions. First, a savings clause that makes clear that nothing in the new section on orphan works affects rights and limitations to copyright elsewhere in the Copyright Act, which is consistent with the structural approach of placing the provision in the remedies chapter. Second, we recommend that the provision sunset after ten years, which will allow Congress to examine whether and how the orphan works provision is working in practice, and whether any changes are needed.

F. International Context

The Notice of Inquiry asked questions about how any proposed solution to the orphan works issue would comport with the United States' international obligations in the various copyright treaties. Our recommendation does not exclude foreign works from its scope, so it must comport with the United States' international copyright obligations. We believe that one of the primary advantages of the ad hoc, reasonably diligent search approach is that it is fully compliant with international obligations.

G. Application to Types of Uses

To further explain how our recommendation would work in practice, Section VI takes the four general categories of users described in Section III and describes how the recommended limitation on remedies would apply in each scenario. The Section describes how the Subsequent Creator, Large-Scale Access User, Enthusiast User and Personal User would proceed under the recommendation. We believe that nearly all orphan work situations are encompassed by one of those four categories, so that if our recommendation resolves these users' concerns in a satisfactory way, it will likely be a comprehensive solution to the orphan works situation.

VI. Reactions to the Report

The reactions we have heard to our Report, for the most part, have been overwhelmingly positive. A broad array of copyright owners and copyright users, including book publishers, libraries, archives, museums, educational institutions, record companies, motion picture studios, independent filmmakers, software publishers and others, have praised the Report and support the basic concept and structure of the proposed legislation. Several of these groups have pointed out specific features of our recommendation that might create unintended consequences, or suggested modifications to the language to address specific concerns.

In this section of the testimony, we comment on some of these reactions and suggestions. As noted in the Report, we proposed specific legislative language to help clarify our conclusions and recommendations by giving interested parties a more concrete understanding of what our conclusions entail. We also recognized that interested parties might have suggested revisions that would improve the clarity of the text or avoid unintended consequences of the language that we proposed. In other words, we recognize that our proposal is likely a starting point for legislation to address orphan works, and would be pleased to work with the Subcommittee, its staff and interested parties on modifying that language. In general, however, these groups are supportive of the overall approach, and the proposed changes are issues that very likely can be resolved with further discussion, and which will result in compromise draft legislation supported by the vast majority of copyright owner and user interests.

A. The Problem of Photographs and Other Visual Images
The one exception to the broad support for our proposed legislation involves certain groups representing individual copyright owners of visual works, such as photographers, illustrators, and graphic artists. They oppose our proposal, which was not unexpected, as many of them filed comments in our proceeding recommending that no change be made to the law to address the orphan works problem. They argue that many, if not most, of their works will be inaccurately labeled orphan works, because it is difficult and often impossible to find the copyright owner of a visual image, usually because the name of the creator is not on the copies of the works distributed to the public. Moreover, existing sources of ownership information are text-based and often not useful if the user only has the work, and not any other information about the work, before him.

In other words, these groups concede the very problem that is at the heart of the Report – a user seeking to locate a photographer or illustrator of an image that has no identifying information on the work itself faces a daunting challenge. The Copyright Office registration records are text-based, and in most cases registration records do not contain much, if any, description of the subject matter of the image. Indeed, efforts by the Office to accommodate photographers by making it easier to register photographs (e.g., the recent regulations permitting group registration of published photographs), while responding to complaints from photographers about the difficulties they have had in registering their works, have probably made the registration system less useful for determining copyright ownership of particular photographs. So even if a photographer has registered his works with the Copyright Office, it may be the case that a user will not be able locate that owner.

Our proposal anticipates and provides safeguards for this situation in a number of ways, primarily by preserving meaningful remedies for owners of works that might be subject to the orphan works legislation. First, in most cases, including all commercial uses, the user of an orphan work is obligated to pay the copyright owner "reasonable compensation" for the use prior to the time the owner resurfaces. Also, the user will not generally not be able to continue making the use after the owner asserts his copyright, unless the user meets the requirements of Section 514(b)(2)(A), and even in that case will be required to pay reasonable compensation to the owner going forward. And in order for noncommercial users to avoid the requirement of reasonable compensation, they must cease the infringement expeditiously after the owner assert his rights, thus preserving future exploitation of the owner's exclusive rights.

Despite being entitled to "reasonable compensation" and these remedies in most orphan work cases, photographers oppose the proposal because they claim that bringing a lawsuit to collect this compensation will be prohibitively expensive. We agree that legal actions to enforce copyrights in visual images are expensive for individual creators, just as any access to our court system is costly. However, this problem exists for copyrighted visual images regardless of whether orphan works legislation is passed or not. Moreover, there are non-legal actions that the photographers, illustrators and similar creators can take to enforce and exploit their copyrights, and at the same time, help eliminate the possibility that their works would fall into the orphan works system.

As a practical matter, a marketplace of licenses and permissions for use of photographs simply cannot exist where potential buyers cannot find the sellers of rights in visual images. Creators of visual images need to address the problem first and foremost, and primarily through non-legal actions – through more consistent marking of copies of their works, through development of mechanisms like collective licensing organizations that can provide ownership and licensing information to users, and by deploying technology to allow searches for owners where the user only has the image and no contextual information. Steps like these will help individual owners enforce and receive payment for

their copyrighted images, and, at the same time, ensure that they are locatable and that their works do not become orphan works. It is important that any legislative solution to address orphan works include photographs and other visual images within its scope to resolve the numerous orphan works problems that exist with these types of works. Moreover, failing to include such works in the scope of the legislation would likely allow visual image copyright owners to avoid resolving these more fundamental problems with non-legal, marketplace reforms.

As to the legal actions that individual creators can take to enforce their rights, our Report acknowledges the real obstacle faced by photographers and other individual copyright owners from the expense of infringement lawsuits. We agree that a more efficient dispute resolution procedure, such as a "small claims" procedure for copyright infringement claims involving relatively small damage amounts, would offer individual owners better access to legal protection of their rights. Such a procedure would also allow these owners to obtain the "reasonable compensation" they would be due under our orphan works proposal even if their works fall into the orphan category. We have proposed that the Copyright Office conduct a study of the "small claims" problem over the next year, examining possible solutions in light of comments from interested parties. We would welcome a similar invitation from this Subcommittee, and would be pleased to work with you and your staffs and interested parties in exploring possible new procedures. It should be noted, however, that the key to creating a more efficient marketplace for copyrighted visual images is not increased litigation, but making it easier for owners and users to find each other, which our orphan works proposal encourages.

In sum, we understand the concerns of photographers and other visual image creators. They face difficulties exploiting their copyrights, particularly in light of new technology like the Internet, and solutions to those problems, both legal and non-legal, should be explored and developed. That fact, however, does not deny that there is a very real problem of orphan works that needs to be addressed, and those issues should not delay Congress in its consideration and enactment of orphan works legislation.

B. Other Comments and Suggestions

The other comments and suggestions we have received concern specific provisions in the Report's proposed language. First, some groups remain concerned that a general standard of "reasonable compensation" might result in high damage awards that would discourage use of orphan works. For reasons set out in the Report, we think this concern is unfounded, particularly in light of the exception that limits monetary relief to no compensation where the use is noncommercial and the user ceases the infringement when the owner resurfaces.

One suggestion made to address this issue is for the statute to define "reasonable compensation" with language from the Report that specifies that it "would equal what a reasonable willing buyer and reasonable willing seller in the positions of the owner and user would have agreed to at the time the use commenced, based predominantly by reference to evidence of comparable marketplace transactions." We agree that including language like this in the legislation would be a helpful clarification. We also believe that legislative history providing examples of how reasonable compensation would be determined in different circumstances would also be helpful.

On the related question of whether the orphan work user's activity is done "without direct or indirect commercial advantage," which would make that user potentially eligible for no monetary relief, our Report attempts to recognize that some nonprofit organizations engage in different types of activity, some of which is commercial and some non-commercial. Museums and other nonprofit organizations have asserted that their activities involving the sale of books or other items using copyrighted

materials are simply a matter of "cost recovery" and should not be considered commercial for the purposes of our proposal. We cannot accept that proposition categorically, especially where the institution has paid other located copyright owners for the use of their works in the same book or product that contains the orphan work. Nevertheless, we agree the drawing lines between situations is difficult, and look forward to working with museums and others on illustrative examples that can be used in the legislative history to help draw those lines.

Second, some groups have expressed concern with our requirement that the orphan work user attribute both the author and copyright owner during their use of the work. Specifically, museums and others have said that determining the copyright owner, as opposed to the author, is often difficult and confusing, and therefore it should not be required. In our view, however, as the Report explains, attributing the copyright owner, if possible, is an important piece of information that other users and the public should be able to learn from the orphan work user. It also will increase the likelihood that the owner will surface after use begins and voluntary agreement over the use can be reached. If the user is unsure of who owns the copyright, then it may not be possible for him to attribute the copyright owner. Also, the manner of attribution should be determined as is reasonable under the circumstances. These two considerations, embodied in our proposal, account for the concerns expressed about attributing the copyright owner, and thus it should remain a requirement.

Third, with respect to the injunctive relief provision of proposed Section 514(b)(2)(A), some have expressed concern about what types of works would be included in that provision. Specifically, some are concerned that the use of the term "derivative work" might not be broad enough to encompass works that our Report explains should be included – the historical book which includes photographs or the inclusion of a sculpture in a scene of a motion picture – because these works do not necessarily "transform" or alter the underlying orphan work. As we note in the Report, the concept behind this provision – with which we have not heard disagreement – was to capture the situation where the user creates a new work that relies to a significant extent on the underlying orphan work, as contrasted with the situation where the user merely republishes the orphan work, either alone or as part of a compilation. We agree that the language in this section could be more clear, and would be pleased to work with interested parties on ways it could be amended to better reflect the concept that underlies it.

Fourth, several groups have expressed concerned about the sunset provision, and have questioned how it applies where a use begins before the 10-year period is over but continues afterward. It was our intent to allow any user who begins use in reliance on the proposed Section 514 before the 10-year period is over to be able to benefit from the provision, even after the 10-year period ends. Changing the word "occurring" to "commencing" would help make that clear, and we would be pleased to discuss further changes to clarify this point. As to whether a sunset provision is appropriate, it is likely that at least some minor — and perhaps some major — adjustments to the orphan works legislation will be advisable after we have had a few years' worth of experience with it. We certainly do not believe that the provisions of the orphan works legislation should actually expire. But without a sunset provision, it may be difficult to persuade a future Congress to modify the existing legislation if it is deemed to be "good enough." Requiring reauthorization after a reasonable number of years will ensure that Congress will, as a practical matter, have little choice but to ask itself at that point whether and how the existing regime can be improved.

As noted above, we would be pleased to work with the Subcommittee, its staff and the interested parties on these or any other issues related to our proposal. We have been greatly encouraged by the generally positive reaction so far, and hope that balanced, comprehensive and effective legislation to address this important issue can be introduced and enacted in the near future.

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March 24, 2005

Jule L. Sigall
Associate Register for Policy & International Affairs
U.S. Copyright Office
Copyright GC/I&R
P.O. Box 70400
Southwest Station, Washington, DC 20024

RE: Orphan Works Study (70 FR 3739)

On behalf of the undersigned illustrators and arts organizations, we respectfully petition the U.S. Copyright Office to maintain copyright protection of so-called orphaned works on all visual artistic works for the following reasons:

It's not valid to infer that a protected work of art has been abandoned simply because a potential user has difficulty identifying or locating an artist. Many works appear in print or on the internet as a result of unauthorized usage, and unsophisticated users may copy art from multiple sources. Also, as publishers adapt previously printed editions to the internet, artistic works may be separated from their original context without attribution. If a work of art is orphaned because of unlawful or feckless usage, its integrity will be irreparably compromised by stripping it of protection.

Automatic protection of visual artistic works is guaranteed without formalities. To strip past work of existing protections would bring copyright law into disrepute. Authors have been guaranteed protection under U.S. copyright law, the Berne Convention and other international copyright treaties. Because a searchable international registry of published visual artists does not presently exist for users to clear authors' rights, it would be unjust to penalize authors because new technology has given users a greater appetite for their work and easier access to exploit it.

Many published artistic works are independently copyrighted contributions to collective works. Even if a collective work is orphaned because a publication ceases or a publisher fails, an artist still retains the rights to his or her own individual contribution to the publication.

BRAD HOLLAND, ILLUSTRATOR
C.F. PAYNE, ILLUSTRATOR
BRUCE LEHMAN, ATTORNEY AT LAW
ELENA PAUL, ATTORNEY AT LAW
DAVID LESH, ILLUSTRATOR
DUGALD STERMER, ILLUSTRATOR
CYNTHIA TURNER, ILLUSTRATOR

Authors' rights are exclusive. The public interest does not compel artists to publish their work. Therefore the public cannot demand that an artist's published work, even if orphaned, be made available for free usage before its copyright has expired.

Authors' rights are their incomes. The *exclusive* right to publish or not publish gives the artist the right to determine what compensation is due for usage. Most freelance artists and writers have no other source of income but their creative work and the accumulated value of that work is no different than the value that accrues to one's home. Therefore the copyright that protects creative work does not deprive the public of an "entitlement" any more than does the ordinary ownership of private property.

Creativity is not chilled by protecting orphaned works. The human imagination is not dependent on unlimited access to an unlimited body of other people's work to physically appropriate. Even with copyright protection intact, orphaned work can inspire and influence others.

Free speech is not restricted by protecting orphaned works. Since ideas and influence are not copyrightable, no one's free speech is restricted by placing legal limits on their appropriation of other people's tangible expressions.

Archival preservation is not hampered by copyright protections. Copyright law already permits the copying of work for archival preservation and does not necessitate giving anyone a broader privilege to copy and distribute work without the author's permission.

Culture is not impoverished by protecting orphaned works, because orphaned works will still be available for study and enjoyment. But if copyright protection, once given, can be taken away, the thread of broader rights could unravel. Stripping orphaned works of their protection would encourage some users to attribute orphaned status even to works whose authors *can* be located, but with a bit of effort. This would endanger the rights of known authors.

The internet has destabilized the environment in which creators must work. And as artistic works become available worldwide, there is an increased demand for content. But the opportunity this presents to artists for disseminating their work is currently menaced by the threat to authorship that comes with unauthorized usage by others. Artists, like other creators, are trying to meet the organizational, financial and legal challenges necessary to create licensing systems to let them compete with corporate content providers. But it takes time, investment, and creative organization to achieve these goals, and in the meantime, artists must still be able to protect their works. Removing protection from work that has fallen through the cracks of this system-in-flux will unfairly reward opportunists at the expense of creative individuals. It would foreclose the ability of future licensing systems to protect and distribute that same work at a future date in a way consistent with the intent of copyright protections.

To strip orphaned works of their protection would invite unjust exploitation. Commercial stockhouses, databases and print and web publishing industries could freely gather "orphaned" images for use by simply declaring authors hard to locate. The Copyright Clearance Center, which currently claims they cannot track usage or identify authorship, would see their continued failure to pay artists legitimized.

To strip orphaned works of their protection would favor corporate interests over individual creators. Corporate copyright holders could easily staff up to handle the increased cost of monitoring and maintaining copyright protection while individual creators might well find the added burden of maintaining multiple copyrights prohibitive.

To strip orphaned works of their protection would threaten an author's integrity. It's a natural evolution for artists to create derivatives of their own work throughout their careers. To force an artist's "orphaned" work into the public domain for others to "remix" without consent is hostile to the centuries-old recognition of authors' rights. It would allow others to create a bastard body of derivative work to compete with the artist's self-created derivatives. This could injure both an artist's reputation and the value of his or her work.

The removal of copyright protection for orphaned work would reinforce the agenda of the "free culture" movement to subvert existing copyright protection for other work. The alternative copyright drafted by Creative Commons and being promoted as law in various countries includes a "Share Alike version" that "requires derivative users to adopt a similarly open license." In the words of a proponent: " Widespread voluntary adoption of this [alternative] license will render measures like the extension of copyright irrelevant... The greater the volume of material with this kind of license that is out there, the greater the incentive to make use of it, even at the cost of forgoing commercial copyrights. Since most commercial culture depends ultimately on unpaid appropriation of older material, the effects will be cumulative, even VIRAL [emphasis added]." – "Lessig on the Limits of Copyright" by John Quiggin 1/26/05
http://johnquiggin.com/index.php/archives/2005/01/26/lessig-on-the- limits-of-copyright/

Since it is not self-evident that "most commercial culture depends ultimately on unpaid appropriation of older material," we should be cautious about accepting this argument as a legal premise. If users of unprotected "orphaned" work could embed their "new derivative creations" with a "viral copyright," then standard copyright law could become as vulnerable to its unintended consequences as computers to an internet worm.

The "Free Culture" argument is at odds with the principle of tangible expression, which is the only aspect of the creative process protected by copyright law. By arguing that creative work is only a "remix" of the work of others, the critics of copyright ignore the factors of experience, personal development and individual vision that are embodied in any author's tangible expression of an idea. The computer and internet, as well as Photoshop, stock and royalty-free content have all made it possible for many people to become content providers by "sampling" the work of others. But the demands of this "new modality" for free and easy access to usable work should not induce lawmakers to legislate as if creativity can be adequately defined by the "remix" model. There is a difference between the alchemy of new creation and the assembling of "found

work." Legal protections for this difference have been built up over centuries and once eroded, would be painful and costly to recover.

The internet has created a culture of appropriation, and immediate global access to artistic works has facilitated piracy, unintentional infringement and plagiary. But instant and unrestricted access to work should not be construed as a *necessity* just because technology has made it a *possibility*. That an artist's work now can be instantly transmitted around the world without the artist's permission or control does not justify a user's "right" to take the work. And if inability to trace a work to its author becomes the justification for creating such a "right," who and what will define the inability to trace the work?

The "orphaned" works currently under consideration by the Copyright Office include the work of many artists now in the prime of their careers. To remove copyright protection from this work has the potential to undermine the important public policy behind copyright: To promote the creation and dissemination of culture by rewarding incentive. Rescinding guaranteed protection from copyrighted works will do more harm than good to the creative community and by extension, to the public good.

Please maintain copyright protection of so-called orphaned works on all visual artistic works.

Sincerely,

By Brad Holland and Cynthia Turner, Illustrators' Partnership of America

Arts Organizations

UNITED STATES
Illustrators Partnership of America (IPA)
American Institute of Architects (AIA)
American Society of Architectural Illustrators (ASAI)
Artists Rights Society New York (ARSNY)
Association of Medical Illustrators (AMI)
Association of Science Fiction and Fantasy Artists (ASFA)
Guild of Natural Science Illustrators (GNSI)
National Cartoonists Society (NCS)
Pittsburgh Society of Illustrators
San Francisco Society of Illustrators (SFSI)
Society of Children's Book Writers & Illustrators (SCBWI)
Society of Illustrators Los Angeles (SILA)
Society of Illustrators New York (SI)
Society of Illustrators San Diego (SISD)
Society of Photographers & Artists Representatives (SPAR)
Akron Society of Artists

AUSTRALIA
Illustrators Australia (IA)
Australian Graphic Design Association (AGDA)
Australian Association of Architectural Illustrators (AAAI)

CANADA
Association des illustrateurs et illustratrices du Quebec
(Quebec Illustrators' Association)
Island Illustrators Society (British Columbia)
Canadian Association of Photographers & Illustrators in Communications (CAPIC)

PAN EUROPEAN
Assocation Européenes des Illustrateurs Médicaux et Scientifiques (AEIMS)
France – Germany - United Kingdom - Italy - Switzerland - Belgium – Holland

BELGIUM
Flemish Illustrators Association

FRANCE
La Maison Des Illustrateurs Francia / French Society of Illustrators

GERMANY
Illustratoren Organisation / German Society of Illustrators

GREECE
Aesopos / Greek Society of Illustrators

IRELAND
Illustrators Guild of Ireland

ITALY
Associazione Illustratori / Italian Society of Illustrators

JAPAN
Japan Architectural Renderers Association (JARA)

KOREA
Korean Architectural Perspectivists Association (KAPA)

MEXICO
Ilustracion Mexico / Mexican Society of Illustrators

THE NETHERLANDS
Association of Dutch Designers

NORWAY
KOPINOR The Reproduction Rights Organisation of Norway
Grafill

SPAIN
Federaciòn de Asociaciones de Ilustradores Profesionales
(Federation of Spanish Illustration Societies)
Madrid Professional Illustrators Association (APIM)
Catalunya Professional Illustrators Association (APIC)
Valencia Professional Illustrators Association (APIV)
Galicia Professional Illustrators Association (AGPI)
Pais Vasco Professional Illustrators Association (APIE-EIEP)

SWEDEN
Svenska Tecknare / The Association of Swedish Illustrators

UNITED KINGDOM
The Association of Illustrators (AOI)
Society of Architectural Illustrators (SAI)

(Not included in this abbreviated version, amended to comply with printing limitation requirements for the Congressional testimony written record, are Pgs. 7-126 containing individual artists' names from around the world. Full version with artists' names may be accessed at http://www.copyright.gov/orphan/comments/OW0660-Holland-Turner.pdf)