

By Electronic Submission

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**RE: Reply Comments to Orphan Works and Mass Digitization Notice of Inquiry, 77
Fed. Reg. 64,555 (Oct. 22, 2012)**

Dear Ms. Claggett:

This letter represents the Berkeley Digital Library Copyright Project's¹ reply to comments filed with the Copyright Office in the response to the October 22, 2012 Notice of Inquiry regarding orphan works and mass digitization.²

Our main contribution in this reply is on the "diligent search" concept. We wish to call your attention to two recent white papers we have prepared, appended to this reply, which set forth information about various approaches that orphan works proposals have taken regarding (a) who must conduct a diligent search,³ and (b) how diligent searches have been defined.⁴ We hope these resources will be of assistance to the Office's inquiry.

In addition, we make six points in this reply letter:

First, a comprehensive approach to orphan works access is preferable to a limited EU-like regime. Several commenters suggested that an orphan works regime should be limited in application to making works available through nonprofit libraries, archives, and other cultural institutions. While improving access to orphan works in the collections of those institutions is important, the orphan works problem extends far beyond those organizations. An approach that

¹ Institutional affiliation is for identification purposes only.

² Orphan Works and Mass Digitization Notice of Inquiry, 77 Fed. Reg. 64,555 (Oct. 22, 2012).

³ David R. Hansen, Gwen Hinze, and Jennifer Urban, *Orphan Works and the Search for Rightsholders: Who Participates in a 'Diligent Search' under Present and Proposed Regimes?* (White Paper No. 4, Berkeley Digital Library Copyright Project, 2013), <http://ssrn.com/abstract=2208163>.

⁴ David R. Hansen, Gwen Hinze, and Jennifer Urban, *What Constitutes a Diligent Search Under Present and Proposed Orphan Work Regimes?* (White Paper No. 5, Berkeley Digital Library Copyright Project, 2013), <http://ssrn.com/abstract=2229021>.



does not permit, for example, applications involving the creation of derivative works or commercial exploitation, would fail to address a core part of the orphan works problem.

Second, we reemphasize that fair use is an important part of a comprehensive approach to orphan works access and, to some degree, mass digitization. We agree with the diverse set of commenters who adopted this position, and urge the Office to affirm the importance of fair use as an important part of the orphan works and mass digitization solution space.

Third, regarding the reasonably diligent search standard, we believe that a flexible factor-based standard for what constitutes diligent search is preferable to a one-size-fits-all approach. Internationally, countries with orphan works regimes have adopted a wide variety of approaches to defining search standards; some contain prescriptive, statutorily-defined sets of resources to which searchers must consult. Others have open-ended standards with no guidance at all regarding what diligent search means in practice. There are good reasons to believe that enshrining a rigid, one-size-fits-all search process in a statute or even regulations would inhibit rather than facilitate searches for rightsholders. However, we recognize that there is value in providing more guidance on the “reasonably diligent search” standard. To meet that need, we recommend that the Office endorse the factor-based approach that it took in its 2006 report, which focused on guiding principles, rather than specific sets of resources, to determine the reasonableness of a given search.

Fourth, we agree with the many commenters who expressed support for the limitation on remedies approach that the Copyright Office recommended in its 2006 report. Given this agreement, we recommend that if the Office recommends legislative reform, it should follow the remedy limitation approach outlined in the Office’s 2006 report.

Fifth, we believe that orphan works and mass digitization do raise somewhat different concerns and should be differentiated in the Office’s policy recommendations. Many commenters made similar points in their comment that differentiated approaches would be appropriate. We agree.

Sixth, registries are an important part of any orphan works regime; development of those tools should be guided by several principles that would preserve their accessibility, utility, and ability to adapt to future needs.

I. A Comprehensive Approach to Orphan Works is Preferable to a Limited Approach

We agree with other commenters that libraries, archives and other cultural institutions should be able to fulfill their mission of preserving and providing access to their collections. But we disagree with proposals to narrow the scope of an orphan works regime to only these entities, or to excluding certain classes of works.⁵

⁵ See, for instance, comments submitted by American Association of Independent Music, American Society of Media Photographers, Graphic Artists Guild; National Press Photographers Association, and GS Stein.

Some commenters have suggested following the model adopted in the 2012 EU Orphan Works Directive. The Directive has been the subject of criticism within the EU precisely because of its scope limitations. For example, it excludes stand-alone photographs— one of the most complex and contested issues in the prior U.S. orphan works proceeding, and by far, the largest proportion of orphan works in the collections of the world’s cultural institutions.⁶ The Directive has also been criticized for imposing a mandatory minimum per-work search requirement that is too onerous and expensive for its very limited scope of relief. It requires payment of fair compensation to reappearing rightsholders for any past use, even where a diligent search was conducted, and precludes ongoing use of works previously thought to be orphaned without consent of the reappearing rightsholder. Commentators have also noted the lack of legal certainty it provides—the full set of copyright remedies apply where a good faith search undertaken by a cultural institution is subsequently found not to be diligent on criteria that are yet to be determined.⁷

The EU Directive also fails to provide any relief to individuals and private cultural institutions that wish to use orphan works. As the UK’s recent copyright consultation concluded, finding appropriate means to facilitate use of orphan works by all users is vital for innovation and economic growth.⁸ These considerations led the UK government to propose an orphan works regime that is more comprehensive in its scope than the EU Directive, covering both individuals and institutions, and permitting both commercial and non-commercial use of orphan works.

We believe that it would be premature to follow the approach of the EU Directive while it is yet to be implemented in the national laws of the 27 EU member states, and there is no experience to evaluate its effectiveness or usefulness as a model for other countries to follow. It remains to be seen whether it will deliver its intended goals—for instance, whether EU cultural institutions will rely on the EU Directive to digitize and make available orphaned EU works within their collections, or will instead find more protection and predictability by pursuing voluntary agreements.⁹

⁶ See GOWERS REVIEW OF INTELLECTUAL PROPERTY ¶4.93 (2006), available at <http://www.official-documents.gov.uk/document/other/0118404830/0118404830.pdf> (reporting figures provided by the Chair of the UK Museums Copyright Group that 70 major UK museums could not identify the rightsholders of about 90% of their combined collection of 19 million photographs).

⁷ Information Sans Frontières, *Response to the Final Compromise Text of the Orphan Works Directive*, June 22, 2012, at: <http://informationsansfrontieres.eu/2012/06/22/a-response-from-information-sans-frontieres-to-the-final-compromise-text-of-the-orphan-works-directive-4/>; see also TransAtlantic Consumer Dialogue, *Orphans Left Out in Cold: Final Vote on Weak Directive*, IP POLICY BLOG, Sept 12, 2012, <http://tacd-ip.org/archives/742>.

⁸ See UK Intellectual Property Office’s Final Impact Assessment, June 15, 2012, at 30: <http://www.ipo.gov.uk/consult-ia-bis1063-20120702.pdf> (estimating that the economic benefits to libraries and individual users for being able to make use of currently orphaned works would be between £2 m and £76 m p.a. with the best estimate being the average, £39 m p.a., and noting that additional commercial opportunities could arise from facilitating permission to use orphan works).

⁹ See Lucie Guibault, *Are European Orphans About to be Freed?*, KLUWER COPYRIGHT BLOG, Sept. 21, 2012, <http://kluwercopyrightblog.com/2012/09/21/are-european-orphans-about-to-be-freed/>

Given these concerns, we make the following recommendation:

Recommendation 1: Any orphan works legislative or policy framework should be comprehensive in scope, and cover institutional and non-institutional, commercial and non-commercial, prospective users of orphan works.

II. Fair Use is an Important Part of a Comprehensive Orphan Works Regime

We agree with the diverse set of stakeholders¹⁰ who have stated that fair use plays an important role in facilitating use of orphan works in current U.S. practice, and is a crucial component of any future proposed legislative or policy orphan works solution. American libraries and cultural institutions are already relying upon fair use together with community-developed best practices to provide access to selected works within their collections, and to enable digitization projects they are undertaking to preserve their collections, to provide accessible format copies to print disabled users, and to facilitate the creation of new technologies and search tools to provide more effective use of works in their collections. Several court decisions (although presently on appeal) have recently affirmed that libraries have applied these principles accurately in determining classes of works for digitization projects and in setting access policies for particular works.¹¹

Since 2006 several U.S. courts have also affirmed that non-expressive or non-consumptive uses of works that do not harm the market for the original work, such as creating and displaying thumbnail images, copying to create full text searchable indices, and other non-expressive uses of metadata, are fair use, and therefore do not require licensing.¹² Although now pending on appeal, the district court in *Authors Guild, Inc. v. HathiTrust* seemed to accept that mass digitization of orphan works and other works for the purpose of extracting metadata should also be considered fair use.¹³ Given those decisions, we believe the Office should reject suggestions

¹⁰ See, e.g., comments filed by Library of Congress, Library Copyright Alliance, American Bar Association Section of Intellectual Property Law (noting that fair use may only offer a partial solution), American Intellectual Property Law Association, the Artists Rights Society, International Documentary Association et al., Bruce Lehman (noting comments filed by the Library Copyright Alliance that libraries are relying on fair use), and American Association of Publishers (supporting clear language explaining that legislation addressing case by case use of orphan works does not affect any right, or any limitation or defense to copyright infringement, including fair use).

¹¹ *Authors Guild, Inc. v. HathiTrust*, 11 CV 6351 HB, 2012 WL 4808939 (S.D.N.Y. Oct. 10, 2012); *Cambridge University Press v. Becker*, 863 F.Supp.2d 1190 (N.D. Ga. 2012)

¹² *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007), (clarifying that reproduction and display of images in the context of online indexing that promotes information access can be fair use); *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009) (concerning reuse of digital copies of student papers in plagiarism detection software, finding that fair use allows for information access and manipulation not just with search or indexing of harvested online content, but also for broader sets of works and for other non-expressive information access uses); *Authors Guild, Inc. v. HathiTrust*, 11 CV 6351 HB, 2012 WL 4808939 (S.D.N.Y. Oct. 10, 2012).

¹³ *Authors Guild, Inc. v. HathiTrust*, 11 CV 6351 HB, 2012 WL 4808939, at *14 (S.D.N.Y. Oct. 10, 2012) (citing with approval to the amicus curiae brief of Digital Humanities and Law Professors)

that licensing regimes be created to cover these types of uses.¹⁴

U.S. courts have also rejected the general idea that the availability of other limitations or exceptions limits the ability of users to rely on fair use. Fair use is a fundamental part of the U.S. copyright system, serving the constitutional purpose of copyright, and reconciling what might otherwise be an irresolvable tension between freedom of expression and protection of copyright holders' rights. As the *HathiTrust* court recognized, fair use and other limitations and exceptions operate side by side.¹⁵ Similarly, users of a prospective orphan works regime should not have to elect to rely on either the orphan work use protections or other limitations and exceptions such as fair use.¹⁶

Finally, as we explained in our initial comments, we believe that there is a strong argument that the orphan works status of a work should itself tend to tilt a given use more toward being fair. This argument, more fully developed in Jennifer Urban's article, *How Fair Use Can Help Solve the Orphan Works Problem*,¹⁷ focuses on two aspects that are unique to true orphan works: first, the nature of the work itself, as an under-exploited and currently unused work, should tend to tilt the second fair use factor analysis (nature of the work) in favor of a fair use finding, and second, because use of an orphan work has no impact on the potential market for the work under the fourth fair use factor, because no market can exist without an owner to sell or license the work.

We note that there is a separate question of what works should be considered orphaned for the purpose of asserting fair use. The library and archive community is already making this determination in practice, and a growing community of libraries, archives and memory institutions are also exploring how to document their use and search process in a best practices document.¹⁸ Some of the undersigned researchers are helping to facilitate the latter process. As a group, we think these various approaches should be encouraged and allowed to develop over time.

Any new legislative or policy proposal should accommodate current practice, and leave room for future development of community-based best practices and fair use jurisprudence. Accordingly, we reiterate our previous recommendation on this point:

¹⁴ See comment of the Copyright Clearance Center.

¹⁵ *Authors Guild, Inc. v. HathiTrust*, 11 CV 6351 HB, 2012 WL 4808939, at *14 (S.D.N.Y. Oct. 10, 2012); See also Jonathan Band, *The Impact of Substantial Compliance with Copyright Exceptions on Fair Use*, 59 J. Copyright Society USA 453 (2012), <http://ssrn.com/abstract=1966593>.

¹⁶ See comment of the Professional Photographers of America, at 8.

¹⁷ Jennifer M. Urban, *How Fair Use Can Help Solve the Orphan Works Problem*, 27 BERKELEY TECH. L.J. (forthcoming 2013), <http://ssrn.com/abstract=2089526>.

¹⁸ REPORT ON ORPHAN WORKS CHALLENGES FOR LIBRARIES, ARCHIVES AND OTHER MEMORY INSTITUTIONS (January, 2013), <http://centerforsocialmedia.org/report-orphan-works-challenges-libraries-archives-and-other-memory-institutions> (a report in which Jennifer Urban and David Hansen, signers of this letter, participated in drafting); see also Society of American Archivists' initial comments and *Orphan Works: Statement of Best Practices* (2009), <http://www.archivists.org/standards/OWBP-V4.pdf>.

Recommendation 2: The Office should affirm that fair use is an important part of the orphan works and mass digitization solution space and is being relied upon by libraries and archives. The Office should take care to explicitly preserve fair use as a part of the solution to the orphan works problem if it decides to recommend legislative reform. This could take the form of an explicit savings clause similar to that in 17 U.S.C. § 108(f)(4).

III. A Factor-Based Standard for What Constitutes Diligent Search is Preferable to a One-Size-Fits All, Rigid Approach

A large and diverse set of commenters discussed identifying orphans as a key issue. Many identified a “diligent search” for rightsholders as an important component of any orphan works proposal;¹⁹ some commented on specific features that that should entail, or on deficiencies with the definition of that term in previous legislative proposals.

Based on our research, we believe that the notion of a “reasonably diligent effort” to search for a work’s owner, as used in the Copyright Office’s 2006 report, in subsequent U.S. legislative proposals, and in similar form in several other countries’ orphan works regimes, is not yet well understood. Indeed, while the term “diligent search,” or a similar term, is used in a variety of different regimes, the expectations and minimum requirements differ significantly across different regimes and proposals.

In recognition of this ambiguity, our research team has produced a set of white papers that explore what is meant by “diligent search” in various orphan works regimes, and how the standards are operating in practice. As explained above, the first paper in that series focused on who must participate in the search process, and was submitted as an appendix to our initial comments.²⁰ The second paper surveys the nature and extent of diligent search requirements in

¹⁹ Including, for instance, comments submitted by a number of library organizations and the American Federation of Musicians of the United States and Canada, AFL-CIO, and The Recording Academy; the American Society of Journalists and Authors; the Digital Music Association; Graphic Artists Guild; the Independent Film and Television Alliance (IFTA); the Internet Archive; the International Documentary Association, Film Independent, Independent Filmmaker Project, Kartemquin Educational Films, Inc., National Alliance for Media Arts and Culture; Gilda Brasch; Kelly Duane de la Vega of Loteria Films, Katie Galloway, Roberto Hernandez, Karen Olson of Sacramento Video Industry Professionals, Marjan Safinia of Merge Media, and Geoffrey Smith of Eye Line Films (the International Documentary Association); the Magazine Publishers of America; the National Press Photographers Association; Picture Archive Council of America, Inc.; Professional Photographers of America; the Recording Industry Association of America and Science Fiction and Fantasy Writers of America, Inc.

²⁰ David R. Hansen, Gwen Hinze, and Jennifer Urban, *Orphan Works and the Search for Rightsholders: Who Participates in a 'Diligent Search' under Present and Proposed Regimes?* (White Paper No. 4, Berkeley Digital Library Copyright Project, 2013), <http://ssrn.com/abstract=2208163>.

various countries' orphan works regimes.²¹ Both papers are attached to these reply comments as an appendix. Based on that research, we make three observations:

First, there seems to be a growing international trend towards differentiated approaches that facilitate different types of uses and users of orphan works.

Second, as the U.S. legislative experience demonstrates, there are risks in attempting to specify a detailed definition of a reasonably diligent search in national law. While such a definition might seem initially to offer greater legal certainty for prospective users, rights management identification processes and technologies are rapidly changing, and an overly prescriptive approach risks becoming outdated. An overly prescriptive approach could also have the unintended consequence of disqualifying a good faith user who has engaged in what appears to be a reasonably diligent search for the user's particular circumstances, but who may not exactly have followed enumerated steps set out in national legislation or administrative rules. This could be because certain steps are clearly unavailing or irrelevant to the particular work or the use, because arising search techniques or technologies have offered new steps not available when the enumerated list was created, or for other reasons.

Third, the level of enumerated detail required for any reasonably diligent search definition should be considered in light of the consequences of failing to meet the definition, as well as the likelihood of reasonable practices changing over time in response to new resources.

Other jurisdictions (such as the EU and the UK) have attempted to avoid these potential pitfalls by prescribing a general framework with a minimal threshold or set of requirements for what constitutes a diligent search, leaving additional details to be developed in national implementation legislation, by secondary legislation, or by administratively established guidelines. The Copyright Office could issue guidance materials to help users responsibly identify orphan works, and assist copyright owners to offer information about how to find the owners of different types of works. We caution, however, against administrative rules and rulemaking proceedings that could recreate the issues created by enumerated lists, and that would require substantial resources to revisit periodically.

Given the need to balance useful guidance with the flexibility to adapt search practices to new situations and new technology, we recommend that the Office adopt the approach it recommended in its 2006 report, which identified several factors that would determine the reasonableness of a search in any given circumstance, without specifying specific resources to which one must look. Those factors included: The amount of identifying information on the work itself; whether the work had been made available to the public; the age of the work; whether information about the work is available in public records; whether the author is still alive, and the nature and extent of the use.²²

²¹ David R. Hansen, Gwen Hinze, and Jennifer Urban, *What Constitutes a Diligent Search Under Present and Proposed Orphan Work Regimes?* (White Paper No. 5, Berkeley Digital Library Copyright Project, 2013), <http://ssrn.com/abstract=2229021>.

²² REGISTER OF COPYRIGHTS, REPORT ON ORPHAN WORKS 98-108 (2006), <http://www.copyright.gov/orphan/orphan-report.pdf>.

Recommendation 3: The Copyright Office should endorse the approach it took in its 2006 report, which focused on factors relevant to the search rather than specific guidelines. The Office should also continue to carefully study and solicit stakeholder input on the notion of a “reasonably diligent search” as a mechanism to determine to which set of works an orphan works regime should apply.

IV. Limitation on Remedies

We note the strong support in the initial comments for an orphan works approach based on limiting the remedies that could be applied against good faith users that have conducted a reasonably diligent search.²³ We agree with the commenters who have noted that fear of large statutory damages awards increases the inherent risk of using suspected orphan works in the United States.²⁴ As some of our team members have noted elsewhere,²⁵ the U.S. copyright regime’s statutory damages regime has deterred lawful and potentially productive uses of copyrighted works and thwarted the constitutional purposes of copyright.

Therefore, we reiterate Recommendation 4 from our initial submission that courts be given discretion to remit statutory damages for users of orphan works that the court determines have conducted a reasonably diligent search for rightsholders prior to use of the work. We also support the suggestion in several of the initial comments²⁶ to reduce the minimum award of statutory damages to \$200 per work for innocent infringers in these circumstances.

Recommendation 4: If the Office decides to recommend legislative reform, it should follow the limitation on remedy approach proposed in the Copyright Office’s previous report. Any legislative solution for orphan works should include an exemption from statutory damages awards against a user that has conducted a reasonably diligent search. It should also provide a workable solution for derivative works that use works considered to be orphaned on the basis of a prior diligent search.

III. Differentiated Approaches for Mass Digitization and Individual Uses May Be Appropriate

The initial comments exhibited widespread support for differentiated approaches tailored to different types of uses and works. We agree with the many commenters who stated that mass digitization and projects that involve use of multiple suspected orphan works raise different

²³ See, e.g., initial comments filed by the American Intellectual Property Law Association, Motion Picture Association of America, Inc., Computer and Communications Industry Association, the Library Copyright Alliance, and the Electronic Frontier Foundation/ Public Knowledge.

²⁴ See initial comments of CCIA.

²⁵ Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WILLIAM & MARY L. REV. 439 (2009).

²⁶ See initial comments of CCIA and EFF/PK.

policy issues from work by work and small-scale uses of orphan works, and should be considered separately.²⁷ As we noted in our initial comments, and as documented in the comment submitted by several library organizations,²⁸ requiring work-by-work searches for mass digitization projects involves significant costs and may jeopardize digitization projects that greatly benefit the public interest.

We recognize that there are differing views about whether it is feasible and necessary for non-commercial public-spirited mass digitization projects to undertake a prior reasonably diligent search on a work-by-work or collection level basis. Whichever view the Copyright Office takes on that question, the Copyright Office should investigate the appropriateness of a differentiated approach to remedies that apply to different scale uses. Therefore, we reiterate the recommendation made in our initial comments:

Recommendation 5: The Copyright Office should consider adopting tailored solutions that facilitate different uses and different types of users of orphan works.

VI. Voluntary Registries

We wish to register our concurrence with the many commenters who identified the development of voluntary registries, use of metadata, and technological tools, as important to alleviating challenges posed by orphan works.²⁹ One important development since 2006 is that industry groups, non-profit organizations, and others have put considerable effort into creating registries in various sectors with the explicit goal of making it easier to identify and communicate with rightsholders of particular works. Several commenters drew the Copyright Office's attention to promising new registries, including the Picture Licensing Universal System (PLUS) (for visual works), the Global Repertoire Database (for musical works), ARROW and ARROW-Plus (for various types of works).³⁰

²⁷ On the need for differentiated approaches to mass digitization and case by case use of orphan works, see, e.g., comments submitted by Microsoft, the Motion Picture Association of America, Inc., the Recording Industry Association of America, Inc., the Science Fiction and Fantasy Writers of America, Inc., and Software & Information Industry Association.

²⁸ See, e.g., comments of the Library of Congress, Council of University Librarians at the University of California, and Duke University Libraries.

²⁹ See, e.g., initial comments of ALL/ MLA/ SLA; ABA; ASCAP/BMI; EFF/ PK; Films Around The World; Microsoft; MPAA; MPA/ HFA; PACA; SIIA; Jill Zimmerman.

³⁰ On PLUS, see, e.g., comments of American Society of Media Photographers, Copyright Alliance; the Copyright Clearance Center, Inc. (CCC); Graphic Artists Guild; Motion Picture Association of America, Inc. (MPAA), Professional Photographers of America; and Picture Archive Council of America, Inc.; on Global Repertoire Database see, e.g., comments of American Society of Composers, Authors and Publishers and Broadcast Music, Inc.; CCC; MPAA; and National Music Publishers' Association and Harry Fox Agency.

The initial comments expressed a range of views on key questions related to voluntary registries:

- whether copyright owners should bear the responsibility of including works in registries, or whether prospective users of orphan works or a central agency should register suspected orphaned works in an orphan works registry, or whether prospective users should file notices indicating their intent to use a particular work suspected of being orphaned;
- the appropriate role for the Copyright Office to play regarding the creation and regulation of such registries; and
- the relationship between searching voluntary registries and what constitutes a “reasonably diligent search” for the purpose of qualifying for remedies limitations or statutory safe harbors from potential copyright infringement.

As we explain in our initial comments, we consider the development of voluntary registries to be a highly desirable part of a robust orphan works system. Our recommendations regarding registries are:

Recommendation 6: We encourage the Copyright Office to undertake further study of the role voluntary registries might perform in a comprehensive orphan works regime.

Recommendation 7: The Copyright Office should be guided by the following overarching principles in considering the appropriate role for, and features of, voluntary registries in an orphan works regime:

- **Content:** Registries should include information about the copyright status and current licensing arrangements that cover their works and, where available, digital watermarks and metadata associated with their works;
- **Searchable:** Registries should be fully searchable, including by metadata describing the creator and subjects of photographs and visual art works; the Copyright Office should encourage use of visual and audio matching systems as they become more accurate and feasible;
- **Publicly Accessible:** Registries should be publically accessible and searchable by all, for low or no cost;
- **Linked:** Registries should be federated with other rights management databases and metadata sources, with the goal of creating a single interface for searching along the lines of the proposed UK Copyright Hub.³¹ This would enable a copyright owner to record information or register a work in only one place, reducing the potential burden on rightsholders while facilitating ease of searching and legal certainty for good faith searchers.
- **Extensible and Interoperable:** Registries should be extensible and interoperable, permitting rightsholders and users to provide updated information subject to an appropriate verification process, and enabling other entities to build new database interfaces and search applications that interoperate freely with the data in the registries.

³¹ Richard Hooper CBE & Dr Ros Lynch, *Copyright Works: Streamlining Copyright Licensing for the Digital Age* (July 2012), <http://www.ipso.gov.uk/dce-report-phase2.pdf>.

- **Comprehensively Sourced:** A federated system of registries should provide access to data held by public entities and by private sector parties. The Copyright Office should consider releasing the full set of digital records that it holds in open XML format to permit use and incorporation of that data into a federated system. The public sector data could be released under a license that would require any subsequent user of the data to provide open access to that data.
- **Public Access Policies:** We believe that orphan works issues will be most efficiently addressed through a combination of private sector databases and voluntary registries, together with thoughtful and consistent national information policies that apply to the public sector. For instance, this could take the form of mandating inclusion of appropriate metadata on authors and licensing agreements as part of a new public access policy for publicly funded research works.³²

Recommendation 8: The Copyright Office should consider how to encourage the creation of voluntary registries by private sector entities and public cultural institutions with the requisite expertise in this area, and explore mechanisms to ensure the accuracy and trustworthiness of such voluntary private registries, including possible certification by the Copyright Office, and to ensure that registries do not become subject to the exclusive control or commercial exploitation by any private party or public institution.

We would be pleased to provide additional information on the above matters or to elaborate on aspects that would be of assistance to the Copyright Office's inquiry. We can be contacted at dhansen@law.berkeley.edu or at (510) 643-8138.

Respectfully,



David Hansen, with and on behalf of Pamela Samuelson, Jennifer Urban, Jason Schultz, and Gwen Hinze

³² For instance, this could be incorporated in regulations made under a Directive issued by the Office of Science and Technology Policy in the Executive Office of the President on use of data and metadata, following the approach taken in the recent Directive on Open Access in *Memorandum on Increasing Access to the Results of Federally Funded Scientific Research* issued by John P Holdren, Director of the Office of Science and Technology Policy, February 22, 2013, at:

http://www.whitehouse.gov/sites/default/files/microsites/ostp/ostp_public_access_memo_2013.pdf. See also Berkeley Digital Copyright Library Project's comments to the Office of Science and Technology Policy, December 29, 2011, at http://www.law.berkeley.edu/files/OSTP_Comments.pdf.