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**INQUIRY REGARDING ORPHAN WORKS
70 FR 3739**

COMMENTS OF THE AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS

Respectfully submitted by:

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COMMENTS ON ORPHAN WORKS

INTRODUCTION

The following comments are respectfully submitted by the American Society of Media Photographers (ASMP) in response to the U.S. Copyright Office's Notice of Inquiry (70 FR 3739) concerning "orphan works." ASMP was founded in 1944 to protect and promote the interests of those professional photographers who earn their living by making photographs intended for publication. It now has more than 5,000 members in the United States and around the globe and includes many of the world's best and best-known photographers in its ranks. ASMP plays an active role in carrying out its mission in the legislative, judicial, administrative and industrial arenas, and it is the world's largest organization of its kind.

It is ASMP's position that the integrity of copyright protection must be maintained for the common good. The founding fathers of this country recognized that fact when they wrote the Constitution, and the need for strong copyright protection has been recognized by every Congress since the First. It is ASMP's belief that the inability of a prospective user to identify and/or locate a copyright owner, or in some cases to ascertain the copyright status of a given work, is a legitimate problem that needs to be acknowledged and dealt with, for the common good. It has been ASMP's experience that the costs, both hard and soft, of copyright infringement litigation are excessively burdensome to all involved, and ASMP believes that litigation should be viewed as a viable alternative only when all other reasonable methods of resolving a problem have been exhausted. Later in these comments we will put forth an proposal that we believe is a fair and workable approach to the use of orphan works, that will reduce the risk of litigation, and that will benefit both users and owners of copyrighted works.

It is also ASMP's belief that, unfortunately, those forces that are fundamentally opposed to the concept of copyright will use the legitimate problem of orphan works as an illegitimate opportunity to try to undermine the very foundations of the current copyright system. They will try to use this occasion to reinsert a system whereby copyrights must be registered at the peril of loss of copyright protection, a system that was specifically repudiated by Congress when it enacted the Copyright Act of 1976 and that has been rejected by every Congress since then. Turning back the clock to such a system would create unworkable and unconscionable burdens on individual creators, and even worse, it would almost certainly violate multiple international treaties to which the United States is a party and by which it is bound. It is ASMP's hope that the forces that oppose the existence of copyright and that seek to erode it will be seen for what they are and that their proposals will be treated accordingly.

In evaluating the following comments and proposals, it must be kept in mind that ASMP has put them forth within the context of its area of experience and expertise: the creation and use of photographs that are made for publication in the various media. We do not address issues that may arise if and when these comments and proposals are applied to other types of copyrighted works.

PRELIMINARY SUGGESTIONS

Before addressing the issue of orphan works directly, we wish to resurrect a suggestion that ASMP has made previously to the Copyright Office and that might alleviate at least one aspect of the orphan work problem. That suggestion is that the Copyright Office, or some other governmental agency, should establish a registry of copyright holders. It would be simply a central directory, presumably on line, of the names and contact information for all copyright holders who wish voluntarily to register and to update their contact information from time to time. There would be no requirement for registering, and there would be no penalty for any failure to register or to maintain current, accurate information. However, the obvious advantages to copyright holders in making themselves easy to locate would appear to be enough incentive to convince large numbers of them to register themselves and to keep their listings current. In that way, where the names of authors or other copyright holders are known, a quick search of an on-line directory might take many works out of the orphan work category easily and inexpensively.

A second change within the Copyright Office that might be incorporated into the current re-engineering project and that could help to take thousands of visual works out of the orphan category would be to provide an image-recognition search tool. That, combined with the anticipated system of on-line registration, and possibly the digitization of existing deposit copies, would make many copyright holders suddenly and instantly identifiable and locatable. Based on meetings that ASMP has had with software and service vendors, it appears that viable technology for usable image-recognition programs is now beginning to become available. Both of these suggestions are free-standing and independent of each other and of the proposal that follows.

ORPHAN WORKS

General Description of Proposal

Turning to the substance of this inquiry, it should first be noted that, unlike the two suggestions mentioned above, any change along the following lines would require federal legislation to amend the Copyright Act and could not be implemented by the Copyright Office without such legislation. It is ASMP's position that any determination of what qualifies as an orphan work must be made on a case-by-case basis and that absolute rules and formulas would constitute a Procrustean and unacceptable approach. It is also ASMP's position

that any provision dealing with orphan works should apply only to published images.

The following is a very general outline of an approach that ASMP considers fair and workable, one that maintains the careful balance of interests that is the lynchpin of copyright protection in the United States:

1. A published work would be considered an orphan work when,
 - A. It has not been registered at the Copyright Office, and
 - B. After conducting a duly diligent search, the author or other copyright holder, or a duly authorized agent, cannot be located.

2. When a published work is considered an orphan work, any entity that desires to use the work must pay a reasonable licensing fee and thereby obtain an orphan work license for the proposed uses before any use can be made. Obtaining such a license and adhering to its terms will make the licensee's use of the work deemed to be made with the copyright holder's permission. The failure to obtain an orphan work license in advance or to adhere to the terms of the license will subject the user to all of the remedies that are available under the Copyright Act for violations of copyrights in non-orphan works.

ASMP believes that such an approach protects the rights of copyright holders while facilitating the public's access to works that might otherwise be unavailable.

As with all legislation, the devil is in the details. The following are ASMP's thoughts as to how an approach like the one outlined above might be implemented. However, there are many details that cannot be addressed until there have been significant amounts of additional investigation, consideration, research and consensus-building. Until it is clear that such an approach might become a reality, that kind of research and development would not be an appropriate use of resources.

Duly Diligent Search

One of the first elements in defining an orphan work under ASMP's proposal is the fact that its copyright status and paternity cannot be established after a duly diligent search. Here, "due" diligence is a high standard. The level of diligence must be high because of the high value of copyrighted works to their owners. To understand the value of each copyrighted work to its creator, one must first understand some basics of the context in which those works are produced.

Individual creators like photographers are uniquely pressured by economic forces on all sides. They are independent contractors, primarily sole proprietors, who earn their livings by licensing the use of their photographs. As such, they are subject to all of the burdens of sole proprietors running small businesses: no ability to organize legally for collective bargaining or other pricing purposes, no insurance or other employee benefits, no job security, no paid vacations, etc. In

addition, they have to incur high educational and training costs, as well as a very large investment in equipment that remains a continuing expense because of rapidly and continually changing technologies.

Conversely, the clients and others to whom they license their photographs are typically large, powerful business entities. In recent years, the trend towards mergers, acquisitions and other forms of consolidation on the client side have served only to exacerbate the difference in bargaining power between photographers and their clients. This, along with other changes in business models affecting professional photography, has resulted in substantial price pressure on the fees that photographers can charge for the use of their photographs. Compounding that situation is the loss of revenues caused by rapidly increasing levels of infringements through digital means. Because of the costs of litigation, most of those infringements constitute simply a loss of revenue, with few tools available for recoupment.

At the same time, the costs of doing business have consistently been going up at an extraordinary rate. A couple of decades ago, a rule of thumb for professional photographers was that the fee typically earned by an editorial photographer for a day's work was approximately enough to buy one professional 35 mm camera body, in those days \$500 - \$600. Today, the pay level for editorial photographers has remained essentially unchanged, meaning that the photographer is actually earning less for a day's work than he or she did 20 years ago. Meanwhile, the cost of a current, professional level digital camera body is roughly \$4,000 - \$5,000, up to as high as \$8,000, roughly 10 to 15 times the cost of what its equivalent was. The costs of the digital hard- and soft-ware to support that camera are at least equally astonishing.

For those reasons, it has become more and more difficult for professional photographers to earn a reasonable living from his or her craft. Photographers need the fees that they can get from licensing the residual rights to every photograph that they possibly can. The loss of revenue from just a few photographs can often have a noticeable financial impact on a professional photographer.

Because of these factors, there must be a high standard of duty imposed on someone who wishes to use a photograph before he or she can do so without negotiating a license directly with the copyright owner and without liability for infringement. The full details of what would constitute a duly diligent search have not yet been fully fleshed out. However, it would include, at a minimum, a use of the tools normally available to most people with access to computers and the internet. It should go without saying that such a search would include a search of the records of the Copyright Office.

Where the name of the photographer or other copyright holder is known, a complete internet search would be required, including the use of search engines

and on-line telephone and address directories. It would also include using print and other telephone directories when there is any information available or discovered concerning the photographers' geographical locations. In addition, the prospective user would be required to contact every trade association or other professional group to which the photographer or other might reasonably be expected to belong.

Where the name of the photographer or other copyright holder is not known, if the photograph came from any kind of work bearing any identifying information, that information must be pursued. For example, if the photograph came from a book, magazine or other collective work, any named publishers and/or other contributors to that publication must be contacted. If there are no such people or entities identified with the photograph, or if those inquiries prove fruitless, a scan of the image would be used in connection with an image-recognition program and web-crawler. Such programs and services are now available in the marketplace and appear to be viable technologies. If such a search is unsuccessful, a comprehensive internet search using search engines that look for photographs based on key words describing the major elements and characteristics of the photograph must be used.

These steps do not constitute an exhaustive list, they are merely preliminary concepts that need to be expanded and developed, if there is additional support for this proposal. In any event, all steps in the search must be documented, and the documentation must be submitted in connection with the request for an orphan work license, discussed below. Needless to say, if any of these steps produced the information necessary to try to obtain a copyright license, the orphan work status would no longer applies to the photograph.

It should also be noted that, if an image has, in fact, been registered at the Copyright Office, it cannot qualify as an orphan work, irrespective of whether a duly diligent search has disclosed the registration and irrespective of the fact that an orphan work license may have been erroneously issued. A photographer who has sought the maximum protection available under the Copyright Act and who has gone to the efforts required to obtain that protection should never be placed in a position where that protection is lessened for any reason.

Licensing

Once it has been demonstrated that all due diligence has been used in an effort to identify and contact the copyright holder without success, a license must be negotiated, paid for and issued. The first obvious question is, who should be charged with negotiating the terms, collecting the fees, issuing the licenses, and eventually distributing the funds? Once again, it should be kept in mind that this proposal is a broad-brush description of a concept, and there are many details and alternatives that cannot be addressed in a comment of this nature.

It is ASMP's proposal that these tasks be handled by the Copyright Office, either internally or through some other entity established and/or supervised by it. This single-source approach would centralize, and therefore simplify, the process. Both copyright users and copyright holders would know immediately where to go to seek licenses and to receive payments of fees, respectively. There would be no need for users to identify and approach multiple entities, based upon the characteristics of various orphan works

Obviously, the Copyright Office does not currently have the information or resources necessary to negotiate prices and licenses for photographs. Fortunately, however, there are several software programs and services for pricing the licensing of existing photographs that are readily available and that are heavily relied upon in the industry. These could be used as the basis for both pricing and establishing the terms and conditions of the licenses.

The next question is what happens to the fees that are collected. Since the Copyright Office or its affiliate would be functioning essentially as a licensing agent for the copyright holders, it should be entitled to a reasonable fee for its services. For example, 50% of each licensing fee might be an appropriate level of compensation. In addition, the entity should be entitled to charge the users an additional transactional fee per license.

The photographers' shares of the licensing fees would be held in trust or escrow by the Copyright Office or its licensing agency for the photographers. Collected fees would be tracked by as much identifying information as possible, including scans of the photographs. Photographers and other rights holders would be able to search those records in multiple ways to identify photographs of theirs that had been licensed. Upon identifying such photographs, the photographers and other rights holders would produce documentation supporting their claims that they are entitled to the copyright holder's share of the licensing fees those photographs. Such documentation would have to be sufficient to establish that the persons requesting payment are, in fact, the copyright holders to those particular photographs. Exactly what documentation would be required is one of those issues that are too complex to try to resolve at this stage of the current proceedings. In any event, given the numerous possible ways in which entitlement might be documented, it appears likely that the determination will have to be made on a case-by-case basis after examining all of the relevant facts and circumstances. Presumably, there would have to be provision for at least one level of review of the determination.

During the time that the money is being held, it should be invested, and the return on the investment should be distributed along with the licensing fee. That leads to the next question, which is what happens to the photographers' shares of the licensing fees that are not claimed. I.e., how long does the Copyright Office or other agency hold those funds in trust or escrow for photographers who do not come forward, and what does it do with those funds at the end of that

period? Given the long duration of copyright protection, it would be inappropriate for the funds to be removed from the trust or escrow category after only a short period of time. Obviously, this kind of specification needs to be examined and discussed. However, at least as an initial proposal, a period of 20 or 21 years after the license fee is paid appears to be a reasonable starting point.

The question of who is ultimately entitled to any unclaimed photographer funds has a number of potential answers, many of which have plausible arguments in their support. It is ASMP's position that the unclaimed licensing fees for photographs should be used in a manner and for a purpose that will benefit the class of owners of copyrights to photographs as a whole. One possible way that could be accomplished would be by using the funds to run an ongoing program of copyright education aimed at the public to make them aware of the copyright laws and the need to follow and uphold them. Such a program would be run by, or under the auspices of, the Copyright Office.

SUMMARY

As stated at the outset, ASMP believes that our system of copyright protection must be preserved and that the problem of orphan works should be addressed fairly. ASMP believes that the proposal outlined above would achieve both of those goals, fairly and reasonably. We thank the Register and her staff for this opportunity to participate in these discussions, and we look forward to engaging in an interesting, challenging, and beneficial dialogue.

Respectfully submitted,

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