

**U.S. COPYRIGHT OFFICE**

**NOTICE OF INQUIRY  
77 F.R. 204, Docket No. 2012-12  
(October 17, 2012)**

**ORPHAN WORKS AND MASS DIGITIZATION**

**February 4, 2013**

**COMMENTS OF THE  
AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS (ASMP)**

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## **COMMENTS OF ASMP**

### **Introduction and Background**

ASMP wishes to thank the Register for this opportunity to provide comments regarding the current state of play for orphan works, an issue with which ASMP has been intimately and extensively involved since the first Copyright Office study of the subject, which began approximately eight years ago.

The American Society of Media Photographers' mission is to protect and promote the interests of professional photographers who make photographs primarily for publication. Founded in 1944, ASMP is the oldest and largest trade association of its kind in the world and currently has approximately 7,000 members. ASMP counts many of the world's best and best-known photographers in its ranks.

Since ASMP has filed multiple submissions and testified before the appropriate committees and subcommittees of both chambers on this issue over the past eight years, ASMP's general views and positions on specific issues are already part of the public record and will not be reiterated here. It is probably sufficient to start the current discussion by noting that, when Congress last addressed this issue, ASMP supported the last version of the legislation in the House of Representatives, H.R 5889, the Orphan Works Act of 2008.

For the past two years or so, ASMP's leaders have been in continuing discussions with representatives of the other major trade organizations representing professional photographers and graphic artists in order to achieve consensus on various issues, such as orphan works, confronting visual artists. The other organizations participating in these informal discussions are Professional Photographers of America (PPA), Graphic Artists Guild (GAG), North American Nature Photography Association (NANPA), American Photographic Artists (APA), National Press Photographers Association (NPPA), and Picture Archive Counsel of America (PACA). While each organization is filing its own submissions in response to the Notice of Inquiry (NOI), all are working together to achieve a common solution to issues like orphan works.

Before moving to the discussion of our answers to the questions posed in the NOI, it should be noted that ASMP's previous submissions and those of other photographic trade associations have already documented in detail the economic

plight of working photographers and the impact that uncompensated uses of their images have on them. However, it is worth updating that information with an unsurprising piece of information: a recent survey has shown that, once again, the average revenues for working photographers declined over the past year. Obviously, visual artists remain the group most vulnerable to the unauthorized uses of their works while being the group least financially able to bear the resulting economic losses. Every uncompensated use is not just a loss of income from that use, it is also a use that competes with the photographer's other images in the marketplace. As noted by one of ASMP's sister organizations in its comments, one cannot compete with "free." At best, uncompensated images drive down the market value of every other image.

### **Subject of Inquiry**

The NOI "seeks comments regarding the current state of play for orphan works, including what has changed in the legal and business environments that might be relevant to a resolution of the problem and what additional legislative, regulatory or voluntary solutions deserve deliberation." The NOI goes on to ask that the comments cover the use of orphan works 1) on an occasional or case-by-case basis and 2) in the context of mass digitization.

### **Discussion**

As a preliminary matter, it should be noted that ASMP generally supports the positions and submissions of its sister organizations mentioned in the introduction to this submission, as well as the submission of the Copyright Alliance, of which ASMP is a member. It should also be noted that, because ASMP is a lead plaintiff in litigation against Google in the U.S. District Court for the Southern District of New York relating to mass digitization (*American Society of Media Photographers, Inc. et al. v. Google, Inc., Case No. 10-CV-2977*) it would be inappropriate to reply to the NOI in the context of mass digitization. However, it is ASMP's position that no form of mass digitization can qualify for fair use because of the very nature of fair use and of §107 of the Copyright Act of 1976.

ASMP does not believe that it would be productive here for us to go through a detailed analysis of the previous legislative proposals and its positions on their various specific aspects. Some of our sister associations have done that, and we generally support their comments and see no point in simply restating what we and other visual artists rights groups have already said. Rather, we wish to resurrect a suggestion that we made in 2007-2008. At that time, we stated our view that the proposed legislation was unnecessarily complex and, in various ways, unsatisfactory for both creators and users of copyrighted material. I.e., we felt it might ultimately not accomplish what we viewed as the goal: a mutually fair and workable approach for rightsholders and users. We proposed that one possible solution would be to take the previous legislation and limit the scope of the limitations of liability afforded under it to those individuals and non-profit

institutions making non-commercial uses that are non-revenue producing or that are works of non-fiction.

This would leave intact full copyright protection where uses are for things like advertising, product packaging, t-shirts, coffee mugs, etc. However, it would provide a safe harbor for uses such as non-fiction books, articles, special interest (e.g. hobbyist) websites, etc. To put it another, and more colloquial, way, if most photographers would normally permit a particular use by a particular user without requiring compensation, orphan works limitations on remedies should be available despite the fact that permission cannot be sought because the copyright owner cannot be located.

At the time that we made this suggestion, there seemed to be some interest in this concept among some of the other parties, including the Copyright Office, but the prevailing feeling was that the existing process of negotiating and refining the details of the proposed legislation was too far along to try to a different approach. Since it is now some five or so years later and there is no piece of legislation currently on the table, ASMP suggests that this might be a good time to examine our suggestion with a fresh and objective eye and perhaps use it as a starting point.

A second point to keep in mind and to put the following comments into context is that ASMP believes that the two keys to solving the orphan works problem --- either without legislation or to be bolstered by legislation --- are attribution and registries. The problem of not being to identify or locate a rightsholder for photographs begins with the separation of images from the names of the photographers. Publication without attribution, or separation of images from attributions, or deletions of attributed names whether accidentally or intentionally --- these all are the genesis of orphan works problems. Any cure for the problem must start with approaches to guarantee the images must have the photographers' names attached to the images whenever they are published and otherwise used, and that the attributions must be maintained.

Similarly, non-profit, voluntary registries of photographers, their contact information and their photographs are crucial to reducing and minimizing the numbers of photographs that might be considered orphan works. In these days of viable image recognition based search technology, registries that provide searchable databases of photographers, their contact information and their images are the best and easiest way for potential users to be put in contact with copyright owners, at least in the world of photography. Fortunately, the PLUS Registry, discussed below, is uniquely positioned to provide solutions to much of the orphan works problem.

### **What Has Changed?**

The NOI solicited comments specifically relating to what has changed in the orphan works landscape over the past five years. Perhaps the biggest change

has been the position of the library community. During the previous orphan works initiatives, the library community was probably the loudest and most forceful voice on the user side, pressing for the need for orphan works legislation. However, in its submission in response to the current NOI, the Library Copyright Alliance (LCA) has now taken the position that it no longer views orphan works legislation as necessary. ASMP fundamentally disagrees with much of the legal analysis and reasoning in the LCA's submission. More importantly, ASMP's concerns about potential abuses of an orphan works law have never been primarily about non-profit institutions; rather, it is the applicability of an orphan works law to commercial uses and commercial users that creates the major issues that we believe have to be addressed. Thus, even though the library community no longer views legislation to be necessary to solve the orphan works dilemma, that does not make the orphan works problem go away.

Another change has been the suggestion by some entities that there should be an increase in the formalities required before copyright protection attaches to a work. To put it simply, any expanded requirement of formalities would be unacceptable to ASMP, would most likely violate the obligations of the United States under the Berne Convention, and would likely be contrary to the public good by reducing the number of copyright registrations available for the public to search. Such proposals are, from ASMP's perspectives, non-starters. The only formality that ASMP might support would be some requirement that all published matter that incorporates photographs must have the photographer's name attached to each photograph, if that could be accomplished while still complying with the Berne Convention.

Related to the issue of formalities and registration, ASMP has been encouraged by the technological advances recently made in the Copyright Office. In furtherance of that progress, it remains ASMP's position that orphan works will remain something of a problem for visual works, and the public is not being served as it should be, until and unless there is a database of deposit copies that is searchable by image recognition technology.

Additional recent changes in the orphan works situation have been the government initiatives regarding orphan works in Europe and the United Kingdom. Such directives and initiatives make two things clear. If there is to be orphan works legislation in the United States, it must 1) address orphan works on a global scale, and 2) be compatible with legislation in the EU and the UK. Even in the absence of legislation abroad, the global nature of the internet and its emergence as one of the dominant means of using and distributing copyrighted works would dictate that any U.S. orphan works legislation take global issues into account.

A further change has been the continuing development of the Picture Licensing Universal System (PLUS) and the PLUS Registry. ASMP is a strong supporter of and participant in PLUS. As a non-partisan entity with international support from

entities in all constituencies within the copyright community --- not just copyright owners, PLUS and the PLUS Registry are ideally positioned to be of invaluable assistance in searches for owners of copyrights in visual images, thereby decreasing the orphan works problem. Several of ASMP's sister organizations, including GAG and PACA, have discussed extensively how PLUS might fit into an orphan works solution in their submissions, so we will not duplicate those efforts here beyond saying that we support those comments. However, as we stated earlier, we believe that the PLUS Registry is crucial and uniquely positioned for solving or at least minimizing the orphan works problem.

Another important change involves the exploration of alternative dispute resolutions for copyright claims where the amount in controversy cannot support the costs of conventional federal court litigation (small copyright claims). The concept was initially included in the previous legislation in the form of a Congressionally mandated study of small claims alternatives to be conducted by the Copyright Office. Since that legislation was not enacted, neither was the mandate. Fortunately, the current Register of Copyrights recently moved forward with the study on her own initiative, and ASMP has participated in various submissions and roundtable discussions on the subject. The difficulties of creating a system that would 1) work, 2) be compatible with the Copyright Act, and 3) be Constitutionally permissible have proved to be far greater than we imagined when we first addressed this issue, seven or eight years ago.

One of the sticking points has been the Constitutional difficulty of placing a defendant in an alternative system without his or her consent (and conversely, the question of how many defendants would consent to such jurisdiction knowing that, without his or her consent, the plaintiff would not have the resources to pursue the claim?). It appears to ASMP that this problem might be solvable if there were orphan works legislation that required consent to the jurisdiction of a small copyright claims system as a quid pro quo for seeking the reduction in liabilities that would be afforded by a defense based on a claim that the copyrighted work was an orphan work.

### **Summary and Conclusion**

These comments have been general in nature and, on most issues, have attempted to avoid specifics and details. That has been intentional: if there is going to be a move towards orphan works legislation, ASMP is not committed to any single approach, but is, and always has been, flexible in considering and responding to any reasonable suggestion that 1) would adequately protect the rights and interests of both copyright owners and users and 2) be practical and workable.

We would like to make one final comment, on an issue not directly related to orphan works. One of the great problems facing the copyright community --- rightsholders and users, alike --- is the appalling lack of education and information regarding copyright among the public at large. This results in a far

greater level of infringements, whether willful or unknowing, than there should be. This, in turn, hurts both the copyright owner who has been infringed and the infringer who finds him- or herself confronted with a lawsuit. ASMP believes that this country needs to embark upon a concerted and formal, governmentally supervised educational program to inform everyone, beginning with young schoolchildren, of the basics of copyright law and the potential consequences for violating it. We suggest that any orphan works legislation incorporate or be attached to legislation providing for such a program.

Thank you for your time and consideration.

Respectfully submitted,  
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