



Proposal For Orphan Works Legislation

Re: Orphan Works and Mass Digitization

(Docket No. 2012-12)

Submitted By

American Photographic Artists
in response to a solicitation from the
United States Copyright Office

Edward C. Greenberg, Special Counsel

James Lorin Silverberg, Esquire
The Intellectual Property Group, PLLC

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INTRODUCTION AND OVERVIEW

The problem of how to deal with orphan works in the United States has long stymied the copyright community, leading to various proposals in Congress. To date, most of the attention has focused on handling “abandoned” orphans: works that their “parents” do not care to protect, have forgotten about, or have otherwise abandoned through the passage of years. Congruent with that approach, legislation proposed in 2008 would have precluded an orphan work rightsholder from collecting not only out-of-pocket loss, but also any statutory damages or attorney’s fees for infringing uses, so long as the user performed a “reasonably diligent search” for the orphan’s parent.

But a separate subset of “orphans” also exists: works beloved by their “parents” but that have been “kidnapped” or otherwise strayed from home. Nefarious or unwitting individuals not infrequently strip works of authorship—especially photographs—of their identifiable copyright information prior to disseminating these works to the world at large. This category of orphan works also deserves legal solicitude, as the House and Senate labor to craft an acceptable solution. Because artists often stake their livelihoods on the ability to exploit their creations for monetary gain through licensing or direct sale,

any sensible statutory scheme must protect their interests. The legislation proposed in 2008 failed to incorporate sufficient safeguards to artists whose works had been kidnapped or otherwise unwittingly been transformed from beloved offspring to “orphan” status.

In that spirit, the American Photographic Artists respectfully submits the following in response to the U.S. Copyright Office’s Notice of Inquiry seeking comments regarding “what has changed in the legal and business environments during the past few years that might be relevant to a resolution of the [orphan works] problem and what additional legislative, regulatory, or voluntary solutions deserve deliberation.”

As set forth below, the APA believes that should Congress pass orphan works legislation, it should preserve the ability to award attorney’s fees, actual damages, and statutory damages when appropriate, as would be the case for unwittingly orphaned, creative works. In the past, the APA forcefully expressed its opposition to a welter of features embodied into previous “orphan works” bills. *See APA Position on the Orphan Works Act of 2008* (2008), http://www.apanational.com/files/public/apa_position_on_orphan_works_2008.pdf (hereafter, “APA 2008 Position Paper”). The APA continues to urge that future legislation would benefit from adopting the various suggested changes explicated at length in its 2008 position paper. The current submission, by contrast, furnishes the conceptual framework for how and why Congress should alter the 2008 bills so that, solely with respect to duly registered works, copyright law will continue to afford appropriate damages and will continue to afford a discretionary award of attorney’s fees and costs where that is also appropriate.

STATEMENT OF INTEREST

The APA (<http://www.apanational.com>) is a leading national organization run by and for professional photographers. The APA provides essential business resources and educational programs to help its members achieve their professional and artistic goals. Headquartered in Atlanta, Georgia with chapters across the country, the APA advocates on behalf of its members and photographers everywhere to champion the rights of photographic artists and forge paths for their success in the industry.

The APA is committed to achieving a system that provides copyright holders an opportunity to vindicate their rights in a fair and just manner. To that end, the APA has previously supported implementing an alternative dispute mechanism for resolving small claims copyright disputes, and has been an active voice in the orphan works dilemma. *See APA: Proposal For Small Copyright Infringement Claims* (Jan. 17, 2012), http://www.copyright.gov/docs/smallclaims/comments/05_american_photographic_artists.pdf. The APA has also participated with other visual art organizations in discussions on the subject of orphan works legislation. Those organizations include Graphic Artists Guild (GAG), Professional Photographers of America (PPA), American Society of Media Photographers (ASMP), Picture Archive Council of America (PACA), North American Nature Photography Association (NANPA), Editorial Photographers (EP) and National Press Photographers Association (NPPA).

Although some of those organizations are anticipated to file their own comments with the Copyright Office that may diverge from the recommendations expressed herein, the APA shares with each of those entities the goal of protecting the copyright of every member, along with all copyright holders in general.

2008 CONGRESSIONAL ORPHAN WORKS BILLS AND APA'S OPPOSITION

In 2006, the U.S. Copyright Office released a lengthy report on orphan works, concluding that new legislation was needed to address the attendant problems. *See Report on Orphan Works: A Report of the Register of Copyrights* (Jan. 2006). After a failed attempt by the House of Representatives to pass legislation in 2006, both chambers proposed similar bills on September 24, 2008 (collectively, the “2008 Orphan Works Bills”). Senators Patrick Leahy, Robert Bennett, and Orrin Hatch sponsored proposed bill S. 2913, known as the Shawn Bentley Orphan Works Act of 2008, which passed the Senate before dying in the House at the end of the 110th Congressional term. Meanwhile, Representatives Howard Berman, Lamar Smith, John Conyers, and Howard Coble sponsored H.R. 5889, a/k/a the “Orphan Works Act of 2008,” which failed to pass either chamber.

The House and Senate versions are similar, but not identical. The main difference lies in the House bill’s so-called “dark archive” provision, which would require users to file a Notice of Use with a governmental agency prior to utilizing any orphaned work. H.R. 5889, 110th Cong., § 5.14(b)(3). The APA supports such a provision in any new legislation that is proposed.

The 2008 Orphan Works Bills were drafted to preclude an orphan work rightsholder from collecting statutory damages or attorney’s fees for infringing uses, so long as the user has performed a “reasonably diligent search” for the orphan’s parent. *See, e.g.*, S. 2913, 110th Cong., §§ 514(b)(1)(A)(i)(I) and (c)(1)(A). The 2008 Orphan Works Bills provided only “reasonable compensation” to the owner of an infringed work.

Previously, the APA expressed grave concerns about the expansive universe of orphan works that might be included under the liberal language of the 2008 Orphan Works Bills. *See* APA 2008 Position Paper. In opposition to the legislation, the APA pointed out that photographers would suffer disproportionately from its effects without traditional protections of copyright law. *Id.* at 2. Rightsholders often depend on the ability to license the copyrights in their creations to generate income; without protections afforded to them under the law, rightsholders would possess little recourse in the face of infringing works. *Id.* at 2–3. Because photographs are often victimized by accidental or purposeful deletion of bylines, captions, or digital watermarks, and thereafter copied with impunity, the APA viewed the 2008 Orphan Works Bills’ treatment of orphan works as especially problematic. *Id.* at 3. The APA argued that the limits of technology then available prevented a readily achievable solution to the desired goal of limiting the universe of orphan works, but left open the possibility that technological advancements could make a legislative solution more palatable in the future. *Id.* at 4–5. Those

concerns amplified the APA's previous commentary on 2006 orphan works legislation. *See The Orphan Works Dilemma: Challenges and Recommendations* (2006), http://www.apanational.com/files/public/apa__on_orphan_works.pdf, at 14.

In the past four years, technological advancements have come to fruition. It is now becoming cheaper to store mass quantities of digital materials. *See, e.g.,* Richard Wright et al, *The Significance of Storage in the "Cost of Risk" of Digital Preservation*, 4 Int'l J. of Dig. Curation 104, 104 (Dec. 2009), http://www.prestoprime.org/docs/training/Cost_of_risk_RW.pdf ("As storage costs drop, storage is becoming the lowest cost in a digital repository[.]"). Furthermore, new technology has increased the speed at which large collections can be digitized. *See* Ricky Erway, *Rapid Capture: Faster Throughput in Digitization of Special Collections*, Dublin, Ohio: OCLC Research (April 2011), at 19 <http://www.oclc.org/research/publications/library/2011/2011-04.pdf> ("[A]s digitization of special collections becomes more commonplace, the costs of equipment and services will continue to decrease."). In addition, technological advancements have made it easier to remove from mass quantities of digital and digitized materials the copyright management, notice, and other information which might otherwise prevent copyrightable works from becoming orphaned.

Meanwhile, the Copyright Office suggested that stakeholders from all visual arts industries work together to figure out a way to minimize the orphan works universe. Upgraded technologies, combined with a conscious movement toward collaboration, led the APA to join the Picture Licensing Universal System ("PLUS") Coalition in an effort to achieve that goal. The following section describes those efforts.

TECHNOLOGICAL ADVANCEMENTS OVER THE PAST FOUR YEARS PERMIT THE PLUS COALITION TO MINIMIZE THE UNIVERSE OF ORPHAN WORKS

The PLUS Coalition ("PLUS"), comprised of stakeholders from the photography, illustration, publishing, graphic design, advertising, museum, library, and education communities, is an international non-profit organization with a tightly focused mission: to "simplify and facilitate the communication and management of image rights." *See Picture Licensing Universal System*, www.usePLUS.org (last visited Jan. 13, 2013). PLUS is an "industry-neutral," apolitical organization, not engaged in lobbying or advocacy efforts, and taking no position on orphan works legislation. Rather, its goal is to serve as a vehicle for cooperation and collaboration among all interested parties by developing industry standards and systems connecting images to rights holders and rights information. Among other achievements, and at the suggestion of the Copyright Office, the participants in the PLUS Coalition have collaborated and developed a viable solution to the orphan works challenge.

A. The PLUS Registry

Aided by technological advances over the past four years, the PLUS Coalition has created the free, nonprofit PLUS Registry, an online resource developed for all communities engaged in creating, using, distributing or preserving images. *See PLUS*

Registry, www.PLUSregistry.org (last visited Jan. 13, 2013). The PLUS Registry enables the public to search its contents to find rights and descriptive information for any image, and to locate current contact information for creators, rightsholders, authorized licensors and other related parties. *Id.* It is designed as a global “hub” for image copyright information, connecting all registries so that a search of any one registry will search all registries connected to the hub. Importantly, the PLUS standards and PLUS Registry provide for both human readable and machine readable rights information, the latter allowing any connected system or application to read and write information to/from the Registry. This provides for fully multi-lingual rights information, together with automated digital asset management.

With increasingly potent search techniques and ever greater participation in the PLUS Registry, the robustness of searches promises to grow exponentially in the future and may serve to effectively eliminate the incidence of “kidnapped” orphans. The Registry also promises to minimize the number of “abandoned” orphans. The breadth of entities that have signed on to the PLUS Registry -- currently including entities from 92 countries -- portends a future in which a truly orphaned copyright work becomes a rarity. That status, in turn, would greatly alleviate one of the APA’s chief concerns with the 2008 Orphan Works Bills, as expressed five years ago.

B. “Best Practices” for Conducting a Reasonably Diligent Search

Of course, it is impossible to eradicate all instances of orphan works. Accordingly, the final version of any orphan works legislation must empower the Copyright Office to work in tandem with the visual arts community in order to promulgate best practices defining guidelines for a “reasonably diligent search” requirement, to include repeated searches of the PLUS Registry at www.PLUSregistry.org as well as other search methods. Due to its non-profit status, its expansive and diverse international membership, and its ten year history of collaboration with the Copyright Office on this issue, the PLUS Coalition is uniquely able to provide the PLUS Registry as a global hub for reasonably diligent searches related to visual works, and we encourage the Copyright Office to continue to work closely with the PLUS Coalition on solving the orphan works challenge. Once the guidelines for reasonably diligent search have been promulgated, users should be required to engage in *all* of the prescribed best practices before concluding that a work is, indeed, an orphan and before proceeding to make use of the work, and the users must engage in continued repeated diligent search throughout the period during which an orphan work is used. This will ensure that, should the rights holder submit the work to a registry during the period of use under the orphan works exception, the user will then identify the rights holder and compensate the rights holder for the use if required.

Without question, the contours of what qualifies as a “best practice” for conducting a reasonably diligent search is a dynamic and ever-evolving issue that cannot be set forth categorically to apply to all situations. This proposal does not seek to delve into the minutiae of what the complete list of “best practices” might contain. Nevertheless, as a baseline for these best practices, the APA recommends implementing a requirement that any actual or constructive knowledge of authorship of a creative work—

provided to or known by the prospective user—must be utilized in conducting a diligent search. For example, if a photograph credits a photographer, agency, representative, or studio, the prospective user must utilize that knowledge in performing a reasonably diligent search. The APA hopes that the collaboration between the Copyright Office, the visual arts community and the PLUS Coalition will result in similar rules that apply to a variety of situations.

IF CONGRESS SHOULD PASS ORPHAN WORKS LEGISLATION THE LEGISLATION SHOULD INCLUDE PROVISIONS MAKING AVAILABLE DAMAGE AWARDS THAT ARE APPROPRIATE TO THE CASE

In light of the foregoing, the APA does not support orphan works legislation without a modification of the general framework set forth in the 2008 Orphan Works Bills. APA remains troubled by the lack of *any* meaningful damages award available to a copyright owner whose work has been unwittingly orphaned and thereafter infringed. The 2008 Orphan Works Bills liberated infringers from the threat of statutory damages so long as they engaged in a “reasonably diligent search” for the orphan’s parents. That solicitude for the interests of those who would exploit orphan works is not appropriately balanced with the rights of photographers and rights owners who have timely registered their works and otherwise diligently acted to safeguard their property. To that extent, it swings the pendulum much too far in the direction of free exploitation. A restoration of balance is needed in order to respect the interests of creators of beloved works, whose parents have not knowingly abandoned them. The assessment of a *di minimus* penalty or fine would provide an illusory defense and/or set a “manageable cost for law breaking” for the infringer.

SPECIFIC RECOMMENDATIONS

In addressing the need to balance orphan work concerns appropriately with the legitimate interests of rights owners, APA has considered a number of specific solutions. For purposes of addressing these specifics, reference is made to S.2913. The judicial remedy limitations currently prescribed under the proposed S.2913 include the abrogation of actual damages (profit and loss recovery), statutory damages, and the attorneys fees and costs awards that are currently available to rights owners. The new section 514 limitations therefore eviscerate the current protections afforded rights holders under copyright law. These protections, considering their limited amounts and the associated litigation costs required to obtain them, already prove entirely insufficient to provide any effective remedy for rights owners as a practical matter in many infringement circumstances. Therefore the current remedy system already erodes the effectiveness of copyright protection to vast numbers of copyright owners who face infringement issues resulting from the acts of parties typically possessed of substantially greater legal and financial assets, or who can merely exploit the expense and inconvenience of the legal system.

The proposed section 514 remedy scale-back threatens to foment the current enforcement difficulties confronted by rights owners and to make infringement a virtually

consequence free activity given what would be the practical limits surrounding enforcement under a section 514 copyright regime. This directly impacts the legal market for rights owners who already suffer from inadequate protection. Rights owners will now effectively compete in the rights market place for work, and the license fees that are the staple of their income. They will now also be required to achieve business success in the context of a prospectively consequence free use of a vast amount of intellectual property that will now be dumped into their competitive marketplace and which might possibly include their own work. The prospect of mass digitization exponentially magnifies these problems. And one might question why the solution to orphan works should be framed in any manner that results in a direct attack on intellectual property businesses which already struggle with the limited existing protections that are provided for as they attempt to achieve commercial success in a competitive and, in practical terms, insufficiently protected market place.

The 514 remedy limitations are also currently designed to provide relief to infringers who conduct a qualified search 514(b)(1)(A)(i)(I), who fail to locate and identify the rights owner 514(b)(1)(A)(i)(II), who provide attribution 514(b)(1)(A)(ii), who include notice 514(b)(1)(A)(iii), (iv) who assert eligibility in initial pleadings and in Rule 26 A disclosures, 514(b)(1)(A)(iv) and (v). Section 514(b)(1)(B) provides that the infringer shall not be entitled to the limitations if they receive notice, fail to negotiate reasonable compensation in good faith, or fail to render payment after reaching an agreement. To become entitled to the 514 limitations a "diligent effort" is required, and that is comprised under 514(b)(2) of a "diligent effort" prior to and proximate to the infringement to locate the owner of the infringed copyright; that effort minimally requires a copyright office search, a search of reasonably available sources of copyright authorship and ownership, use of technology tools, use of data bases, and other reasonable and appropriate actions. The limitations do not apply if the infringer fails to comply with any and all requirements of 514(b). The limitations do not apply to infringements resulting from fixation of certain works in or on useful articles that are offered for sale, license or other commercial distribution to the public.

The applicable limitation is the abrogation of the currently allowed monetary relief in the form of actual damages, statutory damages, costs and attorneys fees other than to require the infringer to pay reasonable compensation to the owner of the exclusive right for use of the infringed work. Certain infringers are also exempt from this remedy. Under certain circumstances injunctive relief may be available.

For the purposes of addressing the Orphan Works problem, APA therefore recommends a structure that will not only afford protection for the use of truly orphaned works, but will protect the commercial interests of the rights owner (who typically can be located with a minimal investment of time or cost for the purposes of negotiating a license) in appropriate circumstances. APA specifically recommends:

A) Modification of Section 514(b)(1)(B) to provide at proposed 514(B)(1) that

Subparagraph (A) does not apply to any work from which copyright notice or copyright management information has been removed in an unauthorized publication, or without authority of the copyright owner, or in violation of an agreement that such copyright notice or copyright management information be included with an authorized publication"

Explanation:

It is a longstanding and historically consistent policy of the copyright law that rights owners who have attempted to comply with the copyright law are not to be penalized where third party action might be taken which negatively impacts the rights owner. Thus, for example, when notice was omitted from a work without the authority of the copyright owner, under prior versions of copyright law, the omission did not result in loss of copyright. Additionally, infringers have historically been disallowed an innocent infringement defense, where they infringed a work from which notice was omitted without the authority of the copyright owner. Consistent with this longstanding copyright policy APA strongly recommends that when balancing the public interest in use of Orphan Works, copyright owners be permitted to retain the few remedies they now have under copyright law where they have affirmatively taken action to protect their rights, have provided copyright management information, and or copyright notice, and where the orphan status of their work results entirely from the unauthorized, and or illegal extraction of that information by others.

B) Modification of Section 514(b)(2) Requirements for searches, stating:

"A search shall not qualify under paragraph (1)(A)(i)(I) if the infringer, a person acting on behalf of the infringer, or any person jointly and severally liable with the infringer, obtains the infringed work from a source which they have not contacted in order to identify and locate the copyright owner, or which they have contacted but which is unable to provide proof that the use of the copyrighted work by that source was with the copyright owner's permission or authorization."

Explanation:

APA strongly recommends that in balancing the public interest in use of Orphan Works, copyright owners be permitted to retain the few remedies they now have under copyright law where the potentially orphaned status of the work is clearly being derived from *an unauthorized or infringing* use. Therefore, in conducting a diligent search, APA strongly recommends that the infringer or party acting in their behalf, should -- at the very least -- be required in conducting a "diligent search", to contact the source from which the work was obtained and to document that the source of the work was authorized by the rights owner. Failure to include this requirement is directly opposite to the objects of copyright law, and would serve to create a circumstance under which copyright infringement itself would function to advance the orphaning of works, and the divestiture of rights from rights owners who otherwise have taken every legally required precaution to protect their interests.

C) Modification of 514(b)(2)(A)(ii) with a “due diligence” requirement added as proposed section (ee):

(ee) due diligence and a good faith concerted effort to identify and locate the rights owner utilizing the measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances, and depending on the relative facts of the special case.

For the purposes of determining if due diligence has been exercised the user of the work shall investigate all reasonably ascertainable information, including without limitation information ascertainable from: a) any attribution given to the work, the copyright notice, the copyright management information, or any other source identifiers associated with the work, b) the work’s sponsor or sponsors, c) the work’s co-creators, and non-author contributors, d) the work’s subject including identifiable sponsors, people, the work’s location, or other subject matter in or connected with the work, e) public and private registries and agencies, e) consultation with people knowledgeable as to the works possible source, including without limitation, consultation with legal entities and individuals who may have knowledge of the identity and location of the author, and consultation with such legally entities’ and individuals’ successors and divisions, affiliates, directors, officers, agents, contractors, employees, former employees, licensees, and assignees, and other related parties, f) rights licensing agencies, g) the Internet, or in libraries, newspapers, or other publications, h) industry and professional publications, i) other intrinsic and extrinsic matter connected with the work as to the source or origin of the work, the identity of the author, and the author’s location. The user shall have the obligation to preserve all indicia of such efforts in the event the issue of due diligence is in dispute. The absence of or failure to produce any such indicia shall be construed against the user and shall serve as a rebuttable presumption that the user has not in fact exercised due diligence.

Explanation:

A legal definition that is often employed for the definition of due diligence is: that measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case. *Perry v. Cedar Falls*, 87 Iowa, 315, 54 N. W. 225; *Dillman v. Nadelhoffer*, 1G0111. 121, 43 N. E. 378; *Hendricks v. W. U. Tel. Co.*, 120 N. C. 304, 35 S. E. 543, 78Am. St. Rep. 058; *Highland Ditch Co. v. Mumford*. 5 Colo. 330.

APA recommends that sufficient “due diligence” be required, before those who seek an orphan works license be able to avail themselves of the orphan works safe harbor. These users of orphan works should be required to demonstrate that they have undertaken due diligence and a concerted effort with respect to the actions they have taken to ascertain the identity and location of the rights owner of an image, i.e., that they have met a standard of due diligence in order to immunize themselves from infringement claims under orphan works legislation.

“Due diligence” is a ubiquitous concept in the sophisticated and unsophisticated worlds of both law and business. A “due diligence” requirement is common in litigation such as trusts and estates, acquisitions, negligence, property damage, breach of contract matters, mal-practice and dozens of other fields which typically do not concern governmental, regulatory or administrative agencies, rules or regulations. As it is a concept that already finds daily employment by lawyers and non-lawyers alike, APA recommends that it be employed as an easily understandable standard for determining whether there has been a “diligent effort” and reasonable investigation, to identify and locate rights owners. Legislation that is readily understandable by laypeople is more likely to be adhered to.

D) Modification of section 514(c)(1)(A):

(A) GENERAL RULE- Subject to subparagraph (B), an award of monetary relief (including actual damages, statutory damages, costs and attorney fees) may not be made in circumstances where such an award would not be just, other than an order requiring the infringer to pay reasonable compensation to the owner of the exclusive right or beneficial interest holder under the infringed copyright for the use of the infringed work. For purposes of determining whether an award of statutory damages, actual damages, costs, and attorneys fees would not be just the court may take into account the facts and circumstances of the search conducted, the benefits derived by the infringer, the profits the infringer has obtained, the license fees that would ordinarily be charged, the need to compensate the copyright owner, the need for deterrence, and any other circumstances in the case. In any action in which the infringer demonstrates that a diligent search was conducted, there shall be a rebuttable presumption that statutory damages shall not include damages for willful infringement.

Explanation:

Under the current copyright law, courts have discretion to award statutory damages and attorneys fees for infringements that commence after registration of the copyrighted work and in certain other circumstances. Courts currently have wide discretion in awarding statutory damages and attorney’s fees. For the purposes of making such awards, the Courts will consider the need to punish the infringer, the need to set an example, the need to compensate the copyright owner, and the need to address other factors attendant to the infringement. APA strongly recommends that section 514 preserve the equitable discretion which the courts currently have to formulate relief in appropriate cases. Therefore APA recommends that these awards be preserved in appropriate circumstances and that the courts are in the best position to determine when those circumstances exist. A limitation for those who perform a diligent search rationally might include relief from statutory damages for willful infringement. Awards for profits are already limited to profits attributable to the infringement, and are subject to apportionment for the use of non-infringing material in combination with infringing material. These rules already provide infringers with substantial protection for their use

of infringing material even where no diligent search is performed. Presumably, in the vast majority of cases where a work is truly orphaned, the infringer should have little or no concern that they will have to deal with even these limited remedies. The preservation of court discretion in awarding attorneys fees and costs, will also serve to limit the consequences for the use of truly orphaned works in appropriate circumstances, but to preserve the remedies for rights owners in appropriate cases.

CONCLUSION

The orphan works dilemma is not an easy puzzle to solve. The Copyright Office has been tasked with recommending a palatable solution to Congress that simultaneously safeguards the rights of millions of copyright holders and reduces the roadblocks currently in place deterring the use of orphan works.

The APA believes that the solution requires balance. The preservation of damage awards in appropriate cases, under appropriate conditions, and threshold search requirements can help restore this balance, and is precisely the type of baseline solution that Congress should employ. Such an approach vindicates the purpose of the copyright law by rewarding those who have sought to preserve their rights as well as the interests of those who have taken appropriate measures to investigate the orphaned status of copyrightable works. Such an approach also serves to minimize the universe of orphan works, particularly in a digital age that threatens all work with an involuntary orphaned status. The APA will also continue its collaboration with other members of the visual arts community and the PLUS Coalition to achieve that goal. Absent the elimination of the orphan works universe altogether, Congress should therefore enact legislation which employs the balance set forth above such that individual creators whose rights are specifically and *unanimously* embodied in the United States Constitution by the Founders at Article I, Section 8, Clause 8 (reinforced repeatedly by Title 17 of the US Code and the amendments thereto) may effectively preserve those rights against those who seek to appropriate them sans payment or consent.