

Testimony of

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

My comments today represent the view of a wide variety of independent and documentary film and independent media organizations, including: Association of Independent Video and Filmmakers; Doculink; Film Arts Foundation; FIND (Film Independent); International Documentary Association; IFP (Independent Feature Project); National Alliance for Media Arts and Culture; National Video Resources; and Public Knowledge. Together, these organizations represent hundreds of thousands of independent and documentary filmmakers, video artists, production facilities, community technology centers, film festivals, media distributors, film archives, after-school programs, community-access television stations and individuals working in the field of film and media arts.

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

Introduction

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

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

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

Whether or not he'd be allowed to get away with this depends on the outlet. PBS uses an exemption for music that allows filmmakers to pay into an escrow account. Most commercial networks and all cable channels would force the filmmaker to delete the music from the scene. It may seem like a small thing, but it has a chilling effect on a filmmaker's ability to create mood and nuance, and to tell a true story - the very things that make television so compelling.

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

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

One piece that has escaped scrutiny is the often seen footage of the Black Panther Party going through their paces in Oakland during the sixties. Associates of mine have spent months trying to find the person who shot that footage, to no avail. We have no idea where it came from. When we use it, we claim it is public domain, cross our fingers, and hope for the best. We try not to use too much of it, lest the grandchild of the person who shot it comes after us.

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

This subcommittee, and the Congress, have before them a tremendous opportunity to inject new vitality into our culture and our democracy by ensuring that forgotten orphan works find new audiences, and that those artists seeking to use such works are able to do so without the fear of great monetary liability. For independent and documentary filmmakers in particular, a solution to the orphan works problem is critical.

Particularly for works that do not lie within established archives, finding the true copyright owner is a labor fraught with difficulty. When a filmmaker cannot clear an orphaned work, she is left with two choices under the present system: 1) proceed, using the work, with the knowledge that unknown liability costs--or even an injunction--may lie ahead; or 2) refrain from using the work. Without a large institution to help spread the monetary risk, with the knowledge that she will have to compete aggressively to sell her film to often risk-averse distributors, indemnify them, and obtain insurance, and with the possibility of an injunction that could squelch her film forever, she simply cannot use the orphaned work. As such, the creative work that she has conceived and would like to present to the public is compromised, and the orphaned work languishes in obscurity.

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

The Copyright Office Report The filmmakers that I represent here today wish to express their deepest appreciation to Chairman Hatch, Ranking Member Leahy and your counterparts in the House, Representatives Smith and Berman, for asking the Copyright Office to address the issue of orphan works. We believe that the Copyright Office undertook

the task you gave them with great seriousness and respect for the views of parties across the spectrum of users and copyright holders. The result is a thoughtful and comprehensive report that evidences great understanding of the problems faced by individual artists seeking to make use of copyrighted works for which the author cannot be found.

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

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

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

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

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

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

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

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

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

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

Thus, we agree with the Report and the vast majority of proposals that a meaningful solution to the orphan works problem calls for "clear limitations on the statutory damages and attorneys' fees remedies in cases involving orphan works."²

However, the Report's proposed general remedy of "reasonable compensation" would not provide the necessary level of certainty or clarity to many orphan works users.

In order to give independent filmmakers the needed certainty to use orphan works, a statutory damages cap is imperative. The Report recognizes that the prospect of a large monetary award for an infringement claim, regardless of its likelihood, is a substantial deterrent for any user of orphan works. It is understandable that "reasonable compensation" may be a meaningful option for some users, particularly those with the institutional ability to spread risk. For most independent artists, however, spreading risk across a larger organization or a multitude of projects is not an option, and neither is budgeting for the potential financial costs of adjudicating a claim. This greater risk is exacerbated by the fact that independent filmmakers and other small artists operate in a market where cost is relative and difficult to ascertain in advance. As such, greater certainty of potential financial risk is critical to their ability to use a work. Overall, the small filmmaker needs to be confident that her decision to make use of an orphan work will not lead to unanticipated costs that could derail her project. Without the certainty provided by a cap, many users simply could not properly measure their potential exposure, preventing them from using orphan works. Importantly, a statutory damages cap will benefit both users and owners. A cap facilitates the transaction between orphan works owners and users by eliminating the need for costly litigation. When a user can properly budget for an orphan works' use, she will be in a better position to pay an emerging owner. Both the user and owner can avoid the costs and uncertainties of litigation, ensuring a monetary return to the owner. Indeed, under the "reasonable compensation" standard proposed by the Copyright Office, which looks to other comparable marketplace transactions, it is possible that the owner will receive little or no payment. Moreover, if litigation is necessary, it is possible, if not likely, that the owners' legal costs will far exceed what "reasonable compensation" he receives. The certainty of a cap provides clear incentives for owners to emerge to collect their awards (and reduces the number of orphan works overall). It also invites users to create with advance knowledge of what the cost of use will be. This is critically important for independent filmmakers and other media artists, who operate under very tight budget constraints.

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

We also understand concerns that a damages cap--or other remedy limitation--could cause some users to refuse to make any payment because the user would know that the costs of pursuing a damages award by the owner would greatly exceed the amount of the capped damages. One way to address this concern is to provide for an exception to the limitation of remedies in cases where a user refuses "to negotiate in good faith." This was suggested by Associate Register for Copyrights Jule Sigall at the March 8, 2006 Oversight Hearing on orphan works before the House Subcommittee on Courts, the Internet and Intellectual Property. Assuming that such an exception would be reserved only for cases of bad faith, we would support the idea.³

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

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

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

All three of the Copyright Office's goals for an orphan works solution are facilitated by the certainty of a cap: reducing the number of orphan works; permitting use of existing orphan works; and reducing costs and burdens on all stakeholders dealing with an orphan works scenario. Although we strongly believe that a statutory cap is essential to a workable orphan works solution for many independent artists, should Congress nonetheless adopt a "reasonable compensation" remedy, there are important clarifications that can be made to the Report's definition of "reasonable compensation" that would provide some needed comfort to an independent filmmaker or other artist using an orphan work. Most notably, we support the addition of statutory language that makes clear how "reasonable compensation" is determined.

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

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

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

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

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

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

Moreover, differentiating between uses that have "any purpose of direct or indirect commercial advantage," as the Report attempts to do, and those that do not, is challenging and problematic. This is reflected in the Report's explanation and was captured at the Summer 2005 roundtables, as well.⁶ A bright line is elusive, especially so in the context of media created by individuals who lack institutionally "non-profit" status, but who operate without a pure profit motive. For instance, what would be made of a film project undertaken by a filmmaker and submitted to a

school-run film festival that goes on to garner awards at national festivals? There are simply too many areas that are technically commercial, but operate with such limited budgets and for the public good that the distinction fails. Likewise, there are not-for-profit organizations that are so large and successful that their ability to respond to damages and undertake risk mirrors their commercial counterparts. The option to cease infringement should not be based on such a murky distinction.

In many cases, of course, it is impossible for a filmmaker to cease a use in a film that has already been finished, but in some cases, "takedown" may be a better choice for the filmmaker. Since independent filmmakers have such sensitive budgets and work on projects where the fair market value for a particular use might be hard to know in advance, the option of taking down the work is critical. This is especially important in the case of experimental and avant-garde films or other new types of art, where there are few useful market transaction guidelines. For other types of artists, such as artists whose canvas is the World Wide Web or those working in other multi-media platforms, the option to take down may be even more important.

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

Injunctive Relief Should Be Limited

So long as there is a broad threat of an injunction, artists will be forced to shun the use of orphan works. As the Report acknowledges, one of the worst nightmares for any filmmaker is a last-minute injunction brought right before the release of a film.⁸

Although takedown may in some cases be the best option in the face of a lawsuit to determine reasonable compensation, it will always be a second-best option for a filmmaker or other follow-on creator who has incorporated orphan works into new creations. As such, a meaningful limitation on injunctive relief is critical for filmmakers.

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

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

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

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

We agree with the Report's recommendation that the attribution requirement can function as a way to advertise the use of orphan works to potential owners, thus encouraging them to step forward. More generally, artists appreciate and follow the general convention of crediting authors and other creative contributors to a project, and we expect others to do the same for us. However, when an attribution is "appropriate under the circumstances" must be clarified in statutory language and legislative history so that the steps required to meet it are not unnecessarily complicated or

vague. Unless the attribution requirement is clear, the validity of the attribution might become a target for attack by an emerging owner seeking to disqualify the use of an orphan work from the purview of this proposed legislation.

We are similarly concerned that the Report does not adequately address instances where a user could reasonably rely upon the results of a previous third party search. The mechanisms of many media industries require a downstream user to rely on the reasonable search efforts undertaken by another party, but still within the context of a single "use" of an orphaned work. For example, a film's distributor should not be required to conduct a brand new search after the filmmaker has already done so in order to obtain protection. Indeed, the Report mentions that it might be reasonable under certain circumstances for a user to rely on the search conducted by another.¹¹ We agree with the recommendation of Allan Adler, Vice President for Legal and Government Affairs for the American Association of Publishers that it should be made clear that any person who engages in a related infringing use of the same work as the user who conducted a reasonably diligent search, should be able to qualify for the limitations on remedies based on the user's search where the related infringing use occurs pursuant to a license from the user or the user's licensee. For example, if the original user of the "orphan work" is an author who incorporates the work into a new work pursuant to conducting a search that meets the statutory standard, then the publisher of the new work, as well as the publisher's distributors and licensees, would also qualify for the limitations on remedies without having to each conduct their own search for the copyright owner of the original work.¹²

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

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

We join the seemingly broad consensus that permitting the orphan works solution to sunset would not benefit the progress of the legislation but instead create more confusion and disruption. As we move toward an orphan works paradigm that provides more certainty for owners and users, a sunset provision that would repeal the law in the future would fundamentally undermine the goal of these collective efforts. Before she can change the way she works and creates vis a vis orphan works, a filmmaker, like any user, would have to know that protections granted by any new legislation are enduring. As an alternative, we support the Copyright Office undertaking a review of the effect of the orphan works legislation, perhaps every three or four years. Understanding the relative successes of the legislation as it is applied, and gathering additional feedback from creators and owners will permit fine-tuning or substantial changes as needed.

Conclusion

We who are documentary filmmakers work with bits and pieces of film, fashioning collages of visual material from found objects and the objects we create. But we can't provide a sense of context, or give the history behind any one subject - without using archived materials. In today's litigious environment, commercial television and other distributors have become risk averse. Even if I feel I've done due diligence to document that an owner can't be found, I will most likely not be able to use the footage.

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

I have been a television journalist for over thirty years. At a time when everyone complains about information overload and the vast ability of programs to be sent over virtually any platform, I feel as though the real education of the public is being hampered because of the onerous burden of researching and paying for rights for every scrap of footage I find. The public's ability to understand its own history, and to place that history in the context of those who

have gone before, in part depends on our ability to present a coherent and nuanced view. We can't do that by presenting snapshots of the present. We need access not only to the documented versions of the past, but the strips of home video, movies, still photographs and even music which remain largely undocumented. As the country becomes more diverse the need to present the historical context for points of view that rely on materials whose origin may remain unknown cannot be chilled. Our ability to hold informed discourse in the public square depends on all of us understanding where we've been, and how we got there.

I would like to again thank Chairman Hatch, Ranking Member Leahy and members of the Subcommittee for the opportunity to address the important issues surrounding orphan works and their effect on the creative process.

Providing the public with broader exposure to valuable works from our cultural heritage is truly within reach. We look forward to working with other stakeholders toward a mutual solution and are confident that under your leadership we can achieve meaningful and effective orphan works legislation.

Coalition Organizations:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 Statement of Maria Pallante-Hyun, p. 6.

8 Report on Orphan Works, United States Copyright Office, at p. 119

9 Id. at p.120

10 Id.

11 Report, p. 9.

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