



May 1, 2014

Maria A. Pallante, Esq.  
U.S. Copyright Office  
101 Independence Avenue, S.E.  
Washington, DC 20559-6000

Re: Orphan Work and Mass Digitization – Docket No. 2012-12

Dear Ms. Pallante:

The College Art Association (“CAA”) appreciates the opportunity to provide these additional comments in response to the U.S. Copyright Office’s Notice of Inquiry (“Notice”) on Orphan Work and Mass Digitization, Docket No. 2012-12. CAA previously submitted reply comments (“CAA reply comments”) regarding the Notice<sup>1</sup> and participated in the recent roundtables on the topic convened by the Copyright Office on March 10-11, 2014. As detailed by CAA in its reply comments, and reiterated during its recent testimony, the Association has long favored the development of orphan works legislation. It participated actively in the discussions that led to the Senate’s passage of The Shawn Bentley Orphan Works Act of 2008, S. 2913, which it supported, and was also significantly involved, prior to that, in proceedings related to the Copyright Office’s 2006 report on Orphan Works. At this time, CAA reiterates its commitment to the positions taken in its reply comments.

The College Art Association represents a diverse constituency of members, including artists, scholars, publishers, and museum professionals. Originally formed in 1911 as an advocacy group to address standardization of academic courses in studio practice and art history, CAA today serves more than 13,000 individual and institutional members in over 65 countries, which include artists, scholars, curators, educators, critics, and students as well as colleges, universities, libraries, museums, and research centers. It publishes three scholarly journals, *The Art Bulletin*, *Art Journal* and *caa.reviews*. And it is the primary professional organization for the academic visual arts.

As a publisher of leading journals—*Art Bulletin* and *Art Journal*, and *caa.reviews*—and an advocate for its members who might similarly seek to use orphan works, CAA continues to support orphan works legislation that 1) would significantly limit the liability of a user of an orphan work who had executed a diligent search for the work’s copyright owner that did not locate the owner, and 2) provide a safe harbor for not-for-profit cultural institutions, engaged in activities not for commercial advantage, that had exercised similar care and that took steps to cease the infringement. At the same time, CAA recognizes the importance of the attribution of the work and, as provided for in S. 2913, believes that if a copyright holder comes forward that rights holder should be entitled to a reasonable licensing fee if, indeed, the use is not considered “fair” as allowed under the law.

Consistent with positions taken by CAA previously, the organization strongly affirms that all copyrighted works, including photographs, should be protected by orphan works legislation. Photographs, which can be notoriously difficult to associate with their makers, have proven particularly tricky as a group of objects, actually being excepted from a directive, adopted by the European Union, intended to facilitate the non-commercial public interest use of orphan works. However, not to consider photographs as part of the larger category of orphan works would be extremely limiting from the perspective of CAA given the strong interest of its members in sources of visual information. Categorically excluding photographic and other works of visual art from orphan works eligibility would disadvantage users of images, including artists, scholars, and publishers, who would face continued risks of being sued for copyright infringement

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<sup>1</sup> [http://www.copyright.gov/orphan/comments/noi\\_11302012/College-Art-Association.pdf](http://www.copyright.gov/orphan/comments/noi_11302012/College-Art-Association.pdf)

despite being unable to determine the identity of the copyright owner at the time of their use. The purpose of orphan works legislation is to mitigate the legal risk of using works that are part of our shared culture. It is because those risks can have chilling effects, adversely affecting creative work by artists and scholars, that CAA has been committed to supporting orphan works legislation.

Given the diverse range of purposes to which copies of orphan works might be put by its members, CAA believes that both commercial and non-commercial uses of such material should be protected. Because artists, like scholars, can be both creators and users of copyrighted items, they may seek to make and market work incorporating reproductions of orphan works. In similar fashion, academic or independent scholars or museum professionals may seek to illustrate orphan works in publications made available for sale. While recognizing that a voluntary registry (or registries) of copyrighted works, such as photographs might be useful, CAA does not endorse requiring such registration, nor does it feel that the terms of a “diligent search” for the holders of copyright of orphaned works should be prescribed, advocating instead that the best approach to such research would be determined on a case-by-case basis, as is already embodied within the foundations of the law in the doctrine of “fair use.”

The growing reliance of many libraries and archives upon the principle of “fair use” as a justification for digitization has led the U.S. Copyright office to consider whether this defense obviates the need for orphan works legislation. CAA believes that this is not the case, recognizing that some uses of copyrighted material may not constitute “fair use.” CAA believes that such legislation is necessary to mitigate the risks of using orphan works across a wide variety of uses in the visual arts community, regardless of whether the uses might be regarded as fair.

As explained in its reply comments, CAA does not support the development of extended collective licensing or statutory licensing as it would create undue economic obstacles to the use of orphan works and impose unwarranted limits on uses of these works. While CAA will follow with interest the development of jurisprudence concerning the mass digitization of orphan works and notes that in recent cases concerning Google Books and the Hathi Trust, mass digitization was found by the US District Court for the Southern District of New York to constitute “fair use,” it does not at present have a view on how legislation might be crafted to accommodate this most effectively.

CAA appreciates the efforts of the US Copyright Office in researching the question of orphan works and mass digitization that takes into account both the occasional or isolated use of orphan works as well as mass digitization, balancing the various interests at stake. We look forward to working with the Copyright Office and Congress on legislation that would accommodate those interests.

Sincerely,



Anne Collins Goodyear, CAA President  
Co-Director, Bowdoin College Museum of Art



Linda Downs, Executive Director, CEO