

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

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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 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 project rely on older works and those from minority groups that often have less reliable records of ownership.<sup>1</sup> 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,

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<sup>1</sup> See Brianna Dahlberg, *The Orphan Works Problem: Preserving Access to the Cultrual 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*.<sup>2</sup> 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,<sup>3</sup> 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<sup>4</sup> 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,<sup>5</sup> 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

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<sup>2</sup> YOUTUBE STATISTICS, [http://www.youtube.com/t/press\\_statistics](http://www.youtube.com/t/press_statistics) (last visited Feb. 3, 2013)

<sup>3</sup> *See id.*

<sup>4</sup> *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.clir.org/pubs/ruminations/01wilkin/wilkin.html/wilkin.pdf> (2011).

<sup>5</sup> 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 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.<sup>6</sup> 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.

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<sup>6</sup> 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 Hambelton.

/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 Cuaron, 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/ 3/31/14  
William Horberg

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/

3/31/14

William Lorton  
Director, *Take Away One*