



AMERICAN SOCIETY OF
MEDIA PHOTOGRAPHERS

U.S. COPYRIGHT OFFICE

**NOTICE OF INQUIRY
79 F.R. 65, Docket No. 2012-12
(March 31, 2014)**

**EXTENSION OF COMMENT PERIOD:
ORPHAN WORKS AND MASS DIGITIZATION:
REQUEST FOR ADDITIONAL COMMENTS**

May 15, 2014

**ADDITIONAL COMMENTS OF THE
AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS (ASMP)**

**SUBMITTED BY:
VICTOR S. PERLMAN
GENERAL COUNSEL AND MANAGING DIRECTOR
AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, INC.
150 NORTH SECOND STREET
PHILADELPHIA, PA 19106**

**215-451-ASMP EXT. 207
FAX: 215-451-0880
perlman@asmp.org
<http://www.asmp.org>**



ADDITIONAL COMMENTS OF ASMP

ASMP supports the Additional Comments submitted by ASMP's sister organization, the Professional Photographers of America (PPA). Those comments were prepared in conjunction with an informal coalition of the leading trade associations representing creators of visual images, including ASMP, PPA, National Press Photographers Association (NPPA), Graphic Artists Guild (GAG), American Photographic Artists (APA) and others, and they represent the joint views of all of the participating organizations.

In addition, ASMP wishes emphasize or bring to the Register's attention the following points relating to the fair use doctrine. Many of the commentators at the roundtable discussions seemed to think that the topic was not orphan works and mass digitization, but fair use. The record from the roundtable contained numerous statements of law and position regarding fair use that were erroneous and need to be corrected. First, the doctrine of fair use, like any affirmative defense to a copyright infringement claim, has no direct bearing on orphan works, any more than it has on any other aspect of copyright law. It is not to be viewed as "The Answer" to the problem of orphan works; or to questions relating to mass digitization, for that matter. Fair use was created, and by its specific language continues, to deal with specific instances of infringement on a case-by-case basis. Further, the reference in §107 to "the amount and substantiality of the portion used" (emphasis added) clearly suggests that fair use was not originally intended to cover uses of complete works, let alone uses of vast numbers of complete works. In any event, however, the point is that fair use is not a solution to the orphan works problem. When touted as such, it is a red herring, since the fair use defense applies to unauthorized uses of orphan works only one case at a time. The only way to deal with orphan works as a class is through new legislation that is fair and workable, not through the uncontrolled expansion of the courts' interpretations of a statute and the perversion of those rulings by specific constituencies.

Another disturbing view relating to fair use that was voiced at the recent roundtable discussions was the incorrect claim that it was settled, black letter law that format shifting constituted fair use. That simply is not the current state of the case law and, like all blanket statements about what fair uses says, can never be true. Fair use determinations cannot be made without the prescribed case-by-

case, factual analysis of each individual situation, and the record needs to reflect that clearly.

With regard to the discussion of PLUS in the group submission being filed by PPA, I would like to note that, to date, the participating trade associations have together contributed nearly \$1,000,000. to PLUS.

To reiterate what we said at the beginning of this submission, ASMP supports the group submission being filed by PPA. We thank the Register for the opportunity to participate in this process.

We greatly appreciate being given your time and consideration.

Respectfully submitted,
American Society of Media Photographers, Inc.
By Victor S. Perlman
General Counsel and Managing Director
150 North Second Street
Philadelphia, PA 19106

P: 215-451- ASMP X207
F: 215-451-0880
E: <perlman@asmp.org>