

PRESERVATION AND REUSE OF COPYRIGHTED WORKS

HEARING BEFORE THE SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET OF THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES ONE HUNDRED THIRTEENTH CONGRESS SECOND SESSION

APRIL 2, 2014

Serial No. 113-88

Printed for the use of the Committee on the Judiciary



Available via the World Wide Web: <http://judiciary.house.gov>

U.S. GOVERNMENT PRINTING OFFICE

87-423 PDF

WASHINGTON : 2014

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512-1800; DC area (202) 512-1800
Fax: (202) 512-2104 Mail: Stop IDCC, Washington, DC 20402-0001

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PRESERVATION AND REUSE OF COPYRIGHTED WORKS

WEDNESDAY, APRIL 2, 2014

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY,
AND THE INTERNET

COMMITTEE ON THE JUDICIARY

Washington, DC.

The Subcommittee met, pursuant to call, at 2:13 p.m., in Room 2141, Rayburn Office Building, the Honorable Howard Coble (Chairman of the Subcommittee) presiding.

Present: Representatives Coble, Goodlatte, Marino, Smith of Texas, Chabot, Chaffetz, Holding, Collins, DeSantis, Smith of Missouri, Nadler, Chu, Deutch, Richmond, DelBene, and Lofgren.

Staff present: (Majority) Joe Keeley, Chief Counsel; Tricia White, Clerk; (Minority) Stephanie Moore, Minority Counsel; Heather Sawyer, Counsel; and Jason Everett, Counsel.

Mr. COBLE. Good afternoon, ladies and gentlemen. Welcome to our hearing today on preservation and reuse.

Several of the witnesses have thanked me for letting you be here. Thank you all for responding to our invitation to be with us today. We are delighted to have a very distinguished panel.

American culture has been described as a key component of our Nation's exports, not just from a financial perspective but also as a demonstration of the creative ability of those who live in a democracy with constitutional guarantees.

It should come as no surprise that as the Co-Chair of the Creative Rights Caucus, along with the gentlelady from California, Ms. Chu, I especially value the unique creations of American artists. The fact that some of these creations can be lost forever, due to an abandonment or outright deterioration, is a loss for our society. I welcome efforts to preserve our Nation's cultural history.

As some of you may know, I am an ardent advocate of blue grass music. Despite my support, I recognize that blue grass may not be the most popular music available to Americans, and we can disagree agreeably about that. But blue grass is a part of the culture of my State, and I do not want that culture to be lost with time. So I am pleased to learn of efforts like those at the Library of Congress and elsewhere to preserve our Nation's culture for future generations.

Clearly, there are those who have raised questions that some efforts claiming to focus on preservation may, in fact, be neglecting the rights of copyright owners who still exist and could potentially be located with minimal effort. I am sure we will hear about that later today.

Several years ago, the Subcommittee spent a fair amount of time on the orphan works issue. While I do not wish to repeat that investment of time here this afternoon, I do want to hear more about the other issues of section 108, the role of libraries and museums, as well as mass digitization. That word throws me every time.

In closing, we welcome our many eminently qualified panelists, as I have said before. Thank you for taking time from your respective business schedules to join us today. We look forward to hearing from you subsequently.

And I am now pleased to recognize the distinguished gentleman from New York, the Ranking Member, Mr. Jerry Nadler, for an opening statement.

Mr. NADLER. Thank you, Mr. Chairman.

Today we examine whether existing law adequately allows for the preservation and reuse of copyrighted works with appropriate protections for content creators and other rights holders. This topic touches on a broad range of interrelated issues, including the existing exception contained in section 108 of the Copyright Act that allows limited unauthorized reproduction of copyrighted works by libraries and archives, and how the existence of orphan works complicates preservation and reuse.

Ensuring the preservation of creative works is unquestionably important. Our libraries, archives, and museums have always played a critical role in compiling and preserving this Nation's rich cultural and historical heritage, and we all want to ensure that they have the tools necessary to continue their important work.

At the same time, and as our copyright law appropriately reflects, authors, artists, and other creators have the exclusive right to control and exploit their works. Our goal is to ensure that we strike the right balance.

Recognizing the unique public service mission served by libraries and archives, Congress first enacted section 108 in 1976, allowing these entities a limited exception for preservation, replacement, and research purposes long before technological innovations made it possible to make digital copies of analog works on a mass scale, a process otherwise known as mass digitization. And while orphan works legislation has previously been considered by Congress, these proposals like the relatively minor adjustments made to section 108 through the Digital Millennium Copyright Act of 1998 did not directly grapple with mass digitization.

This hearing, thus, allows us to revisit preservation and reuse issues in light of the considerable technological changes that have taken place in the last few years.

As a starting point for this discussion, I am interested in hearing from our witnesses regarding what parts of the recommendations issued by the Copyright Office Section 108 Study Group remain relevant today and whether further studies or adjustments might be warranted.

I am similarly interested in hearing whether the existence of orphan works, commonly understood to be copyrighted works whose owners cannot be identified or located making it impossible to negotiate terms for their use, remains a problem and, if so, how we should address it.

Recent litigation over mass digitization seems to confirm the need for a solution. Those cases involve a public-private partnership between Google and HathiTrust to digitize the library collections of several universities. In the case brought by the Authors Guild against Google, the District Court Judge recognized that orphan works remain “a matter more suited for Congress than this court.” As the judge explained, “the questions of who should be entrusted with guardianship over orphan books, under what terms, and with what safeguards are matters more appropriately decided by Congress than through an agreement among private self-interested parties.”

Ongoing uncertainty regarding how to deal with orphan works also played a part in a related case brought by the Authors Guild against HathiTrust where the inability of several universities to create a procedure that accurately identified orphan works resulted in suspension of efforts to digitize these works. This would seem to confirm that orphan works continue to be a problem in need of a solution, and I look forward to hearing from our witnesses on what we should do.

To the extent that some of you may feel that congressional action is not needed, what are other workable options, particularly in response to judicial requests for congressional action?

Mass digitization may pose a similar dilemma. Some stakeholders may take the view that no action is needed, while others may firmly believe that this issue should be addressed. There are unquestionable benefits to be gained from mass digitization in certain circumstances. For example, digitization allows print-disabled individuals unprecedented access to books that enables them to compete on equal footing with their sighted peers. It may also enhance the ability to collect and preserve fragile or out-of-production works. At the same time, bulk digitization involves millions of copyrighted works, some of which are orphan works, and raises complex questions about protections for creators of these works and other rights holders.

Congress has afforded libraries and archives special privileges in the Copyright Act in recognition of the unique and critical role they play in capturing and preserving the Nation’s rich history. Rules sought and potentially created by and for these institutions may be appropriate for other users for uses of copyrighted works. Mass digitization also presents new and different opportunities and risks related to online access to copyrighted works that raise critical and complicated questions that are not presented by analog copies.

These are just a few of the many issues that we will begin grappling with today. As we do so, we should take note of the Copyright Office’s ongoing review of orphan works and mass digitization. That process, which started with a Notice of Inquiry in 2012 and included 2 days of public roundtables just last month, will provide useful guidance. I look forward to reviewing the Copyright Office’s recommendations.

In the meantime, our witnesses provide a diversity of perspectives and a wide range of experience, and I look forward to hearing from them today.

With that, I thank the Chairman again, and I yield back the balance of my time.

Mr. COBLE. I thank the gentleman.

Without objection, opening statements of other Members will be entered into the record.

I will ask the witnesses, if you will, to please rise and raise your right hand. We traditionally swear in our witnesses.

[Witnesses sworn.]

Mr. COBLE. Thank you. You may be seated.

Let the record show that each of the witnesses responded in the affirmative.

Ms. Chu, you want to introduce the last witness. Right?

Ms. CHU. Yes.

Mr. COBLE. All right.

For the third time, I want to say how distinguished the panel before us is, and we appreciate your being here.

You will see two clocks on your table. The green light—you may go full ahead. When the light turns amber, that is your warning that you are running out of time and you will have 1 minute at that point. If you can wrap up on or about 5 minutes, that would be appreciated. You will not be severely punished if you fail to do that, but we try to keep within the 5-minute range up at this table as well.

Our first witness today is Mr. Gregory Lukow, Chief of the Audio Visual Conservation Center at the Library of Congress, located at the Packard Campus in Culpepper, Virginia. Mr. Lukow has been with the Library of Congress for over a dozen years, overseeing the development of the Packard Campus and its preservation programs. Mr. Lukow received his degree in Broadcast Journalism and English from the University of Nebraska and his M.A. in Film and Television Study from UCLA. And I am sure, Mr. Lukow, you are an ardent Husker fan, I suspect. There was no great risk, I assumed, in saying that.

Our second witness is Mr. Richard Rudick, Co-Chair of the Section 108 Study Group. Mr. Rudick retired from John Wiley and Sons, where he served for 26 years, including as senior Vice President and General Counsel. Mr. Rudick received his J.D. from the Yale School of Law and is a graduate of Middlebury College. Mr. Rudick, good to have you with us.

Our third witness is Mr. James Neal, Vice President for Information Services and University Librarian at Columbia University. Mr. Neal oversees 22 libraries at Columbia and has participated in a wide range of professional roles in the library community, including the Section 108 Study Group. Mr. Neal received his B.A. in Russian Studies at Rutgers and his two masters degrees in History and Library Science from Columbia.

Our fourth witness is Ms. Jan Constantine, General Counsel of the Authors Guild since 2005. Ms. Constantine is responsible for representing the interests of the Authors Guild in all legal matters. Ms. Constantine received a B.A. from Smith College and is a graduate of George Washington University's National Law Center.

Our fifth witness is Mr. Michael Donaldson, partner at Donaldson & Callif, LLP. Mr. Donaldson is the former President and board member of the International Documentary Association where he was an advocate for the interests of documentarians. Mr. Donaldson earned his Bachelor of Science degree from the University of Florida and his J.D. from the University of California at Berkeley.

I am now pleased to recognize the distinguished lady from California who has asked permission to introduce our sixth and final witness.

Ms. CHU. Thank you, Mr. Chairman.

I have the pleasure of introducing Professor Jeffrey Sedlik, who is the President and CEO of PLUS Coalition, a nonprofit that seeks to connect images to rights holders and rights information. He is also an educator at the Art Center College of Design in Pasadena, California, and the City of Pasadena is in my district. In addition, I am delighted to say that Professor Sedlik is my constituent. Thank you, Professor Sedlik, for testifying today and representing the voices of independent visual artists.

Mr. COBLE. I thank the gentlelady.

Mr. NADLER. Mr. Chairman?

Mr. COBLE. Yes, sir.

Mr. NADLER. Could I simply give a special welcome to Mr. Neal since he represents Columbia, and I am a proud alumnus of Columbia, as is my son, and since the last reapportionment, it is now in my district, so I want to give a special welcome.

Mr. COBLE. This has no relevance to today's hearing, but I will be very brief in sharing it with you.

I was invited to address a group at the Columbia School of Law some recent years ago, and I had to decline, first, because there were scheduled votes on the House Floor that night. That was altered and then the House votes were in fact—I declined the invitation because we thought there were going to be House votes. There were House votes. I declined. And the lady said to me, "Well, we have already printed the invitations and your name is on the invitation." I said, "I will miss the vote and I will be at Columbia," which I did.

The next day when I returned to the House Floor, I went to the Speaker who was in the chair, and I said, "May I explain how I would have voted had I been here last evening?" He says, "Why were you not here?" And, in a condescending tone, I said, "I was delivering a lecture at the Columbia School of Law." [Laughter.]

He said, "Have they lost their minds?" [Laughter.]

So with that, Mr. Lukow, why do you not kick us off?

Mr. Lukow has requested that we show a little over 2 minutes, I think 2 minutes and 15 seconds, of video which I think is in order, and we will do that now.

[Video shown.]

Mr. COBLE. Mr. Lukow, I would like to some day visit the Culpepper Campus, but we can talk to you about that subsequently. But thank you for making this available to us.

Prior to hearing from our witnesses, I have noticed that the Chairman of the Judiciary Committee has arrived, and I am

pleased to recognize the distinguished gentleman from Virginia, Mr. Goodlatte, for his opening statement.

Chairman GOODLATTE. Well, thank you very much, Mr. Chairman, for holding this hearing and for your forbearance.

This afternoon, the Subcommittee will hear about the preservation and reuse of copyrighted works. This issue is becoming a more urgent issue for American culture as copyrighted works deteriorate with age. Last spring, I visited the Packard Campus of the Library of Congress in Culpepper, Virginia and witnessed firsthand not only the depth of our Nation's great cultural history, but also the preservation challenges caused by the passage of time. I encourage all the Members of the Committee—it is not that great a distance out to Culpepper, and it is a fascinating experience. So, I commend it to you, and hope Members will get out there, along with the Chairman.

The head of this facility is testifying this afternoon, and he has brought with him some examples of the deterioration caused by age and poor storage conditions.

In the 1976 Copyright Act, Congress included several provisions in section 108 to address preservation and reuse issues. However, like many of the 1976 provisions, section 108 is woefully outdated for the digital age.

In 2005, the Library of Congress and the Copyright Office convened a group of experts to make recommendations on updating section 108. Two of the participants in the Section 108 Study Group are testifying today. As they will no doubt highlight, agreement was reached on some, but not all, potential updates.

Recently some have suggested that instead of updating section 108 for the digital age, preservation activities should be covered by the fair use provisions of section 107. While it is probably true that there are clear-cut cases in which fair use would apply to preservation activities, fair use is not always easy to determine, even to those with large legal budgets. Those with smaller legal budgets or a simple desire to focus their limited resources on preservation may prefer to have better statutory guidance than exists today.

Another issue we will look at today is how to best allow access to works that may have been abandoned. In 2006 and 2008, this Committee considered orphan works legislation, and the Senate passed similar legislation in 2008 by a voice vote. In a sign of how quickly technology and business models advance, since then a coalition of photographers, visual artists, and potential orphan works users have worked together to develop a technology platform to better enable the connection of copyright owners of potential orphan works with those interested in using them.

In addition, none of the earlier legislation addressed the mass digitization issue. At a minimum, Congress needs to ensure that any legislative activity in this area can accommodate such rapid progress.

So I look forward to hearing more about these and other preservation and reuse issues from our witnesses. I welcome all of you today. And I yield back to the Chairman.

Mr. COBLE. I thank the Chairman.

Mr. Lukow, we will start with you. Again, if you all can keep a sharp lookout on the clocks, we will be appreciative. You are recognized, sir.

TESTIMONY OF GREGORY LUKOW, CHIEF, PACKARD CAMPUS FOR AUDIO VISUAL CONSERVATION, LIBRARY OF CONGRESS

Mr. LUKOW. Thank you. Thank you, Chairman Goodlatte, Chairman Coble, Ranking Member Nadler, and the Members of the Subcommittee. I appreciate very much the opportunity to participate in today's hearing on preservation and reuse of copyrighted works.

As Chief of the Library of Congress Packard Campus for Audio Visual Conservation, this statement will necessarily focus on challenges facing the Library's audiovisual collections, and those samples that both Chairman Goodlatte and Chairman Coble mentioned of deteriorating media are sitting up there. I think you will appreciate the fact that they are up there because if we handed them around, they would probably fall apart in your hands.

However, the issues raised by this timely hearing, including orphan works, section 108, and mass digitization, profoundly impact the Library's ongoing attempts to acquire, preserve, and make available the American cultural record contained in the 158 million items in all their varied formats and collections at the Library.

Though we have made great progress in preserving substantial parts of our collections, thanks to the support of the U.S. Congress and the American public, we face numerous formidable impediments in making this content available for research and scholarship. Copyright law restricts libraries' abilities both to preserve collections, especially sound recordings and audiovisual works, and to provide access to preserved works.

We face a cruel irony. The promising advent of digital technologies has enabled us to preserve vastly more of this heritage for the long-term future, but the promise is often not fully realized because the public cannot access much of this content beyond the controlled environment of our Washington, D.C. reference centers. Much of the vast film, television, radio, and broadcasting and recorded sound materials in our collections have been out of print for decades and are, in effect, orphaned works in that the companies that own rights to these materials do not currently make them available to the public from lack of commercial incentive to do so, absent of business models, or other reasons.

Our statement focuses not only on orphan works, whose status results from ownership questions, but also on what we call these "marketplace orphans." Although such marketplace orphans have little or no commercial value to their rights holders, many are of great historic, cultural, or aesthetic value to scholars, educators, and the general public. Examples include films from the silent era and thousands of educational, independent, avant-garde, and amateur motion pictures, early television and radio broadcasts, especially local productions, and sound recordings of all types, including ethnic recordings, monaural classical music, operatic recordings, poetry, and other spoken word recordings.

The Library recommends three priorities for statutory change.

First, modernize section 108 so the libraries and archives can fulfill their mission to preserve audiovisual and other materials. Sev-

eral parts of section 108 do not apply to audiovisual materials. As a result, these items do not enjoy the certain valuable preservation and access exceptions expressly granted to other works. Section 108 needs to be updated for the digital age with language applicable to all formats.

In addition, subsection 108(c), which was designed to help libraries and archives preserve their materials, in reality only allows these institutions to preserve materials already damaged or in a state of deterioration. In order to preserve fragile, at-risk audiovisual materials, the Library must be able to legally make copies of materials before they are damaged or deteriorating.

Our second recommendation: expressly address the orphan works issue in copyright law. Our inability thus far to solve this issue is a key factor leading to the unavailability of countless parts of our moving image and recorded sound heritage. We need a common-sense, compromise legislative solution to this vexing problem.

And third, and by no means least, federalize pre-1972 sound recordings. Given the historical development of U.S. copyright law, these works have never been brought under Federal copyright protection. This anomaly creates many vexing preservation, access, and rights issues as the works are covered by common law or a myriad of disparate State laws. Pre-1972 sound recordings must be brought under the Federal copyright regime, a recommendation that was voiced in the U.S. Copyright Office's 2011 report on this topic.

With that, I will conclude my remarks. I will refer you to my written testimony for a number of examples of these kinds of categories of orphan works or marketplace orphans.

And you all, indeed, have a standing invitation to visit the Packard Campus. I hope you will do so. Thank you very much.

[The prepared statement of Mr. Lukow follows:]

Statement of Gregory Lukow
Chief, Packard Campus for Audio Visual Conservation
Library of Congress
Before the
Subcommittee on Courts, Intellectual Property and the Internet
Committee on the Judiciary
U.S. House of Representatives
Wednesday, April 2, 2014

Chairman Goodlatte, Chairman Coble, and members of the Subcommittee: I appreciate the opportunity to participate in today's hearing on "Preservation and Reuse of Copyrighted Works." As Chief of the Library of Congress Packard Campus for Audio Visual Conservation, this statement will necessarily focus on problems and challenges facing the Library's audiovisual collections. However, the issues raised by this timely hearing — including orphan works, Sec. 108 and mass digitization — profoundly impact the Library's ongoing attempts to acquire, preserve and make available the American cultural record contained in the 158 million items in all its varied formats and collections.

The Library of Congress has the largest and most wide-ranging collection of the world's recorded knowledge ever assembled by any one institution, and also the closest thing to a mint record of the cultural and intellectual creativity of the American people. It was created and has been sustained for 214 years by the Congress of the United States. The Library has encouraged, protected, and preserved America's creativity through the work of the Copyright Office since 1871, served the Congress directly for nearly 200 years with the nation's largest law library, and acted as the Congress' primary research arm for 100 years through the Congressional Research Service.

Overview: Library Preservation and Access

Our mission is to support the Congress in fulfilling its constitutional duties and to further the progress of knowledge and creativity for the benefit of the American people. We accomplish this by acquiring, preserving, and providing access to a universal collection of knowledge and the record of America's creativity. Today's Library of Congress is an unparalleled world resource: more than 158 million items, including more than 36.8 million cataloged books and other print materials in 470 languages; more than 68.9 million manuscripts; the largest rare book collection in North America; and the world's largest collection of legal materials, films, maps, sheet music and sound recordings.

Though we have made great progress in preserving substantial parts of our collections thanks to the support of the U.S. Congress and the American public, we face numerous, formidable impediments in making this content available for research and scholarship. Copyright law restricts libraries' ability both to preserve collections, especially sound recordings and audiovisual works, and to provide access to preserved works. Recently, the promising advent of digital technologies has enabled us to preserve vastly more of this heritage for the long-term future, yet we are legally unable in many cases to make these priceless collections available to

researchers or the public now. We face a cruel irony: the tantalizing promise afforded by our increased preservation capabilities is often not realized since the public cannot access this content beyond the controlled environment of our Washington, DC reference centers.

At the Library of Congress, our main concerns involve non-commercial titles, where the problems are most acute. Copyrighted works possessing commercial value historically have a better record of being made publicly available, though there remain substantial portions of still-copyrighted film and recording industry collections not accessible to the general public. Many issues involving commercial works can be addressed, to some extent, through partnerships; the Congress encourages interested parties to find common ground and solve difficult issues whenever possible.

Non-commercial works, however, do not lend themselves to such arrangements and would be vastly aided by legislative remedies. Much of the vast film, television, radio and recorded sound materials in our collections have been out of print for decades and are in effect orphaned works in that the companies that own rights to these materials do not currently make them available to the public, from lack of commercial incentive to do so, absence of business models, or other reasons. Our statement focuses not only on orphan works, whose status results from ownership questions, but also on these “marketplace orphans.” Although these “marketplace orphans” have little or no commercial value to their rights holders, many are of great historic, cultural or aesthetic value to researchers, educators, and the general public. Examples from the audiovisual collections include:

- **Films:** silent era, educational, ephemeral, independent, home movies, avant-garde, and advertising films.
- **Other moving images:** video and digital productions, local television news, the American Archive of Public Broadcasting (described in more detail below).
- **Sound recordings:** radio broadcasts, monaural classical musical recordings, many other pre-1955 works, ethnic recordings, poetry and other spoken word and vast quantities of “non-commercial” recordings found in many other genres.

Another focus of this hearing, mass digitization, does not affect simply preservation of and access to books. As the Copyright Office has noted, mass digitization issues also arise for images, films, sound recordings, and manuscripts. The Library faces a mass digitization challenge in clearing special collections of unpublished works in all formats and, in particular, collections with multiple rights holders such as manuscript correspondence files and sound recordings featuring many layers of rights ownership.

Time is of the essence. Waiting until deterioration is evident, as the law currently requires, not only is counter to best preservation practice, it also significantly and permanently devalues the archived preservation file which will in time be the only/best surviving copy.

Library Priorities for Statutory Change

1) Modernize Sec. 108 so that the Library of Congress can fulfill its mission to preserve audiovisual and other materials. Several parts of Sec. 108 do not apply to audiovisual materials. As a result, these items do not enjoy certain valuable preservation and access exceptions granted to other works. This section of the copyright law should not favor one format over another and its provisions should apply equally to all works. Sec. 108 needs to be updated for the digital age and with language applicable to all formats. In addition, subsection 108(c), which was designed to help libraries and archives preserve their materials, in reality only allows these institutions to preserve materials already damaged or in a state of deterioration. In order to preserve fragile, at-risk audiovisual materials, the Library must be able to legally make copies of materials *before* they are damaged or deteriorating.

2) Expressly address the orphan works issue in copyright law. The dilemma of orphan works plagues audiovisual collections daily. Put simply: our inability thus far to solve this issue is a key factor leading to the unavailability of countless parts of our moving image and sound recording heritage. We need a common-sense compromise legislative solution to this vexing problem; doing so will benefit archives, copyright owners, the general public, and rights-holders both known and unknown. At the end of this statement I have appended three of the case studies the Library submitted to the Copyright Office as it again considers solutions to the orphan works problem.¹

3) Federalize pre-1972 sound recordings. Thanks to quirks in the development of U.S. copyright law, these works have never been brought under federal copyright protection. This anomaly creates many vexing preservation, access and rights issues, as the works are covered by common law or a myriad of disparate state laws. Pre-1972 sound recordings must be brought under the federal copyright regime, a recommendation we note was recently voiced in the U.S. Copyright Office's 2011 report on this topic.

The Role of the Packard Campus for Audio Visual Conservation

The Packard Campus was created through a unique partnership among the Packard Humanities Institute, the U.S. Congress, the Library of Congress, and the Architect of the Capitol. The Library of Congress Packard Campus for Audio Visual Conservation [<http://www.loc.gov/avconservation/>] is a state-of-the-art facility funded as a gift to the nation by the Packard Humanities Institute. Located in Culpeper, VA, this is where the nation's library acquires, preserves and provides access to the world's largest and most comprehensive collection of motion pictures, television programs, radio broadcasts and sound recordings.

Our holdings presently number more than 5 million items (1.5 million moving image and 3.5 million recorded sound). But this is by no means a static collection; each year we acquire around 50,000-100,000 new items. Our robust preservation "factory" preserves nearly 40,000 items annually from existing collections, focusing on those most at-risk or which represent unique or best surviving copies.

¹ Library of Congress "Orphan Works" comments may be accessed at:
http://www.copyright.gov/orphan/comments/loi_10222012/Library-of-Congress.pdf

These collections of invaluable intellectual property are protected through stringent security measures and safeguards. We provide staff support for the Library of Congress National Film Preservation Board (www.loc.gov/film) and the National Recording Preservation Board (www.loc.gov/nrpb), which develop and maintain the national moving image and recorded sound preservation plans, in addition to the national registries for film and recorded sound.

—*Moving Image Preservation and Access*

The Library's vast film collection begins with the oldest surviving motion picture registered for copyright: *Edison Kinetoscopic Record of a Sneeze*, dating back to January 1894. From 1894 until 1912, over 3,300 films were registered for copyright in the form of reels of photographic contact paper, or "paper prints" as they came to be known. These deposits of film transferred to photographic paper were necessary because copyright law did not yet allow for the registration of celluloid motion picture film, for the simple reason that celluloid motion pictures did not yet exist when the law was written. Because of this historical quirk in copyright law, "paper prints" have ensured the survival of these important early works of American cinema. Later, when the Copyright Act of 1912 recognized celluloid motion pictures as a copyrightable format, film companies began submitting nitrate film prints for copyright registration. However, the Library had no suitable storage for flammable nitrate film stock, and so returned the deposits to claimants; it wasn't until 1942 that the Library acquired vaults specifically for nitrate storage.

During this three-decade gap, many thousands of titles disappeared through deterioration, fire, and neglect from perceived commercial irrelevance. The general consensus is that approximately 50% of American films produced before 1951 (the year that non-flammable "safety" film was introduced) no longer survive. This astonishing rate of loss serves as a cautionary tale and vivid demonstration of the need for archival custodianship of these collections.

Film is a fragile medium and motion pictures of all types are deteriorating faster than archives can preserve them. The Library slows this inevitable decay through environmentally controlled storage and copying endangered works onto more durable formats. We devote much of our current effort in attempts to locate and preserve surviving copies of these titles.

Regarding silent-era feature films, the Library published in December 2013 a detailed study of the survival rate of approximately 11,000 U.S. feature films produced between 1912 and 1929². Among the study's findings:

- Approximately 70 percent no longer survive, even in incomplete versions. These staggering losses include: Lon Chaney's *London after Midnight* (1927); *The Patriot* (1928); *Cleopatra* (1917); *The Great Gatsby* (1926), and all four of Clara Bow's feature films produced in 1928, including *Ladies of the Mob*. Only five of Will Rogers' 16 silent

² *The Survival of American Silent Feature Films: 1912-1929*, by David Pierce. Available for download at <http://www.clit.org/pubs/reports/pub158>

features have survived and 85 percent of features made by Tom Mix—Hollywood’s first cowboy star—are lost.

- Fourteen percent of the feature films produced domestically from 1912-1929 survive in their original-release 35mm format.
- Eleven percent of the films are complete only as foreign versions or on lower-quality formats, such as 28mm or 16mm.
- Five percent are incomplete, either missing a portion of the film or existing only as an abridged version.
- Of the more than 3,300 films that survived in any form, 26 percent were originally found only in other countries.
- Of the American silent films located in foreign countries, 24 percent already have been repatriated to an American archive.

We have created an online database³ listing these nearly 11,000 titles and holdings for those that survive. This provides a crowd-sourcing resource where the public can identify extant materials for titles previously considered lost. Through this process, we hope to locate and preserve many of these works that have been lost owing to deterioration and disinterest since they were assumed to have no commercial value.

While qualified researchers can access nearly the entirety of the Library’s moving image collection in our Capitol Hill reference center, we are increasingly focused on making more content available online. Currently, the Library makes fewer than 600 public domain titles available for viewing on its web site, although we have ambitious plans for adding many hundreds more in the next few years.

At the same time, the number of non-public domain titles we can mount online is restricted by the length of copyright protection and, in some cases, the impossibility of obtaining permissions. As a result, access to critically important 20th century collections is currently restricted to those who can afford a research visit to Washington, DC. The current environment of corporate reorganization and consolidation creates a maze of further uncertainty in the rights environment.

These issues are not unique to film; they also impact our broadcast video and other television collections, including the *American Archive of Public Broadcasting*. In August 2013, the Library of Congress entered into a collaborative agreement with WGBH in Boston for the management and oversight of this archive, an initiative designed to preserve for posterity historical public broadcasting programs – both radio and television – that currently are at risk of deterioration. A study commissioned by the Corporation for Public Broadcasting (CPB) concluded that the American people had invested over \$10 billion in programs that were no longer available to them. In the first phase of this initiative, the Library, with funds supplied by CPB, will preserve approximately 40,000 hours of programming selected by more than 100 public broadcasting stations in some 35 states from materials that have sat for decades on shelves in their storerooms. The Library plans to make this material accessible to researchers visiting its reference centers. In addition, once rights are secured, the Library and WGBH plan to make as much of this material as possible available to the general public via the American Archive website. Some of these

³ <http://tweb2.loc.gov/diglib/has/html/silentfilms/silentfilms-home.html>

programs that are not owned by public media entities are now considered to be orphan works, including *Mingus* (discussed below), which was aired on National Educational Television in 1971.

—*Recorded Sound Preservation and Access*

Experts estimate that more than half of the titles recorded on cylinder records – the dominant format used by the U.S. recording industry during its first twenty-three years – have not survived. The archive of one of radio’s leading networks is lost. A fire at the storage facility of a principal record company ruined an unknown number of master recordings of both owned and leased materials. The wire recording made by crew members of the *Enola Gay* from inside the plane as the atom bomb was dropped on Hiroshima has disappeared. Key recordings made by George Gershwin no longer survive. Recordings by Frank Sinatra, Judy Garland, and other top recording artists have been lost. Personal collections belonging to recording artists were destroyed in Hurricanes Katrina and Sandy.

Of the 46 million sound recordings that currently do exist in the nation’s libraries, archives, and museums, millions, perhaps as many as 20 million, are in urgent need of preservation or they, like those recordings destroyed by Katrina, may be lost as well, according to a recent study. Digital technologies can significantly aid in preventing this. Yet digital reformatting of large audio collections is costly. Funders often stipulate that public access be provided for the digitized materials they pay to preserve. Broad access to historical recordings generates support for audio preservation.

Congress recognized the connection between preservation and access when it passed the National Recording Preservation Act of 2000 to implement a “comprehensive national sound recording preservation program” with one of its objectives to “increase accessibility of sound recordings for educational purposes.” The Act called on the Librarian of Congress to create a National Recording Preservation Board, in part to create a study to report on preservation and access challenges. The report titled one of its chapters, *Preservation, Access, and Copyright: A Tangled Web*. In today’s world, the study concluded, “preservation and access have become joined, locked together in the realm of sound recordings.”

Legal impediments to broadened access have created daunting challenges for the national preservation effort. Few historical recordings can be made available online legally because of idiosyncrasies in the U.S. copyright law. Federal copyright protection does not apply to recordings produced before February 15, 1972, leaving them subject to a complex network of disparate state laws. For orphan works, copyright owners cannot be identified or located.

In order to implement the national sound recording preservation program mandated by Congress in 2000, the Library of Congress in December 2012 published 32 recommendations for action in a National Recording Preservation Plan.⁴ The recommendations were crafted by six task forces comprising specialists representing archivists, librarians, academia, the record and music industries, and private collectors.

⁴ The complete Plan can be accessed at: <http://www.loc.gov/rr/record/nrpb/PLAN%20pdf.pdf>

The Plan concluded that broader access to sound recordings can only be achieved if federal copyright protection is applied to sound recordings produced prior to February 15, 1972. This key proposal, discussed in more detail below, will create a more streamlined legal framework for sound recordings, enabling libraries and archives to copy and disseminate/provide access to orphan works; it would also enable a revision of Sec. 108 to clarify libraries and archives' rights to copy, preserve and reproduce materials in all formats for purposes of public access to further private study, scholarship, and research.

Statutory Changes: Library Proposals and Justification

—Sec. 108: Revise to facilitate preservation and expand public access to sound recordings, films and broadcasts.

Sec. 108 was enacted to grant certain exceptions and identify specific circumstances under which libraries and archives can legally make copies, including preservation and replacement copies. In addition to fair use under Sec. 107, Sec. 108 also grants crucial exceptions allowing libraries and archives to reproduce materials for purposes of public access to further private study, scholarship and research. Although these exceptions have been amended over the ensuing years, they are still exceedingly narrow, leading the *Section 108 Study Group* appointed by the Library of Congress and the Copyright Office to conclude in 2008 that the law reflects the pre-digital era and “embodies some now-outmoded assumptions about technology, behavior, professional practices, and business models.”⁵

Furthermore, like films and non-news broadcasts, all post-1972 sound recordings that embody musical works are excluded from exemptions in subsections 108(a) and (d)–(g), while pre-1972 recordings are wholly ineligible for *any* Sec. 108 exemptions.

The following legislative amendments to Sec. 108 are recommended:

- *Make all U.S. sound recordings, including those fixed prior to February 15, 1972, subject to Sec. 108 of the Copyright Act of 1976.*

Because U.S. sound recordings made before 1972 are not subject to federal copyright law they are currently not eligible for Sec. 108 exceptions. Legislative action to bring pre-1972 sound recordings under copyright law would resolve this problem. As an alternative approach, should pre-1972 sound recordings not be placed under federal copyright protection in the near future, Congress should pass an amendment stipulating that Secs. 107 and 108 apply equally to all sound recordings—regardless of whether they are governed by state or federal law.

- *Revise subsections 108(b) and (c), which govern the reproduction of unpublished and published works, to allow for the use of current technology and best practices in the preservation of film, video, and sound recordings.*

⁵ Background on the Study Group and the full report can be accessed at: <http://www.sction108.gov/>

Subsections 108 (b) and (c) present several obstacles to the preservation of sound recordings and other audiovisual works that must be ameliorated.

First, the three-copy limitation on reproduction must be amended to accommodate best practices in the digital era. Nonprofit institutions should be permitted to make a reasonable number of copies of both published and unpublished sound recordings and other audiovisual works for replacement and preservation purposes, which requires the ability to produce and archive digital files in excess of the three-copy limit.

Second, the narrow focus of subsection 108(c), which limits duplication solely to *replacement* copies of a published work that is damaged, deteriorating, or in an obsolete format, must be expanded. Both replacement and preservation copies should be allowed for at-risk recordings, and copying must be allowed *before* damage or deterioration has compromised the medium.

Third, the prohibition of offsite lending of digital replacement copies should be amended. Libraries and archives should be allowed to lend digital replacement copies for scholarly and research purposes under specific circumstances, such as when the original copy is in a physical digital medium that can lawfully be lent offsite and the replacement is in an equivalent format.

- *Revise subsections 108(d) and (e) to allow for the secure electronic delivery of digital copies for private study, scholarship, and research.*

Electronic access under subsections 108(d) and (e) should be permitted if adequate measures are taken to ensure that access is provided only to the designated single user and to prevent unauthorized reproduction or distribution of the work. Recent technological innovations have created various options for streaming audio files, and a growing number of companies provide password-protected secure streaming services. Record companies, film studios and television producers use secure sites to stream recordings (or even offer downloads) to members of the press for publicity and review.

Libraries and archives should likewise be allowed to use these services, or to establish their own secure networks, to stream out-of-print recordings to researchers. Even if the streaming is limited to an interlibrary loan type service (library A streams requested recording to library B, where the researcher listens on-site), this would be a major step toward providing access to out-of-print recordings.

- *Make sound recordings fixed prior to February 15, 1972, subject to subsection 108(h). For sound recordings produced prior to 1961, make subsection 108(h) applicable in the last 45 years of their copyright term (rather than the last 20 years, as is currently the case with other works) provided that the works are not commercially available or cannot be obtained at a reasonable price. For recordings made in 1961 or after, make subsection 108(h) applicable in the last 20 years of their copyright term.*

This recommendation, by a Library of Congress task force convened to advise on the development of the National Plan with regard to copyright and audio preservation, is the result of several factors. Subsection 108(h) was intended to mitigate the impact of lengthening copyright terms by 20 years as required by the Copyright Term Extension Act of 1998, which provided libraries and archives and their users “the benefit of access to published works that are not commercially exploited or otherwise reasonably available during the extended term.” Subsection 108(h) recognizes that very few works are still commercially exploitable near the end of their copyright life, although many may be of great historical, cultural, and research importance.

Applying subsection 108(h) to sound recordings fixed prior to 1972 would allow qualified libraries and archives to reproduce, distribute, or display in digital form a work toward the end of its term of copyright protection for purposes of preservation, scholarship, or research, provided certain benchmarks are met. Specifically, a library or archive could make a recording available if it is not otherwise subject to normal commercial exploitation by its owner and no copy can be obtained at a reasonable price. If either of these conditions applies, or if the copyright owner claims that either condition applies, the library or archives should not be able to take advantage of the exception provided in subsection 108(h).

The task force recommended further that Congress make subsection 108(h) applicable to all sound recordings in their last 45 years of copyright term rather than in their last 20 years, as is currently the case with other works, provided that the works are not commercially available or cannot be obtained at a reasonable price. The task force agreed that applying subsection 108(h) to the last 45 years of copyright protection of sound recordings offers the best hope of providing the certainty and clarity that libraries and archives require to preserve recordings in their collections and make them accessible for scholarship or research.

As an alternative, the task force proposed that libraries and archives should be able to provide access to copyrighted sound recordings during their last 20 years of copyright, as is the case with subsection 108(h) as currently written. This would not be as useful an exemption to scholars and researchers as one based on the last 45 years of copyright term. Its clarity and consistency with existing law, however, makes it an acceptable alternative to libraries and archives, especially when coupled with a copyright term based on fixation and not publication (thus clarifying many of the uncertainties as to what constitutes the last 20 years of term). Libraries and archives could reproduce, distribute, display, or perform in analog or digital form a copy of a sound recording during its last 20 years of copyright term so long as the original recording is not subject to normal commercial exploitation or a copy of the recording cannot be obtained at a reasonable price.

The copyright status of U.S. recordings will not be affected if this recommendation is enacted into law; all recordings still will be protected. Underlying rights in musical compositions or texts and rights in album artwork, photographs, etc., will remain protected under the *status quo* copyright law. This longer “window” will allow a limited exception to copyright for the purposes of private study, scholarship, or research for

sound recordings that are not commercially available and for which rights holders have not indicated a desire to make them available at a later date.

The potential impact on rights holders will be minimal. A report on the availability of historical recordings commissioned by the National Recording Preservation Board⁶ found that for the period 1955 to 1959, only 34 percent of recordings of historical interest were available on compact disc from the owners; for earlier years, the percentage was much lower.

The Library's task force on copyright and audio preservation acknowledged that lengthening the period of the subsection 108(h) exemption beyond the term granted under the Copyright Term Extension Act could be perceived as having an unintended negative impact on the rights holders of underlying musical works. Therefore, the task force recognized that if Congress allows libraries to make sound recordings accessible during the 20th to 45th years of the remaining copyright term (as opposed to only during the last 20 years), libraries may be required to pay mechanical reproduction fees to the owners of rights in the underlying work when such rights exist (i.e., the underlying work is not in the public domain).

These recommendations are made because many older recordings and other audiovisual works of great historical, cultural, and research importance are not available in the marketplace. The recommendations are intended only to allow libraries and archives to fulfill valuable cultural and historical functions by making these noncommercial works accessible, and only because they are not otherwise being made available by the rights holders. Those audiovisual works that still have commercial viability will be excluded from this provision, as subsection 108(h) applies only to works that are out-of-print.

• *Amend subsection 108(i) so that out-of-print sound recordings and audiovisual works fall under the provisions of subsections (d) and (e), regardless of content.*

Subsection 108(i) summarily excludes musical works and audiovisual works other than those dealing with news from the provisions of subsections 108(d) and (e), which govern access copies for users; this exclusion severely limits opportunities for private study, scholarship, and research. Providing limited access to out-of-print recordings and other audiovisual works under section 108 provisions would cause no market harm. Subsection 108(i) should be amended so that sound recordings and other audiovisual works are eligible for subsections (d) and (e), regardless of content, provided they are out-of-print. This would make the treatment of audiovisual works and musical sound recordings consistent with that of other forms of intellectual property.

—Orphan works: Enable audiovisual materials, including recordings, whose copyright owners cannot be identified or located to be more readily preserved and accessed legally.

Orphan works are a serious issue throughout the Library. Potential users of orphan works, who have been unable to obtain permission to use the works legally, often refrain from making

⁶ The study can be accessed at: <http://www.loc.gov/rr/record/nrpb/pub133.pdf>

productive and socially beneficial use of them, fearing the possibility of liability for copyright infringement; this is a situation that the U.S. Copyright Office has characterized as “not in the public interest.” Such potential users include libraries and archives committed to preserving orphan works and making them accessible to the public for educational purposes.

Legislation designed to create a legal framework to facilitate the authorized use of orphan works would greatly benefit the archival community. A legal study commissioned by the National Recording Preservation Board concluded, “If such legislation is ultimately enacted, a limitation of liability for copyright infringement for orphan works could provide greater security for libraries that wish to copy and disseminate such works.” Orphan works legislation will facilitate preserving and making accessible older recordings as well as those produced in the recent past.

However, sound recordings that were fixed before February 15, 1972, will not be covered under orphan works legislation unless Congress also extends federal copyright protection to these works. The confusing and highly restrictive state and common law statutes that govern pre-72 recordings have no orphan works provisions. There are hundreds of thousands of out-of-print recordings dating back to the late 19th century that will in all likelihood never be re-issued because they have little or no commercial value to the rights holders. These “marketplace orphans” include long forgotten but historically significant popular, classical, operatic, and spoken word recordings that are under the control of companies that have no profit incentive to digitize and make them available. Institutions and private citizens who have collected these important cultural artifacts cannot digitize and share them under current copyright law. The end result is that a vast and vital part of America’s audio legacy has fallen out of our collective memory and now stands a significant risk of permanent loss. Should Congress enact orphan works legislation, even in the absence of federal protection for pre-1972 sound recordings, it is crucial that the legislation apply to works protected under state statutes and common law.

The Library also has more than 1,000 reels of unidentified silent films in its collection. These film reels are orphaned in several respects—not only are their rights holders unknown, but their very titles are lost. In June 2012, the Library conducted *Silent Film Archeology: A Film Identification Workshop*, inviting film experts to help identify about 100 reels of unidentified silent film from its collections (See **Appendix**: Case Study 1). During the course of on-site screening of more than 100 films, participants identified over half the films and provided additional information that may facilitate identification of many more. Were the Library able to make this workshop “virtual” by invoking an orphan works exemption to put low-resolution versions of orphaned films online, it could enlist cultural historians, film professionals and aficionados from around the world to crowd-source the identification, exponentially expanding knowledge about the films. Another workshop is planned for this coming July.

The unsettled legal status of orphan works is having a deleterious effect on the accessibility of great swaths of this country’s unparalleled cinematic heritage. Here are three examples drawn from nearly daily occurrences:

- Our collection includes *Mingus*, a 1968 documentary directed by Thomas Reichman about legendary jazz bassist and composer Charles Mingus. Vincent Canby of the *New York Times* called *Mingus* “a very personal, very moving portrait,” while the *Village*

Voice hailed it as “the first jazz film about jazz.” However, *Mingus* is under copyright protection until 2063. Thomas Reichman died in 1975 and all attempts to track down his relatives or heirs have been unsuccessful. *Mingus* is thus a classic orphan work because no one is alive to claim rights to the film, thus diminishing its accessibility.

- Recently, a patron sought to purchase a copy of a 1951 *March of Time* newsreel called *Narcotics and Teenagers*. The Library requires that copyright be cleared prior to duplication, so the patron paid for a search that determined the film was owned by HBO via its ownership of Time, Inc. (original producer of the *March of Time* series). However, HBO stated, “according to our records it is copyright unknown,” so rather than risk it, the patron declined to proceed with the order. The newsreel remains in legal limbo.
- The Packard Campus collects and preserves many thousands of feet of home movies dating back more than 100 years – beautiful and evocative chronicles of a vanished America. However, our ability to make all but a select few available online is hampered, because these classic orphan works, often lack even basic identifying information. As the home movie case study notes, absent the legal ability to put these orphans online for identification and adoption, “whoever owns the film is unlikely to emerge from history’s shadows.” (See **Appendix: Case Study 2.**)

Abandoned Films. Unfortunately, the universe of orphan works continues to expand. For example, the shift to digital motion picture production has been accompanied by a wave of film processing laboratory closures. In many cases, these laboratories also provided storage services to their clients and so when the lab closed, so did their vaults. Usually every effort is made to contact clients to retrieve their property, but in many cases those clients could not be located, resulting in warehouses full of abandoned film. As often as not, those films are eventually offered to the Library and other archives, and rather than see these motion pictures consigned to oblivion, we acquire them.

Rarely do the films arrive with an inventory and/or a record of the last known owner, and as a consequence we store literally thousands of film reels existing in a legal netherworld. We either have no information at all about the rights holders or very few leads to trace that the originating lab didn’t already try. Conversely, when filmmakers cannot locate their material because their storage facility no longer exists, we cannot take the risk of charging for duplicate copies of these films or putting them online for fear that the owner will emerge to claim infringement.

Orphan works legislation is especially relevant to the national effort to preserve our audiovisual history and make it publicly accessible. Many films and sound recordings were issued by small companies that have gone out of business or cannot be located. Ownership is inadequately documented for many types of audiovisual material, including radio broadcast recordings (for which intellectual property rights have not been made explicit in the broadcast itself) and many unpublished works.

—Bring sound recordings fixed before February 15, 1972, under federal copyright law.

Sound recordings have a unique legal status in the United States. Unlike other works, such as books, pamphlets, poems, music, photographs, drawings, paintings, and motion pictures, they were not covered by copyright law until February 15, 1972. As a result, recordings produced

earlier have been subject to a complex network of disparate state civil, criminal, and common laws, a situation that complicates the efforts of libraries, archives, and educational institutions to preserve these recordings. State laws that prohibit unauthorized duplication of sound recordings make no provisions for duplication for preservation purposes by libraries or archives. As a recent report has noted, “[m]any librarians and archivists are reluctant to copy and disseminate older sound recordings in the face of this patchwork of state laws that lack well-delineated exceptions.” Unless Congress revises the law, this situation will continue until February 15, 2067 when pre-1972 sound recordings are scheduled to enter the public domain.

Many pre-1972 sound recordings will deteriorate long before 2067. Sound recordings historically have been fixed on media that are much more fragile than many other types of copyrighted works. The uncertain status of pre-1972 recordings under state common law copyright severely limits the ability of institutions to allocate resources for recorded sound preservation activities. As noted above, Sec. 108, granting libraries and archives limited rights to copy federally protected post-1972 sound recordings for preservation and access purposes, and fair use under Sec. 107, do not currently apply to pre-1972 recordings because they are not covered under federal law. The lack of clarity concerning copyright status and the inapplicability of Sec. 108 and fair use hampers efforts to raise funds to save this material.

Federal coverage for pre-1972 recordings would clarify ownership issues and specify terms of protection that do not vary from state to state. Coverage would provide certainty for qualified libraries and archives to undertake needed preservation copying and cataloging activities, and it would permit transparent rules for permissible access to these materials by library and archival patrons. For the first time, rights holders of pre-1972 recordings covered by federal law would become eligible for licensing payments under the Digital Performance Right in Sound Recordings Act of 1995—payments that are required only for transmissions of recordings protected by federal law. Clarity in the law could benefit rights holders of recordings for other licensing and exploitation purposes as well.

Libraries and archives will be able to preserve pre-1972 recordings through copying to digital formats and make them accessible to patrons much earlier than is currently possible. With careful definitions and processes to determine when a recording is eligible for an extended term of copyright, this approach would not impede preservation and access by libraries and archives.

Summary: Preservation and Access are Vital to the Mission of the Library

Preservation in the digital era is vital for the Library of Congress in order to maintain a mint record of American creativity and universal knowledge for generations to come. Preservation itself is a valuable cultural and historical function, but is that much more meaningful when access to preserved materials is possible, while respecting rights of copyright holders. While new digital technology offers great promise to save the images and sounds of our past, institutions responsible for preserving audiovisual history for future generations have encountered significant economic and legal challenges in transitioning to digital preservation.

Appendix: Orphan Works Case Studies**Library of Congress Orphan Works
Case Study 1: Identification of 'Lost' Silent Films**

A recent report commissioned by the Library of Congress noted that 75 percent of all American feature films made during the silent era no longer exist. Perhaps an even greater percentage of short subjects and newsreels have vanished.

However, many films sit in archives throughout the world that, due to the ravages of time, have lost their identity. Title frames and other identifying information have been removed – sometimes purposefully but more often through deterioration or neglect.

These films are not literally lost – we can physically locate them – but they are mostly lost in the sense that we do not know fully what they are.

In an effort to address the issue of unidentified films, silent-film experts gathered in June, 2013 at the Library's Packard Campus for Audio Visual Conservation for two days of intense viewing of unidentified film at "Silent Film Archaeology: A Film Identification Workshop."

The Library of Congress holds more than a thousand reels of such film, and while staff members regularly are able to identify titles, the added benefit of 60 additional experts viewing the films greatly speeds the process along.

More than 50 percent of the nearly 100 reels shown during the workshop now have been identified, and many of the other reels have had vital information provided that eventually will lead to identification.

The workshop was a collaborative effort, with the Museum of Modern Art (New York), George Eastman House (Rochester), Lobster Films (Paris), EYE Film Institute (Amsterdam) and the UCLA Film & Television Archive (Los Angeles) providing unidentified films to be screened along with those from the Library's own collection. A wide range of film experts and archive professionals representing film festivals, studios, libraries and film archives attended.

**Library of Congress Orphan Works
Case Study 2: Home Movies**

The Library’s Motion Picture, Broadcasting and Recorded Sound Division is responsible for the cataloging, storage, and preservation of more than 1.5 million moving image items on film, video, and—increasingly—as digital files. Included in the collection is a varied array of home movies, which over the past decade have become the object of increased academic and archival interest. For example, Home Movie Day was begun by a group of archivists in 2003 to highlight the importance of these films as cultural documents. What started as a handful of local events has since grown into a yearly global celebration of amateur film in dozens of locations. In 2005, the Center for Home Movies, a non-profit organization devoted to “transform[ing] the way people think about home movies by providing the means to discover, celebrate, and preserve them as cultural heritage,” was founded, and two years later entered into a partnership with the Library to jointly collect and preserve these films.

Although the Library’s Packard Campus for Audio Visual Conservation devotes considerable effort to the preservation and digitization of home and other amateur movies, relatively few are available for online access due to questions surrounding their copyright status. Of the millions of home movies that have been shot since the dawn of small gauge filmmaking 90 years ago, only an infinitesimally small number were formally registered for copyright (e.g., *The Tacoma Narrows Bridge Collapse* and the “Zapruder film”). Some of the Library’s home movie collections are well documented, be they shot by well known people such as Edna St. Vincent Millay, Danny Kaye, and Florenz Ziegfeld, or enthusiastic amateurs like Robbins Barstow, whose *Disneyland Dream* was named to the National Film Registry in 2008.

This leaves many thousands of home movies held by the Library and other archives whose provenance is completely unknown, and that uncertainty has a paralyzing effect on their use, either in commercial productions or in less visible uses such as within academic settings, personal web sites or Facebook pages. For example, in 2009 the Library purchased a collection of over 35,000 reels of film that contained nearly 400 compilations of multiple home movies. One—for which our catalogers have supplied the title *Home Movie 386*—was shot in the early 1940s on Kodachrome color film and was described by the seller as containing a “patriotic parade in Kenosha, Wisconsin; cheer teams, marching bands, military veterans, several American flags being carried by various groups, flowery floats, elegant vehicles of that time, VIP officials--bustling streets; families with lots of children and vehicles on streets--small town atmosphere--good shot of film developing signs; 'Cairo Camera Shop' and '8 Large Prints 35 Cents & 8 Contact Prints 27 Cents, Two Day Service.’”

This particular collection is full of films like this one, beautiful and evocative chronicles of a vanished America, despite the fact that whoever “owns” the film is highly unlikely to emerge from history’s shadows.

**Library of Congress Orphan Works
Case Study 3: Emerson Phonograph Company¹**

In his *Survey of U.S. Recordings*, a study commissioned by the Library's National Recording Preservation Board, author Tim Brooks quantifies the commercial accessibility of recordings published before 1965. Among his most significant (and disturbing) findings: of all recordings published in the U.S. between 1890 and 1965, only 14 percent are currently made available commercially by rights holders. The Recorded Sound Section of the Library of Congress manages a collection of nearly 3.5 million sound recordings, well over a million of which are commercial releases, produced, and sold by record companies as far back as the 1890s. The vast majority of these exist on obsolete formats and, as Brooks notes, are not commercially available. In addition, any recordings produced prior to February 15, 1972 are not covered by federal copyright law, but are governed under a complex array of state and common law copyrights. Accordingly, most of this rich legacy of creativity remains inaccessible to the public.

From the beginnings of commercial recording until the late 1920's, the Edison, Victor, and Columbia companies dominated the domestic marketplace. But there were small and significant record labels that attracted top talent. The Emerson Phonograph Company was one of those. Founded in 1915 by former Columbia executive Victor Hugo Emerson, the label made good quality recordings of popular dance and vocal music, including many jazz and blues records released in a "race" series. Important artists are found in the Emerson catalog: Eubie Blake and Noble Sissle; Fletcher Henderson's band cut a few records, one of which includes Louis Armstrong. The great vaudevillian comic Nat Wills was also on the label, as was Eddie Cantor. They had an operatic series with some members of the Metropolitan Opera Company. Ethnic sides included the Toots Paka Hawaiian Company and Rigo's Hungarian Gypsy Orchestra. Artists from the "pioneer" days of acoustical recording appear as well. But unlike the Victor and Columbia labels (both now under the control of Sony Music, Inc.), the complex corporate lineage of Emerson indicates that a large portion of the recordings produced by the company could be made available under an orphan works exemption if it applied to pre-72 recordings.

In 1924 Emerson was acquired by the Scranton Button Company (and known as Emerson Recording Laboratories). In 1926 it was again reorganized by former Emerson executives as an independent company, the Consolidated Record Corporation, and would own several other record labels until it went under in the early 1930s. Assuming that the entire Emerson back catalog went to Consolidated, Emerson Records, along with those other labels, would likely fall into orphan status because Consolidated seems to be the end of the corporate lineage. However, detailed research into court documents and corporate records by discographers has not been able to confirm this absolutely.

¹ Much of the information for this study was taken directly from:
Allan Sutton, *Recording the 'Twenties: The Evolution of the American Recording Industry, 1920-29* (Denver, CO: Mainspring Press, c2008, p.315)
Allan Sutton, *American Record Labels and Companies: An Encyclopedia (1891-1943)* (Denver, Colo.: Mainspring Press, c2000)

Mr. COBLE. Thank you, Mr. Lukow.
Mr. Rudick?

**TESTIMONY OF RICHARD S. RUDICK, CO-CHAIR,
SECTION 108 STUDY GROUP**

Mr. RUDICK. Distinguished Chairman Coble and Goodlatte, Ranking Member Nadler, and Members, thank you for this invitation.

As you know already, I address you as Co-Chair of the Section 108 Study Group convened by the Library of Congress to recommend changes in that section of the 1976 act which was enacted when the photocopy machine was the hot, new technology that challenged copyright. Half of our members came from the library, archives, and museum community, and half from the content and creative community.

These two communities are part of a larger community, held by common bonds, driven in part by common goals, and bedeviled by similar challenges. In the end, we both serve the public interest by making accessible art, literature, and science. We both face serious economic challenges, and we have both had to redeploy our assets and revise our operations to deal with the opportunities and challenges presented by new digital technologies.

We are interdependent. Libraries are important customers of content providers, and without the work of authors, artists, publishers, and other media producers fueled by copyright, libraries could no longer exist. This is a family quarrel.

In spite of these tensions by distinguishing between what we needed and what we wanted and motivated by a deep-shared common concern for the need for addressing digital preservation issues, we were able to agree on a number of recommendations, including the following: adding museums as eligible institutions, allowing qualified institutions to copy digital material for preservation whenever there is risk of loss or disintegration without waiting for after it occurred, allowing libraries and archives to preserve, reproduce, and make available publicly available online content not restricted by access controls such as websites.

With respect to mass digitization, after some discussion in 2005, we felt the time was not ripe. It is very ripe now in the wake of HathiTrust and Google. I think we need legislation and need to promote voluntary programs, including collective licensing which could facilitate such projects both in the not-for-profit and for-profit sectors.

The study group considered or discussed whether commercial availability should be a factor for purposes of section 108, in effect, providing different rules for works offered in commerce and those either not intended for commercial use or no longer available commercially. Since then, this concept has been utilized or is being considered as a factor for various purposes, for example, in the Google Books settlement, which was rejected by the District Court in New York and in the European Union. Whether in the revision of section 108 or in possible legislation relating to mass digitization, I think we should consider this concept carefully.

Libraries have come to rely heavily on fair use under section 107, in part because of the inadequacies of 108 in the digital era. But

reliance on section 107 for purposes that go far beyond those originally conceived or imagined invites, as we have seen, expensive litigation with uncertain results. A provision so dependent on balancing and analyzing individual facts and circumstances in specific situations is not well suited to the major projects typical of mass digitization, and the doctrine of fair use does not begin to address many of content owners' serious concerns such as security.

From a practical standpoint, as the study group pointed out, an updated and balanced section 108 dealing with digital issues would complement the flexibility of section 107 by providing straightforward guidance, predictability, and clarity in specific situations for working librarians and others.

Clarity is the handmaiden of certainty, and an important function of the law is to provide rules which, if followed, keep us out of trouble. Oliver Wendell Holmes, Jr. once observed that, "Certainty generally is illusion and repose is not the destiny of man." Surely repose is not our destiny, and it may be that absolute certainty is generally an illusion. But a level of certainty is a prerequisite for doing business, whether your business is that of a librarian, a teacher, or a student, or that of a publisher, a writer, or an artist.

I appreciate the opportunity to speak to you on these issues. I hope that legislation which facilitates the preservation and reuse of copyrighted works will be enacted.

And if I have a few more minutes, I have read my good friend Jim Neal's testimony, and I agree with much of what he said. But he answers a question which I have been asking, which is, "Why do the library associations and the major libraries not support an updated, all-dancing, and all-singing 108 to deal with the digital world?" And I think I see the answer, which is there have been a number of lower court decisions that support a very expansive view of fair use. I think that horse is running well for them. But that is not how we should make policy. That is Congress' job. And what we should do is whatever we can to make life easier and better for working librarians, consistent with the need to enable people who scribble for a living to survive and thrive, and also university presses and other publishers. In the end, we have to do what is right for the American people, and the hell with what horse is ahead right now.

[The prepared statement of Mr. Rudick follows:]

Statement of Richard S. Rudick
Co-Chair, Section 108 Study Group

Subcommittee on Courts, Intellectual Property, and the Internet
Committee on the Judiciary U.S. House of Representatives
April 2, 2014

Distinguished Chairman Coble, Ranking Member Nadler, and members of the Subcommittee: Thank you for the invitation to talk to you today about “Preservation and Reuse of Copyrighted Material”. I have been engaged in the practice of law since 1964, from the early 70’s in the publishing industry, before retiring as Senior Vice President and General Counsel of John Wiley & Sons, Publishers in 2004. I currently serve as Vice Chairman of the Board of Directors of the Copyright Clearance Center. I was the Co-Chair of the Section 108 Study Group, convened by the Library of Congress and the Copyright Office in 2005 to recommend changes to Section 108 of the Copyright Act, which contains exceptions applicable to libraries and archives. It is in that capacity that I address you today. I should also note that my Co-Chair, Lolly Gasaway, testified before this Subcommittee on May 16, 2013, and that Jim Neal, on the panel here today, was also a member of the Study Group.

I understand that today’s hearing is focused on Section 108 Revision, Orphan Works, and Mass Digitization. I will talk primarily about the first of these, though some of my remarks will apply more broadly. I will begin by reviewing the work of the Study Group, which I think is relevant because it bears on the difficulties of obtaining a degree of consensus, so important to the legislative process. I will then briefly review our recommendations, and close with some observations on the way forward.

Roughly half of the members of the Study Group came from the library, archives and museum community, and half from the content and creative community. These two communities are part of a larger community, held by common bonds, driven in part by common goals, and bedeviled by similar challenges. In the end we both serve the public

interest by making accessible art literature and science, we both face serious economic challenges, and we have both had to redeploy our assets and revise our operations to deal with the opportunities and challenges presented by new digital technologies. We are interdependent. Libraries are important customers of content providers, and without the work of authors, artists publishers and other media producers fueled by copyright, libraries could not long exist. This is a family quarrel.

As noted previously our mission was to re-examine Section 108 (enacted in 1976 to deal with the then new technology of the photocopying machine); to define what it would take to make its provisions useful and fair in light of the evolving impact of digital technologies on both our communities; and to see if, or at least how much, we could agree on how to do that - in short to make balanced recommendations on how to make this provision of our Copyright Law once again relevant in today's world.

The composition of the group and its working style were based on the idea that in a favorable environment, people of good will with differing perspectives could *listen* to each other, talk *to* instead of *at* each other, and in this way make progress towards a level of agreement on how to fulfill the mission. And always we tried to keep in mind the principle expressed in the lyrics of Mick Jagger: You can't always get what you want "but if you try some time/You just might find/You get what you need." After three years of private, thoughtful discussions and intense debate, we completed our report in 2008, proving in the words of Gypsy Rose Lee, that "anything worth doing well is worth doing slowly."

Our recommendations are in the Report, and were also summarized in Ms. Gasaway's testimony before this Subcommittee on May 16, 2013 but I will review some of them very briefly here.

With respect to eligibility, we recommended that museums be included, that the definition of eligible institutions be improved (e.g., a public service mission, a trained staff, a collection of lawfully acquired material) and that outsourcing (for example, of the

copying required for a mass digitization project) be explicitly permitted so long as the contractor did not retain a copy and agreed to safeguards.

We recommended changes in the subsections covering replacement and preservation – replacing the three copy limit with a flexible rule and removing the current restriction on offsite lending of replacement copies. Most important, we recommend two new sections: The first would facilitate up-front preservation of “at risk” publicly disseminated works, to deal with the fact that once a digital work begins to deteriorate, it may be too late to preserve it. In return, institutions that undertake such work would be required to meet certain standards, including keeping the preserved copies in a secure, managed, and monitored environment. The second would explicitly permit eligible institutions to copy and reproduce publicly available online content not restricted by access control, such as websites, and to make them available to researchers.

Offsite access was a theme that ran throughout the report. In general, it was easier for us to agree on the need and on rules for making preservation copies than on rules for offsite access. It was agreed that academic institutions, which have a defined user group and are able to authenticate its members, could provide online access, with less risk of harm from unauthorized redistribution than, say a public library. However, without safeguards to insure that electronic copies are available only to authorized users, remote access would amount potentially to broad, unauthorized, uncompensated distribution of copyrighted content.

I want to raise two subjects not addressed in the Study Group’s recommendation. The first is “Mass Digitization”. In 2005, after some discussion, the Group felt that the time was not ripe. It is very ripe now, in the wake of the ongoing “Hathi Trust” and “Google” cases. Not speaking for either the members of the Study Group or others, it is my own opinion that we should seek to develop legislation, and to promote voluntary programs, including collective licensing, which would facilitate legitimate projects of this kind, both in the not-for-profit and for-profit sectors, without undermining the purposes of and the incentives provided by copyright protection. I am not in a position to propose specific

solutions, but for reasons set forth below believe that fair use under Section 107 is not the best – in fact is a bad solution.

The Study Group did discuss, without reaching a conclusion, whether the fact that a work has been “commercialized” should be a factor for purposes of Section 108, in effect providing different rules for works offered in commerce and those either not intended for commercial use or no longer available commercially. Since then, the concept of “commercial availability” – whether, for example, a book is “in print”, has been utilized or is being considered as a factor for various purposes, for example, in the “Google Books Settlement” which was rejected by the District Court in New York, and in proposed copyright legislation in Europe. Whether in a revision of Section 108 or in possible legislation relating to mass digitization, it would seem appropriate to consider this concept.

Finally, I want to note that perhaps because Section 108 has been so out of date for so long, libraries have come to rely more heavily on “fair use” under Section 107. Do we in fact need to revise Section 108? The members of the Study Group did address that question. We pointed out that a provision which is so outdated and inadequate as to no longer serve its function invites disrespect for the law, and that Section 108 supplements the flexibility of Section 107 “which requires a careful balancing of factors in specific factual situations ... with straightforward guidance on permissible uses.”

One might add not only with respect to Section 108 but also with respect to Mass Digitization and Orphan Works that reliance on Section 107 for purposes that go far beyond the purposes originally conceived or imagined invites expensive litigation with uncertain results; that a provision so dependent on analyses of individual facts and circumstances is not well suited to major projects typical of Mass Digitization; that the doctrine of fair use as codified in Section 107 does not begin to address many of content owners’ concerns, such as security. From a practical standpoint, a workable, up-to-date and balanced Section 108 would complement the flexibility of Section 107’s fair use provisions with straightforward guidance, predictability, and clarity in specific situations.

Clarity is the handmaiden of certainty, and an important function of the law is to provide rules which if followed keep us out of trouble. Oliver Wendell Holmes Jr once observed that “certainly, generally is illusion and repose is not the destiny of man.” I am certain enough that repose is not our destiny and that absolute certainty is generally an illusion. But a level of certainty is a prerequisite for doing business, whether one’s business is that of a librarian, a teacher or a student, a publisher, a writer or an artist.

Whatever its shortcomings today, Section 108 of the 1976 Copyright Act was then fair and balanced, useful to the library community, and acceptable to the content community. The Section 108 Study Group Report is evidence that with care and effort that balance can be maintained and a broadly acceptable revision of the statute could be drafted. I would like to express the hope that balanced legislation that facilitates the preservation and appropriate re-use of copyrighted works while preserving the incentives and purposes of copyright will be adopted as part of overall copyright reform.

Mr. COBLE. Thank you, Mr. Rudick.
Mr. Neal?

TESTIMONY OF JAMES G. NEAL, VICE PRESIDENT FOR INFORMATION SERVICES AND UNIVERSITY LIBRARIAN, COLUMBIA UNIVERSITY

Mr. NEAL. Chairman Coble, Ranking Member Nadler, Members of the Subcommittee, thank you for this opportunity to testify today. I am a working librarian.

I ask that my full statement be included in the record. It has been endorsed by U.S. library associations.

I will address four issues: first, the importance of library preservation; second, how the library exceptions in section 108 of the Copyright Act supplement and do not supplant the fair use right for important library activities such as preservation; third, how changes in the legal landscape have diminished our need for legislation concerning orphan works; and finally, my perspective on the HathiTrust case.

My overarching point is that the existing statutory framework, which combines the specific library exceptions in section 108 with the flexible fair use right, works well for libraries and does not require amendment.

Before diving into copyright law, I would like to make clear to the Subcommittee that libraries are not seeking a free ride. U.S. libraries spend over \$4 billion a year acquiring books, films, sound recordings, and a variety of other materials. Our objective is to maximize the benefit the American people receive from this enormous investment that they have made. We want to make sure that this material is accessible to current and future generations of users. Libraries think in terms of centuries, not quarterly royalty reports.

First, the importance of preservation. Libraries engage in preservation activities to prevent the loss of vital cultural, historical, and scholarly resources. Much of this material lacks commercial value and publishers may not have the interest, the financial incentive, or the technical expertise to engage in preservation activities.

At Columbia, there are vast collections that demand preservation which may include shifting formats as technologies become obsolete.

For example, the 9/11 oral history project focuses on the aftermath of the destruction of the World Trade Center. This project captured 900 hours of interviews recorded on digital media.

Another example is our human rights archive that documents the condition and progress of human rights around the world. Columbia is making complete copies on an ongoing basis of more than 600 websites from around the world. The archive contains 60 million pages, including many short-lived websites from countries in conflict or with repressive governments.

In short, digital resources are not immortal. They are in formats that are more likely to cease to exist and must be transferred to new digital formats repeatedly as technology evolves. This means that libraries require robust applications of flexible application exceptions, such as fair use, so that copyright technicalities do not interfere with our preservation mission.

Second, section 108 and fair use. Section 108 has proven essential to the library preservation function. The fact that section 108 may reflect a pre-digital environment in our view does not make it obsolete. It provides libraries and archives with important certainty with respect to the activities it covers. Like Dick Rudick, I was a member of that study group. The report did not resolve many important issues such as orphan works or mass digitization, nor did it propose statutory language in areas where there was some agreement.

In addition to section 108, libraries rely upon fair use to perform a wide range of other completely noncontroversial practices. Libraries make preservation copies of musical works and motion pictures, categories not covered by 108. School libraries make multiple copies of appropriate portions of work for classroom use, not covered under section 108. As Congress made clear with the savings clause in section 108, it does not limit the right of fair use.

Third, orphan works. The significant diversity of opinions expressed to the Copyright Office in a Notice of Inquiry in 2013 and the recent roundtables indicate that it will be extremely difficult to forge a consensus on best approaches to resolve orphan works issues. Fortunately, fair use allows libraries to appropriately preserve orphan works and make them available appropriately to researchers and the public.

Fourth, the HathiTrust litigation. HathiTrust is a consortium of libraries that preserves digitized works. There are several uses of the Hathi database: preservation, searches to identify where words or phrases appear, and full-text access only for the print-disabled. I want to emphasize that only the print-disabled have access to the full text of copyrighted works in the HathiTrust repository. The central legal issue was whether the copies made by Hathi were a fair use.

Finally, legislative recommendations. Updating section 108 in my view is not necessary, as is an orphan works amendment, at least for the work of libraries. Other amendments may be appropriate with respect to statutory damages, the coverage of museums, contractual restrictions on copyright exceptions, which is a fundamental issue for libraries, and broader exceptions for people with disabilities.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Neal follows:]

**BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY AND THE
INTERNET**

HEARING ON PRESERVATION AND REUSE OF COPYRIGHTED WORKS

**STATEMENT OF JAMES G. NEAL
VICE PRESIDENT FOR INFORMATION SERVICES AND UNIVERSITY
LIBRARIAN
COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK**

Chairman Coble, Ranking Member Nadler, Members of the Subcommittee, my name is James G. Neal and I am the Vice President for Information Services and University Librarian at Columbia University in the City of New York. My testimony is endorsed by the Library Copyright Alliance (LCA).¹

I appreciate the opportunity to testify today on the important issue of the preservation and reuse of copyrighted works.² In this statement, I will address four issues. First, I will describe the importance of library preservation with some examples of the preservation activities at Columbia. Second, I will explain how the library exceptions in Section 108 of the Copyright Act supplement, and do not supplant, the fair use right under Section 107, for important library activities such as preservation. Third, I will discuss changes in the legal landscape that diminish the need for legislation concerning orphan works. Fourth, I will provide the subcommittee my perspective on the *HathiTrust* case. My overarching point is that the existing statutory framework, which combines the

¹ LCA consists of three major library associations—the Association of Research Libraries, the American Library Association, and the Association of College and Research Libraries—that collectively represent over 100,000 libraries in the United States employing over 350,000 librarians and other personnel.

² This January, the Subcommittee held a hearing on the scope of fair use. In connection to that hearing, LCA submitted a statement for the hearing record on how fair use was integral to the ability of all types of libraries to achieve many facets of their mission, including preservation. The statement specifically discussed the importance of fair use for mass digitization, access to orphan works, and access to users with print disabilities. The statement explained how the library community had developed a code of best practices for the application of fair use by librarians. And the statement noted that recent judicial decisions, such as *Authors Guild v. HathiTrust*, had confirmed our understanding of how our practices were consistent with fair use.

specific library exceptions in Section 108 with the flexible fair use right, works well for libraries, and does not require amendment.

But before diving into copyright law, I would like to make clear to the subcommittee that libraries are not seeking a free ride. U.S. libraries spend over \$4 billion a year acquiring books, films, sounds recordings, and other materials. Our objective is to maximize the benefit the American people receive from this enormous investment that ultimately they themselves make, by funding libraries through taxes or tuition, in order to purchase this material. We want to make sure that this material is accessible to the current generation of users, and that it is preserved so that it can be used by future generations. Libraries think in terms of centuries, not quarterly royalty reports. For almost four hundred years, libraries in America have promoted culture and democratic values, and we intend to continue doing so indefinitely.

I. THE IMPORTANCE OF THE LIBRARY PRESERVATION FUNCTION.

Libraries provide access to their collections of preserved materials as an essential component of their mission. Libraries engage in preservation activities to prevent the loss of vital cultural, historical and scholarly resources. A vast amount of material lacks commercial value or the publisher may not have the interest, financial incentive or technical expertise to engage in preservation activities. It is important to note that the amount of materials demanding preservation far exceeds the capacity of cultural memory organizations to fund, organize, and curate collections, forcing these organizations to make hard, technical decisions which materials to preserve.

The nature of library collections is changing and with change, come new challenges for preservation. Paper-based books and manuscripts have been the mainstay of scholarly communications and library collections for hundreds of years. But in less than two decades, digital information has become integral to research in all disciplines and to the public. Web documents, moving images, sound recordings, and data sets are an increasing part of everyday life and communication for much of the world. Rapidly these media are forming a substantial part of our cultural record some of which libraries are preserving locally or collaboratively through partnerships, consortia and new initiatives such as the HathiTrust and the Digital Preservation Network (DPN). One need only consider recent advances of digital technologies to understand that the preservation of

materials is necessary. Websites come and go, documents disappear from websites, hyperlinks get broken, files become corrupted and storage media become obsolete.

At Columbia, there are a significant number of collections that demand preservation, which may include shifting formats as some formats become obsolete. For example, the 9/11 Oral History Project focuses on the aftermath of the destruction of the World Trade Center. The Project amounts to over 900 recorded hours, including 23 hours on video with over 600 individuals—all recorded on digital media. The collection includes over 500 minidisks, DAT tapes, and other media, recorded in 2002-10 and consisting of oral histories with people from a wide variety of ethnic and religious backgrounds involved with the 9/11 tragedy, including survivors, first responders, and people who lost friends and family members. Minidisks were a short-lived medium that is now inaccessible due to the disappearance of the players. DAT tape deteriorates rapidly. More than half of this collection is already open and available to the public at Columbia, and the entire archive will, in due course, be available for study and research. This is only one of hundreds of such projects within the Columbia Center for Oral History, founded in 1948 and one of the largest oral history archives in the world.

Another example is the Language and Culture Archive of Ashkenazic Jewry, which includes over 5,700 hours of interviews mostly with surviving European Yiddish-speaking informants, collected between 1959 and 1972 in various countries on 2,552 reels of tape. While the purpose of the interviews was linguistic documentation, they include information about pre-World War II customs, culture, and experiences. Without the help of the National Endowment for the Humanities, New York State, and several private foundations who funded the preservation effort, the audiotapes would still be deteriorating and inaccessible.

Finally, the Human Right Archive, begun in 2008, is an innovative approach to documenting the state and progress of human rights around the world. Columbia is making complete copies, on a quarterly basis, of more than 600 websites from around the world, including sites covering human rights in Africa, Asia, the Middle East and South America. The archive now consists of more than 60 million pages, including many short-lived websites from countries in conflict or with repressive governments. This archive contains unique material that may in some cases be the only surviving records of regional

and citizen-based human rights organizations in countries like Uganda, Tibet, Ukraine and Venezuela. Columbia is creating a number of other targeted web archives, all bringing with them the need for long-term digital preservation.

In short, digital resources are not immortal. In fact, they are in formats that are more likely to cease to exist, and must be transferred to new digital formats repeatedly as technology evolves. They require extensive, highly specialized preservation and curation using constantly evolving methods and technologies. This means that the libraries charged with this work require robust applications of flexible exceptions such as fair use so that copyright technicalities do not interfere with their preservation mission.

II. THE RELATIONSHIP BETWEEN SECTION 108 AND FAIR USE.

A. Section 108 and the Privileged Status of Libraries in the Copyright Act.

Recognizing the importance of libraries to American democracy and culture, Congress has accorded them privileged status in Title 17. Section 109(b)(2) excludes libraries from the prohibition on software rental. Section 504(c)(2) shields libraries from statutory damages liability where they reasonably (but incorrectly) believed their actions constituted fair use. Section 602(a)(3)(C) provides organizations operated for scholarly, educational, or religious purposes with an exception to the importation right for “library lending or archival purposes.” Section 1201(d) of the Digital Millennium Copyright Act (“DMCA”) gives libraries the right to circumvent technological protection measures for purposes of determining whether to acquire a copy of the work. Section 1203(c)(5)(B) allows a court to remit statutory damages to libraries in cases of innocent violations of the DMCA. Section 1204(b) excludes libraries from criminal liability for DMCA violations.

More significantly, Congress enacted Section 108 in 1976 to provide libraries and archives with a set of clear exceptions with regard to the preservation of unpublished works; the reproduction of published works for the purpose of replacing a copy that was damaged, deteriorating, lost, or stolen; and the making of a copy that would become the property of a user.

Over the past 38 years, Section 108 has proven essential to the operation of libraries. It has guided two core library functions: preservation and inter-library loans. In the ongoing litigation between the Authors Guild and HathiTrust, however, the Authors Guild has attempted to convert a very helpful exception adopted to benefit

libraries into a limitation on the operation of libraries. This flawed interpretation of Section 108 harms libraries and departs from the plain language of the statute.

B. Section 108 Does Not Constrain Library Practices.

In the District Court, the Authors Guild argued that the Section 108 library exceptions represented the totality of the exceptions to the reproduction and distribution rights available to libraries. Under the Author Guilds' original position, libraries could not employ the first sale doctrine to circulate books, *see Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1364 (2013); nor Section 117(a) to copy software into their computers' memory; nor Section 109(c) to display book covers and posters in exhibitions; nor Section 110(1) to perform films in classrooms; nor Section 110(2) to perform and display works in distance education; nor Section 121 to make and distribute copies in accessible formats. Further, the Authors Guild argued that Section 108 precluded libraries from asserting the fair use right. Judge Baer correctly rejected these assertions.

In the Second Circuit, the Authors Guild more narrowly argued that HathiTrust "exceeded many of the express limitations of Section 108, and these violations should weigh heavily against a finding of fair use." As noted above, libraries rely on fair use to engage in a wide range of activities not covered by Section 108. If the Authors Guild's position were correct, libraries across the country would likely infringe copyright millions of times every day. For example, a major function of public libraries is providing free Internet access. Whenever a user views a website, the browser caches a copy of the website in the computer's memory. Courts have treated this cache copy as a fair use. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1169-70 (9th Cir. 2007). Librarians and library users make hundreds of thousands, if not millions, of such copies every day. Because the cache copying by libraries in the course of Internet browsing wildly exceeds that authorized by Section 108, according to the Authors Guild, "these violations should weigh heavily against a finding of fair use."

Libraries regularly rely upon fair use to perform a wide range of other completely non-controversial practices. Libraries make preservation copies of musical, pictorial, graphic or sculptural works, and motion pictures—all categories of works not covered by Section 108. *See* 17 U.S.C. § 108(i); ARL, *Code of Best Practices in Fair Use for*

Academic and Research Libraries 17-18 (2012) (“Code”). Libraries archive websites of significant cultural or historical interest. *Code* at 26. They reproduce selections from collection materials to publicize their activities or to create physical and virtual exhibitions. *Id.* at 15. Academic libraries copy material into institutional digital repositories and make deposited works publicly available. *Id.* at 23. School libraries make multiple copies of appropriate portions of works for classroom use.

The Library of Congress, where the Copyright Office resides, relies heavily on fair use. For numerous collections, the Library of Congress states that it is providing online access to items “under an assertion of fair use” if “despite extensive research, the Library has been unable to identify” the rightsholder. *E.g.*, Library of Congress, *Copyright and Other Restrictions, Prosperity and Thrift*, <http://memory.loc.gov/ammem/coolhtml/ccres.html>. Similar language appears on the copyright pages of more than a dozen other collections. Under the Authors Guild’ interpretation of Section 108, the Library of Congress is a serial copyright infringer.³

C. Section 108(f)(4) Unambiguously Provides that Section 108 Does Not Limit The Applicability of Fair Use to Libraries.

The plain language of Section 108, and its legislative history, underscore that Section 108 does not limit the availability of fair use to libraries. When the Senate Subcommittee on Patents, Trademarks, and Copyrights reported out the bill in December 1969 with the basic elements of what is currently Section 108, it included the language now in Section 108(f)(4). That clause provides that nothing in Section 108 “in any way affects the right of fair use as provided by section 17....” The Subcommittee report’s discussion of Section 108 stated: “[t]he rights given to the libraries and archives by this provision of the bill are in addition to those granted under the fair-use doctrine.” S. Rep. No. 91-1219, at 6 (1970). Section 108(f)(4) was added to address concerns some in the library community had raised about the potential impact of Section 108 on fair use.

The House Judiciary Committee Report on the 1976 Act quoted the language of Section 108(f)(4) and then explained that “[n]o provision of section 108 is intended to

³ Other federal libraries also rely on fair use. *E.g.*, Smithsonian Institution Libraries, *Proceedings of the National Academy of Sciences of the United States*, Electronic Resources from the Smithsonian Libraries, <http://www.sil.si.edu/eresources/silpurl.cfm?purl=10916490>. (“interlibrary loan requests are to be filled in compliance with the U.S. Copyright Act and fair use provisions of the federal Copyright Act.”).

take away any rights existing under the fair use doctrine.” H.R. Rep. No. 94-1476, at 74 (1976). The House Report’s discussion of other parts of Section 108 reinforces the point that Section 108(f)(4)’s purpose was to prevent any implication that Section 108 limited fair use. In the context of Section 108(h), the House Report observed:

Although subsection (h) generally removes musical, graphic, and audiovisual works from the specific exemptions of section 108, it is important to recognize that the doctrine of fair use under section 107 remains fully applicable to the photocopying or other reproduction of such works. H.R. Rep. No. 94-1476, at 78.

Copyright scholars agree that Section 108 does not limit the availability of Section 107 to libraries. 4 William Patry, *Patry on Copyright* § 11:3 (2011) (“[I]f for one reason or another, certain copying by a library does not qualify for the section 108 exemption ..., the library’s photocopying would be evaluated under the same criteria of section 107 as other asserted fair uses. This interpretation not only gives meaning to both sections but is fully in line with the earlier committee reports.”); 4-13 Melville Nimmer & David Nimmer, *Nimmer on Copyright* § 13.05 (2011) (“[I]f a given library or archive does not qualify for the Section 108 exemption, or if a qualifying library or archive engages in photocopying practices that exceed the scope of the Section 108 exemption, the defense of fair use may still be available.”).

Similarly, judicial opinions addressing the relationship between the Copyright Act’s specific exceptions and fair use state that a defendant’s failure to qualify for a specific exception does not prejudice its fair use rights. In *Sega Enters., Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1520-21 (9th Cir. 1992), Sega argued that because Accolade’s disassembly of Sega’s computer program did not fall within the Section 117 exception relating to software, Accolade could not rely upon Section 107. Sega’s position was that Section 117 “constitutes a legislative determination that any copying of a computer program *other* than that authorized by section 117 cannot be considered a fair use of that program under section 107.” *Id.* The Ninth Circuit responded that this “argument verges on the frivolous. Each of the exclusive rights created by section 106 of the Copyright Act is expressly made subject to all of the limitations contained in sections 107 through 120.” *Id.* at 1521. The court went on to observe that:

sections 107 and 117 serve entirely different functions. Section 117 defines a narrow category of copying that is lawful *per se* The fact that Congress has not chosen to provide a *per se* exemption to section 106 for disassembly does not mean that particular instances of disassembly may not constitute fair use.

Id. Before the District Court, Appellants attempted to distinguish *Sega* on its facts, but the principle of specific exceptions not restricting fair use applies nonetheless. *See also Encyclopedia Britannica Educ. Corp. v. Crooks*, 447 F. Supp. 243, 249 n.7 (W.D.N.Y. 1978) (“The legislative history ... makes clear that the statutory exemptions were intended to supplement rather than supersede the doctrine of fair use”).

Contrary to the assertions of the Authors Guild and other rights holders, allowing fair use to supplement Section 108 does not read Section 108 out of the statute. Section 108 sets forth certain situations where a library can always make reproductions and distributions without the right holder’s authorization. Some of these actions might be fair uses, but Section 108 provides legal certainty that encourages the library to proceed without conducting the more complex fair use analysis.⁴ Other actions under Section 108 might be beyond what fair use would allow, yet Congress in its balancing of competing interests decided to permit them. Section 108(f)(4) clarifies that libraries can rely on Section 108 when they meet its detailed criteria and on Section 107 in other circumstances, when they satisfy its more general criteria.

D. Fair Use Sufficiently Updates Section 108.

Congress wrote Section 108 in the age of photocopiers. Recognizing that Section 108 might need to be updated, the Library of Congress in 2005 convened a group of publishers and librarians to examine Section 108 and make recommendations for how it should be amended to reflect the needs of libraries in the digital age. I was a member of

⁴ *See also* Randolph D. Moss, Office of Legal Counsel, *Whether And Under What Circumstances Government Reproduction Of Copyrighted Materials Is A Noninfringing “Fair Use” Under Section 107 Of The Copyright Act Of 1976* 14 n.12 (1999). (“[S]ection 108 of the 1976 Act does not narrow the protection for fair use provided by the common law doctrine codified in section 107 Section 108 thus fairly can be viewed as a very valuable—and not superfluous—safe harbor: If a certain library practice is noninfringing under the specific and detailed provisions of section 108(a) ... a library need not be concerned about how that particular photocopying practice would fare under section 107’s more complex and indeterminate fair use standards.”)

the Study Group. After three contentious years, the Section 108 Study Group issued a report that reflected at a high level agreement on some aspects of Section 108 that should be updated. The report, however, did not resolve many other important issues such as orphan works, mass digitization, and electronic reserves, nor did it propose statutory language in the areas where there was agreement.

Moreover, the Study Group did not conclude that fair use was inadequate to supplement Section 108's specific provisions. Indeed, the Study Group observed, "[i]n addition to section 108, libraries and archives rely upon fair use to make copies of copyrighted works for preservation and other purposes." *The Section 108 Study Group Report* 21 (2008). The Study Group stated that "section 108 was not intended to affect fair use. Certain preservation activities fall within the scope of fair use, regardless of whether they would be permitted by section 108." *Id.* at 22.

The difficulty of translating even the simplest of the Section 108 Study Group's recommendations into legislation was displayed at a symposium on Section 108 reform hosted by Columbia University Law School in February 2013.⁵ For example, the suggestion that Section 108 be expanded to apply to museums engendered a debate concerning how museums should be defined, and the need to define libraries and archives, currently undefined in Section 108.⁶

Additionally, some of the Study Group's recommendations could have the effect of limiting what libraries do today. The Study Group, for instance, proposed a complex regulatory scheme for website archiving, an activity performed by libraries as well as commercial search engines. Indeed, at the Columbia symposium it was evident that some rights holders saw the "updating" of Section 108 as an opportunity to repeal Section 108(f)(4) and restrict the availability of fair use to libraries. This is completely unacceptable to libraries. In essence, these rights holders seek to deny libraries the benefit of the most significant privilege of the Copyright Act, which the Supreme Court recently described as part of "the traditional contours of copyright protection" and one of

⁵ Symposium: *Copyright Exceptions for Libraries in the Digital Age: Section 108 Reform*, 36 COLUMBIA J. L. & ARTS 527 (2013).

⁶ Even if consensus could be reached on modernizing Section 108, constantly evolving technology would quickly render it out of date once again.

copyright law's "built-in First Amendment accommodations." *Golan v. Holder*, 132 S. Ct. 873, 890 (2012).

The fact that Section 108 may reflect a pre-digital environment does not mean it is obsolete. It provides libraries and archives with important certainty with respect to the activities it covers. Furthermore, Section 108 provides courts with important guidance concerning the application of Section 107. For example, in enacting Section 108(c), Congress indicated that there is a strong public policy interest in libraries making replacement copies. Accordingly, when a library makes a replacement copy that exceeds the specific provisions of Section 108(c) – for example, the library makes four copies rather than three copies – a court should give great weight to Congress's recognition of the public policy interest in replacement copies when assessing the first fair use factor: the purpose and character of the use.⁷ To be sure, this "substantial compliance" with Section 108 is not outcome determinative. It simply tilts the first factor analysis in favor of the library.

III. LIBRARIES NO LONGER NEED ORPHAN WORKS LEGISLATION.

LCA has a long history of involvement in the orphan works issue. It provided extensive comments to the Copyright Office during the course of the Office's study that led to the Office's 2006 Orphan Works Report. LCA also actively participated in the negotiations concerning the orphan works legislation introduced in the 109th and the 110th Congresses. Although LCA strongly supported enactment of these bills, significant changes in the copyright landscape over the past eight years convince us that libraries no longer need legislative reform in order to make appropriate uses of orphan works.

A. The "Gatekeeper Problem" Has Diminished.

In its March 25, 2005, response to the Copyright Office's initial notice of inquiry concerning orphan works, LCA provided a long list of examples of the uses libraries sought to make of orphan works. It explained that while these uses "would significantly benefit the public without harming the copyright owner," copyright law nonetheless inhibited these uses. Even though it believed that many of these uses would qualify as fair use, "the uncertainty inherent in Section 107, when combined with the possibility of

⁷ See Jonathan Band, *The Impact of Substantial Compliance with Copyright Exceptions on Fair Use*, 59 J. COPYRIGHT SOC'Y 453 (2012).

significant statutory damages notwithstanding the absence of actual damages, have caused various ‘gatekeepers’—typically publishers or in-house counsel at universities—to forbid these uses.” Since 2005, the “gatekeeper problem” has diminished markedly for the following reasons.

1. Fair use is less uncertain.

As previously noted, over the past eight years, courts have issued a series of expansive fair use decisions that have clarified its scope. In *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006), *Perfect 10 v. Amazon.com*, 508 F.3d 1146 (9th Cir. 2007), and *A.V. v. iParadigm*, 562 F.3d 630, 639 (4th Cir. 2009), the courts found that the repurposing or recontextualizing of entire works by commercial entities was “transformative” within the meaning of fair use jurisprudence and therefore a fair use. Courts further recognized that a nonprofit educational purpose weighed heavily in favor of a fair use finding in *Cambridge Univ. Press v. Becker*, 863 F. Supp. 2d 1190 (N.D. Ga. 2012), *Authors Guild, Inc. v. HathiTrust*, No. 11 CV 6351, 2012 WL 4808939 (S.D.N.Y. Oct. 10, 2012), *Ass’n for Info. Media and Equip. v. Regents of the Univ. of California*, No. CV 10-9378 CBM (MANx), 2011 WL 7447148 (C.D.Cal. Oct. 3, 2011), and *Ass’n for Info. Media and Equip. v. Regents of the Univ. of California*, No. CV 10-9378 CBM (MANx) (C.D.Cal. Nov. 20, 2012). Relying on *Perfect 10*, *iParadigm*, and *Bill Graham Archives*, the general counsel of the U.S. Patent and Trademark Office (USPTO) opined that the copying of technical articles by the USPTO and patent applicants during the course of the patent examination process constituted fair use.⁸ Importantly, *Amazon.com*, *iParadigm*, and *HathiTrust* all involved mass digitization.

All these uses were determined to constitute fair use even though the copyright owners were locatable. Gatekeepers at libraries and archives understand that similar uses of orphan works are all the more likely to fall within the fair use right because such uses would have no adverse effect on the potential market for the work.⁹ Additionally, the

⁸ Bernard Knight, USPTO General Counsel, *USPTO Position on Fair Use NPL Copies of Made in Patent Examination* (January 19, 2012) http://www.uspto.gov/about/offices/ogc/USPTOPositiononFairUse_of_CopiesofNPLMadeinPatentExamination.pdf.

⁹ The second fair use factor, the nature of the copyrighted work, also weighs in favor of fair use when the work is an orphan. See Jennifer Urban, *How Fair Use Can Solve the Orphan Works*

Code of Best Practices in Fair Use for Academic and Research Libraries, developed by the Association of Research Libraries,¹⁰ explicitly concludes that the orphan status of a work in a special collection enhances the likelihood that its use by a library is fair. The development of the *Code* was prompted by Professor Michael Madison's insight (following a review of numerous fair use decisions) that the courts were implicitly or explicitly, asking about habit, custom, and social context of the use, using what Madison termed a 'pattern-oriented' approach to fair use reasoning. If the use was normal in a community, and you could understand how it was different from the original market use, then judges typically decided for fair use.¹¹

Based on this insight, the Association of Research Libraries undertook an effort to "document[] the considered views of the library community about best practices in fair use, drawn from the actual practices and experience of the library community itself."¹² The resulting *Code of Best Practices* identified "situations that represent the library community's current consensus about acceptable practices for the fair use of copyrighted materials and describes a carefully derived consensus within the library community about how those rights should apply in certain recurrent situations." *Id.*

One of the *Code*'s principles directly addresses the digitizing and the making available of materials in a library's special collections and archives. The *Code* states that the fair use case for such uses "will be even stronger where items to be digitized consist largely of works, such as personal photographs, correspondence, or ephemera, whose owners are not exploiting the material commercially and likely could not be located to seek permission for new uses." *Id.* at 20. That is, the fair use case is stronger for orphan works. Significantly, the *Code* does not require a library to search for the copyright owner of such non-commercial material prior to digitizing it. Rather, the *Code* trusts librarians to exercise their professional judgment and expertise to determine whether the copyright owners of such materials are likely to be unlocateable, i.e., to presume

Problem, 27 Berkeley Technology Law Journal 1379 (2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2089526.

¹⁰ The Code has been endorsed by the American Library Association, the Association of College and Research Libraries, the Arts Libraries Society of North America, the College Art Association, the Visual Resources Association, and the Music Library Association.

¹¹ Patricia Aufderheide and Peter Jaszi, *Reclaiming Fair Use* 71 (2011).

¹² Association of Research Libraries, et al., *Code of Best Practices in Fair Use for Academic and Research Libraries* 3 (2012).

responsibly that certain types of works are orphans.

2. Injunctions are less likely.

Historically, courts routinely issued injunctions when they found copyright infringement, presuming that the injury caused was irreparable. In 2006, however, the Supreme Court in *eBay v. MercExchange*, 547 U.S. 388 (2006), ruled that courts should not automatically issue injunctions in cases of patent infringement, but instead should consider the four factors traditionally employed to determine whether to enjoin conduct, including whether the injury was irreparable and whether money damages were inadequate to compensate for that injury. Lower courts in cases such as *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010), have held that the Supreme Court’s reasoning in *eBay* applies to the Copyright Act as well. The abolishment of the automatic injunction rule diminishes the probability that a court will enjoin a library’s use of an orphan work in the unlikely event that the court finds the use to infringe; the copyright owner bears the heavy burden of proving that the library’s use causes her irreparable injury.

3. Mass digitization is more common.

The leading search engines, operated by two of the world’s most profitable companies, routinely cache billions of web pages without the copyright owners’ permission.¹³ This industry practice has faced absolutely no legal challenge in the United States since the *Amazon.com* decision in 2007, cited above. Gatekeepers understand that a court would favorably evaluate a non-profit library’s fair use defense in the context of this industry practice.

Moreover, in part because of the legal developments described above, libraries across the country have begun engaging in the mass digitization of special collections and archives.¹⁴ The more they engage in these activities, the more confident libraries—and their gatekeepers—become with their fair use analysis concerning the mass digitization of presumptively orphan works.

The controversy concerning the HathiTrust Orphan Works Project (OWP) has not shaken this confidence. In 2011, the University of Michigan (UM) announced an orphan works project, under which it would make orphaned books digitally available to

¹³ <http://www.worldwidewebsize.com/>.

¹⁴ The appendix contains a description of one such project by the New York Public Library.

authorized users of HathiTrust member libraries that had those books in their collections.¹⁵ Several HathiTrust member libraries joined UM in this pilot project. The UM Library developed a procedure to identify books in copyright that were not on the market and for which a rights holder could not be identified or located. The procedure included the listing of possible orphan works on a website to provide copyright owners with the opportunity to claim the works. After UM posted a list of 150 possibly orphaned books, the Authors Guild re-posted the list to its blog, whose readers helped the Guild locate the authors of several of the books (but few copyright owners). Shortly thereafter, the Authors Guild initiated a copyright infringement action against UM, the HathiTrust, and some of the other libraries that participated in the orphan works pilot. In response, HathiTrust suspended the orphan works project.¹⁶

This high profile litigation concerning possibly orphaned books has not deterred libraries from engaging in the mass digitization of archives and special collections. The subject matter of these mass digitization projects is completely different from the published books at issue in the HathiTrust case. Much, if not all, of these historical records, photographs, and ephemera have never been distributed commercially. The HathiTrust litigation, thus, has helped delineate for libraries which orphan works projects will subject them to greater risk of infringement litigation. Moreover, the litigation has demonstrated the ultimate futility of the “reasonably diligent search” approach embodied by the orphan works legislation in the 109th and 110th Congresses. Using the crowd-sourcing power of the Internet and the publicity of the litigation, the Authors Guild was able to generate more information more quickly than a small team of individuals consulting existing databases and search engines. A copyright owner will always be able to identify a trail that would have led the user to his doorstep, and the user’s only defense

¹⁵ Critics of the OWP often mischaracterized the nature of the project by suggesting it would have made entire works downloadable by anyone on the open web. In reality, access to the text of orphan works under the OWP would have been limited to viewing or printing one page at a time on a web browser window while logged in and authenticated as a university library user—and even then the OWP would only allow as many simultaneous users as there were hard copies in the library’s collection.

¹⁶ The district court ultimately found that the infringement claim regarding the OWP was moot because the OWP had been suspended. Notwithstanding the suspension of the OWP, I continue to believe that it was a fair use. *See* Resource Packet on Orphan Works: Legal and Policy Issues for Research Libraries, http://www.arl.org/bm~doc/resource_orphanworks_13sept11.pdf.

would be that she did not have the resources to explore every fork that she would have encountered along the way.¹⁷

B. Profound Disagreement Remains.

In 2013, the Copyright Office issued a Notice of Inquiry Concerning Orphan Works and Mass Digitization. The significant diversity of opinion expressed in the comments submitted in the response to the Notice of Inquiry indicates that it will be extremely difficult to forge a consensus approach to these issues. Indeed, the comments are literally all over the map. There was less agreement in 2013 than in 2007 both on the existence of a problem and the best approach to solve it.

Last month, the Copyright Office held a public meeting on orphan works and mass digitization. The public meeting indicated that nothing has changed over the past year. The divisions are just as profound now as they were in the initial round of comments.¹⁸ Indeed, the divisions between different communities may be even deeper now than before. The public meeting revealed fundamental disagreement as to whether the Constitutional rationale of the copyright system is to promote public benefit. Likewise, the meeting exposed a basic divergence concerning the correctness of fair use decisions over the past decade. In fact, one rights holder representative compared the recent fair use case law to *Plessy v. Ferguson*, suggesting that these fair use holdings were as legally and morally flawed as the Supreme Court's 1892 ruling upholding the "separate but equal" doctrine. The inflammatory nature of this analogy was exceeded only by another rights holder representative threatening three times during the course of one panel to sue libraries if they engaged in additional mass digitization activities. The hostility exhibited by some rights holders to users in general, and libraries in particular,

¹⁷ See, e.g., *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666, 681 ("From Google's point of view, [my grandfather's memoir] is an 'orphaned' book" because the company "is likely to be unsuccessful in trying to locate the publisher, since the book was self-published and my grandfather is now deceased," but "[f]rom my family's point of view, [the memoir] is not orphaned at all. It is very clear who owns the copyright."). Additionally, libraries now have far more experience than in 2005 with searching for the copyright owners of material in archives and special collections. These searches are more time consuming, expensive, and inconclusive than we believed in 2005. This further reinforces the importance of trusting librarians' professional judgment (rather than item-by-item searching) to conduct fair use analysis for mass digitization projects.

¹⁸ For a more detailed discussion of the different points of view expressed at the public meeting, see <http://policynotes.arl.org/post/79876737815/recap-of-the-copyright-offices-roundtables-on-orphan>

suggests that any legislative process concerning orphan works, mass digitization, or Section 108 is bound to fail.

IV. THE HATHITRUST CASE.

The *HathiTrust* case is one of several cases resulting from Google Book Search. The Authors Guild unfortunately sued a consortium of libraries for copyright infringement, but fortunately the district court found that the consortium's activities were permitted under the fair use doctrine and Section 121, an exception for the benefit of people with print disabilities.

Starting in 2004, Google entered into partnerships with leading research libraries, under which it borrowed millions of books from the libraries, scanned the books into its search database, and provided the libraries with digital copies of the books they had borrowed. Columbia was once of these libraries. The search results Google provided in response to a query would be a list of books that contained that search term. If a user clicked on a particular book, Google would display three "snippets" a few sentences long containing the search term, as well as bibliographic information concerning the book. In 2005, the Authors Guild (AG) and five publishers sued Google for infringing copyright by scanning the books into its search database. The parties began settlement negotiations, and reached a complex class action settlement agreement in 2008.¹⁹ Among its many provisions, the settlement agreement allowed Google's partner libraries to create a "Research Corpus," a set of all the scans made by Google in connection with the Library Project. This Research Corpus makes up the core of the HathiTrust Digital Library (HDL). After a lengthy review process, the presiding judge, Denny Chin, rejected the settlement in 2011.²⁰

¹⁹ For a more detailed discussion of the settlement and the litigation leading up to it, see Jonathan Band, *The Long and Winding Road to the Google Books Settlement*, 9 J. MARSHALL REV. INTEL. PROP. L. 227 (2009).

²⁰ For a more detailed discussion of the Judge Chin's rejection of the settlement, see Jonathan Band, *A Guide For the Perplexed Part IV: The Rejection of the Google Books Settlement*, <http://www.librarycopyrightalliance.org/bm%7Edoc/guideiv-final-1.pdf> (March 2011).

Once the settlement was rejected, AG resumed its litigation against Google.²¹ Additionally, AG and several authors' associations in other countries including Canada, Australia, and Norway separately sued HDL for copyright infringement.

HDL envisioned several uses of its database: preservation; full-text searches; and full-text access only for the print disabled. Moreover, as discussed above, HDL announced an orphan works pilot program. (OWP). AG claimed that the copies of the books HDL made when it created the database (i.e., when the digital files were transmitted by Google) infringed copyright. AG additionally claimed that the OWP would infringe copyright.

HDL promptly suspended the OWP. AG, however, continued to pursue the litigation. The central legal issue was whether the copies made by HDL were a fair use. In addition to arguing that these copies were not fair use, AG asserted that HDL could not even raise fair use as a defense because libraries could only engage in the copying permitted under 17 U.S.C. § 108, the specific exception for libraries.²² For its part, HDL argued that the copies it made were justified by the purposes of its mass digitization project: preservation, search, and access for the print disabled. Because the OWP had been suspended indefinitely before any works had been made available, HDL argued the program was moot.

Ruling on a motion for summary judgment on October 12, 2012, Judge Baer of the U.S. District Court for the Southern District of New York decided in favor of HDL on virtually every issue. He found that the library specific exceptions in section 108 do not restrict the availability to libraries of fair use under section 107.

With respect to fair use itself, Judge Baer declared: "I cannot imagine a definition of fair use that would not encompass the transformative uses made by [HDL] and would require that I terminate this invaluable contribution to the progress of science and cultivation of the arts that at the same time effectuates the ideals espoused by the [Americans with Disabilities Act]."²³ In the course of reaching this fair use conclusion, Judge Baer made the following findings:

²¹ The publishers reached a narrow settlement agreement with Google that did not require judicial approval.

²² This issue is discussed in greater detail above in Section II.

²³ *Authors Guild, Inc. v. HathiTrust*, 902 F.Supp.2d 445, 464 (S.D.N.Y. 1992)

- The creation of a search index is a transformative (and therefore favored) use under the first fair use factor: “The use to which the works in HDL are put is transformative because the copies serve an entirely different purpose than the original works: the purpose is superior search capabilities rather than actual access to copyrighted material.”²⁴
- The use of digital copies to facilitate access for the print-disabled is also transformative. Because print-disabled persons are not a significant potential market for publishers, providing them with access is not the intended use of the original work.
- HDL enabled libraries to “preserve their collections in the face of normal deterioration during circulation, natural disasters, or other catastrophes that decimate library collections, as well as loss due to theft or misplacement.” Judge Baer quoted the House Judiciary Committee report on the 1976 Copyright Act stating that the efforts of libraries and archives “to rescue and preserve this irreplaceable contribution to our cultural life are to be applauded, and the making of duplicate copies for purposes of archival preservation certainly falls within the scope of ‘fair use.’”
- The AG failed to show that HDL created any security risks that threatened AG's market.
- AG's suggestion that HDL undermines existing and emerging licensing opportunities is “conjecture.”
- The goal of copyright to promote the progress of science are better served by allowing HDL's use than by preventing it.

In addition, Judge Baer found that the specific exception for the print disabled, the Chafee Amendment, 17 U.S.C. § 121, allowed HDL to provide full text access to the print disabled. The court found that HDL was an “authorized entity” within the meaning of the statute because it had a primary mission of providing services to the print disabled. Moreover, the digital copies met the definition of “specialized formats” because they were made available only to the print disabled.

In sum, the court found two means of getting to the same objective: providing

²⁴ Id. at 460.

accessible copies to the print disabled. On the one hand, the mass digitization of over 10 million published books, of which at least 70 percent were still in copyright, for the purpose of providing accessible format copies to the print disabled was a fair use. Notwithstanding the large number of works, the judge didn't see this as a hard case; the fairness of the use was obvious. On the other hand, the Chafee Amendment also permitted libraries to make accessible format copies for print disabled students and faculty.

AG has appealed Judge Baer's decision to the U.S. Court of Appeals for the Second Circuit. The oral argument was held on October 30, 2013. I hope that the Second Circuit will agree with Judge Baer that HDL preserves important works, allows them to be searched, and provides access to the print disabled, without causing any economic harm to rights holders.

V. LEGISLATIVE RECOMMENDATIONS.

Although we do not seek amendment of Section 108 or special legislation targeting orphan works, certain narrow changes to the Copyright Act would benefit libraries and other cultural heritage institutions. For example, Section 504(c)(2) allows for the remission of statutory damages to libraries, educational institutions, and public broadcasters when they reasonably believed that certain activities were fair uses. However, this limitation does not apply to museums, and it should. Moreover, the limitation for libraries and educational institutions applies only to infringements of the reproduction right, not the performance, display, distribution, or derivative work right. As a result, the limitation provides little benefit, particularly for Internet uses that involve the display of a work on a website. The remission provision for non-profit institutions should apply to museums and to infringements of all exclusive rights under Section 106.

LCA will address other potential amendments as the subcommittee considers the relevant sections, e.g., the anti-circumvention provisions of the Digital Millennium Copyright Act, 17 U.S.C. § 1201. However, two issues should receive special mention because of their significance to libraries. First, the preemption of contractual provisions limiting copyright exceptions. An increasing proportion of library acquisitions is digital resources. Indeed, many research libraries spend over 65% of their acquisition budgets on electronic resources. These licenses often contain terms that restrict fair use, first sale,

and other user rights under the Copyright Act. As it reviews the Copyright Act, the subcommittee should consider possible amendments to Section 301(a) to ensure that libraries and other cultural heritage institutions will be able to preserve digital materials in their collections, notwithstanding contractual provisions to the contrary.

Second, the subcommittee should consider the impact of the Copyright Act on people with disabilities. As previously mentioned, Judge Baer in the HathiTrust case found that both fair use and Section 121 permitted HathiTrust to provide print disabled faculty with students with access to the full text of books within the HathiTrust database. The subcommittee should consider whether Section 121 should be expanded to apply to people with other disabilities.

April 2, 2014

APPENDIX

The New York World's Fair of 1939 and 1940 (the "Fair") was held in Flushing Meadows in Queens. At the conclusion of the Fair, the corporation in charge of the Fair dissolved and donated a large amount of material to the New York Public Library ("NYPL"). The corporation donated over 2,500 boxes of records and documents, as well as 12,000 promotional photographs. These records document an important event in history and are heavily used by researchers and the public.

When deciding whether to digitize this collection and make it available online, NYPL conducted a thorough, good-faith search for rights holders. It started by trying to determine the copyright status for the nearly ten tons of works in the collection. The publication status of much of the material was difficult to determine and was, therefore, treated as if it were in copyright. Because the material may be in copyright, NYPL shifted its focus to find a copyright owner. It spent days combing through the legal records of the Fair to determine whether the Fair's copyright was ever assigned to a third party. It also tried to determine whether copyrights were assigned at the dissolution of the corporation, but could not find an answer in the archive. When the records of the Fair did not help, NYPL searched for rights holders utilizing other methods, including searches on Google, the Copyright Office records, and other relevant sources. This search was time-consuming and, ultimately, fruitless.

NYPL could not locate a rights holder who owned the rights to the material in the collection. After balancing the educational benefit of digitizing and making portions of the collection available online with the risk that a rights holder might subsequently surface, NYPL determined to move forward with the project, guided by fair use considerations. The potential maximum copyright liability for this project was estimated to be in excess of \$1.8 billion dollars. Despite this potential liability, NYPL not only digitized and posted the collection, it used the material in a free app that was later named one of Apple's "Top Education Apps" of 2011. Furthermore, an educational curriculum has been built around this material.

So far, no rights holder has contacted NYPL to ask that it limit the uses of works from the Fair collection. If a rights holder wished to contact NYPL about its uses, NYPL has made its contact information available online and in the iPad application.

Mr. COBLE. Thank you, Mr. Neal.
Ms. Constantine?

**TESTIMONY OF JAN CONSTANTINE, GENERAL COUNSEL,
THE AUTHORS GUILD, INC.**

Ms. CONSTANTINE. Thank you, Chairman Coble, Ranking Member Nadler—I would like equal time. I too am a constituent. So thank you for all you do in New York—and Members of the Subcommittee.

My name is Jan Constantine, and I am General Counsel for the Authors Guild, the largest society of published authors in the country. We have a 100-year history of contributing to debates before Congress on the proper scope and function of copyright law. It is an honor and a privilege to be here today for the Authors Guild to continue to serve that role before this Committee.

Mass digitization and orphan works are two issues that I personally have spent the last 8 years grappling with. We have two active, major lawsuits addressing these very topics, one against Google and one against the HathiTrust, a consortium of university libraries. In these two lawsuits, we are striving to protect authors' rights to their works against institutions vastly larger and more powerful than ourselves.

Google's chutzpah in offering libraries free e-books of other people's property in exchange for access is truly awesome. And once HathiTrust had possession of these e-book editions of many of the world's copyrighted literary works, it was awfully tempting to do something with them. So, HathiTrust sidestepped Congress and started its own orphan works project.

This is not how it is supposed to be. Copyright is part of our Constitution. It is vitally important to our culture. Congress has carefully crafted rules for copying, including detailed rules for library copying. Ad hoc approaches to things as momentous as mass digitization of books or the distributing of so-called orphan books is wildly inappropriate. To me, these look more like exercises in eminent domain, Google or HathiTrust versions of eminent domain. But at least with real eminent domain, the property owner gets paid something.

We do not like suing libraries. We do not even like suing Google—or maybe a little. [Laughter.]

But we have better things to do and these issues are not best decided in the courtroom. These are major public policy issues and Congress, particularly this Committee, should be setting the rules.

One thing I have learned during these 8 years is that the orphan works problem is vastly overstated, at least for books. A book has all of its property owner information printed right in it. The Copyright Office has all sorts of ownership information through its registration system.

And HathiTrust's orphan works program quickly showed that finding rights owners to so-called orphans can be a snap. HathiTrust had an elaborate protocol for finding rights owners. It did not work. But, we tried a different approach. We used Google which, in spite of the chutzpah, is really quite handy, and we were finding rights owners up, down, and sideways in moments. People usually do not die without a trace, at least authors of registered

copyrights do not regularly die without leaving some clue as to their heirs.

Take James Gould Cozzens, the Pulitzer Prize winning novelist. He was on HathiTrust “orphan row.” That is what we called their list of orphan books that it was getting ready to distribute to 250,000 or so people. Free e-books, someone else’s property. And who was that someone else? Harvard University. The Copyright Office says that Harvard was the owner.

But I am not here to rehash the past. Let us talk solutions.

We need a way forward that respects all stakeholders, authors, publishers, libraries, and especially readers. So, we are asking Congress to allow for the creation of a collective rights licensing organization to deal with mass digitization and orphan works. Collective licensing organizations such as ASCAP and BMI make sense when there is a limited set of rights to be licensed and it is too costly to ask individuals whether a use is okay. If you run a radio station and want to broadcast some music, it is impractical to contact every rights holder for each day’s playlist. So you get licenses from ASCAP and BMI.

For mass digitization of books, one also needs a simple, one-stop shopping solution. The benefits would be enormous and pave the way for a true national digital library. This has to be done carefully, however. The licensing would have to be strictly limited in scope. Distributing print books or e-books would not be part of the package. In-print books would not be part of the package either. We should not be disrupting the commercial market.

Instead, this is about displaying out-of-print books, and there are millions of them in our Nation’s libraries. We are talking displaying, not downloading or distributing, displaying books on computer screens. This is about providing access to those books at every college, university, community college, public school, and public library in the country so those institutions could provide access to the vital communities they serve. Every student could have a desktop access to a collection as large as their State’s university. It is a “level the playing field” game-changer, and authors would be compensated for those uses, as they should, rather than being brushed aside by those who should know better.

There are other important things that would go with collective licensing. It would have to be non-compulsory. If an author wants out, the author gets out. It is the author’s literary property after all. The author gets to say “no.” And there would also have to be a referee, someone to go to if the licensing organization and an institution cannot agree on a reasonable fee. That is a feature of collective licensing organizations around the world.

Outside of the U.S., collective licensing solutions for books in particular have been met with great success.

In closing, I look forward to sitting down at the table with other stakeholders, libraries, users, creators, and other media, even Google. What the heck. This can be worked out. The benefits are just too enormous to pass up. This is about bringing our great research libraries to the desktops and laptops of students and library patrons across the country. A true digital library is within our grasp. We should go for it now. And I think once we agree on the shape of the table, I am sure we can get it done.

I would like to thank this Committee for holding this hearing and inviting us to participate, and I refer you to my written testimony. Thank you very much.

[The prepared statement of Ms. Constantine follows:]

U.S. House of Representatives
Committee on the Judiciary
Subcommittee on Courts, Intellectual Property, and the Internet

Preservation and Reuse of Copyrighted Works
April 2, 2014, 2:00 p.m.

Statement of

Jan Constantine
General Counsel
The Authors Guild, Inc.
jconstantine@authorsguild.org

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY AND THE
INTERNET

Preservation and Reuse of Copyrighted Works
Testimony of Jan Constantine on Behalf of the Authors Guild
April 2, 2014

Mr. Chairman, Ranking Member and all other members of the Committee: My name is Jan Constantine, and I represent the Authors Guild, the largest society of published authors in the country. The Guild and its predecessor organization, the Authors League of America, have been leading advocates for authors' copyright and contractual interests since the League's founding in 1912.

Among our more than 8,500 members are historians, biographers, poets, novelists and freelance journalists of every political persuasion. Authors Guild members create the works that fill our bookstores and libraries: literary landmarks, bestsellers and countless valuable and culturally significant works with more modest sales records. We have counted among our ranks winners of every major literary award, including every U.S. Nobel Prize for Literature¹ honoree, dozens of Pulitzer Prize and National Book Award winners,² as well as U. S. Presidents³ and distinguished members of both Houses of Congress.

We have a 100-year history of contributing to debates before Congress on the proper scope and function of copyright law. It's an honor and privilege to be here today, for the Authors Guild to continue to serve that role before this committee.

¹ Sinclair Lewis (1930); Eugene O'Neill (1936); Pearl S. Buck (1938); William Faulkner (1949); Ernest Hemingway (1954); John Steinbeck (1962); Toni Morrison (1993).

² Among them, John Ashbery, Donald Barthelme, Ray Bradbury, Pearl S. Buck, Robert A. Caro, Rachel Carson, John Cheever, Michael Cunningham, Joan Didion, Annie Dillard, E.L. Doctorow, Jennifer Egan, Ralph Ellison, William Faulkner, Paula Fox, Annette Gordon-Reed, Ernest Hemingway, John Hersey, Oscar Hijuelos, Pauline Kael, Madeleine L'Engle, J. Anthony Lukas, Robert Massie, John McPhee, James A. Michener, Toni Morrison, Joyce Carol Oates, Sharon Olds, Katherine Paterson, Annie Proulx, Philip Roth, Arthur M. Schlesinger, Jr., Upton Sinclair, Isaac Bashevis Singer, Jane Smiley, James B. Stewart, T.J. Siles, Barbara Tuchman, John Updike, Gore Vidal, Robert Penn Warren, and William Carlos Williams.

³ Theodore Roosevelt, Harry S. Truman, John F. Kennedy.

Mass digitization and orphan works are two issues that I have grappled with for eight years as General Counsel of the Authors Guild. We have been immersed in mass digitization and orphan works issues in *Authors Guild v. Google* and *Authors Guild v. HathiTrust*, in testifying before Congress, in numerous public discussions and presentations, including, just last month, participating in the Copyright Office's roundtable discussions on these very issues.

Today I will focus on the threats and opportunities to our literary culture and the readers, authors, schools, and libraries that depend on it, posed by mass digitization and orphan works, and propose a legislative solution to maintaining the delicate balance between the rights of authors and other creators and the public interest served by providing access to their literary works.

Ad hoc approaches to mass digitization of books and so-called orphan works are rife with problems and seriously endanger our literary culture. There can be no clearer demonstration of the need for Congressional action than the bold and, in our view, blatantly unlawful uses of authors' literary property rights that prompted the Authors Guild to twice file lawsuits against much larger and more powerful adversaries in the past nine years.

I will discuss these "copyshocks," and then look back 50 years to show that there are far better approaches to copyright that we seem to have forgotten. The drafters of the 1976 Copyright Act, it turns out, saw Google coming, anticipating the very fair use problem such a corporation might pose. The drafters clearly thought they had addressed the issue, placing authors firmly in control of their exclusive right to authorize the digitization of their literary works.

Looking back 50 years is particularly instructive as we consider the challenges of clearing rights to so-called orphan works. When private parties are incentivized to find rights holders, rather than rewarded for failing to do so, they can be remarkably resourceful and successful.

Finally, I will propose a legislative solution, based on well-functioning licensing systems that have been operating around the world for decades. Among other features, these licensing systems have cleared rights to orphan works for years.

**Copyshock One: Google &
The Universal Digital Library**

On December 14, 2004, Google stunned the library, literary, technology, and copyright worlds, announcing it would start scanning millions of copyright-protected books in partnership with the University of Michigan Library. Copyright lawyers re-read Section 108, trying in vain to find anything that might allow Google to engage in so clear a massive copyright infringement. But Google wasn't looking to Section 108. It was gambling that by displaying "snippets" of protected works to its users, all of its copying of entire texts would be deemed a fair use.

Suddenly, the universal digital library, at least the beginnings of one, was rushing toward us.

As details emerged, we were further stunned: Google was swapping authors' ebooks for access. Its agreement with the University of Michigan provided no security guarantees for those ebooks, and Google would be monetizing authors' literary property by running ads alongside its "snippet" displays. Google offered no revenue sharing from those ads. Google had taken it upon itself to put authors at digital risk, with no prospect of digital rewards.

Google's litigation risks were huge; the statutory damages daunting even for a corporation of Google's size. Why roll the dice?

It turns out that Google was suddenly facing a formidable competitor.

Amazon and the A9 Search Engine

On October 23, 2003, Amazon.com launched "Search Inside the Book," which allowed users of Amazon's website to search more than 120,000 books, or 33 million pages, at the time it launched, according to Amazon's press release.

With "Search Inside the Book," not only could Amazon's customers search these 120,000 books, they could preview entire book pages containing the search terms. Customers were required to log in with their Amazon user names and passwords to preview entire book pages, so they could instantly purchase the books they were browsing.

Once customers had clicked on the link to a specific page and signed in with their Amazon.com user name and password, they could preview relevant pages, including the page they selected, and search for other terms of interest within the book.

The announcement was a momentous one in the book world. It was clear to most industry observers that Amazon's ambitions for the program were enormous. Indeed, Amazon had agreements with more than 190 publishers to digitize books for Search Inside the Book, according to its press release, including many of the largest U.S. publishers, such as John Wiley & Sons, Random House, Simon & Schuster, Time Warner, HarperCollins, McGraw-Hill, and Holtzbrinck. The number of participating publishers would rapidly grow to include nearly every book publisher in the U.S.

A critical component of "Search Inside the Book" was that users had to log in with their Amazon user names and passwords before they could view full pages of the books. In that way, those virtually browsing the books would have Amazon's famous one-click purchase button at the ready. By all accounts, Search Inside the Book boosted sales for most of the books in the program, and continues to do so today.

The implications for Search Inside the Book went far beyond the book industry, however. Amazon was offering searchable content that no other entity, not even Google, had offered, and that content was based on contracts negotiated with hundreds of publishers. A November 12, 2003, article in *Wired* magazine made this abundantly clear:

[T]he contents of books may be the only publicly accessible data set with the potential to match Google's Web index both for size and utility. Search Inside the Book makes Amazon the sole guide to tens and ultimately hundreds of millions of pages of information. And while Google's business is vulnerable to any competitor that builds a better search engine, Amazon's book archive is the product of negotiated contracts with hundreds of publishers. Amazon has cornered the market on information that was once hidden away in books. The burden of the physical -

the fact that the database Amazon uses is linked into a complex system involving real things - gives it a stunning, if perhaps temporary, advantage.⁴

Gary Wolf, author of the *Wired* article, wrote about the critical limitations placed on Search Inside the Book:

If you want to read an extensive excerpt, you must turn to the physical volume -- which, of course, you can conveniently purchase from Amazon. Users will be asked to give their credit card number before looking at pages in the archive, and they won't be able to view more than a few thousand pages per month, or more than 20 percent of any single book.⁵

Wolf reported that he spoke to Amazon CEO Jeff Bezos about the project, who was emphatic about his purposes:

Bezos is vehement on this point. He has sold publishers on the idea that digitizing hundreds of thousands of copyright books won't undermine the conventional bookselling business. *"It is critical that this be understood as a way to get publishers and authors in contact with customers," he says in an interview at Amazon's Seattle headquarters. "We're perfectly aligned with these folks. Our goal is to sell more books!"*

Bezos has some good evidence to back up his argument. Amazon has consistently added features that have proven to increase book sales. Through its customer reviews, used-book business, and personalized recommendations, the company constantly puts its customers in contact with new titles. *Amazon is a machine that stimulates the acquisitive urge of readers. It appeals to their specialized interests.*

*It makes people buy books.*⁶

⁴ "The Great Library of Amazonia," *Wired Magazine*, November 12, 2003, available at http://www.wired.com/wired/archive/11.12/amazon_pt.html.

⁵ *Id.*

⁶ *Id.* (Emphasis added.)

While the Authors Guild has had its disagreements with Amazon over the years, many of them quite sharp, our concerns are focused on Amazon's behavior, which we view as frequently monopolistic and unfairly undermining the livelihoods of brick-and-mortar bookstores, which many authors depend on for marketing their books. We have never doubted, however, Amazon's mastery of the online bookselling environment. Our conversations with publishers at the time and since then have confirmed that they agreed to participate in Search Inside the Book because they believed it would sell more books, and the evidence Amazon provided them supported that belief. Amazon was unmistakably on its way to making nearly all in-print books available for searching and previewing at its online bookstore.

Google had conquered online content, but Amazon, by negotiating agreements with hundreds of publishers, had gone where Google could not, making tens of millions of pages of carefully written, edited, and published works, all previously off line, available to its shoppers. Amazon, by cornering the market on book content, was suddenly a competitor unlike any Google had ever faced.

The threat to Google's search dominance became even more apparent just five months later, when Amazon unwrapped its beta version of A9, Amazon's search engine competitor to Google.

The A9 search engine offered user content Google could not match: the millions of book pages available (to those who logged in with their user names and passwords) through Search Inside the Book.

A9's launch came at a critical time in the corporate history of Google, six years after the company was incorporated, and, as the *Times* noted,⁷ just one month after Google made its initial public offering of stock. Google had a well-financed, innovative, disruptive competitor in its own back yard.

⁷ "Amazon to Take Searches on Web to a New Depth," *New York Times*, September 15, 2004, available at http://www.nytimes.com/2004/09/15/technology/15search.html?_r=0.

Google Trumps Amazon, by Avoiding Rights Holders and Their Interests

Google didn't stand still. Three months after the formal launch of Amazon's A9 search engine, with its unique access to an expanding list of in-print, copyright-protected books Amazon scanned with the permission of the books' publishers, Google struck back. It announced that it would begin scanning copyright protected books for its search engine.⁸

Google had come up with a way to neatly leapfrog Amazon's scanning efforts: it would scan copyright-protected books without permission, claiming that its scanning and snippet display were covered by fair use (even when it was scanning and displaying in-print books that had been scanned, or were eligible for scanning, by Amazon).

Rather than painstakingly seeking permission from rights holders, who might require a share in advertising revenue, or who might require that users be logged in to one-click purchasing accounts before viewing portions of their books, or who might demand control over the display, storage and security of their books, Google chose instead to negotiate with libraries, swapping authors' and publishers' ebooks in compensation for access to the libraries' repositories.

Google's library project would soon begin displaying snippets of authors' and publishers' in-print books in competition with the authorized displays available at Amazon and BarnesandNoble.com, and other online retailers. To the extent Google succeeds in luring readers to its search engine and away from online bookstores, Google surely harms book sales.

It isn't just in-print books that were affected. By December 2004, when Google announced its massive scanning-and-display project, thousands of formerly out-of-print books were being made available by print-on-demand technology, including more than a thousand works by Authors Guild members we made available through our Backinprint.com program. Since then, surely tens of thousands of more out-of-print books are commercially available again,

⁸ "All Booked Up," Google's Official Blog, December 14, 2004, *available at* <http://googleblog.blogspot.com/2004/12/all-booked-up.html>.

brought into print by countless publishers such as university presses, newcomers such as Open Road Media, and publishing programs at Amazon and Barnes & Noble.

Book Excerpts Do Sell Books, at Online Bookstores

The Authors Guild believes that allowing readers to search and view selections of books online can promote the sale of books. But the context for those book displays is crucial. If the book excerpts are displayed in a bookselling environment, then book sales are generally promoted. If book excerpts are displayed in a search engine's advertising-driven environment, then ad sales are generally promoted.

To the extent Google's unauthorized displays of books encourages readers to search at its ad-supported search engine, rather than logging in to Amazon's retail environment, Google is hurting the sales of authors' books. For this reason, and many, many others, authors and other rights holders should have control of when their books are copied in their entirety, and where their books are displayed.

Google, in other words, disrupted the commercial, permission-driven development of book-search-and-display at online bookstores in order to gain a competitive advantage over other search engines. In the process, it distributed millions of ebooks to universities, placing those books beyond the control of authors and publishers, while putting them at plain risk of widespread infringement.

50 Years Ago: The Drafters of the 1976 Copyright Act Saw It Coming

Here's something that the drafters of our 1976 Copyright Act couldn't have imagined – a digital library of all books, accessible to countless users throughout the country, in some manner. Work on that legislation had begun in the 1950s, after all, many of its most important sections complete by 1965, including Section 106, the bundle of authors' exclusive rights, Section 107 fair use, and much of Section 108, governing library copying for preservation, replacement and other limited purposes.

Remarkably, however, much of Google's bold venture had been anticipated, with stunning prescience, and the notion of a national digital library was being bandied about in books, journal articles, and the popular press. At the Seattle World's Fair in 1962, for example, the American Library Association presented its Library of the 21st Century, featuring computer terminals displaying digital books.

Visions of the universal digital library weren't confined to World's Fair exhibits. Books and essays were written about it, including *Libraries of the Future*, by J.C.R. Licklider. Licklider's book is based on a study conducted at the behest of the Council of Library Resources. The book predicts much of what's to come: a digital library accessible online, displayed on high-quality computer screens. The digital library would offer highly refined search techniques, and pages could be printed on high-speed devices.

A debate with Licklider spilled into the pages of the Authors Guild's *Bulletin*: how, exactly, were authors to be paid for their work in this digital library of everything? Mr. Licklider's response: flat payment or by use. He thought flat payment made the most sense.

In a 1964 article republished in the pages of the trade publication *Special Libraries*, artificial intelligence expert Arthur Samuel foresaw that within 20 years from then "one will be able to browse through the fiction section of the central library . . . via one's remote terminal."⁹

In 1965, Curtis G. Benjamin, Chairman of the Board of the McGraw-Hill Book Company, wrote of the "inevitable advent of the automated library system in which documents (including book pages) are exchanged and displayed by photocopy, by microimages, or by more sophisticated electronic-optical devices . . . the library system in which one copy of a printed reference book will serve the present uses of ten or even 20 or more copies."¹⁰ He was "convinced" such a system would become "generally operative in the United States in the foreseeable future."¹¹

Discussions of the digital library also reached Copyright Office and legislative hearings on the new copyright act.

⁹ *Special Libraries*, January 1965.

¹⁰ *Special Libraries*, November 1965.

¹¹ *Id.*

The most remarkable and eerily prescient part of the legislative history, however, was surely a Copyright Office hearing more than 50 years ago, on February 20, 1963. The debate addressed whether it ought to be fair use to optically scan a book for computerized uses. Abe Kaminstein, Copyright Register, dramatically announced that he'd received a telegram from Reed Lawlor, a patent attorney in Los Angeles, with a provocative question for those considering the first draft of the new copyright law.

KAMINSTEIN: I was going to hold this for later on, but I have a telegram from Reed Lawlor, who says, "I suggest you consider adding the following section 6: 'In any event reproduction of a copyrighted work in machine readable form for use in the analysis, citation and reasonable quotation of the work by means of an information storage and retrieval system shall be considered a fair use.'". We were going to hold this for the discussion of fair use, but I certainly have no objection to opening up the subject here. Did you want to comment on it?

BROWN: If, as Mr. Lawlor suggested, you have a machine which simply absorbs information for the sake of giving you citations later, and which does not have the capacity to print it out again or to make copies, then it seems to me that that machine might be considered as simply an adjunct to note taking-in the sense that one can absorb a copyrighted work to make proper use of it, which may or may not be considered "fair use."

SCHEFFER: *With the way these things seem to be going, there's a good possibility that, within the lifetime of this statute, they're going to eliminate printed books for most purposes or for many purposes. In other words, if we take Professor Brown's view that you can put material into these machines as a matter of note taking, you may find that, for practical purposes you have eliminated the market for the book entirely.*

I think that the only way to handle these things is to make machine uses, in all forms, subject to exclusive control of the author, except to the extent that the use actually made by the machine is not a use within the concept of substantial taking in the ordinary sense. But the idea that you can feed a book into the machine in its entirety and then make it available to the world at large (as will undoubtedly happen; there are many library-types of computers under study now) will inevitably hurt the copyright proprietor to an extent which cannot be intended here.

FINKELSTEIN: Well, may I then concentrate on one implication of what Fulton says, because his bringing that up brings this to mind. A previous bill - the Vestal Bill, as I recall it - would have given the right "To make any form of record in which the thought of an author may be recorded and from which it may be read, reproduced, performed, exhibited, represented,

delivered, transmitted or communicated" - language along those lines. Is there any reason for not having the grant to the copyright owner that broad? And might not a grant that broad include these information retrieval systems?

And, when we talk about information retrieval systems at another point, why do we say "information retrieval?" Suppose it merely retrieves entertainment? If the right that you are giving for this kind of a system relates only to information, you may be excluding the kind of thing that comes out of one of these big tape machines, something we don't think of now: a complete form of entertainment.

May I just add one thing while I have the floor? *I wonder if at the beginning, right in the introductory sentence-this is a matter of drafting-we couldn't say ".... the rights granted under copyright shall include the right to do or authorize any of the following with respect to the copyrighted work."* The reason for suggesting "authorize" here is this. Suppose ASCAP, or BMI, or any of the other licensing organizations authorizes its licensees to perform a certain work. I doubt whether that would be an act of contributory infringement, but I think there should be liability there. *It would seem to me that the mere authorization to make the use of the copyrighted work, that particular work, ought to subject the person making the authorization to liability even though he may not be a contributory infringer.*

SKIPPER: I am James Skipper, representing the Association of Research Libraries, and I'd like to speak for just a moment on this problem of information storage and retrieval. The point was made that, if a text goes into a computer and the entire text is printed out, this is a violation of copyright, I would be inclined to agree with this principle. However, I would hate to see anything written into the law that would inadvertently inhibit research.

Let me cite an example. The English Department at Cornell University now has a computer concordance program going. They are using the computer to analyze the works of literary authors. And to do this they have to feed the whole text of what the author wrote into the computer. The printout is an analysis; it is not the complete text, but the text has to be in the machine before the analysis or concordance can be obtained.

With the potential of optical scanners, with the potential of indexing in depth for information retrieval, it is becoming increasingly necessary to feed the whole text in to the computer apparatus. But what you're getting out is an analysis. You're indexing literature; you're not printing out the whole text.

I like very much the suggestion, contained in the telegram read by the Chairman, that some consideration of fair use be given, especially with respect to the printout phase of this information retrieval problem.

ROTHENBERG: The information storage systems being defined now will not be confined to use in a library for literary analysis. For example, law offices will have sending and receiving sets to obtain information from a storage system at the nearest large law library. This may reduce substantially the need by law offices for many textbooks. Yet the information obtained from the machine, at any one time, might constitute fair use within the traditional sense.

Accordingly, the copyright owner must control the right at the very outset when his book is being placed into the machine, because it is the cumulative effect of the multiple fair uses which will effectively destroy the value of his copyright.

GOLDMAN: *Are you suggesting that the need is to control putting the work into the machine?*

ROTHENBERG: Yes.

GOLDMAN: *And then you don't have to worry about the use by taking it out of the machine?*

ROTHENBERG: Then it will be merely by contract; whatever arrangement the copyright owner wishes to make with Remington Rand or whoever the company is, or the program.

IRWIN KARP (Authors League/Authors Guild): As Mr. Rothenberg points out, you've got another separate problem when it comes to using the machine in lieu of the book to begin with in the type of operation where you are actually wiping out the markets for multiple copies. *There I don't think you can solve it in any other way than by controlling the right to put it in. I think you have to control both the right to put it in and the right to take it out.*¹⁷

And so it came to pass. The next version of the copyright bill, the 1964 draft, provided: "the owner of the copyright under this title *has the exclusive rights to do or to authorize* and of the following?" (emphasis added). This language filled a frightening loss-of-control void in authors' rights.

¹⁷ 3 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY at 120-27 (George Grossman ed., 2001) (remarks of Abraham Kaminstein, Register of Copyrights; Reed Lawlor, Harry Rosenfeld, Ad Hoc Committee of Educational Organizations and Institutions; George Schiffer, Schiffer & Cohen; James Skipper, Association of Research Libraries; Abe Goldman; Stanley Rothenberg; Irwin Karp, Authors League of America) (emphasis added).

Indeed, the next draft of the copyright bill included language very close to this, which now reads in Section 106, which enumerates the exclusive rights granted to authors: “Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do *and to authorize* any of the [exclusive rights listed in Section 106].”¹³

In a point that is essential to the issue at hand, underscoring the fact that mass copying was an explicitly consideration in balancing the rights of creators and users under the 1976 act, a representative of the Association of Research Libraries, no less, conceded that “if a text goes into a computer and the entire text is printed out, this is a violation of copyright.”¹⁴

This legislation that was passed in 1976 was carefully calibrated to further the purposes of copyright while taking into account the positions of the various stakeholders. Indeed, in the years leading up to the passage of the 1976 act, many stakeholders had seats at the table, including authors, publishers, academics, librarians, visual artists and photographers, as well as representatives from the recording and motion picture industries. But nothing in the 1976 act allows the systematic digitization of entire libraries of books. On the contrary, it is clear that the rights to authorize the reproduction, distribution and display of copyrighted works—all of which are infringed by mass digitization—remain with the copyright owner.

Problem solved, we must have thought.

Copyshock Two: HathiTrust & “Orphan Works”

In 2011, a library consortium—known as HathiTrust—formed by many of the same libraries who were beneficiaries of Google’s Library program by receiving Google’s ebook versions of their physical library books from Google in exchange for providing access to their vast collections of library books, announced it was embarking on its own “Orphan Works Program.” The program, designed by the University of Michigan, purported to identify so-called “orphan works” and, after limited notification to these works’ “parents” through the HathiTrust website for a mere 90 days, set out to make full-text ebooks available for download and display to the University of Michigan community of upwards of 250,000

¹³ 17 U.S.C. § 106 (2012) (emphasis added).

¹⁴ 3 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY 123 (remarks of James Skipper, Association of Research Libraries).

people. Once again, the Authors Guild was compelled to bring litigation in order to protect the authors' rights.

After we filed suit, we quickly found that many of the so-called "orphan" books had authors or authors' estates that were actually quite easy to find through simple online searches. One "orphan" was the child of an emeritus professor at the University of Maryland whose agent had just negotiated an e-book deal for one of his bestselling novels. A French "orphan" author was living at the time in Paris. The estates of others were represented by major literary agencies or were registered with the Authors Registry or the Authors' Licensing and Collecting Society in the U.K. Pulitzer Prize-winning novelist James Gould Cozzens, another orphan author, had left his literary estate to Harvard University, according to Copyright Office records. Rights to one "orphan" were held by our very own Authors League Fund, which provides assistance to authors in dire financial need because of health-related issues or other misfortunes.

In light of all this, HathiTrust quickly suspended its Orphan Works Program. It did not then end the program, however. Instead, it promised to start it anew, after it dealt with the program's flaws. (It was not until last month at the Copyright Office's roundtable discussions did we learn from the Director of the Orphan Works Program that it was officially abandoned.)

50 Years Ago: We Knew How to Find Rights Holders. "Going to Timbuktu"

There had even been a forerunner to Amazon's race with Google to obtain permission to vast databases of books, as print-on-demand technology went mainstream in the early 1960s, a few years after Xerox acquired the Copyflo, a machine capable of printing images from microfilm onto paper. Even as stakeholders gathered in Washington to debate the balance of rights to be struck in the next Copyright Act, a Xerox subsidiary called UMI (University Microfilms, Inc.) of Ann Arbor, Michigan, was playing the role of Amazon, stealing a march on its competitors Bell & Howell and 3M.

A rights race was developing: a race to *clear* rights, that is. Bell & Howell and 3M—both technology juggernauts in their time—were competing with UMI to find the most rights holders and corner the market in print-on-demand books.

In ads in the *Special Libraries Journal*, UMI bragged about its prowess at finding authors: “If we don’t have the book you’re looking for, we’ll find . . . it, clear copyright, pay royalties and send it to you. Whether we find the book in Timbuktu or in our collection of 50,000 old and new titles; whether the original is \$10 or \$10,000, the cost is the same.”¹⁵

These companies’ stance to rights was in sharp contrast to what we have come to expect from the practices of a company like Google today: they were competing against each other publicly to see *who could locate the greatest number of rights holders*.

In 1960 UMI had announced its “O-P Books” Program. After obtaining the rights for an out-of-print book, technicians would microfilm the material and then print it on book-quality paper. UMI was also able to offer specially-designed collections of works whose rights they had obtained to university libraries—as either microfilm collections or as individual, bound reprints of the original books. For example, UMI was able to offer at a reasonable price a collection called “Russian Language Works,” which contained more works than the Library of Congress’s Russian collection. “Books of this sort are virtually unobtainable on the open market,” UMI explained, “and when they can be obtained it is often at an unreasonably high price.”¹⁶

By March 1965, the UMI Russian library consisted of 2,000 out-of-print books. The total number of titles it offered was over 15,000. “In fact,” boasted UMI, “we can supply almost any book that has ever been printed in any language. For as little as 4 cents a page.”¹⁷

Of course, UMI’s success only motivated its competitors to clear more rights themselves. A Bell & Howell advertisement in the April 1965 issue of *Special Libraries* magazine lauds a 5,000-title-strong catalog of out-of-print titles available.¹⁸ But in the end, UMI won the rights race. By August 1965 UMI offered over 57,000 out-of-print titles.¹⁹

This race to clear the rights to out-of-print books shows the market functioning as it should—companies vigorously competing against each other, driving down prices, and

¹⁵ *Special Libraries*, April 1968.

¹⁶ *University Microfilms, Inc.: Ann Arbor, Michigan*. Ann Arbor, Mich.: University Microfilms, 1961.

¹⁷ *Special Libraries*, March 1965.

¹⁸ *Special Libraries*, April 1965.

¹⁹ *Special Libraries*, July-August 1965.

doing so in the proper, responsible way. Rights holders were compensated. Access to books was increased. And in doing so, the benefit to the public is clear: increased access to our literary and cultural heritage at prices libraries and even individuals could afford.

After HathiTrust released the list of candidates for its Orphan Works Program, we had a look at the 1977 UMI catalogue. The very first book listed on the HathiTrust list of “orphans”—*Preachers Present Arms*, by Ray Hamilton Abrams—was listed in that catalog, along with seven other “orphans”: *Between Two Wars* by the Princeton psychologist James Mark Baldwin; Richard Allen Foster’s critical study *The School in American Literature*; a University of Michigan report, *Group Influence in Marketing and Public Relations*; a 1953 biography of the composer Stephen Foster by the music historian John Tasker Howard; Claude Searcy McIver’s literary study of the novels of W.S. Maugham, *Robert Gould: Seventeenth Century Satirist* by Eugene Hulse Sloane; and Henry Justin Smith’s *It’s the Way It’s Written*.

If the rights to so many works could be cleared using mailmen and pre-Google research tools, what excuse remains for the tech giants of today—with greater resources and less standing in their way—to build their empires on the backs of uncompensated creators?

Solution: Non-Compulsory Collective Licensing of a Limited Set Of Rights

A proper solution would ensure that rights holders are compensated for the value their works bring to such projects, and that the proper security measures are in place to protect those works, while at the same time allowing the public to benefit from mass digitization projects. The answer is to allow for non-compulsory, collective licensing system of a limited set of out-of-print book rights, which would be the way for a *real* digital library, not the mere excerpts and snippets currently offered by Google Books. And, critically, the books subject to the license would be out of print, to avoid disrupting commercial markets.

This limited set of rights would include display rights, so that colleges, universities, school libraries, public libraries and other institutions would have ready access to millions of

copyright-protected works. Print and ebook rights would not be part of the package—only the author or other rights holder could authorize such uses.

Congress has already acted to enable collective licensing in the copyright context. Performing rights organizations are identified in Section 101 of the Copyright Act. Section 115 provides for a compulsory license for the making and distribution of phonorecords. And the Copyright Clearance Center—a not-for-profit organization—is a long-established American example of a successful licensing service.

Moreover, collective licensing solutions have met with great success around the world. Nordic countries, for example, have been using collective licensing for the better part of 50 years, with near-universal approval.²⁰ In short, collective licensing can enable uses that are unauthorized but also beneficial by making these uses subject to a payment to the rights holder.

First, a collective management organization would have to be established by Congress: a third-party regulatory body with proper oversight to ensure it does not abuse its monopoly power, and empowered by Congress to negotiate with all stakeholders—libraries, authors, publishers, end-users—to determine the scope of the rights granted and the appropriate licensing fees. This collective would be authorized to license a limited set of rights in certain types of works for the negotiated fee—unless, that is, the rights holder opts out of the license. Licensing would not be compulsory. Rather, authors, publishers and other rights holders would be empowered to remove all their works from the database, or exclude works from any or all uses. In order not to disturb existing commercial markets, in-print works should not be displayed without an opt-in by the rights holder.

Collective licensing is also in the interests of libraries and the companies that seek to establish mass digitization projects. Authors, publishers and rights holders gain proper control over and compensation for the uses of their works. And best of all, colleges, universities, schools and public libraries, and all of the communities they serve, benefit by

²⁰ And in 2011, the European Union issued a memorandum to Member States urging them to solve the problem of “orphan works” in the mass digitization context by establishing collective licensing societies. France passed collective licensing legislation in 2012, and Germany followed a year later. The United Kingdom has recently announced a commitment to introduce a collective licensing scheme to license orphan works.

gaining access to vast collections of books. Our research libraries would become available to all, a great level-the-playing-field leap in access to our literary, scientific, and cultural heritage.

The “Orphan Works” Problem: A Way Forward

For more than ten years the Authors Registry, an affiliate of the Authors Guild, has acted as a payment agent for foreign collecting societies who send revenues from secondary uses (such as photocopying) of books to be paid to U.S. authors. To date, the Authors Registry has paid more than \$20 million to U.S. authors, distributing \$2.8 million last year. These payments are for both in-print and out-of-print books. With one-and-a-half employees on the project we have been able to find a substantial percentage of recipients. The Authors Registry sampled its success at finding rights holders of out-of-print works: it found more than 80% of such rights holders. Longer-established collecting societies—such as the ALCS in Britain—claims success rates of 90%. The “orphan works” problem, at least for books, is vastly overblown.

Some basic principles have emerged regarding so-called “orphan works:”

1. Diligent searches are not the answer to the orphan works problem. This approach appeared promising to many, including us, but it simply doesn’t work in practice. The incentives are all wrong, rewarding failed searches with uncompensated use of copyright-protected materials. Diligent searches may prove to be part of the solution, but such searches must be coupled with the payment of a reasonable license fee for the proposed use.

2. The orphan works problem, at least for rights holders in books, appears to be vastly overstated. Those holding rights to in-print books can readily be found, of course. The difficulties in finding authors of out-of-print works are not nearly as daunting as some have suggested. In 2009, for example, out of a sample of 1,000 authors of out-of-print books for which the Authors Registry had collected overseas photocopy royalties, the Registry located and paid more than 87%. Similarly, the Guild’s 2005 survey of members found that 85% had “never” or “rarely” been unable to reach a copyright owner to request permission to use a copyrighted work.

3. Foreign licensing and collecting organizations have been efficiently licensing orphan works for decades. We should learn from their examples. Collective licensing for a well defined, limited set of uses may be the only means of addressing the complex compensation, control, and security issues raised by the mass digitization of books.

4. Uses permitted under any orphan works regime should be carefully circumscribed, to avoid damaging literary markets here and abroad. Any potential uses should be carefully weighed, with a strong preference given to uses that help authors, artists, filmmakers and others make new creative works. Rote copying of entire works, permitting a user to take on the publishing function, should be avoided. Care should especially be taken to avoid disrupting existing, well-functioning permissions markets served by literary agents, publishers, and authors.

Although arriving at solutions to the problems posed by orphan works appears to be more challenging than ever, we still believe that solutions that respect authors' rights and strengthen the literary markets that copyright is intended to foster are achievable.

I would like to thank this Committee for holding this hearing and inviting us to participate.

Mr. COBLE. Thank you, Ms. Constantine.

Mr. Donaldson, I recognize Mr. Lukow's football Huskers. I failed to mention your basketball Gaitors. For that, I want to make sure that I apologize. I now recognize you.

**TESTIMONY OF MICHAEL C. DONALDSON, ESQ.,
PARTNER, DONALDSON & CALLIF, LLP**

Mr. DONALDSON. My name is Michael Donaldson, representing documentary filmmakers and independent filmmakers really across the country.

I know this is not the sexiest thing on your agenda, so I want to also thank you for just showing up today because this is an incredibly important issue, particularly to documentary filmmakers. Our office worked on over 170 documentaries in the last 12 months. Only half a dozen of them escaped without facing the frustration of orphan works, something that can genuinely not be found after a very serious effort.

Take, for instance, William Saunders who is making a documentary about his 89-year-old grandfather, a seminal songwriter in the country-western field in the 1960's with recordings by Dean Martin and Tommy Lee Jones and Johnny Cash. His songs were sold to publishers. Those publishers are now out of business. His grandson, with tremendous motive and tremendous effort, has not been able to find who the rights holders are on his grandfather's own songs. So his documentary, which should have richly embraced his grandfather's music, is having to rely on fair use, which means he can use bits and pieces but not what he would like to use to make this documentary about his grandfather be all it could be.

It is also an even bigger problem for feature filmmakers who do not have a fair use workaround. The UCLA film and television archive, which is second only to the Library of Congress in its size, has some 200,000 titles in its archive of feature films. Of those, over 10,000 are orphans. With all the facilities of UCLA, they were not able to find the authors, that is, the copyright owners, of these 10,000 films. So they are only available for research, which means that these wonderful stories that somebody thought was worth saving, collectors and archivists, are not available for the retelling or for making sequels. These are 10,000 untold stories, and if you match them up with what is in the Library of Congress, you easily get into six figures, and maybe seven, but I defer to the Librarian for that.

It also affects television. A wonderful series a few years back called *Fallen Angels*—every episode was based on the writings of one of those wonderful film noir writers like Dashiell Hammett or Raymond Chandler or Mickey Spillane, but also on some lesser known writers. And the producer of that television series found many, many stories in pulp magazines and old books that they wanted to make into a television episode. They could not because there is no fair use workaround, and if you do not have the underlying rights to those books and articles, you cannot make a derivative work from them.

So what is the solution? The path out of this very frustrating forest of problems for independent filmmakers and documentarians is a substantial search, and I by that mean a genuine substantial

search which obviously would include a Google search and a lot of other things. If they make a substantial search and the owner comes up later, they should get an immediate payment of a reasonable license fee. If the search was not substantial, if they did not use Google or some of the other tools available like PLUS, which is emerging, then the copyright owner has the full panoply of ability to go after statutory damages, an injunction, the whole panoply of remedies that is available currently.

We are opposed for films to have any kind of a collective bargaining because what happens is what happened in Canada. I mean, they have collected what, \$70,000 in 12 years and nobody showed up to collect it? So you have this money sort of sitting there without any real benefit to anybody except the bureaucracy that set it up.

We are immensely hopeful that this Committee moves forward with a legislative solution for the orphan works problem.

Thank you again.

[The prepared statement of Mr. Donaldson follows:]

Written Testimony Submitted to
The Committee of the Judiciary's
Subcommittee on Courts, Intellectual Property, and the Internet

Hearing on
Preservation and Reuse of Copyrighted Works

Submitted by:

Michael C. Donaldson, Esq.
Partner, Donaldson + Callif, LLP
On behalf of Film Independent and International Documentary Association

April 2, 2014

Statement of Michael C. Donaldson

On behalf of The International Documentary Association and Film Independent

Before the

**Committee on the Judiciary's Subcommittee on Courts,
Intellectual Property and the Internet**

I. INTRODUCTION

The International Documentary Association and Film Independent respectfully submit this statement on behalf of thousands of documentary and independent filmmakers and other creators who struggle every day with the orphan works problem. This problem effectively prevents filmmakers from licensing third party materials whenever the rightsholder cannot be identified or found; for many filmmakers, the threat of a lawsuit, crippling damages, and an injunction makes the risk of using an orphan work just too high. In fact, because of this risk, distribution, broadcast, and film festival admission is often impossible for films that include orphan works.

Documentary filmmakers can sometimes limit the amount of their uses of orphan works in order to bring them within the doctrine of fair use. However, narrative filmmakers often seek to use orphan works to create adaptations, sequels, or remakes. That's not a fair use. Filmmakers must license such third party materials, but are unable to do so when the rightsholder to those materials cannot be identified or located. Filmmakers cannot even begin their projects because no rights can be obtained.

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

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

Such approach is preferable to all other proposed alternative solutions because it builds on the predominant tradition in American copyright law of transactional licensing and allows jurisprudence to continue to evolve. For example, we do not support extended collective licensing regimes such as have been implemented in a few other countries, because such regimes are incompatible with fundamental principles that are at the core of our copyright laws. Such regimes are also unfair and unworkable in the American system because they charge fees that do not reflect

the true value of the works in question; deprive rightsholders of control over the use of their works; are susceptible to administrative inefficiencies and abuse; and would presumably channel licensing fees to third parties that have no relationship with the actual rightsholder.

We also do not support publicly funded registries which would list works that have been orphaned. The Copyright Office is already stretched and has not expressed an appetite to take on such a task. Also, the technology is changing far too rapidly for the government to keep up. There are some private solutions emerging such as Google Search, PLUS, and others that hold great promise. These agile, inclusive sites were not in existence when Congress last considered orphan works legislation. See Mary Swecny's Statement attached to this document. She was frustrated by her inability to make a film because she could not find the rightsholder to the underlying work. When she performed a new search over the weekend, she was able to find that person. If she had listed the work as officially orphaned, someone else might not make the new search. We don't need registries. We need search engines that continue to improve and serve the purpose of finding the creators of works that would have been considered orphans just a few short years ago.

II. THE ORPHAN WORKS PROBLEM PERSISTS AND MUST BE ADDRESSED

The orphan works problem continues to be a significant impediment to documentary and independent filmmaking. The filmmaker cannot obtain insurance coverage, distribution deals, or broadcast deals when orphan works are used. In many cases, even film festivals will refuse to screen films containing orphan works.

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

As it stands now, if filmmakers cannot identify and locate the rightsholder, in many cases they effectively cannot use the work. This problem prevents significant historical and cultural stories from reaching the public, especially where projects rely on older works and those from minority groups that often have less reliable records of ownership.¹ If an appropriate solution to the orphan works problem is enacted, documentary and independent filmmaking will continue to evolve in ways that use the treasure trove of newly available archival material to explore and illuminate our heritage; or, if a solution fails to be enacted, a significant portion of important works will tragically remain hidden from the public, depriving all of use of countless opportunities to explore and reconnect with our heritage. Prime examples are set out in various statements attached to this document.

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

The internet is an increasingly valuable source of third party content for documentary and independent filmmakers. Video-hosting websites, blogs, social media services, and digital libraries and archives are making material available at an astonishing rate. As one example,

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

seventy-two hours of video content is uploaded to YouTube *every minute*.² Ironically, however, as more material becomes available, more works are orphaned. Many videos are uploaded to the internet by people who are not themselves rightsholders to that work,³ and a great deal of material does not come with clear rightsholder information; thus, it is often difficult or impossible to identify and locate the true rightsholder. As a result, a significant percentage of newly available works on the internet are orphan works even as they are birthed.

Numerous initiatives aimed at preserving audiovisual and audio materials are underway, which promise to unlock an incredible amount of content for use by documentary and independent filmmakers. The undeniable cultural and historical potential of this vast body of digital content highlights the importance of the orphan works problem because a large portion of these digitized materials will be orphan works for which no authorization for use in filmmaking can be obtained. Such works should not be locked away from the public.

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

The emergence of new business models and improvements in technology over the last several years has made funding, creation, and distribution of films available to many more filmmakers than ever before. For example, many filmmakers have had enormous success using “crowd funding” services such as IndieGoGo and Kickstarter to finance their creative projects. Crowd funding allows individuals and fans to each pledge anywhere from one dollar to many thousands of dollars in hopes that the project will be realized. In fact, the IndieGoGo platform is being used to underwrite more than one hundred thousand creative or entrepreneurial campaigns,⁵ and continues to grow rapidly.

Filmmakers also enjoy new digital distribution channels such as Netflix, Hulu, Fandor, DailyMotion, and YouTube. Until just a few years ago, digital distribution channels could not support high-quality content streaming for even a small amount of users. This transformation has enabled these new digital distribution channels to expand their audiences massively with large subscriber bases and advertising-supported streaming to levels thought to be impossible until recently. For instance, Netflix offers hundreds of documentary films in twelve different, easily-searchable subgenres that can be watched any time. And of course, new relatively inexpensive digital cameras and editing technologies have made filmmaking accessible to more people than ever before.

The crowd funding model and digital distribution channels have helped a remarkable number of documentary filmmakers realize their projects by allowing the audience to fund projects they want to see and to access smaller, niche films that cater to more dispersed audiences with unique tastes. These exciting new models, together with the vast third party source materials now available through the internet, mean that documentary and independent filmmakers can now produce films

² YOUTUBE STATISTICS, http://www.youtube.com/t/press_statistics (last visited Feb. 3, 2013)

³ See *id.*

⁴ See generally John P. Wilkin, *Bibliographic Indeterminacy and the Scale of Problems and Opportunities of "Rights" in Digital Collection Building*, RUMINATIONS, available at http://www.cllr.org/pubs/ruminations/01_wilkin/wilkin.html/wilkin.pdf (2011).

⁵ Matt Petronzio, *A Look Back at IndieGoGo's Successful Year in Crowdfunding*, MASHABLE (Jan. 11, 2013), <http://mashable.com/2013/01/11/indiegogo-crowdfunding-2012/>.

on obscure or marginalized subjects that would not have been possible in the past.

It is not only obscure and marginalized subjects that suffer from the orphan works problem. An even larger loss occurs when a filmmaker wants to make a film based on an orphaned book or an orphaned film. The UCLA Film and Television Archives has over 10,000 narrative, fiction films for which they cannot identify the rightsholders. Such gifts are not from copyright owners. Copies of old films are given to the archives by collectors, heirs, or folks that are just cleaning out the closet, so to speak. The University with all its resources, was not able to find the copyright owner. So the use of the films is restricted to viewing at the University. No public screenings. No loaning them out for any purpose. And certainly no remakes or sequels. That is over 10,000 stories that were once worthy of telling. Today, many of them are worthy of retelling. But that is impossible. No one would finance such a venture. No company would issue an insurance policy. Nothing is to become of these stories. And that is just the stories locked inside the vaults of the UCLA Film and Television Archives. Other archives have the similar experiences and, of course, orphaned books worthy of being made into films probably outnumber the orphaned films.

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

The goal of any orphan works solution is to enable the American people, including filmmakers, to make use of orphan works while respecting and protecting the rightsholders, even if they are not found until after the item is used. The Copyright Office took the right approach in its 2006 *Report on Orphan Works* when it recommended solutions that require the potential user of an orphan work to conduct a reasonably diligent search and pay reasonable compensation to resurfacing rightsholders, and that limit money damages and injunctions against the user of the orphan work under certain circumstances.⁶ That approach strikes the appropriate balance between rightsholder, other creators, and potential users.

We support the approach offered up by the Copyright Office. Potential users would be required to conduct a diligent search following procedures rigorous enough to ensure that the user made a good faith and reasonable attempt to locate the rightsholder. Such procedures may vary based on the type of orphan work (*e.g.*, film, photography, books) so that diligent search efforts are reasonable in light of the type of work in question. Such industry-specific best practice procedures can be designed to ensure that locatable rightsholders are found.

When the rightsholders are not found but later resurface, such rightsholders would be entitled to reasonable compensation. This approach would therefore not deprive them of royalties they would have received had they been identifiable and locatable. Independent filmmakers have a strong interest in such measures, as they too are rightsholders who are entitled to the exploitation and enjoyment of their creations.

⁶ REGISTER OF COPYRIGHTS, REPORT ON ORPHAN WORKS 95-125 (2006).

IV. CONCLUSION

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

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



Michael C. Donaldson

3/31/2014
Date

This statement is submitted on behalf of organizations whose work supports independent and documentary filmmakers.

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

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

Statement from Mary Sweeney

A number of years ago I tried to secure the rights to a series of British spy novels written by the author Manning Coles. This was actually two people, a man and a woman, who wrote under the singular pseudonym Manning Coles. The books would have made a wonderful movie, or possibly a television series, as there were several books with the same protagonist. I wanted to option the rights to the first book in the series, as well as the main character who was in all the books. I made quite an effort to find someone, anyone to grant me the rights, but even working with a lawyer at an established Los Angeles entertainment firm, I was unable to locate a rights holder. Sadly, I had to abandon the books and project.

Today, search engines have completely changed the landscape. After I prepared the above statement for Michael Donaldson's testimony, I decided to try again. I found the authors right away. I now plan to reach out to the authors in order to option *A Toast to Tomorrow*, the second book, and the character Tommy Hamblen.

_____/s/_____
3/31/14

Mary Sweeney
Film Producer and Board Chair of Film Independent

Statement from Vanessa Perez

Cesar Chavez, currently in theaters, has been Canana Film's biggest production both in cost and scope and the first film to obtain wide distribution in the United States. This last factor gave way to a complicated legal delivery of the film because the filmmaker decided to incorporate stock footage in the film to accentuate the plight of the farmworker struggle and the politics unfolding during that time period.

Cesar Chavez's family optioned his life rights to us. Stock footage for this film came primarily from other documentaries about Cesar Chavez. The material that was initially used for research for the biopic that had been provided by the Cesar Chavez family - those who optioned his life rights to us. We thought that because this material had been used before we would easily be able to obtain clearances. However, we often hit walls because logs were not kept, people were not willing to help, or the person was no longer alive. It took two researchers who were hired for about a year to try and find our footage; and at that point we had cleared approximately 45% of the footage that we wanted in our film and were nearing our deadline to deliver to the distributor.

Most of the footage that we did find was from major news archival sources. Those are the ones we were able to locate quickly, but it gets very expensive quickly. The rest of the footage we were trying to find was of people in the fields, or during protest, or pilgrimages -- it was from people who had participated in the movement. At this point, I had been in touch with the filmmakers behind *A Fight in the Fields*. They agreed to help me locate the footage that we used from their documentary in our film. They dug through old archives. It took them about two months to come back to me with a list, of which 25% of the footage they still could not identify within the list I had sent, even though they had used the material in their documentary. Because so much time had passed many things had been lost as records were not kept. From the information they provided, I was able to clear another 15% of the footage, but much of the information they provided did not yield any results because the network could not find the clip based on the information provided or the information provided was incorrect. Again, the only things we were able to locate were things that were out of copyright and major network news source footage.

In our final stage, we reached out to Donaldson + Callif, who helped use some footage under fair use. Luckily the footage that would not fall under fair use had all been identified, which was something that was able to get us errors and omissions insurance.

Not being able to locate the rights holder threatened to make the movie fall apart because the distributor was requesting all stock footage to be cleared. And, we really had reached a point where we did not know who else to contact and where else to search. Because we worked very closely with the Cesar Chavez' family including his press secretary at the time, we knew we were telling a story that was factually correct. The filmmaker depended on the stock footage to confirm that reality to the audience. We wanted the audience to understand that this really happened and that people really did have such positive and negative sentiments about the movement and the work that Cesar Chavez was doing. During test screenings, we found that for most of the audience the stock footage impacted them. This footage helped them understand the reality of the plight of the farmworker. So instead of taking out the footage because we could not

find the rights holder, we decided to take the calculated risk of leaving the material in there to be able to tell the story the filmmaker had crafted in the edit bay before we knew if this film was going to have a wide release. We know that is a large risk. We take it because the footage is essential to the story. We know we did our best to find the rights holder. Hopefully, Orphan Works legislation will be enacted to protect future filmmakers.

/s/ 3/31/14

Vanessa Perez
Creative Executive Producer, Canana Films

Statement from William J. Saunders

Billy Mize and the Bakersfield Sound is a documentary about a forgotten country music revolution that took place in California's great central valley. Known for its rock'n'roll infused guitar twang and earthy lyrics, the Bakersfield Sound raised country music legends Merle Haggard and Buck Owens. While those two musicians took the national spotlight in the 60s and 70s there were countless unknown artists who paved their path to stardom...maybe none of them more important than Billy Mize.

Billy Mize represents a generation before sensational celebrity, a generation of hard work and hard living. In all cases he is and has a forgotten voice. Billy is still alive, but suffered a massive stroke in 1989 that stole his ability to speak and write. He is able to give some information about his music, but has been out of the loop for over 30 years and his recall and contact information are often outdated. Luckily, I have his entire music catalog. But I'm unique, because I grew up with it. Billy is my grandfather. My mother (his daughter) transferred his music from records to tapes, then tapes to CDs, and CDs to digital files. His catalog also lives on through eBay auctions and covers by artists like Jerry Lee Lewis, Dean Martin and Johnny Cash.

Locating the publishing for his music took a simple search on BMI. But to my surprise, Billy didn't own many of the songs he wrote. Much of it was co-owned, a sign of the times apparently. That's when I began learning about Orphan Works.

One of songs Dean Martin covered was co-published by a company called Two Wood Music, owned by Robert Burrell. This co-ownership of publishing was the product of a deal Dean Martin's manager (Robert Burrell) received for the songs Dean covered. The contact information provided by BMI proved incorrect and after an extensive search, we discovered Robert Burrell had passed away years before without known heirs. Billy's songs, with or without the vocals of Dean Martin, are obviously an important part of Billy's life story as well as an example of his versatile, cross over appeal. The inclusion of these songs is paramount, but we cannot officially license this music.

This is a common conclusion with many of Billy's master tracks as well. In cases where he is the sole owner of the publishing, the record label who mastered the recording is often impossible to find. During the 60s, Bakersfield had a sudden boom of independent record labels all vying after local talents. Many of these labels only survived a few years before folding. Tracking down the rights to an obscure 45 from an obscure artist on an obscure label has proven difficult. Even recent labels have given us dead ends. Billy's last record, titled "Salute to Swing," was recorded under the label GM Records in the mid 70s, but there is no written record of the company nor who now owns the master tracks to the album.

Along with being a recording artist and writer, Billy was a TV personality, often hosting his own shows. I want to use footage from four major shows he appeared on or hosted which include, *Cousin Herbs Trading Post Show*, *The Billy Mize Show*, *Gene Autry's Melody Ranch* and *The Billy Mize Music Hall*. After significant research, I could find no

rights holder and/or no information available to successfully find the rights holder (some of which may in fact be Billy himself).

Cousin Herb's Trading Post and *The Billy Mize Show* were programs recorded in Bakersfield. The physical film of later was found in an unlabeled, rusted 16mm can in Billy's garage. After talking with NBC/Universal and the Gene Autry Foundation, I've determined no one currently claims or has proof of the licensing rights for *Melody Ranch*. The *Billy Mize Music Hall* is one of two pilot episodes that were never officially picked up by any network. It's possible Billy paid for these episodes himself, but again, there is no record or information to support that.

This material is essential for the documentary and, unfortunately, would be forever forgotten without it. This documentary is being made for less than \$150,000 and I can't afford to be sued as a result of unlicensed material use of my grandfather's music. It is an incredible dilemma as a filmmaker, but a ridiculous one as a family member. An Orphan Works solution would be enormously helpful as I tell the story of my grandfather.

_____/s/ 3/31/14
William J. Saunders

Statement from William Horberg

Fallen Angels was an anthology television series broadcast for two seasons on Showtime in 1993 and 1994. The producers were myself, Lindsay Doran, and Steve Golin. Sydney Pollack was Executive Producer. The series featured adaptation of classic noir short fiction from James M. Cain, Dashiell Hammett, Raymond Chandler, Mickey Spillane, and other famous hard-boiled authors, but also lesser known American writers such as William Campbell Gault and Jonathon Craig. Alfonso Cuarón, Steven Soderbergh, Tom Hanks, and Agnieszka Holland were among the filmmakers who directed episodes of the show.

There were many instances of short pulp and noir work that we found in vintage books, magazines, or pulps with good plots and characters that we wanted to adapt for the series but were unable to obtain the necessary rights as the authors had been lost to history and the original publishers of the work were out of business with no forwarding address so to speak. We spent considerable energy tracking down some stories to no effect.

_____/s/_____
William Horberg 3/31/14

William Horberg is an established producer, having produced almost 30 films, including *Milk*, *Cold Mountain*, *Lars and the Real Girl*, *The Quiet American*, *The Talented Mr Ripley*, *The Kite Runner*, *Searching for Bobby Fischer*.

Statement from William Lorton

I recently spent four years producing an independent documentary film on the life and work of my late aunt, Mary Baratta-Lorton, author of the influential 1970's primary math texts *Workjobs* and *Math Their Way*. My goal with this film was to tell Mary's dramatic life story (now largely forgotten), and impress upon the audience how pivotal her work had been in American education.

I would be telling Mary's story to a world and a profession which had overwhelmingly never heard of her, and I was going to need to back up what I was saying.

To demonstrate cinematically to my audience how Mary first became noted as an author and a teacher, I needed to show images of the educational magazine which first touted her work in a major article. The magazine was called *Learning*, and its inaugural issue, which featured the article about my aunt, was published in November of 1972. Because it was a first issue, thousands of copies were sent out to educators across the United States at no charge, so an unusual amount of people were able to read about my aunt just as her book *Workjobs* was being published. This timing was very significant in the launching of Mary's career.

In documentary filmmaking, the director is not simply telling a story, he/she is also presenting the results of their research so that the audience will understand a.) that the story being told is true, and b.) that there exists audio-visual evidence that anyone watching would be able to track down and double-check for themselves if they had any doubts.

So to this end, I needed to show the cover of the magazine, the title page of the magazine with the publication date on it, as well as enough pages of the article on my aunt to demonstrate that the size of the story was substantial.

In the case of the magazine *Learning*, I was working with a periodical that was no longer in print, and had gone out of business so many years ago I was not even able to calculate how long its run had lasted. Because this publication was no longer extant, I was not able to contact anyone in authority to sign a release for this material.

Fortunately, Donaldson and Calif was able to help me use abbreviated version of the material in my film pursuant to fair use that would enable me to insure my project with an errors and omissions insurance policy.

_____/s/_____ 3/31/14
 William Lorton
 Director, *Take Away One*

Mr. COBLE. Thank you, Mr. Donaldson.
Mr. Sedlik?

**TESTIMONY OF JEFFREY SEDLIK, PROFESSOR, PRESIDENT
AND CHIEF EXECUTIVE OFFICER, PLUS COALITION**

Mr. SEDLIK. Chairman Goodlatte, Chairman Coble, Ranking Member Nadler, Members of the Subcommittee, thank you for the opportunity to testify today on the preservation and reuse of copyrighted works.

Chairman Goodlatte, thank you for referring to PLUS and praising our efforts in your opening statements.

And, Congresswoman Chu, thank you very much for the personal introduction.

In addition to my role as President and CEO of the nonprofit PLUS Coalition, I am a professional photographer with 30 years of experience. I am also an educator, having served for 20 years as a professor at the Art Center College of Design in Pasadena, California.

While much of the public discussion and debate on copyright issues focuses on big business, we must not forget that copyright is the engine of free expression for independent visual creators and other authors and that licensing the use and reuse of their copyrights, as provided under title 17, is typically the only means by which such creators are able to support themselves and their families and to afford to create new works for the ultimate benefit of the public.

Despite the significant ongoing efforts of visual artists to protect their works by appending identifying information to each new work prior to distribution, this information is often lost or removed upon distribution of the works. With instantaneous worldwide distribution of images occurring upon first publication, millions of newly orphaned images are injected into the global ecosystem on a daily basis. As a result, publishers, museums, libraries, researchers, documentary filmmakers, and the public dedicate considerable time and resources to attempts to identify and contact rights holders in order to seek permission to make use of visual works, often in significant quantities.

With demand for visual content increasing exponentially, many organizations now face the daunting challenge of managing millions of visual works. At that scale, the management of image rights seems an impossible challenge, but solving this challenge is entirely possible. In the not too distant past, there were no bar codes on any product in any store. There were no ISBN's in any book on any shelf. These and other standardized, persistent identification systems are now ubiquitous, providing instantaneous global access to that vital information and successfully serving as the backbone for commerce and other activities.

The lack of a similar identification system for visual works is at the root of many of the most significant challenges faced by image creators, publishers, the public, and the cultural heritage community. By employing persistent identifiers, in combination with image recognition technologies, in a system of interconnected registries, we can provide instantaneous automated global access to image rights information.

At the suggestion of the Copyright Office, the PLUS Coalition was founded in 2004 as a multi-stakeholder initiative charged with addressing this challenge. A nonpartisan, industry-neutral, non-profit organization, PLUS is operated by and for all communities engaged in creating, distributing, using, and preserving images. Members of the coalition include publishers, museums, libraries, educational institutions, advertising agencies, design firms, photographers, illustrators, stock photo libraries, standards bodies, and other interested parties spanning 117 countries. This diverse spectrum of stakeholder communities has established common ground by jointly founding and operating the PLUS Coalition as a vehicle for intense collaboration on a tightly focused mission to connect images to rights holders and rights information on a global scale.

This Committee has consistently reminded and encouraged stakeholder communities to cooperate in addressing and resolving the ever-present challenges at the nexus of copyright and technology. I am glad to report to the Committee that the PLUS Coalition, after 10 years of success, is a real-world example of the remarkable progress that can be achieved by stakeholder cooperation.

Toward that success, the PLUS Coalition first established a system of standards facilitating the identification of rights holders and the communication and management of image copyright information. Essentially, the PLUS standards provide the equivalent of a UPC or bar code system for visual works.

With the global rights language in place, we are now developing the PLUS Registry at PLUSregistry.org as a nonprofit, international hub for image rights information, connecting all registries in all countries. Using the PLUS Registry, anyone in any country will be able to instantly identify the creator, rights holder, and descriptive information associated with any registered visual work, even in the event that the work was distributed many years ago and bears no identifying information.

Museums and libraries and archives will use the PLUS Registry to facilitate preservation and to maximize public access. Creators and other image rights holders will use the PLUS Registry to ensure that they can be easily found and contacted by anyone seeking information about their visual works. Publishers and other businesses will use the PLUS Registry to identify and contact image rights holders and to manage image rights associated with vast quantities of works. Search engines will use the PLUS Registry to automate rights management and to allow individuals and businesses to make informed decisions about using visual works.

Persistent attribution is not only the key to ensuring the survival of independent visual artists, but is vital to the success of all rights holders and distributors engaged in licensing the use and reuse of visual works. Importantly, persistent attribution, in combination with fair use and other exceptions, is also the key to ensuring that museums, libraries, and archives are best able to preserve visual works and to maximize public access to our cultural heritage.

Thank you for your time and consideration. I look forward to taking your questions.

[The prepared statement of Mr. Sedlik follows:]



COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON COURTS, THE INTERNET,
AND INTELLECTUAL PROPERTY

HEARING ON PRESERVATION AND REUSE OF COPYRIGHTED WORKS

APRIL 2, 2014

TESTIMONY
OF
PROFESSOR JEFFREY SEDLIK
PRESIDENT AND CHIEF EXECUTIVE OFFICER
PLUS COALITION

PLUS COALITION
2797 EAST FOOTHILL BOULEVARD
SUITE 120
PASADENA, CALIFORNIA 91107

866.669.7587 or 626 405 8100

info@usePLUS.org

www.usePLUS.org and www.PLUSregistry.org



Chairman Goodlatte, Chairman Coble, Ranking Member Nadler, Members of the Subcommittee, thank you for the opportunity to testify today on the preservation and reuse of copyrighted works.

In addition to my role as President and CEO of the non-profit PLUS Coalition, I am an independent professional artist, a professional photographer with nearly thirty years of experience. I am also an educator, having served for the past twenty years as a Professor at the Art Center College of Design in Pasadena, California.

Visual artists are not in the business of making artworks. Most visual artists are not in the business of selling their artworks, nor are they in the business of selling the time involved in creating their artworks. In reliance on the exclusive rights afforded to authors for a limited time under Title 17, visual artists ARE in the business of licensing the copyrights in their artworks. While much of the discussion and debate on copyright issues focuses on big business, we must not forget that copyright is the engine of free expression for independent visual creators, and that licensing the use and reuse of their copyrights is very often the only means by which such creators support themselves and their families.

The smallest of small businesses, visual creators often operate as the sole employee of a sole proprietorship. Tasked not only with continually creating and licensing new works but also with marketing their businesses, bookkeeping, managing their archives and all manner of other business management tasks, artists have little time to dedicate to identifying infringements and to protecting and enforcing their rights. Despite significant efforts by visual artists to protect their works by adding identifying information upon distribution, this information is often lost or removed upon distribution of the works, injecting millions of newly orphaned images into the global ecosystem on a daily basis.

As a result, publishers, museums, libraries, researchers, historians, documentary filmmakers and the public are often forced to dedicate considerable time and resources to endless searches aimed at identifying and contacting visual creators in order to seek necessary permissions to make use of visual works. With demand for visual content increasing exponentially, and with technology enabling instantaneous worldwide distribution of images upon first publication, the challenge of identifying and managing image rights seems an impossible challenge. But solving this challenge is entirely possible.

Let us not forget that in the not too distant past, there were no bar codes on any product, in any store. There were no ISBNs in any book, on any shelf. These and other standardized persistent identification systems are now ubiquitous, providing instantaneous global access to information and successfully serving as the backbone for commerce and other activities. The lack of a similar identification system for visual



works is at the root of many of the most significant challenges facing all communities involved in creating, distributing, using and preserving images. All communities will benefit from persistent attribution of rightsholders, employing identifiers, image recognition and other technologies to facilitate the discovery (and if necessary, the recovery) of image rights information. Without such a solution, publishers and other image users will continue to struggle to manage the millions of images in their systems, museums and libraries will continue to struggle to identify rightsholders for preservation and cultural heritage purposes and visual creators will continue to struggle to support themselves and their families.

At the suggestion of the Copyright Office, the PLUS Coalition was founded in 2004 to address this challenge. The PLUS Coalition is a multi-industry, non-partisan, non-profit organization operated by and for all communities engaged in creating, distributing using and preserving images. Members of the Coalition include publishers, photographers, illustrators, museums, libraries, educational institutions, advertising agencies, design firms, stock photo libraries and other interested parties, spanning 117 countries.

While it is inevitable that stakeholders from such a diverse spectrum of communities will disagree on many issues, they have established common ground by founding and jointly operating the PLUS Coalition as a vehicle for intense collaboration on issues of critical importance to all concerned. This Subcommittee has consistently reminded and encouraged stakeholders to cooperate in addressing and resolving the ever present challenges at the nexus of copyright and technology. The PLUS Coalition is a remarkable example of the success that can be achieved by such cooperation.

The PLUS Coalition maintains a tightly focused mission. Simply stated, our mission is to connect images to rights holders and rights information on a global scale. To accomplish this mission we first created a system of standards facilitating the identification of rightsholders and the communication and management of image copyright information. With a global rights language in place, we are now developing the PLUS Registry, a non-profit, international "hub" for image rights information, so that anyone, in any country will be able to instantly identify the creator, rights holder and other rights information associated with any registered image, even in the event that an image bears no identifying information. Using any application, registry or search engine connected to the PLUS Registry Hub, the public may search for and instantly access information about any image registered with any resource connected to the Hub.

Creators and other image rightsholders will use the PLUS Registry to ensure that they can be easily found and contacted by anyone seeking information about their visual works. Publishers and other businesses will use the PLUS Registry to identify and contact image rightsholders and to seek and manage image rights at scale. Search engines will use the PLUS Registry to automate rights management and to allow



individuals and businesses to make informed decisions about using visual works. Museums and libraries will use the PLUS Registry to facilitate preservation and to maximize public access to visual works.

Persistent attribution is not only the key to ensuring the survival of independent visual artists, but is vital to the success of all rightsholders and distributors engaged in licensing the use and reuse of visual works. Importantly, persistent attribution is also the key to ensuring that museums, libraries and archives are best able to preserve and maximize public access to our cultural heritage.

Thank you for your time and consideration.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'J Sedlik', written over a light blue horizontal line.

Professor Jeffrey Sedlik
President & CEO
PLUS Coalition

Mr. COBLE. Thank you, Mr. Sedlik. Thanks to each of you.

We try to apply the 5-minute rule to ourselves. So if you could make your responses as terse or as brief, at the same time responding to the question, we would appreciate that.

Mr. Lukow, what are the most important changes that need to be made to update section 108 for purposes of preservation and reuse of copyrighted works?

Mr. LUKOW. Well, we would certainly like all pre-1972 sound recordings federalized and, therefore, along with other audiovisual works, brought under all paragraphs of section 108. We would like section 108 to allow us to provide copies to researchers for audiovisual and sound recording materials. We would like it to allow us to preserve materials in order to save them for future generations before they are visibly deteriorating. Those three things alone are at the heart of what we are looking for from section 108.

Mr. COBLE. I thank you for that response.

Mr. Neal, is there hope for users and owners to be able to agree on how orphan works and mass digitization efforts should be treated under the law?

Mr. NEAL. I believe that there are many opportunities for the user community and the content community to work together. I want to emphasize that the largest digital collection that exists in every library in this country is the material that we license and purchase from publishers and vendors. A very small percentage of our digital collections represent materials that we have converted, we have digitized, or that we have captured as born digital information. I think there are many opportunities from us to learn from each other, as we did in the 108 Study Group process, and to build the right understandings and working relationships that allow me as a librarian to make content available to my students and my faculty in responsible and appropriate ways.

Mr. COBLE. I thank you, sir.

Mr. Sedlik, I have consistently supported photographers. How have their business models been altered by digitization for photographers? Are they flourishing or still adapting to the digital age?

Mr. SEDLIK. Chairman Coble, the photographers are still adapting to the digital age and making their best efforts to identify their works. The most challenging aspect of being a photographer today is ensuring that your works are identifiable after they leave your hands. If we can achieve that, the photographers will be able to make a living from their creative works during their copyright life and society will benefit to the maximum.

Mr. COBLE. Thank you, sir.

Ms. Constantine, should a revision of section 108 include specific provisions for orphan works or mass digitization, or should orphan works and mass digitization be covered by different provisions of law?

Ms. CONSTANTINE. We would think that if our solution, collective licensing, was implemented and that there was money to be had for the uses, then that would be a solution.

With respect to section 108 and mass digitization, it was, as my testimony references, not—it was addressed to some extent with respect to the technology of photocopying way back in the 1960's at the hearings, and mass digitization was not taken into account in

the current law but it was anticipated, and I think that 108 covers it adequately now. But I do think that a collective licensing solution would be the best solution for both orphan works and for mass digitization.

Mr. COBLE. I thank you for that.

Mr. Rudick, I have time for one more question, and you will be my clean-up hitter. Do you want to add anything generally?

Mr. RUDICK. Your question was what?

Mr. COBLE. I said I have time for one more question, and I will call on you to be clean-up hitter. Do you want to add anything generally?

Mr. RUDICK. Yes. With respect to the question that Jan just answered, section 108 only applies to libraries, archives, and I hope someday museums. Orphan work issues and mass digitization issues go beyond libraries. There are for-profit mass digitization programs. And many of us have orphan work problems, including authors and publishers, because we are diligent about clearing rights and sometimes we have trouble doing that. So I think those should be handled separately from section 108.

And with respect to the collective licensing, there is an effective voluntary collective licensing program in the United States, which is the Copyright Clearance Center. It does not cover all types of works. It focuses on literary works, and it is voluntary. But it exists.

Mr. COBLE. Thank you, sir.

I see my red light has illuminated.

I recognize the gentleman from New York, Mr. Nadler.

Mr. NADLER. Thank you.

First of all, let me begin by asking unanimous consent to submit a statement from the Writers Guild of America for the record and also a statement of the Copyright Alliance, which my colleague, Representative Chu, wanted to make sure was part of the record.

Mr. COBLE. Without objection.

[The information follows:]



March 31, 2014

Rep. Howard Coble, Chairman
Rep. Jerry Nadler, Ranking Member
Subcommittee on Courts, Intellectual Property and the Internet
2141 Rayburn House Office Building, B-352
Washington, D.C. 20515

Dear Chairman Coble and Representative Nadler:

The Directors Guild of America (DGA) and Writers Guild of America, West (WGAW) respectfully submit this statement in connection with the April 2, 2014 Subcommittee hearing regarding the preservation and reuse of copyrighted works. DGA represents over 15,000 directors and members of the directing team who create the feature films, television programs, commercials, documentaries, news, and other motion pictures that are this country's greatest cultural export. WGAW represents more than 8,000 professional writers of motion pictures, television, radio, and Internet programming, including news and documentaries. Both DGA's and WGAW's mission is to protect the creative and economic rights of their members.

As with many copyright issues, directors and writers occupy a unique position in the debate over orphan works. As artists who often draw on other copyrighted works to shape their own creations, they fully appreciate the attraction of orphan works reform. However, they also know that, done improperly, such reform could threaten their own economic, creative, and human rights. These longstanding rights protect our members' ability to create, share, and benefit from the artistic creations they offer to audiences around the world.

Unfortunately, the debate regarding orphan works has largely ignored the authors who lie at the conceptual center of copyright law. Instead, it has focused almost exclusively on the competing interests of users of copyrighted works and copyright holders. The purpose of this statement is to remind the Subcommittee that there is a third category of "rightholders" in this debate. Even if they are not copyright holders, directors and writers of motion pictures have important economic, creative, and human rights that deserve consideration and protection.

DGA and WGAW do not oppose an exploration of the need for orphan works legislation, particularly with respect to educational and library use. However, the goal of orphan works reform should be to facilitate the identification of copyright holders and enable the lawful licensing of copyrighted works. If a legislative or regulatory initiative addressing orphan works

*DGA and WGAW
Statement for the House Subcommittee on Courts, Intellectual Property, and the Internet
Re: The Preservation and Reuse of Copyrighted Works*

is forthcoming, we ask that it preserve and protect the economic, creative, and human rights of directors and writers. We do believe there are ways to protect those rights without jeopardizing the promise of orphan works reform. We therefore welcome any additional questions the Subcommittee may have on this important topic.

The DGA and WGAW once again thank the Subcommittee for commencing this and other hearings in its ongoing review of U.S. Copyright Law, and we appreciate the opportunity to add the voice of directors and writers to the ongoing debate. We look forward to working with you.

Respectfully submitted,

/s/
Kathy Garnezy
Associate Executive Director
Government & International Affairs
Directors Guild of America, Inc.

/s/
Ellen Stutzman
Director of Research & Public Policy
Writers Guild of America, West Inc.

cc: Members, House Judiciary Subcommittee on
Courts, Intellectual Property, and the Internet



**Statement for the Record of Sandra M. Aistars, Chief
Executive Officer, Copyright Alliance**

**To The House Judiciary Committee Subcommittee on Courts,
Intellectual Property and the Internet**

“Preservation and Reuse of Copyrighted Works”

April 2, 2014

The Copyright Alliance submits these comments for the record in order to identify four principle issues the Committee should bear in mind while considering the preservation and reuse of copyrighted works – commonly referred to as the “orphan works” issue.

Members of the Copyright Alliance, like many creators and innovators, are both creators and users of copyrighted works, and thus are interested in ensuring that productive and beneficial uses of orphan works not be inhibited because potential users of copyrighted works cannot identify or locate the owner of a work they wish to use and cannot determine the conditions under which the work may be licensed. We therefore encourage the Committee to assist the Copyright Office in addressing this issue.

**1. The Goal Of Any Orphan Works Solution Must Be To
Identify Authors, Not Consign Works To “Orphan” Status**

We urge the Committee to agree at the outset of its deliberations that the guiding light in any orphan works solution must be that all searches be conducted for the primary purpose of identifying rights holders so that their works do not fall into “orphan” status (as

opposed to deeming works orphaned or adding works to a list of “orphaned” works for licensing or other purposes). Bearing this purpose in mind will of necessity suggest certain approaches as more appropriate than others when establishing solutions.

We believe the Copyright Office can play a very important role in promoting the identification of authors of works, and limiting the number of works which fall into “orphan” status by (1) the establishment of officially recognized registries for various types of works; and (2) defining standards for conducting a reasonably diligent search for the author of a work. The Copyright Office has already engaged in extensive inquiries to examine the state of the affected industries, and has gathered testimony from various stakeholders on a variety of approaches in use today. We urge that this work be completed and presented for evaluation.

2. The Copyright Office Should First Improve the Registration System

Even before identifying registries and standards for performing searches, we believe a first step in limiting issues with orphan works should be investigating how the Copyright Office can improve the current registration system to make it more effective and more useable – including by making it searchable for works like photographs and other works of visual art, which are among the areas where great challenges in identifying authors of works have existed. The Copyright Office has itself recognized that among its key priorities must be increasing incentives for participation in the registration system. This serves not only authors, but users of works. Realizing such improvements will likely require additional funding for the Copyright Office.

As it exists now, the registration system works relatively well, and is used fairly consistently by copyright owners of works like motion pictures and books, which may be described as low volume and high individual value copyrighted works. Such authors are

accordingly afforded all the benefits of timely registration, including the ability to pursue claims for statutory damages for infringements. The availability of statutory damages is often a threshold question for an individual author deciding whether or not to pursue a claim of infringement against an infringer, given the extremely high costs involved in bringing a copyright claim in Federal Court. Thus, whether or not the registration system adequately serves an individual author's needs can mean the difference between being able to enforce one's copyright or not.

In contrast to authors of low volume/high value works, the current registration system does not serve the interests of large volume/low value works often created by authors such as photographers, and other "creative upstarts." The costly and burdensome nature of the registration process for these users, and the inefficiency of the system (e.g. lack of searchability for images) reduces the likelihood that individual authors of such works will register their copyrights. This creates numerous problems both for owners and for potential users of such works, including exacerbating the so-called "orphan works" problem in multiple ways. First, and most obviously, if authors do not feel the registration system serves their needs, they do not register their works, and they are less likely to be found. Second, even when authors do register their works, if the registration system is not adequately searchable, it is not an efficient tool to aid potential users in identifying authors of works. Thus, a cost effective, searchable and non-burdensome registration system which serves the needs of registrants and users of large volume/small value works at least as well as the current system serves to identify authors of low volume/high individual value works could begin to encourage greater and more accurate registration of works, as well as better searchability and thus reduce the incidence of orphan works.

3. Progress Has Been Made Since 2008

The issue of orphan works is not a new one for this Committee.

But happily, progress has been made since the last time this issue was considered in 2008.

Given the particular challenges inherent in addressing orphan works in the visual arts world, we are encouraged by the collaborative work of the Picture Licensing Universal System (PLUS), a neutral, non profit 501(c)6 organization which brings together stakeholders from the photography, illustration, publishing, graphic design, advertising, museum, library and education communities to seek solutions to mitigate the orphan works challenge facing those communities. We believe the standards developed by this group and the image rights registry and registry hub established by PLUS in the intervening years since 2008 demonstrate that it is feasible to define standards for identifying rights holders and communicating rights information; and model best practices for operating an industry neutral, global, non profit rights registry for images.¹

4. Mass Digitization Presents An Entirely Different Set Of Concerns

Although of late the issues have been raised together, it is erroneous to presume that a policy overlap exists in resolving orphan works issues and mass digitization issues. In most instances where mass digitization has been at issue, the entities

¹ Of course numerous other registries have existed for various categories of works for many decades, which may also serve as a model for best practices for registries. For instance, ASCAP, BMI and SESAC have each maintained registries for musical works for many decades, which they each use to license and deliver royalties to songwriters and composers who have registered their works with them. These practices are elaborated on in the Joint Comments of the American Society of Composers, Authors and Publishers [and] Broadcast Music, Inc. [and SESAC, Inc.], Copyright Office Docket No. 2012-12 (February 4, 2013); also explained therein is why these practices mean there is for all practicable purposes not an Orphan Works “problem” when it comes to the public performing right in musical works. Similarly, SoundExchange operates a very effective registry for delivering royalties for certain uses of sound recordings to musicians.

involved were not seeking to identify authors of works for purposes of seeking permission to digitize and make the works available. While we are sympathetic to the preservation and archival needs of libraries, archives and museums and recognize that in the digital environment these needs may ultimately involve entire collections of an institution's work, it is important to proceed from the premise when dealing with orphan works that the ultimate goal is to identify and engage with the author of the work. Section 108 very specifically addresses the preservation and archival needs of various institutions in a way that does not contemplate such an engagement.

Mr. COBLE. And I will remind the witnesses the record will remain open for 5 days. So nobody is holding a stop watch on you.

Mr. Nadler?

Mr. NADLER. Thank you.

As a loyal Columbia alumnus, I will start with Mr. Neal. Mr. Neal, Mr. Rudick and Ms. Constantine suggest exploring the possibility of some sort of collective licensing agreement. I think I just heard Mr. Rudick say that that exists already. And the Copyright Office is currently exploring that.

What is your view of this approach, and might it be worth exploring for orphan works and for mass digitization?

Mr. NEAL. I do not think that a volunteer collective licensing program is what we want and need.

Mr. NADLER. Because?

Mr. NEAL. It would not solve the orphan works problem in my view because I question whether many of the rights holders would, in fact, emerge to opt in. I also worry whether libraries and other users would often end up paying for things that would be appropriate to use for free under fair use. Collecting societies sometimes in this country and sometimes outside the United States have problematic track records, and I would be concerned.

Mr. NADLER. Ms. Constantine, could you comment on that? The same question.

Ms. CONSTANTINE. I disagree. I think even Mr. Neal and I could sit around the table and craft something that would be workable.

The problem is—and we found this in the Google settlement. I think it is true that if you have something of value to somebody, they will step forward. So I think an orphan who has visions of some kind of compensation will be easy to find.

And we have an affiliated organization in our Authors Guild called the Authors Registry. It was founded in 1995. And we have paid over \$20 million. Last year, we distributed \$2.8 million, and we are the payment agent for two foreign rights organizations from the UK and one from the Netherlands. And we distribute secondary royalties, royalties for photocopying, broadcast, library lending, and it works. It has been successful. And we did a survey and our success rate is better than 80 percent. So we are able to find orphans. If there is money, they will come.

Mr. NADLER. Thank you.

Mr. Rudick, do you want to comment on that briefly before my next question?

Mr. RUDICK. It is wrong to think of, I think, collective licensing as a total solution to anything. It is a tool that you use—

Mr. NADLER. It could be a partial solution.

Mr. RUDICK. Sorry?

Mr. NADLER. It could be a partial solution.

Mr. RUDICK. It is a partial solution. It is a tool that helps.

With respect to orphan works, I have always liked the 2008 Senate bill. I think that answers our needs. I do not think you need, for orphan works, an elaborate scheme such as collective licensing.

With respect to mass digitization, again collective licensing is a tool.

I think what we need is legislation that addresses some of the issues that the courts are trying to address, and of course, that are working their way through the courts.

Mr. NADLER. Got it. Thank you.

Mr. Lukow, in your written testimony, you note the desire to increase offsite access to the Packard Campus' collection. In discussing offsite access in his written testimony, Mr. Rudick noted that, "Without safeguards to ensure that electronic copies are available only to authorized users, remote access would amount potentially to broad unauthorized, uncompensated distribution of copy-righted content." And that is a real concern.

Is it possible to ensure sufficient security?

Mr. LUKOW. Yes. The private companies, record companies, film studios, and online resources of audiovisual material have mechanisms for making access to these materials available to consumers. Those technologies are available. We think that they can be deployed under section 108 for archives and libraries as well.

Mr. NADLER. Thank you. And to the extent that increased offsite access is developed through case law under a fair use approach, would sufficient safeguards develop?

Mr. LUKOW. We want fair use and section 108, both absolutely at our—

Mr. NADLER. So I assume your answer is no without the section 108.

Mr. LUKOW. I am getting a little lost in the question. We definitely want to continue to rely and revise 108 and fair use.

Mr. NADLER. And I would ask Mr. Rudick the same question on the last point. To the extent that increased offsite access developed through case law under a fair use approach, would sufficient safeguards develop?

Mr. RUDICK. I had a little trouble following the question.

Mr. NADLER. To the extent that increased offsite access is developed through case law under a fair use approach, will sufficient safeguards develop?

Mr. RUDICK. I think that case law is not a very good way to address that issue. It is much better and simpler and easier, I think, to address it through legislation. And in our report, we noted that for many types of libraries, the question of remote access could be dealt with. What you look for is a defined user group. The hardest problem to solve—and it is a hard problem to solve—is the public library. But I do not think it is impossible to solve it.

Mr. NADLER. My time has expired. Thank you.

Mr. COBLE. I thank the gentleman.

The distinguished gentleman from Pennsylvania, Mr. Marino.

Mr. MARINO. Thank you, Chairman.

Good afternoon, lady and gentlemen. Thanks for being here.

I want to get right to an issue here, and I think you danced around it a little but I did not quite get the gist of what you were trying to say, or I could be wrong on this totally. But when you hear my question, you will understand.

How are we going to pay for this? I would like each of you to respond to that, if you would like to, starting with Mr. Lukow.

Mr. LUKOW. Each of us?

Mr. MARINO. Yes. I mean, there is so much in there. We talk about music. We are talking about films. We are talking about documents. We are talking about papers. I am sure I am missing so many other things. And there is no one that does not want to see these items preserved, preserve our history—we learn from it. We teach our children and our grandchildren about it. But how are we going to pay for this restoration? How are we going to pay for this process? We are \$18 trillion in debt.

Mr. LUKOW. We are grateful to the Congress and the American people for having funded the creation of the Packard Campus, in collaboration with our private sector partner, the Packard Humanities Institute. It is a preservation factory. It dramatically increased our preservation capabilities in some cases by a power of 10. We preserve about 40,000 items every year at the Packard Campus. So with continued support of annual appropriations, we have years and years worth of work ahead of us, but we are doing well.

Mr. MARINO. But what if we come up with a way—and I am asking you for recommendations on it—with a minimal or maybe no support by the taxpayers? How do we do this? What do the universities have to say? What do the individual entities have to say about this, in addition to the Library of Congress? Your budget is what? About \$19 million a year?

Mr. LUKOW. Yes, for the Packard Campus.

Mr. MARINO. I imagine there are hundreds and hundreds of millions of dollars worth of work that can be done out there.

Mr. RUDICK and then down the line please.

Mr. RUDICK. Well, if I understand the question, in terms of paying for this, I think there is an opportunity for collaboration between the private sector and the libraries with respect to preservation. There is no need to do the same thing twice. Fundamentally, preservation is a core library mission, and I do not think you can rely on the private sector.

Mr. MARINO. The libraries like to—and I agree with them. They do not like to charge, and it is a public library. So how are you tying the library into—you say the libraries should start coming up with some type of fee?

Mr. RUDICK. There is nothing in the 108 report that suggested libraries should start charging for core library functions. I am not sure I understand that question.

Mr. MARINO. You answered it. I got it.

Mr. Neal?

Mr. NEAL. Thank you for that question. I think it is important to recognize that when we preserve through digital technologies, we have the cost of digitizing the item. We have the cost of creating the intellectual infrastructure. Let us call it cataloging. There is the cost of the actual intellectual cataloging metadata, and we have the long-term storage of that digital object. We increasingly are allocating funds out of our operating budget in order to be able to take care of the resources that we receive, we purchase.

Mr. MARINO. At Columbia.

Mr. NEAL. At Columbia.

Mr. MARINO. Okay. So you are doing that in and of your own right.

Mr. NEAL. Exactly, because we recognize that is a fundamental part of our responsibility to my current faculty and students and to future scholars and students who are going to need that stuff.

Mr. MARINO. How can we help, though? Columbia and the universities are not going to be able to do this on their own given the fact of the cost of education, the way that that is going. I need recommendations. I need suggestions. We need suggestions.

Mr. NEAL. Well, I think public-private partnerships are essential. We work, for example, with a large number of publishers and vendors who we make these collections available. They get a number of years in order to commercially make them available for licensing purposes, and after a certain period of time, 5 years or 10 years, then it is opened up for public access and use.

Mr. MARINO. I have a minute for three more responses, if you would break it up.

Ms. CONSTANTINE. I just would add this is not my issue, preservation. It is a creation of compensation for rights holders. But I have an idea.

Google is reaping massive profits by its mass digitization efforts. If we tax them for both creator compensation and preservation efforts, them and others who are taking advantage of all of the technological advances and content that they are using and getting advertising revenues, that might be a way of getting the answers to the libraries' questions.

Mr. MARINO. Thank you.

Mr. Donaldson, you have about—

Mr. DONALDSON. Of course, this is not my issue either, but the cost issue is, which is one of the many reasons we are opposed to setting up some sort of a registration when you plan to use an orphan work or if you have used an orphan work. All of these costs money that nobody is willing to come up with. So we are against all those.

Mr. MARINO. Mr. Sedlik, quickly please.

Mr. SEDLIK. Congressman Marino, I would also bring up the fact that there are hundreds of millions of works sitting in the collections undigitized by individual artists. Illustrators and painters, in particular, have a problem in digitizing their works. These works have not yet been seen by the Library or by any library. These are a record of our time. They are part of the fabric of our cultural heritage, and the individual artists are left with the burden of digitization.

Mr. MARINO. Thank you.

I yield back.

Mr. COBLE. I thank the gentleman.

The distinguished lady from California, I think, is next in line. Ms. Lofgren?

Ms. LOFGREN. Well, thank you very much. This has been a very interesting session.

At the beginning, everybody introduced witnesses, but I did not get to mention that David Packard, who was from my neck of the woods, gave a major gift to the Library of Congress that actually made the center possible. And so I think it is worth thanking the Packard family and the Packard Foundation for that very generous gift that helped make this happen.

You know, I was thinking back. Howard Berman and I decided a number of years ago that we would solve together the orphan works problem. And we engaged in discussions and we brought people together. And what we found was that it was impossible to do. Everybody was arguing with everyone else, and we could not get everybody on the same page, even though I think everybody was working in good faith. You would think it would be easy to solve, and we found out it was not easy to solve. And yet, it is still important.

So here is a question I have. Ms. Constantine, what you have outlined is not exactly what we discussed, but it was along those lines where you do a search and if you could not find, then you could use. I mean, if the person owns a copyright, they own it. So if they want to opt out, that is up to them. They can make a deal separately. But if you cannot find the owner, that is something else. You do not want to wall off from the culture. And visual artists objected to that.

What is your take on Ms. Constantine's proposal, Mr. Sedlik?

Mr. SEDLIK. I think, first of all, PLUS is not an advocacy organization.

Ms. LOFGREN. No. I understand. But I am just interested in your view.

Mr. SEDLIK. I would say that you would find that the visual artists felt threatened because of the inability to distinguish between works that were older and works that were created 5 minutes ago. If I, as a photographer, create a work now and wished to publish it, it is going to be stripped of its identifying information and end up being circulated and used and being orphaned.

Ms. LOFGREN. It is not really orphaned. It is being infringed.

Mr. SEDLIK. Correct, correct.

And I think that this was the threat that the visual artists perceived.

A couple of other issues that the visual artists had were the inability to stop objectionable use. If their works, once orphaned, were out there being used in a manner that was counter to the beliefs of the creator and did not fall under fair use, that was an issue.

Competitive use. Let us say one of my images ended up being picked up by someone else who found it, did a diligent search, did not find me, and begins making posters or some products with my images. And then a violation of more of my exclusive rights, meaning that—let us say I have an exclusive license with one of my images to some party, and somebody else picks it up as an orphan work and begins using it in a manner that conflicts with my exclusive license.

The issue of being able to get all of my works into a registry so that I could be found is going to take years, hundreds of thousands of images per artist being either digitized or brought into a registry.

The issue of reasonable compensation. Some works are more rare than others, and this can become an issue.

Ms. LOFGREN. I get the drift.

We even talked about eliminating the visual arts from the orphan work proposal, and there was objection to that as well. Do

you object? If we were able to craft an orphan works scheme that everybody else agreed to, but we excluded the visual arts, would there be objection to that?

Mr. SEDLIK. The photographer in me would have no objection to that. However, the PLUS Coalition has the libraries, the museums, the archives, the educational institutions, and these works, should they actually be orphaned eventually, have tremendous value to our society, and I do not know that we can exclude visual works from the orphan works act. We might have to treat them in a special manner.

Ms. LOFGREN. My time is just about out. Just a couple of observations.

One, the fair use doctrine is a court-created doctrine. It always has been. It is not statutory. And I actually think we are better off with that. It is created because of the First Amendment. They do not have fair use in places that do not have a constitution. And I just think our capacity to err greatly is very high when it comes to that.

I do think there is an opportunity on the orphan works thing. We have not discussed the issue of the term of copyright which, of course, we extended dramatically with the Sonny Bono Copyright Act. So, it is now basically a century and a half, which is a very long time. And I think that to some extent, that may be aggravating some of the orphan works issues. Life of the author plus 70 years is a long time, and it really is walling off—I mean, I am not suggesting—one of my colleagues on the Floor told me that he thought we ought to go back to the term that was in the Constitution. I think that 14 years would be rather small. But I do think we should have a discussion about what we have done in terms of walling off whole bodies of work for a century and a half. It just seems like something that should be part of this discussion.

With that, my time is up, Mr. Chairman. Thank you very much.

Mr. COBLE. I thank the gentlelady.

The gentleman from Missouri has no questions I am told. The gentleman from Florida.

Mr. DESANTIS. Thank you, Mr. Chairman.

Ms. Constantine, so how did the snippets of books displayed in these search engines result in economic losses for the authors? And how do you respond to the argument that that actually could facilitate more book sales once people get a snippet of the work?

Ms. CONSTANTINE. Well, I will go with the second question first. It is not proven. There is no evidence of that. And we believe taking eyeballs from a retailer like Amazon, for instance, and bringing it into Google where there is a search facility—you cannot buy anything from Google. You can buy something from Amazon. So you have a sight of the book from Amazon. You look at it, and then, “Oh, this is an interesting book.” I can look at a few pages of it. I am going to press and I am going to buy a book. With Google, it is not the same thing, and there has been no evidence that it has caused more sales.

With respect to snippets, there is a very lucrative excerpt market out there for permissions for scholarly and other material that is being adversely impacted by snippets, believe it or not. And there was testimony to that effect at the Google Books settlement fair

use hearing. So there are specific authors who are losing money because you can get a snippet of the information that previously they were able to sell a license in the open market.

But it is not just snippets. What is happening is they are copying the entire books. Snippets—you can get 78 percent of the book. They basically blacken 10 percent of every book. So you can get a large chunk of the book.

And snippets are not defined anywhere in the law or, in fact, in Google's back offices. They can expand and shrink at Google's whim. It is a made-up concept and it is a made-up term. So snippets can become a page or they—

Mr. DESANTIS. How does that work with Amazon? Do they have a limit? Because I know I have shopped—

Ms. CONSTANTINE. 20 percent.

Mr. DESANTIS. Okay, so like table of contents and you get to do some of those.

Like the public benefits to having some of these mass digitization products—how should they be weighed against risk to authors?

Ms. CONSTANTINE. Well, the problem with mass digitization and what is happening now is that they are very vulnerable to security breaches. They are online. Once there is a security breach, you have widespread, flawless copies going out and distributed anywhere. And then there is the pirate issue.

So the authors who I speak to are very concerned that they did not give permission to anybody to digitize their works, and they specifically do not want their works—some of them—digitized because they are concerned about this total loss of marketplace if the works get out there into the Ethernet. So it could be a devastating blow to literary culture.

Mr. DESANTIS. Mr. Donaldson, how many projects do not proceed due to orphan works issues, and what is the economic impact of those not proceeding? I know just the ball park estimate from being knowledgeable.

Mr. DONALDSON. There are probably thousands. Nobody keeps those records, and I wish they did. But the potential is huge because there is so much of that wonderful old material that could be remade or made into films from books, articles. And in the documentary field, virtually all documentaries eventually run into the problem of wanting to use something and not being able to find the owner. So they have to pull back and try and use it within fair use or find something that may not be as good, but it will kind of work in that instance.

Mr. DESANTIS. So the economic impact—I mean, it is not insubstantial.

Mr. DONALDSON. That is correct.

Mr. DESANTIS. There would be a tangible economic impact. Okay, great.

Mr. Sedlik, what has changed in the photography world since the original discussions about orphan works legislation, and have positions of photographers towards these orphan works changed, and if so, how?

Mr. SEDLIK. The photography organizations have come together to attempt to reach consensus in the interim. I do not know that they have reached consensus. However, I believe that you will find

that the photographers and illustrators are very open to cultural heritage type usages, noncommercial in nature, of their works. There still remains the concern in distinguishing between commercial and noncommercial usages of orphan works.

But I think that you will find that the photography groups acknowledge that society is the ultimate beneficiary of copyright law. The issue that they see is that if copyright is a tree, you do not want to chop the tree down to provide the public with access to the apples. You want to put a ladder up and let people get access and keep the tree growing strong and producing apples indefinitely.

Mr. DESANTIS. Great. I am out of time. I yield back to the Chairman.

Mr. COBLE. I thank the gentleman.

This concludes today's hearing. I stand corrected. The gentleman from Florida.

Mr. DEUTCH. Thank you, Mr. Chairman, and thank you to the witnesses for waiting around for me.

I appreciate your holding this hearing today.

I wanted just to go back to something that you said, Mr. Lukow, in your testimony earlier. You referenced the problems that are created by the sound recordings produced prior to 1972, which have to rely on State rather than Federal copyright protections. As an avid music fan myself, I have been troubled that there is an enormous number of America's music legends, really real legends, that do not benefit from the basic protections of sound recordings as our contemporary artists do.

And I applaud Ranking Member Conyers for his attention to this issue as well.

You told Chairman Coble that legislation correcting this shortcoming is needed. I absolutely agree.

One issue that you raised, though, that I had not considered before is the challenges that the pre-1972 loophole, I would call it for lack of a better word—the challenges that are created for preservation. And I would like you just to run through some of those issues as they relate to the issue of preservation.

Mr. LUKOW. Well, the bottom line is that sound recordings, pre-1972 sound recordings, because they have no Federal protection, they are not included in any of the clauses of section 108 which authorize preservation.

So we are doing a lot of preservation under fair use and recognizing items that are degrading and in need of immediate preservation.

One of our most public high profile projects was the Library of Congress National Jukebox where we did receive a license from Sony Music to digitize tens of thousands of the earliest recordings from the first 35 years of history. So that became a major preservation and access project. It is very successful. We are going to be adding another 10,000 recordings to the jukebox later this year.

Mr. DEUTCH. Great. I appreciate that.

Mr. Rudick, I just wanted to turn to you on a different issue, although judging from your reaction, you may have a comment on my first question.

Mr. RUDICK. Well, I just wanted to point out that among the recommendations in the section 108 report is a proposal that would

address just the concern that Mr. Lukow raised. So we did recognize the problem and we did propose just the solution that is being requested. Sorry.

Mr. DEUTCH. No. I appreciate that.

I wanted to talk about the orphan films that I think you had discussed. No, no. Mr. Donaldson?

Mr. DONALDSON. Yes, sir.

Mr. DEUTCH. Sorry about that. That is what I get for running to another meeting in between.

Of those, I think there were 10,000 of them, 10,000 orphan films?

Mr. DONALDSON. At the UCLA film and television archive alone.

Mr. DEUTCH. I am just curious. Again, a process question. Did UCLA try contacting the director or writer for the films as an attempt to try to get at this? I imagine that many of them are still with us or, at a minimum, their heirs would know where to find the copyright holder.

Mr. DONALDSON. I do not know the answer to that question, but I would say that a substantial search for the copyright owner of a film, when otherwise not locatable, should include contacting the director and writer because they talk to each other and maintain friendships over a lifetime and say, "Oh, I know where that guy went." To me, a substantial search really has to be a substantial search. That would include friends of friends. Bill Saunders has tried all kinds of ways to find out who owns his grandfather's music.

Mr. DEUTCH. I appreciate it.

Mr. Chairman, I appreciate your holding this hearing open long enough for me to ask a couple questions. And I yield back.

Mr. COBLE. You are indeed welcome.

Again, we will express our thanks to the distinguished panel that has joined us today.

This concludes today's hearing. Thanks to all of our witnesses for attending.

Without objection, as I said previously, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

This hearing is adjourned.

[Whereupon, at 3:41 p.m., the Subcommittee was adjourned.]

A P P E N D I X



MATERIAL SUBMITTED FOR THE HEARING RECORD

**BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY AND THE
INTERNET**

HEARING ON PRESERVATION AND REUSE OF COPYRIGHTED WORKS

**SUPPLEMENTAL TESTIMONY OF JAMES G. NEAL
VICE PRESIDENT FOR INFORMATION SERVICES AND UNIVERSITY
LIBRARIAN
COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK**

I would like to take advantage of the opportunity to respond to questions raised at the April 2 hearing and to amplify on the statements included in my written testimony. This supplemental testimony has been endorsed by the Library Copyright Alliance, which consists of the American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries.

I. Collective Licensing

Ranking Member Nadler asked for the panel's views on collective licensing. Collective licensing does have the potential to reduce transaction costs when a large number of works are licensed to a large number of users, thereby benefiting both rights holders and users. However, the track record of collective rights' organizations (CROs) reveals that they often fail to live up to that potential. Although there are a wide variety of CROs operating under divergent legal frameworks, many unfortunately share the characteristic of serving their own interests at the expense of artists and the public.

The CROs often are well-organized and highly profitable, and have succeeded in promoting themselves and the collective licensing model.¹ A recent law review article tells the other side of the story, providing balance to any policy discussion that addresses collective licensing and CROs.² Even experts who tout the benefits of collective licensing in the abstract often include the caveat that in practice these bodies require a "well-

¹ See, e.g., the many interventions of the International Federation of Reproduction Rights Organizations in national and international policymaking processes. Position Papers | IFRRO, <http://www.ifrro.org/content/position-papers> (last visited January 4, 2013).

² Jonathan Band and Brandon Butler, "Some Cautionary Tales About Collective Licensing," 21 MICHIGAN STATE INTERNATIONAL LAW REVIEW 687 (2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2149036.

developed structure and culture of collective management.”³ The episodes recounted in the article reveal a long history of corruption, mismanagement, confiscation of funds, and lack of transparency that has deprived artists of the revenues they earned. At the same time, CROs have often aggressively sought fees to which they were not legally entitled or in a manner that discredited the copyright system. While properly regulated CROs in some circumstances may enhance efficiency and advance the interests of rights holders and users, the Subcommittee should be aware of CROs’ mixed history as it considers the appropriateness of CROs as a possible solution to copyright problems in general and the obstacles relating to preservation, orphan works, and mass digitization in particular.

I can offer two recent examples of the problematic behavior of CROs. First, the Copyright Clearance Center (CCC), a collecting society for publishers, has paid half of the litigation expenses of publishers in the Georgia State electronic reserves case. Many in the library world find it troubling that CCC is using the fees it has collected from academic libraries to sue an academic institution over the use of books written by academics.

Second, the Educational Rights Collective Canada (ERCC) has failed to distribute any royalties to authors. ERCC was formed in 1998 to collect royalties for educational copying of broadcast programs.⁴ The ERCC asked the Copyright Board of Canada (CBC) to put an end to its tariff, acknowledging that in its fifteen years of operation it has never distributed any money to rights holders and it is \$830,000 in debt. According to Professor

³ Johan Axhamn & Lucie Guibault, Institut Voor Informatierecht, *Cross-border extended collective licensing: a solution to online dissemination of Europe’s cultural heritage?* viii (2011). *See also, id.* at 41 (“[ECL] presupposes the existence of a representative CMO with a sound culture of good governance and transparency”); Pamela Samuelson, *Legislative Alternatives to the Google Book Settlement*, 34 COLUM. J. L. & ARTS 1, 24 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1818126 (noting that the unfamiliarity of ECLs may be a barrier to their adoption in the U.S.); Tarja Koskinen-Olsson, *Collective Management in Nordic Countries*, in *Collective Management of Copyright and Related Rights* 283, 306 (Daniel J. Gervais ed., 2010) (“[The system of ECLs in Nordic countries] presupposes that the ‘copyright market’ is well organized and disciplined.”). Experts have suggested that the United States has a copyright culture that would be less favorable to a broader role for CROs. *See, e.g.*, Daniel J. Gervais, *The Landscape of Collective Management Schemes*, 34 COLUM. J.L. & ARTS 423, 424 (2011) (explaining that “the fundamentally economic model under which [CROs] operate in the United States, and the worldview that informs it, are likely to limit” the role that CROs play in the copyright ecosystem in the U.S.).

⁴ Michael Geist, *Copyright Collectives Gone Mad: How the ERCC Spent Dollars to Earn Pennies* (Dec. 20 2013), <http://www.michaelgeist.ca/content/view/7036/125/>.

Michael Geist, “the debt was largely accumulated in trying to create the tariff in the first place.” Professor Geist concludes that “the ERCC was simply a bad idea in which millions was spent by both sides to decide on royalties worth a fraction of expense....”

The Subcommittee should avoid promoting the creation of similarly expensive licensing infrastructures that benefit intermediaries at the expense of users and rights-holders. This is particularly the case with respect to orphan works, where the CRO likely would distribute few of the funds collected because it would be able to find only a very small percentage of the rights holders.

II. Contractual Restrictions on Copyright Exceptions

As I briefly mentioned at the end of my testimony, the Subcommittee should focus attention on a serious negative consequence of the proliferation of licensing: the use of contract terms to circumvent limitations in the Copyright Act. This is a serious problem confronting libraries, which license access to e-books and electronic databases of journals and other information resources.⁵ Publishers frequently include terms in their licenses that restrict libraries’ ability to exercise their rights under sections 107 (fair use), 108 (library exceptions), and 109(a) (first sale doctrine). This problem will only get worse as publishers distribute more of their materials solely in digital formats.

Courts have considered a variety of legal theories for refusing to enforce contractual restrictions on copyright exceptions in the mass-market license context. These include questioning whether a consumer manifested assent sufficient to form a contract, preemption under Section 301(a) of the Copyright Act, and constitutional preemption. No consensus has emerged on any of these theories, in part because of variations in the facts of these cases in terms of the nature of the contract, the nature of the relationship between licensor and licensee, and the nature of the work. Further, it is unclear how courts would apply these theories in the library context.

Congress and other legislatures frequently restrict the waiver by contract of protections provided by statute.⁶ Indeed, in the Copyright Act itself, Congress provided

⁵ Research libraries already spend two-thirds of their acquisition budgets on licenses to electronic resources.

⁶ For a list of examples of statutory limitations on contractual waivers of rights in various jurisdictions, see Jonathan Band and Deborah Goldman, *Restrictions on the Waiver of Rights*, <http://www.arl.org/focus-areas/copyright-ip/2871-restrictions-on-the-waiver-of-rights>.

that a termination of a grant of copyright “may be effected notwithstanding any agreement to the contrary.” 17 U.S.C. § 203(a)(5). Congress included this provision to protect authors from publishers who might take advantage of their bargaining strength to force authors to waive their termination rights.

As part of its review of the Copyright Act, the Subcommittee should assess the adverse impact of the potential replacement of the public law of copyright with the private law of contract, both on libraries and the public at large.⁷ I believe that Congress should adopt restrictions on the enforcement of contractual terms that attempt to limit exceptions in the Copyright Act such as first sale, fair use or interlibrary loan under Section 108.⁸

III. Preservation of Born-Digital Materials

I would like to expand on my testimony on the need for preserving born-digital materials, both those under license and those openly available over the Internet. Some believe that because digital materials do not suffer the same kind of physical wear and tear as printed paper copies, library preservation is less important than before and can be recalibrated or safely surrendered in license terms. This is not so. As a study just released at the University of British Columbia illustrates, digital materials are subject to risks of loss, corruption, and destruction just as profound, if not more so, as those that face older formats. The study found that 80 percent of scientific data from a random sample of studies were lost over two decades because of old email addresses and outdated storage devices.⁹ The researchers tried to collect data from 516 studies made between 1991 and 2011. They found that although complete data sets were available in the year of publication, the ability to access the data dropped by 17 percent per year. According to

Restrictions on “contracting out” are also included in the legislative proposals of the UK Intellectual Property Office, the Irish Copyright Review Committee, and the Australian Law Reform Commission.

⁷ The Register of Copyrights, Maria Pallante, identified this issue when she observed that “Congress may not want a copyright law where everything is licensed and nothing is owned.” Maria Pallante, *The Next Great Copyright Act*, at 18.

⁸ The suite of statutory instruments for amending the UK copyright law that will come into force on June 1, 2014, prohibit the “contracting out” of many exceptions in the research and education context.

⁹ Julie S., *80 Percent of Scientific Data Gone in 20 Years*, Headlines & Global News (Dec. 20, 2013), <http://www.hngn.com/articles/20083/20131220/80-percent-of-scientific-data-gone-in-20-years.htm>.

the lead investigator, Tim Vines, “much of these data are unique to a time and place, and is thus irreplaceable, and many other datasets are expensive to regenerate. The current system of leaving data with authors means that almost all of it is lost over time, unavailable for validation of the original results or to use for entirely new purposes.” Vine stated that scientists should upload their data to public archives before agreeing to publish their findings.

Research and academic libraries rely heavily upon commercially-produced digital content. This content is usually licensed with provisions that do not permit its preservation by libraries. As the number of born-digital publications increases significantly, and as they represent an increasing percentage of electronic publications that libraries license or acquire, preservation entities are unable to keep pace. These entities are only preserving less than a quarter of electronic journal titles. A 2011 study by the libraries of Columbia University and Cornell University found that two preservation entities—LOCKSS and Portico—preserve a very small percentage of the holdings of electronic journals of these libraries, confirming earlier estimates of very low preservation rates for born-digital journal content.¹⁰

These studies highlight the importance of libraries acting decisively to preserve digital materials.¹¹ Many publishers simply do not have the financial incentive, or the institutional stability, to preserve digital materials for decades, let alone centuries. Moreover, because of their commitment to intellectual freedom, libraries collectively seek to preserve as much as possible of our cultural heritage, not just materials with potential economic value. The copyright system must encourage this preservation through exceptions that allow preservation and “contractual override” provisions.

Likewise, libraries must be encouraged to preserve our cultural heritage expressed through websites. Many libraries have long recognized the importance of preserving websites, and have website archiving projects underway.¹² Website archiving by

¹⁰ <http://blogs.cornell.edu/dsps/2014/02/06/strategies-for-expanding-e-journal-preservation/>.

¹¹ See also Jennifer Howard, *Born Digital, Projects Need Attention to Survive*, Chronicle of Higher Education (Jan. 6, 2014), http://chronicle.com/article/Born-Digital-Projects-Need/143799/?cid=at&utm_source=at&utm_medium=cn.

¹² See, e.g., Web Archive Collections – Web Archiving (Library of Congress), <http://www.loc.gov/webarchiving/collections.html>; The Columbia University Human Rights Web Archive, <http://hrwa.cul.columbia.edu>.

academic and research libraries is a transformative fair use.¹³ In countries such as the UK, where seeking permission and paying licenses for “high volume, low value uses” is already the norm, web archiving lags far behind what is available under fair use in the United States.¹⁴ Copyright and generic “terms of use” provisions should not interfere with this significant work.

A more recently identified digital preservation problem is “link rot” – where a link in a webpage, or a URL cited in a document, no longer functions. A recent study found that more than 50 percent of the links in U.S. Supreme Court opinions no longer resolve to working websites.¹⁵ In response, a coalition of more than thirty law libraries has created a tool to help ensure the continued functioning of URLs in academic journals and other sources.¹⁶ It is essential for our cultural, scientific, and legal future that libraries continue to rely on fair use to preserve linked references without waiting for a licensing regime or a special exception.

IV. The Cost of Preservation

Vice Chairman Marino asked for creative solutions to the significant problem of funding preservation efforts. In addition to the public/private partnerships I mentioned, research libraries have formed consortia such as HathiTrust and the Digital Preservation Network to avoid needless duplication and to achieve economies of scale. These cooperative efforts reduce the overall cost of preservation.

¹³ Association of Research Libraries, et al., CODE OF BEST PRACTICES IN FAIR USE FOR ACADEMIC AND RESEARCH LIBRARIES 26 (2012) available at <http://www.arl.org/fairuse>; Jonathan Band, A NEW DAY FOR WEBSITE ARCHIVING 2.0, <http://www.arl.org/storage/documents/publications/band-new-day-for-archiving-2.0-23feb12.pdf>.

¹⁴ Mark Ballard, *UK prepares to launch internet archive without internet access*, COMPUTER WEEKLY (Dec. 11, 2013), <http://www.computerweekly.com/news/2240210795/UK-prepares-to-launch-internet-archive-without-internet-access> (“The archive was held up by a decade of negotiations between publishers and the British Library, meaning that regulations permitting the library to perform its first archive copy of every UK website were not passed until April this year, more than 20 years since the World Wide Web took off and 10 years since Parliament passed a law making it possible.”).

¹⁵ Jonathan Zittrain et al., *Perma: Scoping and Addressing the Problem of Link and Reference Rot in Legal Citations*, (October 2013), Harvard Public Law Working Paper No. 13-42, available at <http://ssrn.com/abstract=2329161>.

¹⁶ See Perma.cc, <http://perma.cc> (last visited Dec. 27, 2013).

Further, it is important to recognize that Google has spent hundred of millions of dollars digitizing books in the course of developing Google Book Search.¹⁷ These scans are an important part of the HathiTrust Digital Library. My colleague Paul Courant at the University of Michigan estimated that at the pace Michigan was digitizing its collection of books before its partnership with Google, it would have taken Michigan 1,000 years to complete the task. But with Google's assistance, this task is already largely completed. However, there are millions of other items in our libraries, archives and special collections that Google is not digitizing, and libraries need to find alternative funding sources for the preservation of these important materials.

V. Community Fair Use Best Practices

As Mr. Donaldson and I mentioned, the development of fair use best practices has been a very productive and useful tool for a number of communities working with copyrighted works. For example, "The Code of Best Practices in Fair Use for Academic and Research Libraries" provides a clear statement of fair and reasonable approaches to fair use developed by and for librarians who support academic inquiry and higher education. A copy of the Code is attached.

¹⁷ Contrary to Jan Constantine's statement at the hearing, there is no evidence that Google is earning millions of dollars from its investment in Google Book Search.

“The Code of Best Practices in Fair Use for Academic and Research Libraries”

can be found at

<http://www.arl.org/storage/documents/publications/code-of-best-practices-fair-use.pdf>



Written Testimony Submitted to
The Committee of the Judiciary's
Subcommittee on Courts, Intellectual Property, and the Internet

Hearing on
Preservation and Reuse of Copyrighted Works

Submitted by:

Michael C. Donaldson, Esq.
Partner, Donaldson + Callif, LLP

On behalf of

Film Independent, Independent Filmmaker Project, International Documentary Association,
Kartemquin Educational Films, Inc., National Alliance for Media Arts and Culture,
Women in Film & Video of Washington, DC

&

Doc Mayer, Gilda Brasch, Vanessa Perez, William Horberg, William Lorton,
William J Saunders

April 8, 2014

I. INTRODUCTION

The International Documentary Association and Film Independent respectfully submit this statement on behalf of thousands of documentary and independent filmmakers and other creators who struggle every day with the orphan works problem. This problem effectively prevents filmmakers from licensing third party materials whenever the rightsholder cannot be identified or found; for many filmmakers, the threat of a lawsuit, crippling damages, and an injunction makes the risk of using an orphan work just too high. In fact, because of this risk, distribution, broadcast, and film festival admission is often impossible for films that include orphan works.

Documentary filmmakers can sometimes limit the amount of their uses of orphan works in order to bring them within the doctrine of fair use. However, narrative filmmakers often seek to use orphan works to create adaptations, sequels, or remakes. That's not a fair use. Filmmakers must license such third party materials, but are unable to do so when the rightsholder to those materials cannot be identified or located. Filmmakers cannot even begin their projects because no rights can be obtained.

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

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

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

We also do not support publicly funded registries which would list works that have been orphaned. The Copyright Office is already stretched and has not expressed an appetite to take on such a task. Also, the technology is changing far too rapidly for the government to keep up. There are some private solutions emerging such as Google Search, PLUS, and others that hold

great promise. These agile, inclusive sites were not in existence when Congress last considered orphan works legislation. See Mary Sweeney's Statement attached to this document. She was frustrated by her inability to make a film because she could not find the rightsholder to the underlying work. When she performed a new search over the weekend, she was able to find that person. If she had listed the work as officially orphaned, someone else might not make the new search. We don't need registries. We need search engines that continue to improve and serve the purpose of finding the creators of works that would have been considered orphans just a few short years ago.

II. THE ORPHAN WORKS PROBLEM PERSISTS AND MUST BE ADDRESSED

The orphan works problem continues to be a significant impediment to documentary and independent filmmaking. The filmmaker cannot obtain insurance coverage, distribution deals, or broadcast deals when orphan works are used. In many cases, even film festivals will refuse to screen films containing orphan works.

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

As it stands now, if filmmakers cannot identify and locate the rightsholder, in many cases they effectively cannot use the work. This problem prevents significant historical and cultural stories from reaching the public, especially where projects rely on older works and those from minority groups that often have less reliable records of ownership.¹ If an appropriate solution to the orphan works problem is enacted, documentary and independent filmmaking will continue to evolve in ways that use the treasure trove of newly available archival material to explore and illuminate our heritage; or, if a solution fails to be enacted, a significant portion of important works will tragically remain hidden from the public, depriving all of use of countless opportunities to explore and reconnect with our heritage. Prime examples are set out in various statements attached to this document.

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

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

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

² YOUTUBE STATISTICS, http://www.youtube.com/t/press_statistics (last visited Feb. 3, 2013).

³ See *id.*

newly available works on the internet are orphan works even as they are birthed.

Numerous initiatives aimed at preserving audiovisual and audio materials are underway, which promise to unlock an incredible amount of content for use by documentary and independent filmmakers. The undeniable cultural and historical potential of this vast body of digital content highlights the importance of the orphan works problem because a large portion of these digitized materials⁴ will be orphan works for which no authorization for use in filmmaking can be obtained. Such works should not be locked away from the public.

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

The emergence of new business models and improvements in technology over the last several years has made funding, creation, and distribution of films available to many more filmmakers than ever before. For example, many filmmakers have had enormous success using “crowd funding” services such as IndieGoGo and Kickstarter to finance their creative projects. Crowd funding allows individuals and fans to each pledge anywhere from one dollar to many thousands of dollars in hopes that the project will be realized. In fact, the IndieGoGo platform is being used to underwrite more than one hundred thousand creative or entrepreneurial campaigns,⁵ and continues to grow rapidly.

Filmmakers also enjoy new digital distribution channels such as Netflix, Hulu, Fandor, DailyMotion, and YouTube. Until just a few years ago, digital distribution channels could not support high-quality content streaming for even a small amount of users. This transformation has enabled these new digital distribution channels to expand their audiences massively with large subscriber bases and advertising-supported streaming to levels thought to be impossible until recently. For instance, Netflix offers hundreds of documentary films in twelve different, easily-searchable subgenres that can be watched any time. And of course, new relatively inexpensive digital cameras and editing technologies have made filmmaking accessible to more people than ever before.

The crowd funding model and digital distribution channels have helped a remarkable number of documentary filmmakers realize their projects by allowing the audience to fund projects they want to see and to access smaller, niche films that cater to more dispersed audiences with unique tastes. These exciting new models, together with the vast third party source materials now available through the internet, mean that documentary and independent filmmakers can now produce films on obscure or marginalized subjects that would not have been possible in the past.

It is not only obscure and marginalized subjects that suffer from the orphan works problem. An even larger loss occurs when a filmmaker wants to make a film based on an orphaned book or an orphaned film. The UCLA Film and Television Archives has over 10,000 narrative, fiction films for which they cannot identify the rightsholders. Such gifts are not from copyright owners. Copies of old films are given to the archives by collectors, heirs, or folks that are just cleaning

⁴ See generally John P. Wilkin, *Bibliographic Indeterminacy and the Scale of Problems and Opportunities of “Rights” in Digital Collection Building*, RUMINATIONS, available at <http://www.clic.org/pubs/ruminations/01wilkin/wilkin.html/wilkin.pdf> (2011).

⁵ Matt Petronzio, *A Look Back at IndieGoGo’s Successful Year in Crowdfunding*, MASHABLE (Jan. 11, 2013), <http://mashable.com/2013/01/11/indiegogo-crowdfunding-2012/>.

out the closet, so to speak. The University with all its resources, was not able to find the copyright owner. So the use of the films is restricted to viewing at the University. No public screenings. No loaning them out for any purpose. And certainly no remakes or sequels. That is over 10,000 stories that were once worthy of telling. Today, many of them are worthy of retelling. But that is impossible. No one would finance such a venture. No company would issue an insurance policy. Nothing is to become of these stories. And that is just the stories locked inside the vaults of the UCLA Film and Television Archives. Other archives have the similar experiences and, of course, orphaned books worthy of being made into films probably outnumber the orphaned films.

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

The goal of any orphan works solution is to enable the American people, including filmmakers, to make use of orphan works while respecting and protecting the rightholders, even if they are not found until after the item is used. The Copyright Office took the right approach in its 2006 *Report on Orphan Works* when it recommended solutions that require the potential user of an orphan work to conduct a reasonably diligent search and pay reasonable compensation to resurfacing rightholders, and that limit money damages and injunctions against the user of the orphan work under certain circumstances.⁶ That approach strikes the appropriate balance between rightholder, other creators, and potential users.

We support the approach offered up by the Copyright Office. Potential users would be required to conduct a diligent search following procedures rigorous enough to ensure that the user made a good faith and reasonable attempt to locate the rightholder. Such procedures may vary based on the type of orphan work (e.g., film, photography, books) so that diligent search efforts are reasonable in light of the type of work in question. Such industry-specific best practice procedures can be designed to ensure that locatable rightholders are found.

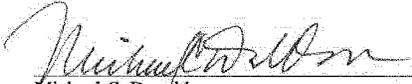
When the rightholders are not found but later resurface, such rightholders would be entitled to reasonable compensation. This approach would therefore not deprive them of royalties they would have received had they been identifiable and locatable. Independent filmmakers have a strong interest in such measures, as they too are rightholders who are entitled to the exploitation and enjoyment of their creations.

IV. CONCLUSION

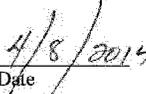
The orphan works problem is impairing our cultural and social progress by preventing the public from accessing a vast amount of works, and by preventing independent and documentary filmmakers from doing their part to fulfill the promise of the digital revolution. Orphan works of critical historical and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

⁶ REGISTER OF COPYRIGHTS, REPORT ON ORPHAN WORKS 95-125 (2006).

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



Michael C. Donaldson



Date

ABOUT THE COMMENTERS

This statement is submitted on behalf of organizations and filmmakers whose work supports independent and documentary filmmakers.

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

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

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

In 1966, **Kartemquin Educational Films** began making documentaries that examine and critique society through the stories of real people. Their documentaries, such as *The Interrupters*, *Hoop Dreams* and *The New Americans*, are among the most acclaimed of all time, leaving a lasting impact on millions of viewers. Most recently, *As Goes Janesville*, a co-production with 371 Productions, aired on PBS Independent Lens and is now available on DVD. In 2013, they expect to have their busiest year ever, with releases including *The Trials of*

Muhammad Ali, *Cooked*, and *Life Itself*, about film critic Roger Ebert, among others. Kartemquin Films is a home for independent media makers who seek to create social change through film. With a noted tradition of nurturing emerging talent and acting as a leading voice for independent media, Kartemquin is building on over 45 years of being Chicago's documentary powerhouse. Kartemquin is a 501(c) 3 non-profit organization.

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

Women in Film & Video (WIFV) of Washington, DC is dedicated to advancing the professional development and achievement for women working in all areas of film, television, video, multimedia and related disciplines. WIFV supports women in the industry by promoting equal opportunities, encouraging professional development, serving as an information network, and educating the public about women's creative and technical achievements. WIFV, a 501(c)(3) non-profit community benefit organization founded in 1979, is the premier professional resource for people who want successful media careers in the DC-metro region. Our resources, connections and advocates support a vibrant, creative media community.

Doë Mayer holds the Mary Pickford Chair at USC's School of Cinematic Arts where she teaches documentary and fiction filmmaking. She holds a joint appointment with the Annenberg School for Communication & Journalism where her work is centered on the practical application of communication campaign strategies and designs for social issue and health-defined organizations.

Professor Mayer has been working in film and television for the past 25 years and has produced, directed and provided technical support for hundreds of productions in the United States and numerous developing countries. Much of this programming has been in the areas of family planning, basic education, health and nutrition promotion, HIV/AIDS prevention, population, and women's issues.

Gilda Brasch is a television producer/director whose credits include PBS, ABC, CBS, NBC, Oprah Winfrey's OWN, Discovery, SoapNet, and Home & Garden TV. Gilda is currently Co Executive Producer of VH1's hit series *Love and Hip-Hop Atlanta*. With roots in journalism, Gilda also produced for the Christian Science Monitor and American Public Radio. Gilda currently sits on the board of directors of two nonprofits, The International Documentary Association and Hollywood Arts.

Vanessa Pérez joined Canana in 2008. In her last five years at Canana, Perez has been involved in the productions of projects such as *Abel*, *Revolution*, *Miss Bala* and *Chavez*. In

2011, Pérez returned to her native Los Angeles to run the U.S. operations of Canana. Pérez's goals are to develop English language content that represents the Hispanic Millennials and to leverage the talent pool in Latin America for U.S. based projects. Pérez started her career at International Creative Management in the Motion Picture Talent department. Pérez holds a B.A. from Whittier College in International Relations and French.

William Horberg is a Los Angeles based independent film and television producer and the principal of Wonderful Films. William has produced over 30 movies and TV shows and has worked in various aspects of the entertainment business since 1979. He was a Senior Vice President of Production at Paramount Pictures and President of Production at Sidney Kimmel Entertainment, and is a member of AMPAS, PGA and BAFTA.

William Lorton is the director and producer of the independent documentaries *Take Away One* and *Spitfire 944*.

William J Saunders is an EMMY Award winning documentary filmmaker and graduate of Columbia University's School of the Arts.

Statement from Mary Sweeney

A number of years ago I tried to secure the rights to a series of British spy novels written by the author Manning Coles. This was actually two people, a man and a woman, who wrote under the singular pseudonym Manning Coles. The books would have made a wonderful movie, or possibly a television series, as there were several books with the same protagonist. I wanted to option the rights to the first book in the series, as well as the main character who was in all the books. I made quite an effort to find someone, anyone to grant me the rights, but even working with a lawyer at an established Los Angeles entertainment firm, I was unable to locate a rights holder. Sadly, I had to abandon the books and project.

Today, search engines have completely changed the landscape. After I prepared the above statement for Michael Donaldson's testimony, I decided to try again. I found the authors right away. I now plan to reach out to the authors in order to option *A Toast to Tomorrow*, the second book, and the character Tommy Hamblen.

_____/s/_____
Mary Sweeney
Film Producer and Board Chair of Film Independent

Statement from Vanessa Perez

Cesar Chavez, currently in theaters, has been Canana Film's biggest production both in cost and scope and the first film to obtain wide distribution in the United States. This last factor gave way to a complicated legal delivery of the film because the filmmaker decided to incorporate stock footage in the film to accentuate the plight of the farmworker struggle and the politics unfolding during that time period.

Cesar Chavez's family optioned his life rights to us. Stock footage for this film came primarily from other documentaries about Cesar Chavez. The material that was initially used for research for the biopic that had been provided by the Cesar Chavez family - those who optioned his life rights to us. We thought that because this material had been used before we would easily be able to obtain clearances. However, we often hit walls because logs were not kept, people were not willing to help, or the person was no longer alive. It took two researchers who were hired for about a year to try and find our footage; and at that point we had cleared approximately 45% of the footage that we wanted in our film and were nearing our deadline to deliver to the distributor.

Most of the footage that we did find was from major news archival sources. Those are the ones we were able to locate quickly, but it gets very expensive quickly. The rest of the footage we were trying to find was of people in the fields, or during protest, or pilgrimages -- it was from people who had participated in the movement. At this point, I had been in touch with the filmmakers behind *A Fight in the Fields*. They agreed to help me locate the footage that we used from their documentary in our film. They dug through old archives. It took them about two months to come back to me with a list, of which 25% of the footage they still could not identify within the list I had sent, even though they had used the material in their documentary. Because so much time had passed many things had been lost as records were not kept. From the information they provided, I was able to clear another 15% of the footage, but much of the information they provided did not yield any results because the network could not find the clip based on the information provided or the information provided was incorrect. Again, the only things we were able to locate were things that were out of copyright and major network news source footage.

In our final stage, we reached out to Donaldson + Callif, who helped use some footage under fair use. Luckily the footage that would not fall under fair use had all been identified, which was something that was able to get us errors and omissions insurance.

Not being able to locate the rights holder threatened to make the movie fall apart because the distributor was requesting all stock footage to be cleared. And, we really had reached a point where we did not know who else to contact and where else to search. Because we worked very closely with the Cesar Chavez' family including his press secretary at the time, we knew we were telling a story that was factually correct. The filmmaker depended on the stock footage to confirm that reality to the audience. We wanted the audience to understand that this really happened and that people really did have such positive and negative sentiments about the movement and the work that Cesar Chavez was doing. During test screenings, we found that for most of the audience the stock footage impacted them. This footage helped them understand the reality of the plight of the farmworker. So instead of taking out the footage because we could not

find the rights holder, we decided to take the calculated risk of leaving the material in there to be able to tell the story the filmmaker had crafted in the edit bay before we knew if this film was going to have a wide release. We know that is a large risk. We take it because the footage is essential to the story. We know we did our best to find the rights holder. Hopefully, Orphan Works legislation will be enacted to protect future filmmakers.

_____/s/_____
Vanessa Perez
Creative Executive Producer, Canana Films

3/31/14

Statement from William Horberg

Fallen Angels was an anthology television series broadcast for two seasons on Showtime in 1993 and 1994. The producers were myself, Lindsay Doran, and Steve Golin. Sydney Pollack was Executive Producer. The series featured adaptation of classic noir short fiction from James M. Cain, Dashiell Hammett, Raymond Chandler, Mickey Spillane, and other famous hard-boiled authors, but also lesser known American writers such as William Campbell Gault and Jonathon Craig. Alfonso Cuarón, Steven Soderbergh, Tom Hanks, and Agnieszka Holland were among the filmmakers who directed episodes of the show.

There were many instances of short pulp and noir work that we found in vintage books, magazines, or pulps with good plots and characters that we wanted to adapt for the series but were unable to obtain the necessary rights as the authors had been lost to history and the original publishers of the work were out of business with no forwarding address so to speak. We spent considerable energy tracking down some stories to no effect.

_____/s/_____
William Horberg 3/31/14

William Horberg is an established producer, having produced almost 30 films, including *Milk*, *Cold Mountain*, *Lars and the Real Girl*, *The Quiet American*, *The Talented Mr Ripley*, *The Kite Runner*, *Searching for Bobby Fischer*.

Statement from William Lorton

I recently spent four years producing an independent documentary film on the life and work of my late aunt, Mary Baratta-Lorton, author of the influential 1970's primary math texts *Workjobs* and *Math Their Way*. My goal with this film was to tell Mary's dramatic life story (now largely forgotten), and impress upon the audience how pivotal her work had been in American education.

I would be telling Mary's story to a world and a profession which had overwhelmingly never heard of her, and I was going to need to back up what I was saying.

To demonstrate cinematically to my audience how Mary first became noted as an author and a teacher, I needed to show images of the educational magazine which first touted her work in a major article. The magazine was called *Learning*, and its inaugural issue, which featured the article about my aunt, was published in November of 1972. Because it was a first issue, thousands of copies were sent out to educators across the United States at no charge, so an unusual amount of people were able to read about my aunt just as her book *Workjobs* was being published. This timing was very significant in the launching of Mary's career.

In documentary filmmaking, the director is not simply telling a story, he/she is also presenting the results of their research so that the audience will understand a.) that the story being told is true, and b.) that there exists audio-visual evidence that anyone watching would be able to track down and double-check for themselves if they had any doubts.

So to this end, I needed to show the cover of the magazine, the title page of the magazine with the publication date on it, as well as enough pages of the article on my aunt to demonstrate that the size of the story was substantial.

In the case of the magazine *Learning*, I was working with a periodical that was no longer in print, and had gone out of business so many years ago I was not even able to calculate how long its run had lasted. Because this publication was no longer extant, I was not able to contact anyone in authority to sign a release for this material.

Fortunately, Donaldson and Callif was able to help me use abbreviated version of the material in my film pursuant to fair use that would enable me to insure my project with an errors and omissions insurance policy.

_____/s/_____
 William Lorton
 Director, *Take Away One* 3/31/14

Statement from William J. Saunders

Billy Mize and the Bakersfield Sound is a documentary about a forgotten country music revolution that took place in California's great central valley. Known for its rock'n'roll infused guitar twang and earthy lyrics, the Bakersfield Sound raised country music legends Merle Haggard and Buck Owens. While those two musicians took the national spotlight in the 60s and 70s there were countless unknown artists who paved their path to stardom...maybe none of them more important than Billy Mize.

Billy Mize represents a generation before sensational celebrity, a generation of hard work and hard living. In all cases he is and has a forgotten voice. Billy is still alive, but suffered a massive stroke in 1989 that stole his ability to speak and write. He is able to give some information about his music, but has been out of the loop for over 30 years and his recall and contact information are often outdated. Luckily, I have his entire music catalog. But I'm unique, because I grew up with it. Billy is my grandfather. My mother (his daughter) transferred his music from records to tapes, then tapes to CDs, and CDs to digital files. His catalog also lives on through eBay auctions and covers by artists like Jerry Lee Lewis, Dean Martin and Johnny Cash.

Locating the publishing for his music took a simple search on BMI. But to my surprise, Billy didn't own many of the songs he wrote. Much of it was co-owned, a sign of the times apparently. That's when I began learning about Orphan Works.

One of songs Dean Martin covered was co-published by a company called Two Wood Music, owned by Robert Burrell. This co-ownership of publishing was the product of a deal Dean Martin's manager (Robert Burrell) received for the songs Dean covered. The contact information provided by BMI proved incorrect and after an extensive search, we discovered Robert Burrell had passed away years before without known heirs. Billy's songs, with or without the vocals of Dean Martin, are obviously an important part of Billy's life story as well as an example of his versatile, cross over appeal. The inclusion of these songs is paramount, but we cannot officially license this music.

This is a common conclusion with many of Billy's master tracks as well. In cases where he is the sole owner of the publishing, the record label who mastered the recording is often impossible to find. During the 60s, Bakersfield had a sudden boom of independent record labels all vying after local talents. Many of these labels only survived a few years before folding. Tracking down the rights to an obscure 45 from an obscure artist on an obscure label has proven difficult. Even recent labels have given us dead ends. Billy's last record, titled "Salute to Swing," was recorded under the label GM Records in the mid 70s, but there is no written record of the company nor who now owns the master tracks to the album.

Along with being a recording artist and writer, Billy was a TV personality, often hosting his own shows. I want to use footage from four major shows he appeared on or hosted which include, *Cousin Herbs Trading Post Show*, *The Billy Mize Show*, *Gene Autry's Melody Ranch* and *The Billy Mize Music Hall*. After significant research, I could find no

rights holder and/or no information available to successfully find the rights holder (some of which may in fact be Billy himself).

Cousin Herb's Trading Post and *The Billy Mize Show* were programs recorded in Bakersfield. The physical film of later was found in an unlabeled, rusted 16mm can in Billy's garage. After talking with NBC/Universal and the Gene Autry Foundation, I've determined no one currently claims or has proof of the licensing rights for *Melody Ranch*. The *Billy Mize Music Hall* is one of two pilot episodes that were never officially picked up by any network. It's possible Billy paid for these episodes himself, but again, there is no record or information to support that.

This material is essential for the documentary and, unfortunately, would be forever forgotten without it. This documentary is being made for less than \$150,000 and I can't afford to be sued as a result of unlicensed material use of my grandfather's music. It is an incredible dilemma as a filmmaker, but a ridiculous one as a family member. An Orphan Works solution would be enormously helpful as I tell the story of my grandfather.

ws/ 3/31/14
William J. Saunders

Association of American
Publishers, Inc.
www.publishers.org

455 Massachusetts Ave., NW Suite 700
Washington, D.C. 20001
Telephone: (202) 347-3375
Fax: (202) 347-3690



Association of American Publishers¹
Statement Submitted for the Hearing Record
House Judiciary Committee
Subcommittee on Courts, Intellectual Property, and the Internet
April 9, 2014

Hearing on “Preservation and Reuse of Copyrighted Works”
April 2, 2014

I. Introduction

On behalf of its members, the Association of American Publishers (“AAP”) appreciates this opportunity to place its views in the record of the House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet (“IP Subcommittee”) regarding the recent hearing on “The Preservation and Reuse of Copyrighted Works.” AAP thanks Committee Chairman Goodlatte and Subcommittee Ranking Member Nadler for their recognition of the need to address each of these issues in a way that balances the interests of users and owners of copyrighted works.²

Publishers are both owners and users of copyrighted works and thus appreciate that Section 106 of the Copyright Act grants right holders a number of exclusive rights, including the right to control the reproduction and distribution of their works, and that Section 107 of Copyright Act provides a general exception for “fair use.” However, relying on courts to set rules of the road for modern preservation practices, use of orphan works, or mass digitization based upon fair use would inevitably produce a patchwork of inconsistent and even conflicting determinations and rules, rather than the uniform and balanced national standards, procedures

¹ The Association of American Publishers (AAP) represents over 400 publishers, ranging from major commercial
² *Preservation and Reuse of Copyrighted Works: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) (Opening Statement of Chairman Goodlatte (R-VA)); *Preservation and Reuse of Copyrighted Works: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) (Opening Statement of Ranking Member Nadler (D-NY)).

and policies that, through Congressional vetting, are more likely to limit risk, foster innovation and take into account the numerous legitimate interests of right holders and users. Below, AAP explains its members' concerns and provides suggestions for achieving an appropriate balance between the interests of right holders and users in addressing the Section 108, orphan works and mass digitization subjects discussed at the IP Subcommittee's April 2, 2014 hearing.

II. Section 108

a. *Updating Section 108 for the 21st Century*

Congress created Section 108 of the Copyright Act in 1976 to provide libraries and archives with specific statutory exceptions to certain exclusive rights of copyright owners for the benefit of those institutions and their users. Specifically, Section 108 authorizes a library or archive, which is open to the public or to qualified researchers, to make a limited number of copies of works in its collection under certain specific circumstances (*e.g.*, for preservation, replacement, or private study).³ However, with the advent of the Internet and the availability of digital capabilities to easily reproduce and distribute copyrighted works, substantial portions of Section 108 are viewed as out-of-date and functionally irrelevant, despite modest amendments enacted as part of the DMCA in 1998 to permit the limited making and use of digital copies.⁴

Recognizing the need to more thoroughly assess the impact of digital change on Section 108, the Copyright Office and the Library of Congress convened a group of experts from the publishing, library, archives, and museum communities—the Section 108 Study Group (the

³ More specifically, Section 108 authorizes a library or archive to copy works in its collection under certain specific circumstances if such institution is open to the public or to qualified researchers, is making copies “without any purpose of direct or indirect commercial advantage,” and affixes a notice that the copy is being made under the provisions of Section 108. According to the 1976 Senate report on the proposed Section 108, the requirement that permitted reproduction and distribution must occur “without any purpose of direct or indirect commercial advantage” was intended to preclude a library or archives in a profit-making organization from providing copies of copyrighted materials to employees engaged in furtherance of the organization’s commercial enterprise, unless such activities qualify as fair use or the organization has obtained the necessary copyright licenses. See U.S. COPYRIGHT OFFICE, *Circular 21: Reproduction of Copyrighted Works by Educators and Librarians*, 13 (2009). However, the House report on the version of Section 108 which was eventually enacted offered a broader interpretation noting that, under Section 108, a purely commercial enterprise could not establish a collection of copyrighted works, call itself a library or archive, and engage in for-profit reproduction and distribution of copies, nor could a nonprofit institution, by means of contractual arrangements with a commercial copying enterprise, authorize the enterprise to carry out copying and distribution functions that would be exempt if conducted by the non-profit institution itself. Effectively explaining why the provisions of Section 108 are not limited to “non-profit” libraries and archives, the House report noted that “advantage” in this context “must attach to the immediate commercial motivation behind the reproduction or distribution itself, rather than to the ultimate profit-making motivation behind the enterprise in which the library is located. *Id.* at 15.

⁴ See generally, Symposium, *Copyright Exceptions for Libraries in the Digital Age: Section 108 Reform*, 36 COLUM. J.L. & ARTS 527 (Summer 2013) (exemplifying this view are the comments of Register Pallante that “today, there is no question that [S]ection 108 is woefully out of date...[and] that in order to ensure that [libraries and archives and museums [can] make the copies they need and to distribute those copies in ways that do not unduly harm the valid interests of rights holders...[the Copyright Office] is very likely...[to] adopt and recommend many of the conclusions of the [Section 108] study group...[and] also address issues that were left unsolved by the group.”).

“Study Group”)—in 2006 to undertake this analysis and make recommendations for updating its provisions. Despite the Study Group’s achievement of a number of consensus-based recommendations for updating Section 108 in its 2008 Report (the “Section 108 Report”),⁵ no legislation has been introduced to enact and implement the recommended amendments that would support 21st-century uses of copyrighted works by these cultural institutions.

Today, however, some of the same library groups that previously participated in the Study Group now assert that their community is no longer interested in discussing legislative “updating” of Section 108, but instead prefer to rely on fair use to “authorize” many of the activities that were recommended for inclusion in an updated Section 108.⁶ The Register of Copyrights, however, has made clear that adding new specific exceptions and limitations to a modernized Copyright Act would improve its clarity and functionality, and that “[w]hile fair use can also be helpful to users of copyrighted works in appropriately tailored circumstances, it requires an intensive application of the facts at hand and is therefore ill-suited as a vehicle for bright line rules or more systematic activities of users.”⁷

Unfortunately, the “Code of Best Practices in Fair Use for Academic and Research Libraries” (the “Code”) sponsored by the Association of Research Libraries (“ARL”) shows how the application of fair use to systematic activities of libraries and archives in lieu of specific statutory limitations or exceptions could fail to provide the necessary and appropriate balance of interests needed in an “updated” Section 108.⁸ Although described by ARL as “a clear and easy-to-use statement of fair and reasonable approaches to fair use developed by and for librarians who support academic inquiry and higher education,” this so-called “best practices” document is essentially a one-sided statement of the ARL’s “wish list,” which explicitly encourages libraries to employ fair use to undertake activities the Study Group recommended for inclusion in a revised Section 108 balancing the needs of libraries and publishers.⁹ Moreover, at the heart of

⁵ SECTION 108 STUDY GRP., The Section 108 Study Group Report (2008) <http://www.section108.gov/index.html> (the “Section 108 Report”).

⁶ See *Preservation and Reuse of Copyrighted Works: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) (Testimony of James G. Neal); see also James G. Neal, *A Lay Perspective on the Copyright Wars: A Report from the Trenches of the Section 108 Study Group*, 32 COLUM. J.L. & ARTS (Winter 2009). Recent court decisions favoring expansive assertions of fair use to justify the “mass digitization” of library book collections in the Google Books Library Project and the HathiTrust Digital Library Partnership, as well as the “electronic reserves” program at Georgia State University, have no doubt bolstered this view within the library, archival and education communities. See *Authors Guild, Inc. v. Google*, 05 Civ. 8136, 2013 WL 6017130, (Nov. 14, 2013); *Authors Guild, Inc. v. HathiTrust*, 902 F.Supp.2d 445 (S.D.N.Y. 2012); and *Cambridge University Press v. Becker*, 863 F.Supp.2d 1190 (N.D.Ga. 2012), *appeal docketed*, No. 12-15147 (11th Cir., Jan. 28, 2013).

⁷ Maria Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315, 332 (Spring 2013).

⁸ Association of Research Libraries, *Code of Best Practices in Fair Use* (2012) <http://www.arl.org/focus-areas/copyright-ip/fair-use/code-of-best-practices> (the “ARL Code”).

⁹ See generally *id.* (covering activities such as: (1) digitization for purposes of (a) preservation and (b) building a library’s e-collections; (2) offsite access to digital copies; and (3) copying and making available materials that are

this exercise in “consensus-based community standards” derived from the views of just a single stakeholder “community,”¹⁰ the Code argues for applying fair use through “two key analytical questions” that “effectively collapse” the four statutory factors in Section 107 in a manner that “rephrases” one of them and merely “touches” upon the key “market harm” factor with no reference to its actual statutory wording.¹¹ Instead of relying on fair use and one-sided “best practices” to establish modern rules of the road for cultural institutions (beyond libraries), the publishing industry agrees with the Register of Copyrights that all stakeholders could benefit from a good faith effort to legislatively update Section 108, should Congress decide that such revision is necessary.¹²

b. Section 108 Study Group Recommendations

As noted by both Co-Chairs of the Section 108 Study Group, many recommendations from the Section 108 Report were relatively non-controversial and remain a useful starting place for updating the statute,¹³ such as:

- including “museums” as beneficiaries of a revised Section 108;
- adding certain eligibility criteria for beneficiary institutions (such as having a public service mission, employing a trained staff, and possessing a collection of lawfully acquired or licensed materials);
- permitting beneficiary institutions to “outsource” certain activities to outside contractors;

publicly available online. All of these uses were the subject of Section 108 Study Group discussions and recommendations).

¹⁰ ARL, *The Good News about Library Fair Use*, <http://www.arl.org/storage/documents/publications/fair-use-infographic-aug2013.pdf> (last visited Apr. 9, 2014) (expressly noting that the Code was “developed by practice communities themselves, without intimidation from hostile [or any other] outside groups.”). This Subcommittee’s first hearing regarding its comprehensive review of the Copyright Act (The Copyright Principles Project: A Case Study in Consensus Building) was meant to examine, in Chairman Goodlatte’s words, whether people “with divergent views on copyright law [could] productively” discuss a range of copyright issues as they had done in past efforts to put forth consensus recommendations for updating the law. AAP hopes to have productive discussions with library and other stakeholder communities that could benefit from updating Section 108 and hopes that Congress will encourage this dialogue. *A Case Study for Consensus Building: The Copyright Principles Project: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2013) (Opening Statement of Chairman Goodlatte (R-VA)).

¹¹ *Id.* at 8.

¹² See *supra* note 7.

¹³ *A Case Study for Consensus Building: The Copyright Principles Project: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2013) (Testimony of Laura Gasaway) (suggesting that in order to maintain a proper balance between users and owners of copyrights (a balance that is necessary “if our society is to flourish and maintain its competitive position in the world,”) Congress should “revise section 108 of the Act to expand the exceptions to the exclusive rights of the copyright owner to take into account the changes wrought by the digital age in accordance with the Section 108 Study Group Report and update and expand those recommendations”) (emphasis added); *Preservation and Reuse of Copyrighted Works: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) (Testimony of Richard Rudick).

- changing the three-copy limit¹⁴ for replacement and preservation copying to the number of copies that are reasonably necessary to create and maintain the replacement or preservation copy, as applicable, and that digital copies made in tangible form should be permitted to be lent offsite in the same formats and with the same technological protections measures (if any);
- adding “fragile” as a condition that would permit a replacement copy to be made for “at risk” collection copies, allowing a “usable” (rather than an “unused”) copy available on the market to suffice for the requirement to determine if a replacement copy can be purchased by a library in lieu of making a replacement, and, in certain circumstances, allowing the availability of a license for a work to substitute for a purchase;
- creating a *new* exception for preservation of “publicly disseminated” works which, subject to certain limitations, would permit the making of preservation copies of those works by qualifying institutions able to meet certain criteria; and
- creating another *new* exception for preserving publicly available online content, given that an enormous amount of content is “born digital” and exists only online and current law makes no provision for its collection and preservation.¹⁵

c. Guiding Principles for Updating Section 108

While the recommendations in the Section 108 Report offer a solid foundation for considering any proposed legislative updating of Section 108, AAP notes that, as Richard Rudick pointed out in his hearing testimony, there were issues that eluded any consensus recommendation by the Study Group or were viewed as not ripe for consideration, including (among others) off-site access to digital copies made under exceptions for replacement or preservation and mass digitization.¹⁶ Should Congress decide to embark on updating Section 108 to provide a balanced set of modern exceptions for these cultural institutions (including museums), AAP urges Congress to keep the following general principles in mind:

- An updated Section 108 should permit libraries, archives and museums to provide reasonable access to cultural and intellectual content in modern ways that do not undermine the incentives of publishers and other creators to continue supplying such content.
- Fair use is not a substitute for a specific limitation or exception where the unauthorized use at issue is predictable, systematic, and/or large scale. To the extent that Congress determines

¹⁴ In 1998, Congress made a few modest amendments to Section 108 to facilitate digital preservation and replacement by authorizing the making of up to three copies of a working digital format. At that early stage of limited online experience, however, Congress required that such digital copies could not be made available to the public outside the library or archives premises. See 17 U.S.C. §108(b)(2)-(c)(2).

¹⁵ The new exception would be subject to certain limitations, including the right of copyright owners (except for government and political websites) to “opt out” while the Library of Congress would be permitted to copy and preserve all publicly available online content without regard to a rights holders preference to “opt out.”

¹⁶ *Preservation and Reuse of Copyrighted Works: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) (Testimony of Richard Rudick).

that such an unauthorized use serves a public purpose worthy of a copyright limitation or exception, the scope of the statutorily-authorized activity should be clearly described and the institutions that would be eligible to engage in that activity should be clearly identified.

- Current Section 108 activities, as well as new activities that have developed with respect to digital works, including making digital or accessible copies for library patrons, as well as the digital reproduction of copyrighted works for replacement or large-scale preservation projects, should be authorized only under a predictable set of rules that have been crafted to accommodate the interests of all relevant stakeholders, including copyright owners.
- New limitations or exceptions for making unauthorized uses of copyrighted works should be paired with appropriate new responsibilities for using and storing such digital materials. To the extent that an updated Section 108 includes the ability to make, share and, in appropriate cases, provide access to digital copies, it should also provide, as a prerequisite to exercising such privileges, that reasonable safeguards must be utilized by eligible institutions.¹⁷
- Copyright owners should be given meaningful recourse when a beneficiary of a limitation or exception fails to uphold their responsibilities.¹⁸
- In any revision of Section 108, the relationship between fair use and the specific limitations or exceptions should be more clearly defined. If a particular activity (like copying for preservation purposes or making copies for users) is addressed in a revised Section 108, the safeguards and balances built into the statutory language should not simply be disregarded in favor of applying a fair use analysis. The Congressional intent reflected in the scope of a specific Section 108 limitation or exception should, *at a minimum*, inform any fair use analysis, and Congress' intention that it do so should be made explicit in the language of the limitation or exception itself.
- Similarly, the scope of a revised Section 108 should be considered in the context of other specific limitations or exceptions, such as the first sale doctrine (Section 109) and the so-called "Chafee Amendment" (Section 121). Additionally, many concerns with respect to preserving and providing access to certain works could be addressed if an appropriate statutory treatment for "orphan works" was simultaneously crafted.

d. Evolving Role of Libraries

The creation of Section 108 as part of the comprehensive revision that led to the Copyright Act of 1976 was the subject of a great deal of discussion surrounding the increasingly widespread availability of photocopying capabilities. While libraries saw the ability to make and

¹⁷ These safeguards could include, among other things, limiting access to a clearly defined user community (and making certain limitations or exceptions available only to those eligible entities that can define such a community); placing simultaneous user restrictions to the number of lawfully acquired copies in the relevant collections; and, requiring inclusion of reasonable and effective technical measures to hinder unauthorized access and reproduction.

¹⁸ These responsibilities should apply to public and private eligible entities alike, which means that where the beneficiary is a state entity, it should be required to waive sovereign immunity prior to taking advantage of the limitation or exception, so that an aggrieved copyright owner can seek monetary damages as well as injunctive relief where appropriate.

distribute photocopies of works in their collections as essential to their public service mission, publishers were concerned that such widespread copying of their works would interfere with their markets and reduce their incentive and ability to invest in the creation of new works. The enactment of Section 108 was chiefly an attempt to balance those concerns, and to incorporate certain assumptions about the roles and capabilities of libraries and publishers at that time.

Although there has been much discussion of the impact of the shift to digital technologies on libraries and archives, the impact on publishers of exactly how libraries and archives may exploit the capabilities of digital technologies promises to be no less profound. Below, AAP explains how the missions and practices of institutions subject to Section 108 are changing in ways that warrant Congress's careful consideration of the circumstances under which libraries should be authorized to make and distribute copies of certain works for individual users given the potential for libraries to facilitate digital copy access, distribution and delivery in ways that pose the risk of market-harming unauthorized reproduction and distribution of publishers' works in the absence of appropriate preventive safeguards.

Any significant proposed revision of Section 108 should begin with an examination and definition of the kinds of institutions that will be the beneficiaries of such changes.¹⁹ Despite creating the Section 108 privileges specifically for libraries and archives in 1976, Congress has never provided a definition of either institution in the Copyright Act. Is our understanding of the nature of a library or archive the same today as it was almost forty years ago, or has the advent of digital technologies and the Internet – accessible to and used by their patrons as well as by the institutions themselves – reshaped their views of their respective missions and practices? Are so-called “virtual” libraries or archives, which exist primarily or even exclusively in cyberspace, the same entities as the traditional brick-and-mortar establishments that have held specific identities and played particular roles in communities across our nation?²⁰

The tension that exists today between libraries and publishers regarding appropriate policies for library lending of eBooks is, thankfully, seemingly being worked out through cooperative experimentation in the marketplace rather than by government fiat which would

¹⁹ *A Case Study for Consensus Building: The Copyright Principles Project: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2013) (Testimony of Laura Gasaway at 3 (noting the Section 108 Study Group's recommendation to add “museums to the institutions eligible to take advantage of the exceptions but also [adding] better definitions of libraries, archives and museums that qualify for the exception.”)).

²⁰ For example, how should the Digital Public Library of America, <http://dp.la/>, the HathiTrust Digital Library Partnership, <http://www.hathitrust.org/>, and the Internet Archive, <https://archive.org/index.php>, among other organizations, be viewed for purposes of potential Section 108 revisions as compared to the kinds of libraries and archives that Congress contemplated as the beneficiaries of Section 108 in 1976? See also *Penguin Group (USA) Inc. v. American Buddha*, 640 F.3d 497 (2d Cir. 2011) (Plaintiff NY-based publisher brought copyright infringement action against Defendant Oregon non-profit corporation, with its principal place of business in Arizona, which operated a website known as the Ralph Nader Library, alleging that American Buddha unlawfully uploaded to servers an unauthorized copy of four of Penguin's copyrighted works for downloading, via the Internet and free of charge, by any of the 50,000 members of what American Buddha terms its “online library.”).

likely satisfy neither libraries nor publishers.²¹ In many ways, it is an echo of the debates over high-speed photocopying that began in the 1960s and deeply influenced the efforts of Congress to enact Section 108 in a way that carefully balanced the interests and concerns of both libraries and publishers. But, if that technology was viewed as having the potential to impact the business of publishers by making it possible for libraries and their patrons to freely make and distribute copies of copyrighted works in library collections, consider the exponentially greater potential impact on the business of publishers that is presented by the capabilities of the Internet and the ubiquitously available and affordable consumer devices that allow individuals to digitally access, reproduce and distribute copies of such copyrighted works instantly and globally.

In the past few years, projects to advance library publishing services have become a keen interest within the academic and research library communities. Initial work in areas of open access journals, conference proceedings, and monographic publications is rapidly evolving toward something potentially much bigger as individual institutions share their experiences and expertise toward developing broader capabilities and business models for fee-based publishing services.

When the Association of Research Libraries surveyed its membership on the subject in late 2007, the results verified that publishing services “are rapidly becoming a norm for research libraries, particularly journal publishing services” similar to those provided by numerous commercial and non-profit members of AAP’s Professional & Scholarly Publishing (“PSP”) Division.²² The key paper that explained the results of the survey asserted that “[t]he aspirations of libraries to replicate traditional publishing services are modest to non-existent,” claiming that library publishing services “have few pretensions to the production of elaborate publications” and that “libraries pursue a different economics from those of traditional publishers.”²³ Still, the paper acknowledged that “[l]ibraries’ products certainly resemble many publications produced by traditional publishers,” and that, in addition to base budget and overhead support from the library, the “mechanisms for supporting a library’s publishing program” would also include “royalties and licensing fees, print on demand revenue, and other forms of sales of some kind,” much like the sources of funding that sustain traditional publishers.²⁴ Stating that libraries are “addressing gaps in traditional publishing systems,” the paper concluded that “collectively[,] research libraries are beginning to produce a substantial body of content” and that the question

²¹ See *The Rise of Innovative Business Models: Content Delivery Methods in the Digital Age: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2013) (Statement of the AAP at 6-7 (discussing various library eBook lending models)

http://www.publishers.org/_attachments/docs/copyright_policy/aapncwbusinessmodelspls112613.pdf.

²² Press Release, ARL, *ARL Publishes Report on Emerging Library Role* (Apr. 2, 2008)

<http://old.arl.org/news/pr/research-library-publishing-services-2apr08-print.shtml>.

²³ Karla Hahn, *Research Library Publishing Services: New Options for University Publishing*, ARL, 6 (Mar. 2008)

<http://www.arl.org/storage/documents/publications/research-library-publishing-services-mar08.pdf>.

²⁴ *Id.*

“is no longer whether libraries should offer publishing services, but what kinds of services libraries will offer.”²⁵

Within just five years of that initial study, it became clear that these library publishing activities were already directly challenging publishers of scholarly publications – will they extend beyond these “core campus constituencies” to other markets? It is probably much too soon to tell. But the questions that these libraries are asking of themselves and others, and the capabilities that they are seeking to develop, might offer some hints about the broader missions they may eventually decide to pursue. According to one significant report²⁶ on a later major survey of library publishing services:

The vast majority of library publishing programs (almost 90%) were launched in order to contribute to change in the scholarly publishing system, supplemented by a variety of other mission-related motivations... [and] many respondents expect a greater percentage of future publishing program funding to come from service fees, product revenue, charge-backs, royalties, and other program-related income...

Library publishing programs – many of which offer skeletal production systems and minimal editorial support – have discovered that authors and editors continue to demand publishing services that the library had assumed to be irrelevant in an era of digital dissemination. The skills that these publishing services require do not always align well with traditional library staff expertise, requiring libraries to either lure staff with publishing experience or to seek training for existing staff.²⁷

Additionally, in the proposal that created a new Library Publishing Coalition, it was noted that “library publishing may perhaps be distinguished from other library-based dissemination activities by requiring a production process, by generally presenting original work activities not previously made available, and by applying a level of certification to the content published, whether through peer review or extension of the institutional brand.²⁸ Library publishing services “take inspiration and borrow elements from traditional publishing approaches, such as those practiced by scholarly societies, university presses, and commercial publishers...,” but how will they respond to the “potential competitors to libraries” that “bring a culture of commercialization to new projects that are incompatible with the public good philosophies of academic libraries...?”²⁹

²⁵ *Id.* at 7.

²⁶ Purdue University Press, *Library Publishing Services: Strategies for Success: Final Research Report* (Mar. 2012).

²⁷ *Id.*

²⁸ *Id.* at 12–13.

²⁸ *Library Publishing Coalition (LPC): A Proposal*. LIBRARY PUBLISHING COALITION, 4 (Aug. 14, 2012) http://www.educofia.org/sites/educofia.org/files/LPC-Proposal-08142012_0.pdf.

²⁹ *Id.* at 7.

AAP member publishers, for their part, welcome the prospect of new entrants, including libraries, as publishers in all sectors, provided these new entrants are bound by the same rules of copyright that apply to “traditional” publishers. This reasonable expectation should not stifle any legitimate library-publishing endeavors as publishing is a highly-competitive market that supports a growing number of diverse business models that AAP believes support the public good by facilitating the broad dissemination of literary and scholarly works.³⁰ This open and competitive industry will cease to offer a level playing field if libraries or other institutions are able to take advantage of specific privileges under limitations and exceptions to the exclusive rights of copyright that are not only unavailable to their competitors but could, in some circumstances, potentially allow library publishers to make use of the copyrighted content of “traditional” publishers without their permission.

Recognizing the evolving states of the beneficiary institutions of Section 108 in response to the opportunities presented by digital technologies is a responsibility that Congress must accept if it is to be able to balance stakeholder interests in any legislative “updating” of Section 108 as it carefully endeavored to do in 1976. To that end, it is important for Congress to examine how libraries and archives have changed in the past forty years and factor that assessment, along with an understanding of the future plans of such institutions, into its consideration of any new Section 108 legislative initiative that would expand their privileges under copyright law.

III. Orphan Works

a. The Framework of the Shawn Bentley Orphan Works Act of 2008 is Still Sound

It is important for Congress to bear in mind that the orphan works problem and the potential benefits of addressing it legislatively extend well beyond libraries³¹ (e.g. efficient incorporation of extended orphan film clips into documentaries, inclusion of photographs into biographies and textbooks, development of derivative works such as television series based upon

³⁰ See generally *The Rise of Innovative Business Models: Content Delivery Methods in the Digital Age: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the 11. Comm. on the Judiciary*, 113th Cong. (2013) (Statement of the AAP (discussing various publishing industry models) http://www.publishers.org/_attachments/docs/copyright_policy/aapncwbusinessmodelsphis112613.pdf).

³¹ Based on previous study of the potential uses of orphan works to benefit the public, AAP, the Copyright Office and past Congresses have supported orphan works legislation that permits responsible use of *all* types of works by *all* types of users. AAP sees no policy reason to limit use of orphan works to libraries under a fair use rationale where copyright owners are asked to “trust librarians to exercise their professional judgment and expertise to determine whether the copyright owners of [non-commercial] materials are likely to be unlocatable.” *Orphan Works and Mass Digitization: Notice of Inquiry*, 77 Fed. Reg. 64,555 (Oct. 22, 2012) (Comments of the Library Copyright Alliance at 4).

stories protected by unknown rights holders).³² With our members' considerable experience in seeking permissions for the embedded use of discrete copyrighted works as parts of works of history and biography, textbooks and anthologies, and virtually all other genres of literary works that they publish, they have a deep understanding of the problems that can arise when a copyright owner cannot be identified and located for purposes of obtaining necessary permissions and our members support finding an efficient, fair, and balanced solution to the orphan works problem. AAP encourages Congress to enact orphan works legislation that facilitates responsible use of orphan works in the pursuit of sharing the full potential of these works with the public in the various ways illustrated above.

Congress and the Copyright Office have attempted on several occasions to address the issue of orphan works. At the request of Congress, the Copyright Office conducted a comprehensive study of the issue in 2005, which resulted in the publication of its 2006 "Report on Orphan Works" (the "2006 Report"). Following the release of the 2006 Report, both the House and the Senate worked extensively with the Copyright Office and a wide variety of stakeholders (including publishers, authors, libraries, academics, photographers and film makers, among others) to draft and enact legislation in the 109th and 110th Congresses, a process that ultimately achieved Senate passage of the *Shawn Bentley Orphan Works Act of 2008* (the "2008 Act").³³

Publishers recognize that there have been changes in the legal and technological landscapes that are tangentially related to the orphan works problem in the years since the Senate acted in 2008, but they would observe that these changes have not resulted in anything approaching a clear, uniform, nationwide legal policy for responsibly and efficiently using orphan works. As was made clear through the various examples recounted by the witnesses at the recent IP Subcommittee hearing, the defining characteristic of the orphan works problem remains the same, namely, there are potential users of in-copyright works that are forgoing making uses which would require permission of the copyright owner because the "owner of [the] copyrighted work cannot be identified and located."³⁴ To broadly enable efficient use of such works while respecting the rights of copyright owners, AAP continues to support orphan works legislation, "relevant where [permission is necessary and] all other exemptions [including fair use] have failed,"³⁵ that helps "to make it more likely that a user can find the relevant owner in

³² *Preservation and Reuse of Copyrighted Works: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) (Testimony of Michael Donaldson of behalf of Film Independent and the International Documentary Association).

³³ See *Shawn Bentley Orphan Works Act of 2008*, S. 2913, 110th Cong. 17 U.S.C. § 514 (2008) (passing in the Senate on Sept. 26, 2008).

³⁴ See generally *Preservation and Reuse of Copyrighted Works: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) (Testimony of Jan Constantine, Michael Donaldson, Gregory Lukow, and Richard Rudick); see also U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS (2006) <http://www.copyright.gov/orphan/orphan-report-full.pdf> ("ORPHAN WORKS REPORT").

³⁵ ORPHAN WORKS REPORT at 95.

the first instance, and negotiate a voluntary agreement over permission and payment...for the intended use of the work.”³⁶

AAP believes that the basic tenets and structure of the 2008 Act should comprise the framework of any proposed new orphan works legislation. Conceptually, orphan works legislation should: (1) require the fewest possible changes to current U.S. copyright law; (2) have no impact on U.S. obligations under international copyright agreements; and (3) entail the least possible bureaucratic impact on governmental entities and on owners and users of copyrighted works. With constantly improving prospects for search capabilities, registries, and identification technologies, AAP believes that new legislation based on the 2008 Act can achieve these objectives, especially if the key provisions highlighted below are part of the framework of new legislation:

Key Provisions of the 2008 Act

- A common standard applied to all types of copyrighted works, whether published or unpublished, regardless of their age or national origin.³⁷
- Use of orphan works without discrimination regarding the type of use or the status of the user (e.g., for-profit or not-for-profit) after the would-be user has made a reasonable, but unsuccessful, search to identify and locate the copyright owner for permission.
- Case-by-case good faith diligent search requirements for occasional uses of orphan works requiring personal documentation of the search.
- No requirement that the user of an orphan work file a search report or a notice of intent-to-use the orphan work.
- Robust limitations on infringement liability:
 - using “reasonable compensation” as the appropriate monetary remedy that would remain available to rights holders that wished to bring a claim against an infringer for using a work after conducting a proper diligent search;³⁸ and
 - ensuring that there are sufficient limitations on injunctive relief so that any remaining availability of such relief does not undermine the limitations on monetary damages or, for that matter, the incentives to use an “orphan work” by conducting a reasonably diligent, good-faith search for the copyright owner.
- Clear language explaining that legislation addressing occasional uses of orphan works “does not affect any right, or any limitation or defense to copyright infringement, including fair use.”³⁹
- A provision to appropriately address limitations on copyright owner remedies in the case of users that, acting in an official capacity, assert that they are protected under the Eleventh

³⁶ *Id.* at 93.

³⁷ *Id.* at 95.

³⁸ S. 2913, 110th Cong. § 2(c)(1)(A) (2008).

³⁹ *Id.* at § 2(d) (stating the “Preservation of Other Rights, Limitations, and Defenses”).

Amendment “sovereign immunity” doctrine from being sued in federal courts for monetary damages on a claim of infringement.

Despite the passage of time and some evolving case law, it seems clear from the responses to the Copyright Office’s renewed inquiries about this topic since 2012 that many entities, in addition to AAP, see orphan works legislation as essential for facilitating the use of copyrighted works where no copyright owner can be identified or located to give the user necessary permission.⁴⁰ Furthermore, many of those advocating for orphan works legislation share AAP’s view that the “reasonably diligent, good-faith search” and “limitations on remedies” framework of the 2008 Act is the most effective and appropriate means of encouraging occasional uses of orphan works by a broad array of prospective users, particularly those who do not have a litigation budget to pursue the “use-first-claim-authorization-later” approach inherent in reliance on fair use.⁴¹

b. Weaknesses of Other Proposals

1. Fair Use

Similar to the fate of the Section 108 Report recommendations, some library communities that had supported the need for legislation to address the orphan works problem now propose that fair use suffices to allow for occasional uses of such works as well as their mass digitization. These stakeholders argue that two district court decisions, *Authors Guild v. HathiTrust*⁴² (authorizing digitization to facilitate non-consumptive, *i.e.*, non-display uses of copyrighted works and the making of an accessible copy for a visually impaired individual) and *Authors Guild v. Google* (authorizing non-consumptive uses),⁴³ have changed the legal landscape as to orphan works such that legislation to limit the risks involved in using these works is no longer necessary.⁴⁴ However, in its official announcement of public roundtables to discuss orphan works and mass digitization, the Copyright Office expressly noted that the district court in *HathiTrust* “did not consider the copyright claims relating to the *HathiTrust Orphan Works Project*, finding that the issue was not ripe for adjudication because the defendants had

⁴⁰ See generally 77 Fed. Reg. 64,555 (Comments of the American Bar Association Section of Intellectual Property Law; American Intellectual Property Law Association (“AIPLA”); Authors Guild; Copyright Alliance; Public Knowledge/Electronic Frontier Foundation (stating that “we believe that a limitation on remedies conditioned on a reasonably diligent search can serve as a useful means of lowering barriers to the use of orphan works”); and the Library of Congress).

⁴¹ See generally 77 Fed. Reg. 64,555 (Comments of the American Association of Law Libraries; Copyright Alliance; Copyright Clearance Center; Future Music Coalition; International Documentary Association; Recording Industry Association of America, and Software Information Industry Association).

⁴² 902 F.Supp. 2d 455 (S.D.N.Y. 2012).

⁴³ No. 05 Civ. 8136 (DC), 2013 WL 6017130, (S.D.N.Y. Nov. 14, 2013).

⁴⁴ 77 Fed. Reg. 64,555 (Comments of LCA at 1, 2). Of note, the LCA also stated that “other communities [*i.e.*, communities other than those within LCA membership] may not feel comfortable relying on fair use and may find merit in an approach based on limiting remedies if the user performed a reasonably diligent search for the copyright owner prior to the use.” *Id.* at 7.

suspended the project.”⁴⁵ Similarly, the Copyright Office noted that the district court in *Google* “neither indicated how broadly [its] opinion could be used to justify other types of mass digitization projects *nor did it explicitly address the issue of orphan works*.”⁴⁶

Notwithstanding the lack of application of these cases to orphan works, recent statements by the Library Copyright Alliance (“LCA”) and others of a similar mind seek to propagate the idea that legislative changes are no longer necessary to permit the use of orphan works by libraries because, as a result of a handful of recent judicial opinions, “fair use is less uncertain.”⁴⁷ However, as noted above, the orphan works issue and the potential benefits of addressing the issue extend well beyond non-consumptive uses or library creation of accessible format copies for the visually impaired.⁴⁸ For example, the hearing testimony of Michael Donaldson, representing Film Independent and the International Documentary Association, made clear that almost all documentary film makers are forced to limit use of important footage because there is no *ex ante* procedure for limiting liability for use of orphan works.⁴⁹ Moreover, comments on behalf of museums and other libraries also made it clear that uses of copyrighted works are still being discouraged because of the legal uncertainties presented when a copyright owner cannot be located and the use may exceed those permitted under applicable exceptions or limitations.⁵⁰

Even if the *Google* and *HathiTrust* decisions had addressed the orphan works issue, expansive applications of “fair use” are not a sufficient solution to the orphan works problem. One basic reason is that orphan works, as generally characterized by the Copyright Office⁵¹ and others, are inherently understood as works that require permission for an intended use but for which such permission cannot be obtained due to the inability to locate or identify the copyright

⁴⁵ *Orphan Works and Mass Digitization: Request for Additional Comments and Announcement of Public Roundtables*, 79 Fed. Reg. 7706, 7708 (Feb. 10, 2014).

⁴⁶ *Id.* at 7707.

⁴⁷ *Preservation and Reuse of Copyrighted Works: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) (Testimony of James G. Neal at 1, 11) (admitting that “over the past eight years, courts have issued a series of *expansive fair use decisions*.” Neal then argues that this expansion has “clarified its [Section 107’s] scope”—a position with which AAP does not agree.) (emphasis added).

⁴⁸ See U.S. COPYRIGHT OFFICE, Public Roundtable, *Orphan Works and Mass Digitization* (Mar. 10-11, 2014) (public record forthcoming Apr. 2014).

⁴⁹ *Preservation and Reuse of Copyrighted Works: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) (Testimony of Michael Donaldson on behalf of Film Independent and the International Documentary Association).

⁵⁰ See e.g., 77 Fed. Reg. 64,555 (Comments of Rutgers University Libraries and Reply Comments of J. Paul Getty Trust (including endorsement by the Association of Art Museum Directors); and the College Art Association). The Library of Congress also provided a number of reasons why orphan works legislation is still valuable to its endeavors to more broadly benefit the public. *Preservation and Reuse of Copyrighted Works: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) (Testimony of Gregory Lukow); see also 77 Fed. Reg. 64,555 (Comment of the Library of Congress at 2-4 (explaining that a few examples of successful applications of fair use to orphan works projects do not “obviate the need for a [legislative] solution.”)).

⁵¹ “Orphan works” is the term “used to describe the situation in which 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.” ORPHAN WORKS REPORT at 1.

owner who could grant such permission. Undoubtedly, the traditional four-factor fair use defense can still be raised by a user showing a good faith belief that a particular work was an orphan, the ultimate success of each such defense to be determined on a case-by-case basis.⁵² However, the fact that a work may be an “orphan” does not make use of that work “fair” *per se*. Furthermore, fair use, even as expansively interpreted under the *Google* and *HathiTrust* decisions, does not enable creators to provide the public with the broadest possible array of culturally-enriching uses of orphan works (*e.g.* documentaries, derivative works, or other consumptive uses). Legislation, however, makes these broader uses possible while balancing the rights of copyright owners and users in a comprehensive manner that cannot be done through individual court decisions. AAP continues to believe that any new legislation, whether just addressing occasional uses or also addressing mass digitization of orphan works, should clearly state that it does not affect the fair use defense, but AAP also rejects the idea that fair use, absent further legislative guidance, can serve as the sole basis for addressing the use of orphan works.

In sum, relying on courts to set rules of the road for permissible uses of orphan works under fair use would inevitably produce a patchwork of conflicting determinations, rather than a uniform and consistent policy for using such works. Thus, AAP continues to support the conclusion, endorsed previously by the Copyright Office and currently by many countries, that legislation is the appropriate method to effectively, efficiently, and fairly address the orphan works issue.⁵³

⁵² Potentially, the “orphan status,” if based upon a reasonably diligent, good-faith search, would tip the fourth factor, market harm, in favor of a finding of fair use, if the copyright owner contesting the use had no actual or likely potential market for the work at the time the alleged infringer used the “orphan” work. However, this still begs the question whether what constitutes such a search should be determined by Congress in uniform and consistently-applicable statutory terms that balance multiple stakeholder interests as a matter of national policy or should be decided by individual federal courts without the benefit of specific guidance on applicable standards and procedures derived from and informed by the legislative process.

⁵³ Orphan works issues are also being considered by important U.S. trading partners, and are the subject of a recent European Union Directive (Directive 2012/28/EU) which limits copyright infringement liability for publicly accessible cultural heritage organizations that wish to digitize and make available (online and on demand) certain copyrighted works after conducting a diligent search. While the limitation of remedies in exchange for a diligent search resembles the proposed 2008 Act approach in the U.S., the EU Directive also differs in some significant respects by excluding certain types of copyrighted works (*e.g.*, standalone photographs and illustrations) and by limiting its application to non-commercial use by cultural heritage institutions. The UK has passed legislation to implement the EU Directive as an exception to its copyright law and has also “passed primary legislation to introduce a domestic scheme for licensing” commercial and non-commercial uses of any type of orphan work, provided the applicant conducts a satisfactory diligent search for the rights holder and pays the appropriate fee. See UK INTELLECTUAL PROPERTY OFFICE, COPYRIGHT WORKS: SEEKING THE LOST: CONSULTATION ON IMPLEMENTING A DOMESTIC ORPHAN WORKS LICENSING SCHEME AND THE EU DIRECTIVE ON CERTAIN PERMITTED USES OF ORPHAN WORKS (2014) <http://www.ipo.gov.uk/consult-2014-lost.pdf>. These examples show that requiring a diligent search before use of an alleged orphan work is the growing international norm.

2. Licensing

In its testimony before the IP Subcommittee and its Comments to the Copyright Office, the Authors Guild has proposed a collective licensing structure to solve the orphan works problem stating that “diligent searches are not the answer.”⁵⁴ This new position may stem from the fact that Authors Guild members were able to identify, “with simple online searches,” the authors of several works alleged to be orphans under the “diligent” search criteria of the HathiTrust Orphan Works Program.⁵⁵ Although it had previously supported the 2008 Act, the Authors Guild now says that “the answer is to allow for [a] non-compulsory, [opt-out,] collective licensing system of a limited set of out-of-print book rights,” such as “display rights,” but not print or eBook rights.⁵⁶

While AAP is open to discussing new approaches to addressing the orphan works problem, publishers (and many other stakeholders) believe that a collective licensing model requiring up-front payments to a third-party collecting society is not the most effective or efficient way to encourage use of orphan works while respecting the rights of copyright owners.⁵⁷ As pointed out by the Library of Congress, few owners come forward to contest uses of orphan works.⁵⁸ Thus, requiring up-front payments is likely to impose an unnecessary cost to using orphan works. Additionally, the Copyright Office noted in its 2006 Report that the advance payment requirement was a primary reason that the Canadian process for obtaining a license to use an orphan work was so little used.⁵⁹ Furthermore, although AAP believes compensating copyright owners for use of their works is a crucial principle of copyright, AAP does not believe that channeling payments through third parties is a better way to protect this right than providing reasonable compensation directly to orphan works owners once they come forward. Thus, AAP believes that the “reasonably diligent, good-faith search” and “limitation on remedies” framework of the 2008 Act will be more effective than a licensing scheme for encouraging fair and efficient occasional uses of orphan works.

⁵⁴ 77 Fed. Reg. 64,555 (Comment of the Authors Guild at 1); *Preservation and Reuse of Copyrighted Works: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) (Testimony of Jan Constantine at 19) (“Authors Guild Testimony”).

⁵⁵ See Authors Guild Testimony at 14-15.

⁵⁶ See *id.* at 17-18.

⁵⁷ See generally 77 Fed. Reg. 64,555 (Comments of AIPLA; Internet Archive; Public Knowledge /Electronic Frontier Foundation; and LCA (highlighting additional drawbacks to creating a licensing scheme, such as the conflict of interest problems that would undermine the effectiveness of third party collecting societies, not to mention the costs of creating an entirely new infrastructure to effectuate an orphan works licensing model)).

⁵⁸ See e.g. 77 Fed. Reg. 64,555 (Comments of the Library of Congress at 5-6 (explaining that “in the more than ten years that the Coolidge collection has been available online, the Library has not received a single complaint.”)).

⁵⁹ See ORPHAN WORKS REPORT at 113-114, Appendix A (describing why the Canadian model requiring an escrow payment is “highly inefficient” and noting the lack of use of the Canadian model in its Federal Register notice included at Appendix A of the Report (*Orphan Works: Notice of Inquiry*, 70 Fed. Reg. 3739, 3741 (Jan. 26, 2005))).

IV. **Mass Digitization**

There is a growing demand for easy, *online* access to and use of copyrighted content. To meet this growing demand for online access to new and old copyrighted material, both commercial and non-commercial entities have started digitizing works and are showing interest in digitizing additional vast collections of hard copy, printed books ranging from those that are no longer commercially available to “orphan works” to books that are currently commercially available.⁶⁰ These true mass digitization projects, such as those conducted by major commercial interests like Google or non-profit endeavors like the HathiTrust Digital Library Partnership, are high-volume efforts that require advance planning and substantial upfront investment, and while they *may* include works for which the identity or location of the copyright owner is unavailable, they also implicate many other issues, especially the copyright owners’ exclusive right of reproduction.

a. Mass Digitization Generally

Recognizing this growing demand for instant, online access to all published material, publishers have been investing in modern licensing infrastructures that connect various databases around the globe to facilitate easy licensing of all-kinds—from one-off licenses to mass digitization.⁶¹ Congress should give this market time to provide *voluntary direct licensing* options to facilitate mass digitization of copyrighted works, the groundwork for which is already in development.

However, if Congress determines that the Copyright Act should be amended to facilitate certain types of mass digitization projects, any such proposed amendments should be carefully crafted and limited in their application. Publishers are prepared to work with Congress and other stakeholders to ensure that such measures, if adopted, are designed to promote investment in efficient means for commercial and non-commercial users to engage in mass digitization of copyrighted works while respecting the copyright owner’s legitimate interests in the exploitation of their works.⁶² Furthermore, as noted above, the publishing industry supports a number of changes to facilitate new uses of copyrighted works in digital formats by libraries, archives and other cultural institutions.⁶³ However, the innovative potential of mass digitization projects will

⁶⁰ With respect to efforts to digitize commercially available books and journals, universities and colleges across the nation, are undertaking less sizeable but still widespread and systematic programs that digitize chapters or articles from books and journals for use by educators and students as so-called “electronic reserves” materials which constitute digital successors to paper course packs. These programs present legal issues that are similar to those in mass digitization projects but are, in many important respects, *different* because they involve levels of work selectivity and particularized intended use that are not present in true mass digitization projects.

⁶¹ See, e.g., Copyright Clearance Center’s Get-It-Now service (<http://www.digitalbookworld.com/2013/copyright-clearance-center-enhances-academic-library-offering/>); Copyright Hub (<http://www.copyrighthub.co.uk/about/>).

⁶² For example, those means should include the development of voluntary incentives and technologies to populate, link, and search databases of copyright ownership to facilitate voluntary (direct and collective) licensing.

⁶³ See *supra* Section II at 2-10 (detailing AAP’s views with regard to updating Section 108 of the Copyright Act).

not be realized if limited solely to non-profit/non-commercial uses. Therefore, any potential legislative provision(s) addressing mass digitization, for orphan works or otherwise, should be in a separate section of the Copyright Act that provides for both commercial and non-commercial uses.

b. Mass Digitization of Orphan Works

Although AAP does not believe it necessary for Congress to intervene in the developing market for broader mass digitization projects, there may be a role for Congress in the mass digitization of orphan works. As was noted at the hearing, previous legislative proposals did not address mass digitization of orphan works.⁶⁴ However, a number of projects, including the Digital Public Library of America, Google Books, and HathiTrust, to name the most prominent, have raised this issue. Thus, AAP believes it appropriate to discuss the possibility of addressing the mass digitization of orphan works as part of comprehensive orphan works legislation.

With respect to digitizing orphan works, given the advancements in search technology (e.g., Google, Shazam⁶⁵), the wide availability of online data, and constantly improving registries (e.g., PLUS Coalition, ARROW, Copyright Office Catalogue), it is not implausible to believe that a search protocol could be designed that would be as effective as an individual user's reasonably diligent search for the holder of rights in a particular work. Thus, AAP supports continued discussion of whether application of a single, principles-based, reasonably diligent, good-faith search framework for occasional uses of orphan works could also apply to mass digitization projects where the intent or effect is to make the orphan work available to users for discrete (as opposed to non-consumptive) purposes. However, should Congress deem it necessary to also address broader uses of mass digitization, such efforts should occur separately from orphan works legislation and should not undercut the importance of the reasonably diligent, good-faith search framework for digitization or other uses of orphan works.

c. Fair Use

Publishers acknowledge that a district court has "ruled that the digitization project undertaken by the HathiTrust Digital Library (HathiTrust) and its five university partners was

⁶⁴ See generally *Preservation and Reuse of Copyrighted Works: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) <http://judiciary.house.gov/index.cfm/2014/4/hearing-preservation-and-reuse-of-copyrighted-works>.

⁶⁵ Shazam is an app, available on all mobile platforms, that helps more than "300 million people, in more than 200 countries and 33 languages...identify music anywhere: from the radio, TV, film or in a store, bar or club" and "enable[s] people to explore, buy and share" the music they've "discovered" through Shazam. According to its website, "Shazam identifies songs by "listening" to the music then matching what it hears with a vast database collection of songs [sourced from over 100 countries]. The app can identify tracks that have no lyrics at all or tell the difference between two songs performed by different artists singing the same lyrics." *What is Shazam?* SHAZAM (Apr. 19, 2013) <https://support.shazam.com/entries/23616781-What-is-Shazam-How-do-I-use-Shazam->

largely transformative and protected by fair use”⁶⁶ and that another district court found “the Google Books mass digitization project to be fair use.”⁶⁷ Publishers also recognize that many of the goals of library, university, and commercial entity mass digitization projects are laudable.

The ends, however, should not justify the means if such means turn copyright on its head. Authors and publishers should not lose protection for their works simply due to the ease with which modern technology enables individuals to engage in copyright infringement on a massive scale—digitization, *i.e.*, converting a printed copy of a work to a digital copy, is reproduction, a fundamental exclusive right of copyright owners. Thus, while publishers agree that fair use may well apply in specific one-off instances of digitizing books, fair use was neither intended nor designed to authorize the systematic exercise of the reproduction right inherent in the mass digitization of diverse copyrighted works.

As a general matter, fair use is an assessment to be made on a case-by-case basis and therefore provides little actual certainty for unauthorized uses of large volumes of copyrighted works. Thus, only those willing to act speculatively and risk significant liability along with the waste of time and resources are currently able to undertake mass digitization projects. Moreover, relying upon fair use cannot establish a comprehensive, uniform, national policy for mass digitization that balances all of the various interests of users with the legitimate rights of copyright owners. Achieving such balance, comprehensiveness, and nation-wide predictability is only possible for Congress, if it should determine that the issues surrounding the mass digitization (reproduction) of copyrighted works in their entirety merits amending the Copyright Act. As noted above, AAP encourages Congress to let the voluntary licensing market for mass digitization projects mature. However, AAP believes, on the discrete issue of mass digitization of orphan works, that a properly-crafted orphan works statute can, if followed, provide substantially greater certainty in undertaking such projects and could benefit the public by bringing many of these valuable works into the public eye for the first time.

V. Conclusion

AAP appreciates this opportunity to give the IP Subcommittee the publishing industry’s perspective on Section 108, orphan works and mass digitization. As the Copyright Office has said before, “policy initiatives that redefine the relationship between copyright law and new technology are in the first instance the proper domain of Congress, not the courts.”⁶⁸ In that light, should Congress deem it appropriate to amend the Copyright Act with regard to Section

⁶⁶ 79 Fed. Reg. 7708 (citing *HathiTrust*, 902 F.Supp.2d 445 (S.D.N.Y. 2012)).

⁶⁷ *Id.* at 7707 (citing *Authors Guild, Inc. v. Google, Inc.*, Case No. 05 Civ. 8136 (DC), 2013 WL 6017130, (S.D.N.Y. Nov. 14, 2013).

⁶⁸ U.S. COPYRIGHT OFFICE, LEGAL ISSUES IN MASS DIGITIZATION: A PRELIMINARY ANALYSIS AND DISCUSSION DOCUMENT 2 (2011) http://www.copyright.gov/docs/massdigitization/USCOMassDigitization_October2011.pdf.

108, orphan works and mass digitization, AAP believes that all stakeholders could benefit from a good faith effort to update Section 108 and that orphan works legislation (for occasional uses and mass digitization) should remain faithful to the 2008 Act's reasonably diligent, good-faith search framework. To the extent that any efforts to update Section 108 or address orphan works or mass digitization would need to be responsive to legal and market developments, AAP encourages Congress to author high-level, principles-based legislation and authorize the Copyright Office to provide nuance for implementing any new laws through rulemaking proceedings. We look forward to continued engagement with the IP Subcommittee as it undertakes future hearings on other copyright issues.

Sincerely,



Allan Adler
General Counsel
Vice President for Government Affairs
Association of American Publishers
455 Massachusetts Ave. NW
Washington, D.C. 20001



Computer & Communications
Industry Association
Tech Advocacy Since 1972

Before the
United States House of Representatives Committee on the Judiciary
Subcommittee on Courts, Intellectual Property, and the Internet

Regarding

Preservation and Reuse of Copyrighted Works

April 2, 2014

Statement of the
Computer & Communications Industry Association

The Computer & Communications Industry Association (CCIA) represents large, medium-sized, and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications and Internet products and services – companies that collectively generate more than \$250 billion in annual revenues.¹ CCIA requests that this statement be included in the record of this hearing.

I. Limitations and Exceptions Facilitating Preservation and Reuse

As other stakeholders will no doubt explain in greater detail, current limitations and exceptions in the U.S. Copyright Act, principally Section 107 and 108, enable various types of preservation, reuse, and digitization of protected works. Although often performed by non-profit entities and educational institutions, these activities depend substantially upon commercially-produced information technology. Thus, whether for-profit or non-profit, most preservation and digitization is ultimately facilitated at least in part by businesses, including some CCIA members. This facilitation may involve direct participation, or it may consist of providing inputs such as software, hardware, and systems, without which the task would be impossible.

Legal uncertainty will impede these important activities. If the terms of copyright law around these exercises are unclear, businesses may be disincentivized to engage in or facilitate projects that federal courts have lauded as serving important social goals, including the preservation of knowledge and cultural works. For example, Second Circuit Judge Denny Chin sitting by designation in the Southern District of New York district court, lauded the societal

¹ A complete list of CCIA members is available at <http://www.ccianet.org/members>.

benefits of mass digitization in a November 2013 opinion, finding that

Google Books provides significant public benefits. It advances the progress of the arts and sciences, while maintaining respectful consideration for the rights of authors and other creative individuals, and without adversely impacting the rights of copyright holders. It has become an invaluable research tool that permits students, teachers, librarians, and others to more efficiently identify and locate books. It has given scholars the ability, for the first time, to conduct full-text searches of tens of millions of books. It preserves books, in particular out-of-print and old books that have been forgotten in the bowels of libraries, and it gives them new life. It facilitates access to books for print-disabled and remote or underserved populations. It generates new audiences and creates new sources of income for authors and publishers. Indeed, all society benefits.

Authors Guild v. Google, 954 F. Supp. 2d 282, 293 (S.D.N.Y. 2013). Judge Chin also favorably cited Judge Baer's 2012 *HathiTrust* opinion, which said, "I cannot imagine a definition of fair use that would not encompass the transformative uses made by Defendants' [Mass Digitization Project] and would require that I terminate this invaluable contribution to the progress of science and cultivation of the arts that at the same time effectuates the ideals espoused by the [Americans with Disabilities Act]." *Id.* at 294 (quoting *Authors Guild, Inc. v. HathiTrust*, 902 F. Supp. 2d 445, 460-61, 464 (S.D.N.Y. 2012)). Accordingly, to the extent Congressional action addresses this subject, it should be done with the objective of preserving and promoting these valuable activities.

II. Causes and Effects of the Orphan Works Problem

Existing limitations and exceptions are bounded, of course, and beyond those boundaries uses of works must be licensed. Licensing, however, is greatly hampered by the orphan works problem. Orphan works represent a substantial obstacle to the promises of mass digitization. The orphan works problem is the product of three independent policy choices in the late 20th century: (1) the repudiation of formalities; (2) repeatedly lengthening copyright terms; and (3) disproportionate remedies. The confluence of these policy choices has produced a system in which rights are dispensed without record, for a period of time likely to exceed human memory, and yet succeeding generations face penalties for violating those rights that are de-linked from the magnitude of the injury. The result is a system that consigns large numbers of works to obscurity and non-use. Given formalities, intellectual property would behave more like the property to which it is often analogized; and given shorter terms, authors and rights-holders would be less likely to disappear over the passage of time.

Insofar as the first two sources of the orphan works problem were perceived as prerequisites to harmonization with international copyright conventions, policy options around

these may be limited. Remedies, on the other hand, are not so limited. Although the Berne Convention restricts formalities, it leaves the means of redress to the laws of the nations where protection is claimed.² In particular, statutory damages are a form of redress particularly characteristic of U.S. law, not employed or accepted universally, and thus constitute a viable area for reforms to alleviate the orphan works problem and encourage mass digitization and preservation efforts.

A. Formalities

Moving away from an “opt-in” default for copyright protection was the most proximate cause of the orphan works problem. While one of the merits of an opt-in system is that it does not dispense unsought entitlements, re-implementing formalities may pose certain international complications. Berne’s prohibition on formalities is carried forward in the World Trade Organization Agreement on Trade-related Aspects of Intellectual Property Rights,³ the WIPO Copyright Treaty,⁴ and the WIPO Performances and Phonograms Treaty.⁵ Various proposals have been advanced toward restoring formalities in an ostensibly Berne-compliant manner,⁶ but the U.S. Copyright Office has previously recommended against formalities-related proposals in light of international obligations.⁷

B. Term

According to a liberal interpretation of the Constitution’s Progress Clause,⁸ copyright term has repeatedly been extended to its current, extraordinary length. The most recent extension in 1998, validated by the Supreme Court in *Eldred v. Ashcroft*, 537 U.S. 186 (2003), compounded by two decades the problem of orphan works. The effect of term extension on orphan works was a “known bug” – the Copyright Office had previously identified problems associated with term extension, having cited users’ complaints from as early as the consideration

² Berne Convention for the Protection of Literary and Artistic Works, as last revised July 24, 1971, amended Oct. 2, 1979, S. TREATY DOC. NO. 99-27, 828 U.N.T.S. 221.

³ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 81.

⁴ WIPO Copyright Treaty, Dec. 20, 1996, S. TREATY DOC. NO. 105-17, 36 I.L.M. 65.

⁵ WIPO Performances and Phonograms Treaty, Dec. 20, 1996, S. TREATY DOC. NO. 105-17, 36 I.L.M. 76.

⁶ See, e.g., Christopher Sprigman, *Reform(alizing) Copyright*, 57 STANFORD L. REV. 485 (2004).

⁷ See, e.g., U.S. Copyright Office, *Report on Orphan Works* (2006) (available at <http://www.copyright.gov/orphan/orphan-report-full.pdf>), at 60-61 (noting options of a registration requirement, a notice requirement, and notice requirement as condition of enforcement).

⁸ U.S. Constitution, art. 1, § 8, cl. 8 (“To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”).

of the 1976 Act, where “some users pointed out that the longer copyright term created by that revision might inhibit scholarly or academic uses of works where the copyright owner may no longer be actively exploiting the work commercially.”⁹ The Copyright Office’s report also pointed out that “[d]uring consideration of the Sonny Bono Copyright Term Extension Act of 1998 [CTEA] (which extended the term of copyright by 20 years), the Copyright Office [had] noted problems with unlocatable copyright owners, while some users pointed out that term extension could exacerbate problems with orphan works.”¹⁰ These misgivings notwithstanding, the CTEA was enacted and endorsed, albeit half-heartedly, by the Supreme Court in *Eldred*. Since then, a life+70-term obligation has repeatedly appeared in U.S. free trade agreements.

C. *Disproportionate remedies*

The availability of statutory damages for copyright infringement – and in particular the potential for steep penalties independent of any demonstration of actual harm – dramatically increases the inherent risks associated with using orphan works. This has the effect of deterring productive noncommercial and commercial uses of works of minimal economic value. Commercial entities are less likely to build upon, disseminate, digitize, aggregate, or pursue other activities, due to the potential for 6-figure awards per work. Particularly in the orphan context, where digitization involves a large number of potentially registered works, the prospects for large statutory awards are daunting.¹¹ In light of the lack of treaty obligations around statutory damages and the lack of international consensus on this subject, Congress could consider rationalizing statutory damages to further promote the preservation and reuse of orphaned works.

Given the policy choices of the previous century, there are few attractive options for directly addressing the orphan works problem in a way that will encourage lawful mass digitization of works. The credibility of the copyright system depends upon its capacity to promote the creation *and use* of works of authorship, however. Accordingly, to the extent that Congress’s ongoing review of U.S. copyright law concludes that legislative action should be taken with respect to the digitization, preservation, and reuse of works, mitigating statutory damages should be considered.

⁹ *Report on Orphan Works*, *supra* note 7, at 16.

¹⁰ *Id.*

¹¹ Scholars have painted an in-depth picture of the punitive, unpredictable, inconsistent, and arbitrary outcomes that may occur under statutory damages. See, e.g., Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439 (2009).

"Preservation and Reuse of Copyrighted Works"

Written Testimony of Edward Hasbrouck
for the National Writers Union (UAW Local 1981, AFL-CIO)

Before the

Subcommittee on Courts, Intellectual Property and the Internet
Committee on the Judiciary
U.S. House of Representatives

April 9, 2014

Chairman Goodlatte, Ranking Member Conyers, Chairman Coble, Ranking Member Nadler, and members of the Subcommittee, we appreciate the opportunity to submit testimony in reference to your hearing on "Preservation and Reuse of Copyrighted Works."

As the only national labor union of working writers in all genres, media, and formats -- fiction and nonfiction book authors, journalists, business and technical writers, website and e-mail content providers, bloggers, poets, playwrights, editors, academic writers, and others, at all levels of commercial success -- the National Writers Union (UAW Local 1981, AFL-CIO) welcomes the opportunity to provide this written testimony for the record of the Subcommittee's hearing regarding "Preservation and Reuse of Copyrighted Works."

The preservation and reuse by writers of our own previous works have long been central to our creative process and to our ability to earn a living from our personal repertoires of past work.

The most basic business lesson passed on from each generation of freelance writers to the next is of the importance of being able to reuse our own work in new markets and media to generate additional revenues that sometimes exceed those for the first use of the work; to build on our own past work to create our own new works; and to preserve both our work and our rights to it so we are able to engage in and earn a living from those new uses.

Phrases, lines, sentences, paragraphs, and pages of text used in blog posts and magazine articles are the building blocks for our subsequent books -- and vice versa. Stories and articles are rewritten with new titles, tag lines, and "hooks" for new audiences and markets. All this is standard business practice.

As the entrepreneurial small business sector of the creative industries, individual writers -- not larger, less agile, legacy publishers -- have been the leaders in creating and pursuing new business models for distributing and earning a living from our work in the digital age. We aren't called "creators" for nothing, and our creativity extends to new ways to reuse our work, new ways to preserve it, and new ways to make it available, as well as to the creation of new written works on paper or on screen.

Those new models are increasingly disintermediated, decentralized, and digital, facilitated by the vastly increased ease of self-publishing and direct, peer-to-peer, writer-to-reader distribution.

Neither past print publishers, nor libraries that rely on publishers for information, typically know whether or how works included in "out of print" books or magazines have been reused, reissued, or made available by their creators in some new format or media, such as a new self-published or author-licensed print-on-demand edition (with a different ISBN), a self-published e-book, a PDF file of an individual story, article, or poem (first published in some book or journal) downloadable from the author's website, or a revised, updated, and perhaps reorganized and retitled version of some or all the same content now incorporated into one or more websites that generate advertising revenue.

If a work that is shown in a library catalog or bibliographic database as "out of print" in some past edition has been preserved and is now being reused and made available, that is most often because the author herself held onto a copy of the work, held onto or was able to reclaim her rights to reuse it, and has fact found a business model (more and more often some form of digital self-publication) which promised a reasonable return on the investment she has made in her time to make the work available, perhaps updated or improved or in a more usable format than the original.

For writers struggling to earn a living from writing, every marginal dollar, every potential revenue stream, and every piece of our work is essential. We can't afford to "abandon" any of our work.

It is publishers, not writers, who are much more likely to "abandon" works they have previously published. Typical author-publisher contracts have allocated 85-95% of revenues from sales of printed books to the publisher (under the "royalty" clause), but anywhere from 50% (under a subsidiary rights licensing clause, if it includes digital rights) to 100% (in the absence of any assignment of digital rights) of revenues for new digital editions to authors. This gives print publishers a compelling incentive to prioritize marketing of their "frontlist" of new books, while giving authors an equally great incentive to prioritize making their personal "backlists" of works available in new digital forms.

Observers unfamiliar with the book business might assume that the "long tail" of works included in old periodicals and in books shown as "out of print" in bibliographic databases makes a negligible contribution, if any, to authors' income. This is mistaken, to a rapidly growing degree. Many authors are finding that because of their larger share of revenues from new digital editions and the higher unit sales resulting from lower prices, they can earn more from new digital editions of their personal backlists than from the small royalty percentage a publisher pays them for frontlist books.

As a result, far more of the works included in "out-of-print" books and periodicals in library collections are available today in digital format because writers ourselves have made them available online or through licensed new digital editions than because libraries have digitized them or the original print publishers have actually held and legitimately exercised rights to have them digitized.

In this context, the role of Congress in preservation and reuse of copyrighted written works should be seen as the task of supporting writers – the people who are actually doing most of this preservation and reuse today – and enabling us to earn a living from this work.

The single greatest limitation on writers' ability to reuse and make available our past work is our inability to reclaim our rights to that work from past publishers who have disappeared due to corporate mergers and acquisitions or have gone out of business entirely. More and more of our own work is being placed beyond our own ability to make it available to would-be readers by publishers' insistence on contracts that assign rights beyond those publishers ever intend to exercise, and by the increasingly short typical lifespan and failure-prone nature of Internet and digital publishers.

One of the factors that must be considered in evaluating "fair use" under Section 107 of the Copyright Act is "the effect of the use upon the potential market for or value of the copyrighted work." The Berne Convention permits exceptions to copyright only if they do not "conflict with a normal exploitation of the work." Understanding of the new markets for copyrighted work in the digital age, and the "new normal" of business models, including those digital self-publishing and Web content, is thus an essential precondition to policy making on these issues. But little attention has been paid to this element of fair use analysis. Most discussion of writers' business models has relied on information from publishers (who are often unaware of how writers are exploiting our copyrights), or on other third-party speculation about us, for its conclusions about how we earn our livelihoods. We strongly encourage Congress and the Copyright Office to conduct more basic research about new markets and norms of exploitation in direct consultation with writers and other creators as the basis for any new policies.

An author who cannot be located may be profitably exploiting her rights in ways that are intended to ensure that she cannot be found. Writers on stigmatized or controversial subjects, whistleblowers, muckrakers, writers who fear retaliation for their writing, or writers who want to preserve their own or others' privacy – for example, a professional "mommy blogger" who wants to tell family stories without naming herself, or a writer on workplace issues who doesn't want to name her employer – may be earning their living from advertising on anonymous, untraceable websites. These writer/rights holder/self-publishers cannot be found by even the most diligent search, but what's important is that new digital business models have created markets that enable them to earn a living from their work.

As we have explained in detail in our comments to the Copyright Office, "orphan works" legislation would inevitably interfere with these normal forms of exploitation of rights by authors.¹

Rights held by a publisher that has gone out of business, on the other hand, are the typical case of genuinely "orphaned" rights that by definition cannot legally and commercially be exploited.

Section 203 of the Copyright Act has too many limitations and procedural obstacles to be useful to most writers, including a requirement for actual notice to the rights holder that can never be fulfilled if the rights holder has gone out of business without a successor-in-interest. As a result, Section 203 cannot be used by a creator to reclaim her rights, as a prerequisite to making the work available to new readers, in the case in which it is most needed: an "orphan publisher" that has gone out of business.

¹ NWU comments to the Copyright Office on "orphan works" (February 4, 2013), available at <<http://www.nwubook.org/NWU-orphan-works-4FEB2013.pdf>>, and NWU reply comments on "orphan works" (March 6, 2013), available at <<http://www.nwubook.org/NWU-orphan-reply-comments-6MAR2013.pdf>>.

It is hard to believe that Congress intended Section 203 to enable a creator to reclaim her rights from a recalcitrant and uncooperative publisher, but not from an out-of-business former publisher.

Reform of Section 203, as we have argued to the Copyright Office in our comments on "orphan works," could simultaneously solve the largest and easiest portion of the "orphan works" problem (the orphan or "zombie" publisher problem), while enabling creators to further pursue the new and publicly beneficial digital distribution business models in which we have already been the pioneers.

Reversion of rights to a work's creator(s) should be automatic after a number of years (no more than 20) without requiring notice, registration, or other formalities. Reversion of rights held by a corporation, partnership, or other entity other than a natural person should be automatic and immediate on the dissolution of the corporation, partnership, or entity, unless notice of a successor-in-interest is recorded with the Copyright Office before the entity is dissolved.

Many of writers' efforts to preserve, reuse, and make available our work in new formats, particularly in digital form, have gone on below the radar of librarians and bibliographers who remain focused on centralized, intermediated, legacy print publication business models and data sources.

Library catalogs, including that of the Library of Congress, and the work of the Copyright Office, reflect little of what writers have done to make our work available, including the massive (but decentralized) scale on which individual authors have already digitized portions of our work.

Authors' own efforts at digitization, self-publication, and distribution should not be omitted from discussions of models and possibilities for mass digitization. As we have already noted, if a digital edition of a work included in an "out-of-print" book or periodical in a typical library collection exists, it is most likely one created and distributed or licensed by the author herself.

Unfortunately, that available digital edition – perhaps one with new and updated content in a format that the author believes will be more useful to readers than the original edition – is unlikely to be listed in any library catalog or acquisitions database, and even less likely to be linked to records for the original edition in which the work was included. Librarians and bibliographers are continuing to rely on former print publishers as the exclusive and authoritative source of information about the status of availability of works included in books and periodicals previously published in print form, and are thus missing a vast assortment of available new editions.

Much of the digital content libraries and readers want already exists, but library catalogs and bibliographic databases don't enable librarians and readers to find those new editions. That's a cataloging problem, not a rightsholding problem. It's a problem that can and should be solved by librarians. It doesn't require legislation, but it does require librarians to talk to working writers and learn more about the forms in which writers have made, and are making, digital content available.

In failing to keep pace with the changes in writers' business models, libraries have fallen behind in their aspiration to serve as connectors between readers and the written work they seek.

If a writer is making available all or part of the content of a book or contribution to a journal on the writer's website, or as one or more self-published e-books, the writer probably wants libraries and library patrons to know about it. But neither the Library of Congress nor any other library or library consortium or cataloging system we know of allows an author to add information to an existing bibliographic listing to indicate (a) contact information for the author as rights holder in case a library or anyone else wants to seek a license for digitization or other use; (b) a URL or other information as to where all or part of the work is already available for acquisition by a library or consultation by a reader in digital form; (c) whether the author grants or is willing to grant a license for digitization, digital distribution, or other use on standard terms (such as some specified Creative Commons license) or for a specified standard fee (one-time fee, per-lending fee, monthly or annual license, etc.).

Congress should encourage the Library of Congress to take the lead in opening up its catalog to incorporate pointers to, and information about, decentralized mass digitization already being engaged in by individual writers. And Congress should encourage the Library of Congress and the Copyright Office to involve working writers directly in developing new policies and procedures, not to rely on assumptions about us and our business models made by even well-meaning outsiders.

We look forward to working with this Subcommittee and Committee, the Congress, the Administration, the Library of Congress, and the Copyright Office to continue our leading role as writers in preserving, reusing, and making available our work to readers in the widest possible range of formats and media, according to the widest possible range of existing, emerging, and not-yet-imagined business models. Thank you for considering our views.

Edward Hasbrouck
Co-Chair, Book Division

National Writers Union
(UAW Local 1981, AFL-CIO)
256 West 38th Street, Suite 703
New York, NY 10018

212-254-0279
nwu@nwu.org
<http://www.nwu.org>

**Prepared Statement of Marc Maurer, President,
the National Federation of the Blind**

Section 108 of the Copyright Act provides a safe harbor for libraries and archives to make copies of copyrighted works, without prior authorization, under a very limited set of circumstances. In the words of the statute, “[n]othing in this section . . . in any way affects the right of fair use as provided by section 107.”¹ Section 108 could not be any clearer that it does not supplant or otherwise limit fair use rights. Because fair use is critical to enabling the blind to access our society’s wealth of information, the National Federation of the Blind (“NFB”) respectfully requests that any revision to the Copyright Act retain a provision expressly stating that libraries’ right to copy is not limited to the circumstances enumerated in section 108.

Making copies of copyrighted works for the blind has long been considered a paradigmatic example of fair use.² Through the doctrine of fair use, blind individuals have been able to access copies of works that would otherwise be unavailable to them given the scant market for accessible texts. Fair use and section 121³ of the Copyright Act have worked to vastly increase access to copyrighted works for the blind. Programs like the Library of Congress National Library Service for the Blind and Physically Handicapped, Learning Ally, and Bookshare allow quick access to hundreds of thousands of popular titles to blind and other print-disabled readers.

With the development of the HathiTrust digital library, a digital collection of more than ten million works from various university libraries, equal access to scholarly works for blind students and scholars has become a reality. Before the HathiTrust, blind university students would have to wait weeks or months for limited, ad hoc access to required course reading and had no meaningful opportunity to engage in library research. The HathiTrust has begun to change this. Blind students and scholars at participating universities now have access to millions of texts at their fingertips, with the ability to browse titles, skim through book chapters, consult tables of contents and indices, and perform research on par with their sighted peers. The HathiTrust has been revolutionary for the blind.

If section 108 were to be revised so that it limited, or could be interpreted as limiting, libraries’ rights to make copies for the blind under sections 107 or 121 of the Copyright Act, all of the progress in advancing access to information for the blind would be lost. Indeed, in its lawsuit challenging the legality of the HathiTrust digital library, the Authors Guild has argued that section 108 requires that the HathiTrust be shut down.⁴ The crux of the Authors Guild’s argument is that the HathiTrust violates the Copyright Act because it exceeds the bounds of section 108 by including copies of every work in the libraries’ collections (rather than only those specifically requested or otherwise authorized under section 108) and by permitting blind readers to access the digital copies on their home computers outside of the walls of the library. Given the clear language of section 108(f)(4), the district court rejected the Authors Guild’s argument.⁵ Nevertheless, the Authors Guild has continued to argue on appeal that the libraries are not permitted to copy beyond what is authorized under section 108.⁶

If the Authors Guild’s argument were to prevail, or if section 108(f)(4) were eliminated, the doors of the library would, as a practical matter, be closed to the blind. If libraries’ right to copy materials were limited to only those rights set forth in section 108, libraries could make copies for archival purposes, but they could not create libraries of digital copies for use by the blind because such copies would not have been made upon the “request” of the user, but in advance of and in anticipation of

¹ 17 U.S.C. § 108(f)(4).

² *Copyright Law Revision*, H. R. Rep. No. 94–1476 at 73 (1976); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 455 n.40 (1984).

³ 17 U.S.C. § 121 permits authorized entities to copy and distribute copyrighted materials to the blind and other print-disabled individuals in specialized formats.

⁴ *The Authors Guild, Inc. v. HathiTrust*, 902 F. Supp. 2d 445, 456 (S.D.N.Y. 2012). The NFB intervened as a defendant in this lawsuit.

⁵ *Id.* at 457–58.

⁶ The Authors Guild’s appeal to the United States Court of Appeals for Second Circuit is pending. See No. 12-4547-cv (2d Cir.)

such requests.⁷ Thus, a student in need of sources for a research paper would have to wait for library staff to make an accessible copy of each book that seemed remotely on point—a process that might take longer than the time in which the student had to write the paper. Yet sighted students could simply walk into the library, browse the stacks, and immediately select and begin reading relevant texts. In a world in which libraries could not engage in mass digitization to make accessible copies of their collections in advance of individual requests, there is no way a blind student could compete with his peers or meaningfully engage in library research. The only way that blind students and scholars can be assured of timely and equal access to information is by having large collections of accessible digital copies ready for use in advance of requests for specific texts.

The other problem with confining libraries' ability to copy texts to the confines of section 108 is that it limits digital copies made for archival purposes from leaving the premises.⁸ A blind Ohio State University student who had persuaded Bookshare to make him a copy of his introduction to economics textbook would have to fly to northern California, where Bookshare's offices are located, each time the professor assigned new pages.

A revision of the Copyright Act that limited libraries' right to make accessible copies to only those circumstances enumerated in section 108 would therefore remove accessible texts from the hands of blind individuals, effectively excluding the blind from participation in our increasingly information-driven society. Such an outcome would run counter to the purpose of the Copyright Act, which is "to promote the Progress of Science and useful Arts."⁹ The Constitution is clear that copyright is first and foremost a tool for promoting learning, not for barring the blind from our collective storehouses of knowledge. Thus, to fulfill the purposes of copyright and to advance the tremendous progress that has been made in opening the library doors to the blind, the rights of libraries to make copies should not be limited to the circumstances enumerated in section 108, but should continue to include the rights set forth in section 107 and 121 of the Copyright Act.



⁷ 17 U.S.C. § 108(d),(e).

⁸ 17 U.S.C. § 108(b)(2), (c)(2)

⁹ U.S. Const., Art. I, § 8, cl. 8.