
**BEFORE THE
U.S. COPYRIGHT OFFICE**

WASHINGTON, D.C.

**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**

**ADDITIONAL COMMENTS OF THE
NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION**

MICKEY H. OSTERREICHER, GENERAL COUNSEL

**ALICIA WAGNER CALZADA, ATTORNEY FOR
NPPA, HAYNES AND BOONE, LLP**

**NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION
3200 CROASDAILE DR., SUITE 306**

DURHAM, NC 27705-2586

PHONE: 716.688.7800

FAX: 716.608.1509

advocacy@nppa.org

<http://www.nppa.org>

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ABOUT THE NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION

Founded in 1946, the National Press Photographers Association (“NPPA”) is a 501(c)(6) non-profit professional organization dedicated to the advancement of visual journalism, its creation, editing and distribution in all news media. The NPPA encourages visual journalists to reflect high standards of quality and ethics in their professional performance, in their business practices and in their comportment. As one of the largest journalism organizations in the nation, the NPPA vigorously promotes freedom of expression in all forms. Its more than 7,000 members include still and television photographers, editors, students, and representatives of businesses serving the visual journalism industry.

ADDITIONAL COMMENTS

These additional comments are being submitted in response to a Notice of Inquiry issued by the U.S. Copyright Office (the Office) regarding the issue of Orphan Works on February 10, 2014. The Office published a Notice of Inquiry announcing public roundtables and inviting additional public comments on potential legislative solutions for orphan works and mass digitization under U.S. copyright law. The Office held its public roundtables on March 10–11, 2014, during which various participants, including NPPA, voiced a wide range of opinions. In order to enable commenters sufficient time to respond to issues raised during the March 2014 roundtables, the Office extended the time for filing additional comments from April 14, 2014 to May 21, 2014.

NPPA supports the Additional Comments submitted by NPPA’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 NPPA, PPA, American Society Of Media Photographers (ASMP), Graphic Artists Guild (GAG), American Photographic Artists (APA) and others, and they represent the joint views of all of the participating organizations.

NPPA also wishes to expand upon certain points made in its initial Comments submitted to the Register and respond to statements made by other participants at the March 2014 roundtables. Unfortunately it appeared that many of the commentators at those discussions seemed to think that orphan works legislation was no longer necessary given their increased reliance on the doctrine of fair use. It is the position of NPPA and others that, while fair use may be a doctrine or even an exception to copyright infringement, the courts still view it as an affirmative defense which may be asserted by a defendant. It is then up to the court to make a fair use determination based upon the four factors found in Section 107. It is not a buzzword that is just bandied about, allowing those who use images with permission, credit or compensation to go on their merry way once those two words are spoken.

What was almost as disconcerting was the belief, also expressed during the roundtables, that many users would be happy to have orphan works legislation as a backstop to their fair use claims. This would allow them “two bites at the apple” of copyright infringement protection. Fair use being an absolute bar to an infringement claim and orphan works a limitation on recovery for the same infringement. That same second bite at the apple orphan works protection would also apply to mass digitization.

This one size fits all approach appears to be what is turning Title 17 law on its head with copyright now becoming the exception to fair use. Rather than conducting a proper balancing of the four fair use factors, a number of courts have made such ruling once they determine that a use is transformative. NPPA asserts that this type of analysis was never intended to be applied as the sole determinative element in making a fair use ruling in an individual copyright infringement case, let alone in one involving mass digitization of millions of works.

Additionally, some courts have themselves “transformed” the transformative use argument to one in which using a work in a different format satisfies that factor. As applied all this does is transforms the proceeds from such works going from the creator of such works to the new users.

What did not receive adequate discussion in March is the fact that far too many social media websites automatically strip out any and all identifying metadata when images are uploaded to their sites, thus creating instant orphans of contemporary work despite the best efforts by creators to identify and establish ownership. This is an issue that needs to be addressed more seriously and, once properly resolved, would help rectify most of the orphan works concerns expressed by users.

Once again, NPPA greatly appreciates the opportunity to participate in this process and we thank the Register and the Copyright Office for their time and consideration.

Respectfully submitted,

Mickey H. Osterreicher
Alicia Wagner Calzada

Mickey H. Osterreicher, General Counsel
Alicia Wagner Calzada, Attorney, Haynes and Boone, LLP

National Press Photographers Association
3200 Croasdaile Dr., Suite 306
Durham, NC 27705-2586