



U.S. Copyright Office

Orphan Works and Mass Digitization

[Docket No. 2012-12]

**POST-ROUNDTABLE COMMENTS OF THE
AMERICAN PHOTOGRAPHIC ARTIST'S INC.**

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The Intellectual Property Group, PC

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American Photographic Artists, Inc. ("APA") appreciates this opportunity to provide post-roundtable comments with regard to Orphan Works and Mass Digitization.

The APA (<http://www.apanational.com>) is a leading national organization run by and for professional photographers. The APA provides essential business resources and educational programs to help its members achieve their professional and artistic goals. Headquartered in Atlanta, Georgia with chapters across the country, the APA advocates on behalf of its members and photographers everywhere to champion the rights of photographic artists and forge paths for their success in the industry. The APA is committed to achieving a system that provides copyright holders with an opportunity to vindicate their rights in a fair and just manner.

The APA has participated with other visual art organizations in discussions on the subject of orphan works legislation. Those organizations include Graphic Artists Guild (GAG), Professional Photographers of America (PPA), American Society of Media Photographers (ASMP), Picture Archive Council of America (PACA), North American Nature Photography Association (NANPA), Editorial Photographers (EP) and National Press Photographers Association (NPPA). The APA has also been a strong supporter of the PLUS Registry. APA's position on any prospective orphan works legislation is that if such legislation is to be enacted it must appropriately balance the commercial interests of rights holders and the public's interest in access to orphaned works.

APA believes that several key points must be addressed in striking the appropriate balance:

1. To preserve the long recognized commercial interests of rights holders and the domestic economy in intellectual property, and in the copyrights subsisting in work, the burden of establishing an exception to any existing licensing requirement, or infringement consequence, should be on the prospective user of the work.

2. In determining when the burden that is placed upon the prospective user to establish an orphaned work status is reasonable, the threshold question should be whether it is a practical impossibility to locate the rights owner, not merely an inconvenience. The law should clearly define what constitutes a practical impossibility. It should equally make clear that mere inconvenience is not a sufficient ground to abate the need for rights compliance.

3. APA has suggested in prior submissions to the Copyright Office that a “prudent man” or “due diligence” requirement be a part of what determines whether a work can be considered an orphaned work. Specific factors should be considered in determining whether prudence and diligence has been exercised before a work should qualify. The prospective user should be required to investigate all reasonably ascertainable information. They should be required to pursue information ascertainable from (and without limitation): a) any attribution given to the work, the copyright notice, the copyright management information, or any other source identifiers associated with the work, b) the work’s sponsor or sponsors, c) the work’s co-creators, and non-author contributors, d) the work’s subject including identifiable sponsors, people, the work’s location, or other subject matter in or connected with the work, e) public and private registries and agencies, e) consultation with people knowledgeable as to the works possible source, including without limitation, consultation with legal entities and individuals who may have knowledge of the identity and location of the author, and consultation with such legally entities’ and individuals’ successors and divisions, affiliates, directors, officers, agents, contractors, employees, former employees, licensees, and assignees, and other related parties, f) rights licensing agencies, g) the Internet, or in libraries, newspapers, or other publications, h) industry and professional publications, i) other intrinsic and extrinsic matter connected with the work as to the source or origin of the work, the identity of the author, and the author’s location.

The prospective user of the work should have the obligation to preserve all indicia of their efforts to locate the rights owner in the event the issue of due diligence is in dispute. The absence of or failure to produce any such indicia should be construed against the user.

4. Rights owners should not be penalized and suffer a loss of rights or remedies when, due to no fault of their own, their identifying information is removed from their work, or where the prospective user is relying upon an anonymous copy or one otherwise produced or circulated without the rights owner’s authorization. Thus APA has suggested that orphan works should not include those where there has been removal of identifying information without copyright owner’s permission, or authority or in violation of an agreement or a reliance on unauthorized publication. Further APA

has suggested that a search not qualify as a reasonable search if the work is obtained from a source that the user has not contacted in order to identify or locate the copyright owner, or where the prospective user has contacted the source and the source is unable to provide proof that the use of the copyright work was authorized.

5. APA further suggests that the interests of rights owners are improperly impaired through the technological practice of mass stripping of copyright management information. This practice creates a class of orphan works for which the rights owners are not responsible; and often occurs in violation of the copyright law. While there may currently be remedies against a party illegally removing copyright management information, an orphan works bill should not operate to prejudice rights owners for this illegal conduct by making the public a benefactor of conduct which the law otherwise prohibits.

6. The PLUS Registry and other information sources will increasingly obviate the public's inability to locate rights owners. These registries and burgeoning information sources including those on the Internet will increasingly ameliorate the problem posed by unidentifiable, and or un-locatable, rights owners. Correspondingly, the need for orphaned works legislation is an ever-diminishing one, as industry wide advances in making author identification possible increasingly provide a solution to the orphan works problem.

7. The orphan works problem is in large part solved under the fair use doctrine. Because of the large number of instances in which the fair use doctrine provides a remedy for the use of any work, and given the expansion of the fair use doctrine in recent years, the need for orphan works legislation and the extent of the remedy needed has substantially declined. Consequently, if there is still a need for orphan works legislation at all, the legislation should be limited so as to deal with the more nominal number of cases which do not include fair use, or where fair use is not a solution. It should only provide a remedy in a limited class of circumstances and only where no other possible solution to locating a rights owner is at hand.

8. An award of monetary relief (including actual damages, statutory damages, costs and attorney fees) should not be eliminated in addressing orphan works. If awards are limited, the limitations should apply only in circumstances where such awards would not be just. The prospective user should in every event be required to pay, at the very least, reasonable compensation to the owner of the exclusive right or to beneficial interest holder for the use of the work. The user of the work should not obtain a windfall. For purposes of determining whether an award of statutory damages, actual damages, costs, and attorneys fees would not be just, and whether a limitation of remedies should apply, the court should take into account the facts and circumstances of the search conducted, the benefits derived by the infringer, the profits the infringer has obtained, the license fees that would ordinarily be charged, the need to compensate the copyright owner, the need for deterrence, and any other circumstances in the case. In any action in which the infringer demonstrates that a diligent search was conducted, there should be a rebuttable presumption that statutory damages shall not include damages for willful infringement. Rights owners should retain the ability to receive attorney fees, actual, and statutory

damages for unintentionally orphaned works, and where copyright management information is removed without the rights owner's permission.

9. A solution to the orphan works problem is to be found in the establishment of a statutory license scheme, and a collective rights management system, for secondary uses of copyrighted works. Under such a system prospective users of a work would have the ability to obtain a statutory license for their uses at industry set rates. Prospective users would thereby be provided with a safer harbor for the use of orphan works, while paying licensing fees at industry set standards. The PLUS Registry, and other distribution vehicles in the industry, now supply a means of distributing these revenues to the rights owners, and can assist in making equitable distributions of any non-title specific or non-author specific works to creators and their representatives when a rights owner cannot be found. The introduction of a statutory licensing scheme would also preserve the balance currently established by the copyright law. It would compensate rights owners while facilitating the public's use of copyrighted works at reasonable market rate cost. APA suggests that it is better to facilitate the use of orphaned works through such a streamlined statutory licensing system than to discard the copyright law's protections in favor of new immunities for unauthorized uses that merely erode the income of rights owners and the domestic economy in intellectual property.

Respectfully Submitted,

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