

## **Response to US Orphan Works Consultation; the British Photographic Council**

The British Photographic Council exists to protect, develop and promote the rights and interests of photographic image makers, those involved in the distribution of their work, and the bodies that represent them in the UK.

The Council represents these views to the Government, the European Commission and other relevant bodies either directly or through or with the co-operation of other bodies with similar aims.

The British Photographic Council is an umbrella body, and its board is comprised of representatives from its member organisations. Many of these represent freelance and self-employed photographers, who under UK and international law are the first holders of copyright in the work they produce.

We have only just heard of this consultation, so this response is less detailed than it might otherwise have been, but orphan works are a particular problem for photographers in that much of their work is not credited when used, and images online are often stripped of metadata, creating orphans continuously. However there is the potential to track usage online and chase infringement of copyright.

Photographers depend on retaining copyright and the ability to re-licence and resell the same images more than once. A great photograph can sell hundreds of times or more, earning many thousands of pounds. Also photographers need to be able to licence exclusively where the client requires it, giving added value to the client and generating added value for the photographer.

At present there is little or no defence against orphaning of images, as laws on attribution and keeping metadata with images are weak and unenforceable. Moreover the culture and mechanism of the web is one of prolific copying and sharing: around 80% of uses are unauthorised according to Picscout, photos seized from their original context and separated from any means of identifying their owner. The vast majority of images on the web are in fact orphans as a result; or more accurately, stolen intellectual property.

But allowing legal use of orphan works would undermine photographers in reselling their images, as users would likely opt for using an orphan work instead of using direct licensing from a photographer or an agency, and photographers and their agents will not be able to guarantee exclusive licences to clients if copyright of the images are infringed, the images orphaned, and then reused as orphan works.

This would destroy the livelihoods of many photographers, and prevent them benefiting from a lifetime's work into their retirement, and from bequeathing income-earning images to their children.

Such orphan works legislation would breach the international Berne agreement on copyright, and because it is not possible to ascertain the nationality of the creator of a photograph, the work of foreign rightsholders would be caught in usage of orphan works in the USA.

In particular use of orphan works would breach the Berne three step test, where authors/rightsholders have the exclusive right to authorise usage of their work, except:

1. in certain special cases;
2. that do not conflict with the normal exploitation of the work; and
3. that do not unreasonably prejudice the legitimate interests of the author / right-holder.

Allowing use of orphan works will break all three steps.

Firstly, because orphan works are widespread, allowing their use in law would therefore not be confined to 'certain special cases'.

Secondly, use of orphan works would conflict with the normal exploitation of the work, by undermining photographers' ability to resell their images, as users will be tempted to use an orphan work instead of using direct licensing from a photographer or agency, and photographers and their agents will not be able to guarantee exclusive licences for their clients if copyright of their images are infringed, the images orphaned, and then reused as orphan works.

Thirdly, this would unreasonably prejudice the legitimate interests of photographers as authors, and picture libraries and agencies as licensed commercial distributors of photographs, in that their ability to licence and sell images will be compromised.

For these reasons we ask you to withdraw this proposed legislation on usage of orphan works in the USA.

Yours sincerely

Simon Chapman

On behalf of:

British Photographic Council

<http://british-photographic-council.org/>

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