

March 25, 2005

VIA E-MAIL: orphanworks@loc.gov

Mr. Jule L. Sigall
Associate Registrar for Policy & International Affairs
U.S. Copyright Office
James Madison Memorial Building, Room LM-401
101 Independence Avenue, S.E.
Washington, DC 20540

ORPHAN WORKS NOTICE OF INQUIRY

Dear Mr. Sigall:

I am writing to you as an arts professional who has been impacted by "Orphan Works" in many different ways. For this reason I thank you for allowing me this opportunity to comment on the Copyright Office's Notice of Inquiry in the matter of Orphan Works. With these comments, I speak for myself, not for my employer, the State of Oregon or the University of Oregon.

As an arts professional, I wear many hats. I am a visual resources curator, an art historian, an editor of a scholarly journal, a writer of books and articles, a member of many arts organizations, and I am an artist. In each of these professional activities I have encountered problems or issues with Orphan Works.

As the director of the Visual Resources Collection at the University of Oregon, I face innumerable instances where we have no clue as to who might own the rights to slides donated to our school or delivered to the library over the many years the collection has existed as a community-shared resource.

Prior to 1978, little if any thought was ever given to the question of copyright for it was assumed that our uses of images of art and architecture were within the boundaries of legal acceptability and fairness. Art history as a discipline has been around for over a century and throughout that history images of art have been photographed, reproduced, displayed, and published as an essential component to that discipline. It has only been since 1978, and the revision of the 1909 Copyright Law, that our practices have been noticed but, I am happy to say, still untarnished by legal action.

Our purpose – to facilitate inquiry about art and architecture and to educate our students using slides, photographs, or digital images – cannot be accomplished without access to images and as we have learned, time and again, clearing rights for these images is an impossible task. Teaching and scholarship, in order to remain vital and current, cannot and should not be hindered when the outcome to fulfill a legal requirement is destined to be

fruitless and wasteful of limited resources. It is also important to emphasize that asking for the right to display an artwork within an educational context is contrary to logic or ethics. If that be the case, we would only be teaching about the art that wants to be promoted by its maker or agent. Free inquiry in education would be destroyed. It is vital that the teaching of art and its place in history can use images as part of scholarly discourse, even those for which rights are uncertain or unknown, without breaking the law.

As an art historian, I have faced Orphan Works repeatedly in the course of my studies, research, and professional writing. The most common situation I encounter is when I want to illustrate a work in an article or book and I cannot locate the legitimate rights holder. I want to emphasize legitimate because there is a great difference between somebody who claims rights and the person who is entitled by law to claim rights. The Orphan Works initiative will make it easier for the potential user of an image whose pedigree of ownership is unclear to make use of the image with some assurance that the claimant of dormant rights has to legitimize the claim before stopping me! That, in itself, would be an enormous relief.

As an editor of a scholarly journal (I am the Technology Editor of *Visual Resources: An International Journal of Documentation [VR]*), I deal with Orphan Works regularly. Since the journal's focus is photographic documentation, especially in an historical context, we face many roadblocks in obtaining clearance required by our publisher, Taylor & Francis/Routledge. Adding to the complication is the fact that Taylor & Francis/Routledge would like to offer *VR* as an e-journal – adding international issues to a very complex national law. Without assurances that rights are cleared – a requirement imposed on each author – the article will not be accepted for publication.

Since historical photography is fraught with problems of identification, even more seriously than simply who owns the rights, we are dealing with a circular argument that needs repair. Resolution through the Orphan Works initiative is seen by those of us involved in scholarship using images as a much needed beneficial action for education and scholarship and an overdue effort to provide balance between the rights of owners and their respective giveback to society for being granted those rights through the law.

As an artist I face the problem of worrying about my own rights but I know that it is my responsibility to assert them and to take care of them. In working with other artists, I know that many do not understand copyright law but fear that their rights are being compromised every time new legislation is introduced. In some cases, their worry is well founded, but with the Orphan Works initiative, I do not think this would be the case.

By far one of the most frequently cited issues involving copyright among artists is appropriation – following the tradition of building on the creativity and discovery of others in making new creative contributions to society. We,

as artists, are doing nothing unnatural but we are faced with a legal system that tries to regulate when an idea turns into an expression and how much of somebody else's creativity can flow without ripples into new art. The Orphan Works initiative would remove some of the uncertainty in using earlier art that no longer has a trail leading back to the creator.

As an artist I accept the responsibility to manage my creativity and intellectual property and if I don't, then I will not blame others for my negligence. I also respect the rights of others but only if their claim to ownership is valid. Finally, the laws of our nation should respect when and if I care to abandon my rights and that's what I see as a major step with the Orphan Works initiative.

I thank you, again, for this chance to state my views. Incidentally, I have been privileged to read many of the statements being circulated for comment by the professional societies in which I am active. I am deeply moved by the care that is going into this process and hope that the efforts of those who have worked on this project will see legislation come forward that finally addresses a problem and a concern that has been a true barrier to the fulfillment of copyright as a right for all people.

Most sincerely yours,

Christine L. Sundt
Visual Resources Curator