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May 19, 2014

LIBRARY OF CONGRESS

Copyright Office

[Docket No. 2012-12]

Notice of Inquiry.

**Orphan Works and Mass Digitization; Request for Additional Comments and
Announcement of Public Roundtables**

Additional Comments Submitted by the Graphic Artists Guild

By electronic filing

Re: Federal Register / Vol. 79, No. 27 / Monday, February 10, 2014 / Notices

NOTICE OF INQUIRY SUMMARY: The United States Copyright Office is requesting additional public comments on Orphan Works and Mass Digitization, as a follow-up to the roundtable discussions held in March 2014.

INTRODUCTION

The Graphic Artists Guild is pleased to have the opportunity to submit our additional comments, opinions and suggestions to the US Copyright Office as contribution to the study of orphan works. These comments are submitted on behalf of visual artists, with a focus on illustrators and graphic designers (together “graphic artists”).

The Graphic Artists Guild supports the comments and positions so well stated by the Professional Photographers of America (PPA) reply comments, and would like to take this opportunity to make some additional comments. Photographers, graphic artists and illustrators share the same concerns and issues regarding orphan works as we all create visual works as classified in Copyright Law. Very often the visual creator’s name is not on the image, or inadvertently becomes separated from the image, or metadata in digital image files is lost, resulting in allegedly orphaned visual works although the creator is still living and licensing his/her works.

Graphic arts are integral to a broad range of industries, such as publishing (illustration, book design, graphic novels), advertising, educational and training materials, motion pictures and broadcasting, retail packaging, websites and online commerce, textiles, video games, apparel, home furnishings, computer graphics, stationery, posters, CD and DVD art, ceramics, and



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editorial illustration. Because graphic art is so integral to the American economy, the graphic art industry is uniquely vulnerable to copyright infringement. Protecting the creative works of illustrators and graphic designers must continue to be a necessary and integral part of U.S. law.

From the moment you get up in the morning, your day is influenced by graphic artists. A graphic artist's job is to translate society's ideas and messages from the market to you. Your sheets were designed by a textile artist; so are the printed fabrics you wear. Your morning paper, news website, or TV news program was formatted by a graphic designer or broadcast designer. The printed book, magazine, or e-book you read as you commute to work has a title design and illustrations created by artists or photographs shot by a photographer. The logos, letterheads, and brochures you see at work present a visual image that adds to the messages you are receiving and were created by a graphic artist. The software you use every day is composed of icons, user interfaces, and a variety of graphics created by artists. The font you're reading was designed by a typographer. There are approximately 47,000 products in the average American supermarket, each with individual package design. Every product of our society is dependent upon the work of a graphic artist in order to convey its message to you.

The graphic artist's, designer's or illustrator's name is often not displayed with their images as used in the marketplace according to customary industry practice.

Nearly 300,000 books were published in the United States in 2012, each designed by a publication designer, and many contained images.ⁱ Some types of books are entirely purposeful because of their images, for example textbooks with illustrations and photographs; books about travel, art, biographies, history, architecture, animals, and science; and children's stories.

The irony is, despite the high public visibility of the works of graphic artists, the actual artist is invisible and seldom acknowledged for what he/she contributes to the economy at large.

Virtually all areas of commerce and communications use the graphic arts. Graphic artists often specialize, focusing their talents to serve particular markets within the communications industry, such as magazine or book publishing, or they work for corporations, manufacturers,



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retailers, advertising or marketing agencies, broadcasting companies, production companies, or for-profit and non-profit institutions. Clients may be individuals, small companies, or conglomerates.

Graphic artists include two primary groups of visual communicators: illustrators and graphic designers. Illustrators create the entire spectrum of commercial artwork for reproduction, and graphic designers create all types of visual communication in print and digital media.

The economic contribution by graphic artists is felt in every industry in the United States. For example, the licensing industry generated \$93.37 billion in revenue in 2011 for all 18 product categories tracked, according to *The Licensing Letter*. Those product categories include accessories, apparel, home furnishings, publishing, stationery, toys, and videogames/software. Graphic artists contributed to those categories in one form or another, whether it was the product's package design and/or artwork, or textile design for home furnishings or apparel.

Graphic art, and the artists who create it, is a vital, necessary, integral part of the economic fabric of this country. Protecting that creativity should be a vital, necessary, integral part of the law.

Given the phenomenal expansion of the global economy, which will only continue to grow, it is essential to protect the copyrights of those who create American intellectual property. Graphic artists' livelihoods depend on their ability to claim authorship of the work they produce. The ability to sell or license limited usage, or limited rights, to a creative work for a fee is not only an issue of basic fairness; it is the economic essence of copyright law that sustains the productivity of American creative professionals.

SUBJECTS OF COMMENTS

I. The need for legislation in light of recent legal and technological developments

Orphan Works has nothing to do with recent legal cases or technological developments and fair use already provides for preservation of works. The problem of orphan works is not



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solved by Fair Use, and must be addressed separately with new legislation describing very narrow allowances so as not to harm the potential market for those works or those creators, just as has been considered in the Doctrine of Fair Use.

2. Defining the Good Faith “Reasonably Diligent Search” Standard

We would like the Copyright Office to take a role in establishing basic guidelines for Best Practices. Diligent Search guidelines could then be developed by author’s and creator’s groups.

Libraries and researchers have already created Best Practices which have been in use for years. The Authors Guild and National Writers Union have noted that users are in actuality rarely unable to find authors, and are often able to find authors through publishers. Publishers and authors are also likely to be able to locate the visual creators whose works were included in those publications.

Vetting a use to qualify for fair use and vetting a work to qualify as an orphan work are very different assessments.

The purpose of any “reasonably diligent search” should be to locate the author/creator/rights holder so as to facilitate legitimate licensing of the work.

Search practices, procedures and criteria are best established by the authors and creators of those particular classes of works, possibly with the advice of professional researchers. Our concern is about search practices established by user groups or business entities that will deliberately prescribe practices that will lead to the results they seek; to fail to find the rights holder so that the work they seek to use would qualify as “orphaned” in order to use the work for free.

A diligent search needs to be done before the work is used, rather than reverse-engineering the search after the use has been made.

3. The Role of Private and Public Registries



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The Graphic Artists Guild is a member of the [Picture Licensing Universal System] PLUS Coalition and supports the work of the PLUS Registry.

4. Types of Works Subject to Orphan Works Legislation, Including Issues Related Specifically to Photographs

The EU model for orphan works excludes photos [images] unless embedded in another work. [<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012L0028&from=EN> section 1.4]

Of course, it would be very appealing and an easy solution to visual creators to exclude all visual works from orphan works legislation, but that is not practical. The EU model does not define what qualifies as another work. An illustration or photo “embedded” in a book, magazine or poster? That illustration may have the artist’s signature on it; why should that be considered orphaned if the publisher of the book, magazine or poster is unlocatable?

Some user groups have suggested establishing an age limit of the work to establish a statutory designation as an orphan work, exempting that work from a “reasonably diligent search” for the rights holder by a potential user. The presumption is that older works, particularly those not fairly recently used in a commercial use, no longer have market value and have been abandoned by their rights holder, or that older works created for personal use never had any commercial value. The age of an allegedly orphaned work, or whether the user believes the work was created for commercial use rather than personal use is wholly irrelevant as to the necessity or extent of a diligent search for the creator by the user, whether a visual work should be considered orphaned, or whether the user should pay a licensing fee for the use of the work.

Art and photographs created *on speculation* — at the creative inspiration of the visual creator rather than explicitly created on commission by a client for a specific commercial use and on a deadline — may not seem to have commercial value at the time the work is created, but those visual works may have great commercial value at any time in the future. The creator’s (rights holder’s) economic right to license the work throughout its term of copyright is specifically intended to afford the creator income for their works that may increase in demand, value and interest in the marketplace in all variety of media. Works obviously created



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without commercial use, such as sketchbooks and “personal work,” may have commercial and market demand in the future either as commercial opportunity presents itself or when someone makes a biography or retrospective of the visual creator.

Some users participating in the recent roundtable discussions expressed a presumption that out of print books have no commercial value, and that the reason the books went out of print in the first place was because the work had lost commercial value. Books (which often include visual works) go out of print for a variety of reasons. The original publishing contract was for a specific number of copies or years of sales, and perhaps the author or rights holder [an heir] could not come to a satisfactory agreement with the publisher for reprints. Publishers sometimes limit the quantity of books in their catalog in current production. Publishers typically have a threshold of sales necessary for their own profit margin, and decline to continue to print books that don’t earn a lot of money; that doesn’t mean that there is zero commercial demand for the work or that the work has no value anymore. The author may have assigned the publication rights to a publisher for a long period of time, and although the publisher decided to discontinue printing/selling the work the author was unable to regain their rights so as to take the work to another publisher. The work could have inadvertently been caught up in litigation or some other legal dispute and publication/sales suspended. Or, a publisher may have gone out of business without assigning publication rights to another publisher or assigning rights back to the authors. The visual works included in these out of print books may have a wider and completely separate market and commercial value than the book as a whole by itself.

5. Types of users and uses subject to orphan works legislation

Orphan works is not the flip-side option for free use if fair use doesn’t apply. These are entirely separate and unrelated.

Commercial use of allegedly orphaned works should not be allowed by any user or entity. Fair use already permits non-commercial uses by the cultural non-profit organizations. Visual creators would not object to display or exhibit of allegedly orphaned works by cultural non-profit organizations.



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Cultural non-profit organizations such as museums and libraries seek blanket indemnity for use of orphan works because they fear rights holders coming forward and suing for copyright infringement, resulting in a huge damage award that would financially devastate the cultural institution. This is nothing more than speculative risk aversion with no actual evidence that visual creators or the courts have done this. Museums typically set aside funds to pay rights holders for permission/license. It is not unusual for an unlocatable or unidentifiable rights holder to come forward and contact a museum after he/she finds out his/her work is on exhibit or in use. Museums are professionally responsible and respectful, and customarily negotiate a satisfactory fee for use with the rights holder and pay without a dispute resulting in litigation. To date, we are not aware of any graphic artist or illustrator suing a museum or library for a licensing fee after the exhibit/display of his/her works.

Some non-profit users participating in the roundtable discussions requested exemption from paying a licensing fee for an allegedly orphan work categorically on the basis of their non-profit status. The corporate class and IRS status of “non-profit” has no bearing on a corporate entity’s obligation to pay a customary licensing fee for use of a visual work. Non-profit entities pay employees, pay for professional services, pay for marketing and advertising, and pay for operating expenses. Many non-profit entities generate income, including educational institutions, charities, cultural/entertainment entities such as museums and live theatres, religious organizations, social and recreational organizations. There are millions of Americans, including individual creators, small and large businesses, which create and license works specifically for these markets. The “non-profit” status does not entitle a business or organization to use copyrighted works for free in any way.

Some have suggested a blanket allowance of use of orphan works by educational institutions and/or for educational purposes. We would like to remind those who use copyrighted works that millions of American authors, illustrators, graphic artists, photographers, filmmakers and songwriters earn our living creating original works intended for educational use. As do small studios and production companies, as well as publishers of all sizes. Instructional and educational materials are a significant economic sector. Depending upon the course syllabus and class level, including university and graduate courses as well as vocational schools, a teacher or instructor may choose to use just about anything for educational purposes. In fact,



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the Copyright Clearance Center *RightsLink* exists to facilitate easy online licensing of content for educational use. There is no justification for denying rights holders the opportunity to license their work and earn income for educational use.

I. Remedies and Procedures Regarding Orphan Works

There are two distinct categories of orphan works:

- a) Works whose author/creator or rights holder cannot be located or identified for a variety of reasons. The copyrights to these works are still owned by an existing author/creator or rights holder (which may be a business), who would be able to grant permission and license use if the user could locate them. For some works, the author's/creator's/publisher's name is known but the user has difficulty locating them. For other works, especially visual works, the creator's name is unknown because there is no name on the work and therefore the creator is unidentifiable. Neither of these situations warrant denying the author's/creator's/rights holder's copyright protection or licensing rights of their works.
- b) Copyrighted works owned by a corporate entity that is no longer in business or operation, and those IP assets were not assigned to anyone else nor were they bought out by another business. Perhaps the owners or operators of the business simply "closed up shop" and walked away. This is the case with many old, small publishers, record companies, production studios, ad agencies, etc. These are true copyright orphans in that the rights holder doesn't exist anymore.

Copyrighted works owned by a defunct corporate entity and have become legally orphaned can be addressed by new statutory reversion of rights as a solution. Many of these works have known authors and creators; the writer, screenwriter, songwriter, director, photographer, illustrator or graphic artist. These individuals are the true authors and creators of works created under work-made-for-hire situations and assignment of rights deals. Often there was no paperwork stating the assignment of rights to the corporate entity, publisher or employer and subsequent reversion of rights. Or whatever contract existed many years ago has been lost, even if there was a reversion of rights clause. But the author's/creator's name is known.



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The rights to these works should be returned to the author or creator upon dissolution of the corporation that assumed the rights to his/her work.

Injunctive relief can be allowed for rights holders to order print-on-demand books to cease sales if their work was published in a POD publication; it would be easy enough for the publisher to cease production. The amount of monetary compensation should be directly tied to injunctive relief and the inability of the user to cease use; e.g. use in a printed publication or a motion picture. Rights holders ought to receive higher compensation if the user cannot cease use or remove the work from a derivative or collective work.

We continue to support the establishment of the ADR system of a “Small Value Copyright Court” as a remedy for rights holders who are unable to negotiate a licensing fee from someone who has made unauthorized use of their works, either under the presumption that the work was orphaned or an occurrence of typical infringement. We would like a provision that requires a user to participate in the “Small Value Copyright Court” system if the user agrees to use an allegedly orphaned work under the orphan works scheme and the copyright owner comes forward and a dispute results about usage fee due from the user.

2. Mass Digitization, Generally

The Internet has created a commodity economy mindset where everything competes on pricing, i.e., how can I get it for less or perhaps even free. Mass digitization is part of that mindset. When everyone and/or everything competes based only on pricing of mass digitized goods and services, it fosters an environment of competition that eventually guarantees a non-livable wage especially for the creators of original goods and services. Is that the economy we want to create for the future?

3. Extended Collective Licensing and Mass Digitization

The main objection that visual creators have to extended collective licensing is that it will in effect establish fixed prices for works in the marketplace whereas individual creators and rights holders have the right under copyright law to determine their own price for use of their works. We would always prefer independently and individually negotiated licensing fees,



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because different users and different uses compel different fees. ECL would likely result in forcing licensing fees downward for the entire market, which is detrimental to creators. Stock image licensing has already forced fees for commissioned illustration way down.

However, all images still under copyright are still owned by someone and still have value. The fact that a copyright owner cannot be identified or located by a user doesn't eliminate the market value of the work; clearly the work has value because someone wants to reproduce or display it. Allowing use of allegedly orphaned works without requiring the user to pay any fee before use quite literally will create an ever-increasing quantity of free contemporary images in addition to older works already in the public domain. This would be devastating to visual creators. No visual creator can compete with free work. "Free" work erodes copyright protection and erodes the value of all visual works. The user would be taking something of value without paying for it.

The argument by users that paying a licensing fee for an allegedly orphaned work "creates a drag on the economy" or amounts to "a tax" is completely specious. Anyone who wishes to use a copyrighted work must get permission from the rights holder and pay a licensing fee for use if the rights holder demands one; that is the rights holders' economic right. Users have no right under the law to use copyrighted works for free (outside of what is permitted under fair use). A licensing fee is not a "tax," as described by one roundtable participant. Paying a creator for his/her work is quite literally his/her income.

Extended collective licensing would be an acceptable solution only for the current infringing use for secondary uses.

ABOUT THE GRAPHIC ARTISTS GUILD

In the course of its 47-year history, the Graphic Artists Guild has established itself as the leading advocate for the rights of graphic artists on a wide range of economic and legislative issues, from copyright to tax law. Through its publication of the *Handbook: Pricing & Ethical Guidelines* (now in its 14th edition), the Guild has raised ethical standards in the industry, and provides an invaluable resource on pricing information that is relied on by both artists and



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clients. The Guild's newsletter, the *Guild News*, provides lively, provocative, and useful coverage of developments in the visual communications industry for its readers.

The Guild also provides a wealth of services and benefits for its members, including educational programs, discounts on a multitude of products and services, a legal referral network, and grievance handling. The Guild's website offers up-to-date information on Guild activities, updates on advocacy issues, members' portfolios, individual chapters, and tools and resources for all graphic artists.

Respectfully submitted,

Lisa Shaftel, National Advocacy Committee Chair
Haydn Adams, President
Tricia McKiernan, Executive Director

ⁱ Bowker. *2013 U.S. Book Consumer Demographics and Buying Behaviors Annual Review*, http://www.bowker.com/en-US/aboutus/press_room/2013/pr_08062013.shtml.

ⁱⁱ <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.