

U.S. Copyright Office

**Orphan Works and Mass Digitization
[Docket No. 2012-12]**

POST-ROUNDTABLE COMMENTS OF THE

**PROFESSIONAL PHOTOGRAPERS OF AMERICA (PPA)
AMERICAN PHOTOGRAPHIC ARTISTS, INC. (APA)
AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS (ASMP)
GRAPHIC ARTISTS GUILD (GAG)
NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION (NPPA)
PACA, THE DIGITAL MEDIA LICENSING ASSOCIATION (PACA)**

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Introduction

Thank you for this opportunity to offer post-roundtable comments on behalf of Professional Photographers of America (PPA), the American Photographic Artists, Inc. (APA), the American Society of Media Photographers (ASMP), the Graphic Artists Guild (GAG), the National Press Photographers Association (NPPA), and PACA, the Digital Media Licensing Association (PACA) on this important subject. We appreciate the Copyright Office's longstanding interest in and dedication to finding a fair and reasonable resolution to the orphan works issue that promotes the lawful use of photographs and other graphic art, while continuing to respect the rights of creators. We hope that you find these comments helpful and we look forward to continuing to work with the Copyright Office and other stakeholders to reach a mutually satisfactory conclusion.

Founded in 1869, PPA is the world's oldest and largest non-profit trade association for professional photographers and photographic artists from dozens of specialty areas including portrait, wedding, commercial, advertising, and art. We directly represent over 26,000 professional photographers (cumulatively represent an additional 20,000 photographers) through nearly 150 affiliated organizations. For more than 140 years, PPA has dedicated its efforts to protecting the rights of photographers and to creating an environment in which these members can reach their full business and creative potential.

The vast majority of PPA's members consider themselves portrait and/or wedding photographers. They are quite literally the copyright holders next door, giving us lasting images of the people dearest to us, at the most important times of our lives. Their works are not just enduring memories of special occasions for those who were there, but a tangible glimpse into who we are and where we are from; images of those who came and went before us, and of our parents and grandparents that one day we will share with our children and grandchildren to teach them their most personal heritage.

American Photographic Artists, Inc., is a leading national organization run by and for professional photographers. With a culture that promotes a spirit of mutual cooperation, sharing, and support, the APA offers outstanding benefits educational programs, and essential business resources to help its members achieve their professional and artistic goals. Recognized for its broad industry reach, the APA continues to expand benefits for its members and works to champion the rights of photographers and image-makers worldwide. The APA has a core value of advocacy for its members, as well as for the benefit of all photographers. APA is committed to achieving a fair system that provides more opportunity for copyright holders and the public that enjoys the work of its members.

The American Society of Media Photographers is a 501(c)(6) not-for-profit trade association, established in 1944 to protect and promote the interests of professional photographers and videographers who earn their livings by making images, both still and motion, intended for publication. It is one of the most active professional photographers' trade associations in the United States and is the leading organization of its kind. There are approximately 7000 members of ASMP representing literally every aspect of professional publication photography (commercial photography as opposed to consumer or retail photography).

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 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.

The National Press Photographers Association is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's approximately 7,000 members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted and defended the rights of photographers and journalists, including intellectual property rights and freedom of the press in all its forms, especially as it relates to visual journalism.

Editorial photographers like many of the members of ASMP and NPPA, record history as it happens for current and future generations. Their images, often made at great personal risk, create a lasting record of the world around us, from the most world shattering events to the small moments that make up our everyday lives. Because covering news events is so inherently unpredictable it is very difficult for our members to spend time policing the Internet in search of copyright infringements and unauthorized/uncredited use of their images. Allowing limitations on remedies for users under an orphan works rubric without commensurate protections for photographers would further shift an already skewed playing field and provide an unfair second bite at the apple for those already claiming fair use protection.

PACA, the Digital Media Licensing Association was established in 1951 by a core group of New York stock photo agencies. Today PACA membership includes more than 100 companies representing the world of digital content licensing. PACA has evolved as the world has moved online but our focus has remained constant: to protect the rights of creators and those representing their work. For over 60 years, PACA has developed business standards, promoted ethical business practices and actively advocated copyright protection on behalf of its members.

Image aggregators and distributors, many of whom are PACA members, play a key role in the marketplace for images, assisting creators in marketing and distribution of their works. They also make it easier and more convenient for those who want to use copyrighted images to obtain a license for them. These functions enhance the digital marketplace, promote lawful use of copyrighted works to the benefit of all, and connect creators with users, helping the address the orphan works issue.

Professional photographers live in every nook and cranny across the U.S. -- in cities, suburbs, and rural areas. Some work out of their homes, others have studios. Overwhelmingly they are small businesses with fewer than five employees. The average photographer works over fifty hours a week and makes about \$35,000 a year. Assuming they work fifty weeks a year; that works out to an hourly wage of about \$11.60.

Yet, photographers are among the most prolific creators in any industry. Every weekend as many of us relax and enjoy time with our family, photographers are working to create the memories that we will cherish for generations. Wedding photographers can create up to a thousand images at a single event. Editorial and commercial photographers work at a comparable pace.

The lost opportunity for even a few hundred dollars in licensing revenue makes a noticeable difference to a family depending on \$35,000 of income. And to our members who are struggling the most, it could mean the difference between staying in business and closing shop.

Properly drawn orphan works legislation could be a productive tool that enhances public enjoyment of creative works and through diligent searches puts users in contact with artists to generate new licensing income.

Session 1: The Need for Legislation in Light of Recent Legal and Technological Developments

Collectively our associations have long been candid about recognizing the issue of orphan works and the appropriateness of a carefully crafted system to encourage and promote connecting users with creators to promote licensed use of copyrighted works. That has not changed.

We have not waited for Congress to act on this issue. For example, PPA has created a call center at our own expense with a toll-free phone number that anyone can call to try to connect users with creators. We have a database of over 50,000 creators, and if the photographer's contact information is not in our database, our staff will often assist the consumer to track down any potential leads. Our staff fields as many as 40-50 calls a week.

Even when taking this approach, there are occasions where the information on the copyright owner is simply unavailable – usually as a result of a business closure. In those instances, we are faced with the unpleasant prospect of explaining to someone who wanted to play by the rules and was potentially willing to pay a creator, that we cannot help them make an authorized use of the photograph.

Our associations have joined with many others to form the PLUS Coalition. The Coalition and the database it has created are discussed in more detail below.

We believe that these and similar efforts have significantly reduced the need for orphan works legislation. Nonetheless, we remain willing to work in good faith towards a reasonable construct for such legislation.

The position of certain user groups at the Roundtable was telling. A number of them reversed their previous position of seeking orphan works legislation and now say it is no longer necessary. They were candid about the reason for this switch; recent court

decisions that vastly expanded the application of fair use, specifically *Authors Guild, Inc. v. Google, Inc.*¹ and *Authors Guild, Inc. v. HathiTrust*².

We note that while both these cases involved some orphan works, neither was primarily an orphan work case.³ They were both mass digitization holdings into which some orphan works were swept. We note further that neither of these cases involved or considered the use of orphan works in the context of the creation of new works of authorship, which is the context in which the case for orphan works was originally made. Finally, if mass digitization becomes widespread, it would have a devastating effect on creators. In previous discussions of orphan works, there was a concept of limiting uses to trusted institutions. But with no limits on who could undertake mass digitization, copyrighted works would inevitably be copied by entities that are not trustworthy, who, for example, might take no steps to prevent further downstream copying and distribution. This would have the very real potential to displace secondary markets for photographs and other graphic art.

We also consider that if the claims of these user groups ever became true; that courts were willing to hold across the board that the unlicensed use of copyrighted works is fair use simply because the copyright owner is not readily available and the new use has some societal benefit, that would put the United States at odds with the globally accepted three-step test for copyright exceptions. Indeed, it would fail all three of the steps. It would not be a special case, it would conflict with a normal exploitation of the work, and it would unreasonably prejudice the legitimate interests of the right holder. The Copyright Office's "*Report on Orphan Works*" discussed the three-step test in the abstract but did not seek to apply it. The Office could contribute to the consideration of these issues in the courts and by Congress by publicly stating its views about cross cutting fair use

¹ Case No. 05 Civ. 8136 (DC), 2013 WL 6017130 (S.D.N.Y. Nov., 14 2013).

² 902 F. Supp. 2d 445 (S.D.N.Y. 2012).

³ The *HathiTrust* case did have a purely orphan works component, but the court did not rule on that aspect, finding it was not ripe for adjudication precisely because it had been suspended due to its inadequacies. *Id* at 455-56.

claims regarding orphan works, as well as the implications of those views with regard to international standards.

Those who have abandoned their support for orphan works legislation in light of a handful of expansive fair use decisions confirm our worst fears; that to at least some in the user community this is really about using our creative works for free and not about connecting would-be licensees and licensors for their mutual benefit. Similarly disturbing are those entities that are instrumentalities of states, and as such would rely on sovereign immunity to insulate them from damages for their infringing acts. This is the type of inequitable behavior the Copyright Office warned of over a decade ago.⁴

During the first session of the Roundtable, we were astonished and appalled to hear one representative of a user group refer to photographs as “ephemera.” If indeed that were an accurate characterization, surely there would be no justification to reduce the rights of photographers through orphan works legislation. We know that characterization to be false, indeed absurd, and we hope that view is not representative of other users or even that particular individual’s clients. But it does help explain the cavalier attitude that leads to the claims that nearly any use of orphan works qualifies as fair use.

Session 2: Defining the Good Faith “Reasonably Diligent Search” Standard

We take this opportunity to reiterate that we believe a good faith reasonably diligent search should include (but is not limited to) the following characteristics:

- A definition of “reasonably diligent search” that is flexible enough to adjust for technological and marketplace evolution, and updated as necessary;
- Policing of bad faith searches with legal consequences for such;
- Inclusion of unique identifiers, metadata, and digital watermarks as elements of the search;

⁴ “*State Immunity in Infringement Actions*,” General Accounting Office (2001) at 72-73 (Appendix VII: Comments from the United States Copyright Office)(available at <http://www.gao.gov/assets/240/232603.pdf>).

- Inclusion of a search of relevant key words (e.g., the artist's name) as well as visual fingerprint searches;
- A requirement for updated searches for secondary/subsequent uses;
- Application to all prospective users;
- A philosophy that searches are for the purpose of finding and contacting the rights holder, rather than to check the box for unlicensed use.

Much of the discussion at the Roundtable focused on best practices and the need to take into account different practices in different creative sectors. We agree. Indeed, as the Federal Register notice for the Roundtables recognized, photographs and photographers are a uniquely situated sector that should involve the most rigorous standards for good faith reasonably diligent searches.

The previous legislation had already built in flexibility for differing best practices across different types of works, and the Copyright Office was to play a major role in setting those standards. If this was relatively settled before, it is reaffirmed by the comments at the Roundtable.

Session 3: The Role of Private and Public Registries

It seems from the comments at the Roundtable that all agree there is an important role for private registries in addressing orphan works. That is why we have joined together to create the PLUS Coalition.

In response to the Copyright Office's suggestion, stakeholders from the photography, illustration, publishing, graphic design, advertising, museum, library, and education communities formed the Picture Licensing Universal System (PLUS) Coalition.

The PLUS Coalition is a neutral, apolitical 501(c)(6) non-profit organization, governed by a Board providing equity and representation for all industries involved in creating, distributing, using, and preserving images.

At the recommendation of the Copyright Office, the PLUS Coalition first created standards for identifying rights holders and for communication of rights information. Also at the recommendation of the Copyright Office, the PLUS Coalition then commenced development of a global image rights registry and registry hub – a federated network that is designed to be interactive with all other image/creator search services, collectively called the “PLUS Registry.”

The PLUS Registry is operated on a non-profit, cost recovery basis by and for its users. Its participants are in 88 countries. The PLUS Registry utilizes unique identifiers and visual recognition, and searches are available in any language and are free. It provides both human readable and machine interpretable information and interoperates with other registries and applications. The PLUS Registry is cloud-hosted, incorporates security measures to prevent abuse, and protects the privacy of its users.

We have done this because it is the right thing to do and is good for our members. Some at the Roundtable argued that copyright owners should be burdened with an affirmative obligation to make themselves known to any prospective user of their works. This blame the victim approach is inconsistent with the long-standing treatment of copyright as a property right. It also ignores the realities of modern practices, where even when copyright owners like photographers and other graphic artists apply metadata to their works, certain social media sites automatically strip that information from images uploaded to their sites.

To the extent that private registries are available and growing, they should be at the heart of a best practices regime. Ultimately, they contribute to reducing or even eliminating the need for orphan works legislation.

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

Only about 1% of photographers regularly register their copyrights. Indeed, 84% of professional photographers have never registered even a single image with the Copyright Office. The average photographer creates over 20,000 images a year – that is simply too many photographs for a struggling small business to take the time to assemble and deposit.

Nonetheless, photographers take what steps they reasonably can to protect their rights. It is industry practice to mark photographs with the photographer's name and contact information. To the extent these remain available to the consumer; this goes a long way toward avoiding orphan works questions. Unfortunately, these markings can be (and often are) removed after they leave the photographer's hands. The markings may also be hidden as consumers place photographs into adhesive albums, or lost as they are posted and circulated via social media sites. Commercial publishing and other entities often remove the photographer's identifying information prior to publication. Most iterations of software for maintaining websites and for processing images for uploading to the web automatically strip out identifying metadata in order to speed the up- and download process. One participant at the Roundtable described the reality of how quickly creator information is removed from photographs as "instant orphans." That captures the jeopardy of our members perfectly.

This combination of circumstances; small businesses with high volume/comparatively low-margin business models and frequent removal of rights management information is a potential perfect storm if orphan works legislation is not carefully crafted.

For all these reasons, in order to maintain equitable treatment, we believe that if photographs are included in orphan works legislation, the good faith reasonably diligent search requirement must be most vigorous with regard to photographs and limitations on remedies cannot make compensation inaccessible, as we outlined in our previous written

comments and reiterate below. However, if photographs are not included, the Copyright Office may find more flexibility in resolving these issues.

Session 5: Types of users and use subject to orphan works legislation

The Roundtable discussion of this topic focused on whether commercial uses should be covered by orphan works legislation. We could not help but notice that many of the most significant commercial users of orphan works were not present at the Roundtable at all. Five years ago they turned out in force to showcase their wares at a Copyright Office technology fair with a focus on addressing orphan works. In contrast, a few weeks ago they were represented at the Roundtable by only a single presentation, even then only by their trade association. And the discussion in the room was unquestionably influenced by who was actually there. The Copyright Office should not be under any misconception – the majority of orphan works users are commercial entities making for-profit uses of others’ copyrighted works. We are willing to entertain that orphan works legislation could apply to commercial uses of copyrighted works, subject to the qualifications on good faith reasonably diligent searches discussed above, and the availability of remedies discussed below.

In the context of uses by non-profit entities, some previous approaches would have denied any form of remedy to creators, even after they came forward as the copyright owner. We strongly believe that this is unjustified and unfair.

Complete immunity from damages must be avoided. As we have described in this submission, the margins for photographers are razor thin. For the law to envision a circumstance in which the creator has become known and reachable, but to then deny that creator any compensation for the unlicensed use of their work is both harmful to the legitimate interests of the right holder and inequitable as a matter of fairness in the law.

That is not to say we are unsympathetic to the distinction between commercial and non-commercial uses. We could accept a lower basis for reasonable compensation in such

circumstances, so long as it remains meaningful. In this context, we also wish to clarify that not every act of a non-profit organization is non-commercial in its nature and marketplace effect. Accordingly, the availability of this reduced royalty obligation should turn on a definition of “non-commercial” that takes into account those factors and not merely by reference to an organization’s tax status.

Session 6: Remedies and Procedures Regarding Orphan Works

A key component of a viable orphan works solution is a properly balanced limitation on the remedies that are available in instances in which the photographer comes forward after a good faith reasonably diligent search is completed (but does not bear fruit) and the unlicensed use of the work has begun.

We accept and agree that there will be some circumstances in which orphan works legislation would preclude injunctive relief. We cannot accept that in all circumstances orphan works legislation would preclude injunctive relief. The precise contours are a fitting subject for further discussion.

We also accept and agree that it is appropriate to limit, but not eliminate, the monetary relief available to the creator. If photographs are to be included in an orphan works regime, the touchstone for remedies must be that the creator receives reasonable compensation for the use of their work.

Monetary relief for the creator should be both meaningful and accessible. In the past, some have proposed a “reasonable compensation” standard. While this might produce a fair calculation of the amount properly owed to the creator, it suffers from certain flaws. In our industry, the “reasonable compensation” for the use of our members’ works is so low that it is impractical to enforce. The result risks being a de facto loss of any income from the use of the work. At the same time, we understand why users might object to paying more than a “reasonable compensation.”

We suggest that two elements could bridge the gap. First, upon supplying evidence of the licensing fees for similarly situated uses, the creator should enjoy a rebuttable presumption of the amount of the reasonable compensation.

The second element arises from the great expense of federal litigation. There is no logic in spending tens of thousands (if not hundreds of thousands) of dollars litigating a claim for a royalty that is far less than that. “Reasonable compensation” makes sense from a market perspective, but it has to be applied in concert with a small claims process that makes it feasible for copyright owners to enforce their rights. Further, there should be a disincentive for users to be recalcitrant about paying the reasonable compensation owed to right holders who come forward. At least for cases involving the use of works under an orphan works regime, bad faith refusals to pay compensation should generate enhanced awards and awards of attorney’s fees. If creators must face the “so, sue me” approach to use of their works, they will never be fairly compensated.

We appreciate the Copyright Office’s continuing interest in evaluating a small claims procedure. It was our pleasure to provide comments in that inquiry as well, and we refer you to those comments for a fuller discussion of the relevant issues.

Again, the result of any limitation on remedies must still be that creators who come forward receive reasonable compensation for the use of their work. Any regime that fails to provide that, either by design or in practice, is both harmful to the legitimate interests of the right holder and inequitable as a matter of fairness in the law.

Conclusion

PPA, APA, ASMP, GAG, NPPA, and PACA appreciate this opportunity to provide these comments. We commend the Copyright Office for its continued commitment to these important issues and for the open process that it is conducting. We look forward to continuing this discussion and to working with the Copyright Office and other

stakeholders to produce an approach to the orphan works situation that is productive for all parties.

Respectfully submitted,

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