



copyright alliance

Connecting creators · Protecting creative work

February 4, 2013

Library of Congress  
Copyright Office  
[Docket No. 2012-12]  
Orphan Works and Mass Digitization

Comments by the Copyright Alliance

## I. Introduction and Background

The Copyright Alliance welcomes this opportunity to participate in the U.S. Copyright Office's review of the issue of orphan works under U.S. copyright law.

The Copyright Alliance is a non-profit public interest and educational organization that is supported by nearly forty entities comprised of individual artists and creators, as well as the associations, guilds, and corporations that invest in and support them. Besides these institutional members, we represent more than 7,000 individual "One Voice Artist Advocates" who give their personal time and creativity to support our work. Among the myriad types of copyright owner and creator groups represented by The Copyright Alliance, we represent many of the most vibrant visual arts organizations in the United States, including: American Photographic Artists, the American Society of Media Photographers, Graphic Artists Guild, National Press Photographers Association, and Professional Photographers of America, and as a whole, a group with a distinct set of concerns regarding Orphan Works. The perspective of visual artists, and in particular photographers, is of significant importance in this inquiry, because as the Copyright Office has noted "[p]hotographs are particularly challenging" as "they affect a vast variety of images . . . for which there may or may not be a living copyright owner" and "they frequently lack or may become divorced from ownership information."<sup>1</sup>

The Copyright Alliance is committed to promoting the cultural and economic benefits of copyright, providing information and resources on the contributions of copyright, and upholding the contributions of copyright to the fiscal health of the nation and for the good of creators, owners, and consumers around the world. Among other principles, we seek to promote appropriate copyright protection and enforcement to encourage the creation and lawful distribution of works, with fair compensation to the authors of creative works. While many of the entities we represent are small businesses and individual creators, all who participate in the copyright ecosystem have an interest in effective mechanisms for registering and licensing copyrights.

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<sup>1</sup>Notice of Inquiry, *Orphan Works and Mass Digitization*, 77 Fed. Reg. 64,556 (2012).

### Introduction and Summary

Members of the Copyright Alliance, like many creators and innovators, are both creators and users of copyrighted works, and thus share the Copyright Office's concern that productive and beneficial uses of "orphan" works may be inhibited because potential users of copyrighted works cannot identify or locate the owner of a work they wish to use and cannot determine the conditions under which the work may be licensed.

As creators and users of copyrighted works, the Copyright Alliance would be prepared to support appropriately scoped, constructive orphan works solutions, managed by the Copyright Office. Such solutions should focus primarily on two principle issues: (1) the establishment of officially recognized registries for various types of works; and (2) defining standards for conducting a reasonably diligent search for the author of a work.

The guiding light in any orphan works solution must be that all searches be conducted for the primary purpose of identifying rights holders so that their works do not fall into "orphan" status (as opposed to deeming works orphaned or adding works to a list of "orphaned" works for licensing or other purposes). Bearing this purpose in mind will of necessity suggest certain approaches as more appropriate than others when establishing registries and defining standards for conducting reasonably diligent searches, some of which we will outline further here. In any event, the Copyright Office should use this principle as its lodestar as it considers these important questions.

In its Notice of Inquiry (NOI), the Copyright Office notes that various changes in United States law relaxing copyright formalities may have exacerbated the difficulties users face in locating authors of orphan works. As the Copyright Office correctly recognizes, such changes were made for sound and important reasons (including ensuring compliance with international treaty obligations) and are necessary to protect individual authors from being deprived of their copyright interests on purely technical grounds.<sup>2</sup> For these reasons we believe it would be entirely inappropriate to return to copyright formalities, or otherwise make the copyright registration system more challenging to use for individual copyright holders (e.g. by imposing periodic registration renewal requirements etc.) as a means to address the orphan works issue. We fear that such requirements could have the opposite effect from that intended.

Indeed, we believe the Copyright Office should first investigate how it can improve the current registration system to make it more effective and more useable – including by making it searchable for works like photographs and other works of visual art. The Copyright Office has itself recognized that among its key priorities must be increasing incentives for participation in the registration system. This serves not only authors, but users of works.<sup>3</sup>

As it exists now, the registration system works relatively well, and is used fairly consistently by copyright owners of works like motion pictures and books, which may be described as low

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<sup>2</sup> *Id.*

<sup>3</sup> *Priorities and Special Projects of the United States Copyright Office, 2011-2013*, at 3 (2011). available at <http://www.copyright.gov/docs/priorities.pdf>.

volume and high individual value copyrighted works. Such authors are accordingly afforded all the benefits of timely registration, including the ability to pursue claims for statutory damages for infringements. The availability of statutory damages is often a threshold question for an individual author deciding whether or not to pursue a claim of infringement against an infringer, given the extremely high costs involved in bringing a copyright claim in Federal Court. Thus, whether or not the registration system adequately serves an individual author's needs can mean the difference between being able to enforce one's copyright or not.

In contrast to authors of low volume/high value works, the current registration system does not serve the interests of large volume/low value works often created by authors such as photographers, and other "creative upstarts." The costly and burdensome nature of the registration process for these users, and the inefficiency of the system (e.g. lack of searchability for images) reduces the likelihood that individual authors of such works will register their copyrights. This creates numerous problems both for owners and for potential users of such works, including exacerbating the so-called "orphan works" problem in multiple ways. First, and most obviously, if authors do not feel the registration system serves their needs, they do not register their works, and they are less likely to be found. Second, even when authors do register their works, if the registration system is not adequately searchable, it is not an efficient tool to aid potential users in identifying authors of works. Thus, a cost effective, searchable and non-burdensome registration system which serves the needs of registrants and users of large volume/small value works at least as well as the current system serves to identify authors of low volume/high individual value works could begin to encourage greater and more accurate registration of works, as well as better searchability and thus reduce the incidence of orphan works.

Some may advocate that orphan works related issues could be addressed via reliance on the courts, and application and/or extension of defenses such as fair use. We believe that such an "ask forgiveness, not permission" approach to licensing the work of authors turns copyright law on its head. Our views are supported by litigation in the context of mass digitization projects (e.g the "Google Books" project).<sup>4</sup> Moreover, such approaches further compound the burdens placed on individual authors and small businesses and seem to be little more than barely disguised attempts to rely on the likelihood that creative upstarts will not have the financial means to defend their copyright interests, and thus their authorship rights will be available to be appropriated by others, relatively risk free.

The Copyright Alliance represents a broad and diverse membership. Many of our members are filing individual comments outlining their specific recommendations regarding the issues the Copyright Office seeks comment on. We therefore set forth below some high level principles to frame the Office's consideration of these issues, in response to the Office's questions.

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<sup>4</sup> *Authors Guild, Inc. v. Google Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011).

1) *Is the 2008 legislative framework surrounding orphan works viable for considering occasional or isolated uses of orphan works?*

The 2008 framework generally raises the key components to be considered in addressing the orphan works issue, should it be addressed legislatively. While we are not convinced that legislative solutions are the only or best solutions possible, we would be prepared to support appropriately scoped, constructive orphan works solutions, managed by the Copyright Office, focused primarily on: (1) the establishment of officially recognized registries for various types of works; and (2) defining standards for conducting a reasonably diligent search for the author of a work.

In order to ensure that registries meet appropriate standards, are easy to find and use, facilitate searches, and avoid actual or potential business conflicts, the Copyright Office must take the central role in identifying and officially recognizing registries for various types of works, and in setting and administering standards for best practices for registries.

Happily, numerous registries already exist for various categories of works, which may serve as a model for best practices for registries. For instance, ASCAP, BMI and SESAC have each maintained registries for musical works for many decades, which they each use to license and deliver royalties to songwriters and composers who have registered their works with them. These practices are elaborated on in the Joint Comments of the American Society of Composers, Authors and Publishers [and] Broadcast Music, Inc. [and SESAC, Inc.], Docket No. 2012-12 (February 4, 2013); also explained therein is why these practices mean there is for all practicable purposes not an Orphan Works “problem” when it comes to the public performing right in musical works. Similarly, SoundExchange operates a very effective registry for delivering royalties for certain uses of sound recordings to musicians.

Given the particular concerns expressed by the Copyright Office over the challenges inherent in addressing orphan works in the visual arts world, we are encouraged by the collaborative work of the Picture Licensing Universal System (PLUS), a neutral, non profit 501(c)6 organization which brings together stakeholders from the photography, illustration, publishing, graphic design, advertising, museum, library and education communities to seek solutions to mitigate the orphan works challenge facing those communities. We believe the standards developed by this group and the image rights registry and registry hub established by PLUS in the intervening years since 2008 demonstrate that it is feasible to define standards for identifying rights holders and communicating rights information; and model best practices for operating an industry neutral, global, non profit rights registry for images.

With respect to establishing standards for conducting a diligent search, we offer the following high-level thoughts:

- First and foremost, the primary purpose of any search for an author of an orphan work must be to locate the author, and facilitate licensing of the work, not to establish the work as “orphaned” and add it to a list of works available to be used freely without compensation to the author.

- Ideally, the Copyright Office itself would take steps to assist or facilitate searches for authors of orphan works. As a neutral agency, vested with the responsibility of administering the Copyright Act appropriately, the Copyright Office is well placed to define best practices for conducting a diligent search. The Copyright Office should also certify any existing registries as official registries based on standards to be defined through consultation with stakeholders and maintain a list of registries, which users must, at a minimum, search for a given category of works, as part of satisfying the requirement that a diligent search for the author be conducted.
- As a threshold matter, any work accurately listed in and kept updated in an officially recognized registry cannot by definition be considered “orphaned.”
- Authors should be encouraged, but not required, to list their works in registries. To do otherwise would be tantamount to imposing a formal registration requirement, which, as we have noted, would likely impose particular challenges for individual copyright owners.
- The obligation must be on users to search all officially recognized registries each time they seek to use a given work. Authors must not be required to register in multiple registries for a variety of practical reasons:
  - In order to operate effectively, registries will likely require authors to provide a variety of information – potentially including copies of works to the registries to ensure searchability, and to regularly update information, and to maintain membership in the registry. This can be burdensome and duplicative for authors to provide to multiple registries, and for registries to maintain. Conflicts between registries could result.
  - Registries often have rules preventing authors from joining more than one registry.
  - Limiting membership to one registry per work/per author limits problems for users seeking to license copyrighted works, including limiting duplicative and/or conflicting license demands on users and the possibility of multiple requests of payments of license fees for the same work by multiple registries.

We stand ready to work with the Copyright Office to provide more detailed thoughts on best practices for registries, and standards for conducting a diligent search for an author should the Copyright Office elect to pursue an orphan works solution along these lines.

2) *Circumstances under which orphan works may be used in a mass digitization context.*

The NOI also seeks comment on whether orphan works could be used in a mass digitization context, and if so, under what circumstances. Although the notice assumes that there is policy overlap in resolving the orphan works and mass digitization issues, we would suggest that in most instances where mass digitization has been at issue, the entities involved were not seeking to identify authors of works for purposes of seeking permission to digitize those works.<sup>5</sup>

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<sup>5</sup> *Cambridge Univ. Press, et al v. Becker*, No. 1:08-cv-1425-ODE (N.D. Ga. May 11, 2012) (referencing overwhelming number of instances in which party digitizing works did not attempt

While we are sympathetic to the preservation and archival needs of libraries, archives, and museums and recognize that in the digital environment these needs may ultimately involve “mass digitization” of entire collections of an institution’s work, The Copyright Office is already undertaking a review of whether section 108 of the Copyright Act, which provides libraries and archives with specific exceptions targeted to such preservation and archival needs requires updating in the digital age.<sup>6</sup> Numerous Copyright Alliance members have taken part in this inquiry and contributed to the work of the Section 108 Study Group.

To the extent the Copyright Office seeks to address issues beyond those concerned with orphan works in the context of preservation and archival use of copyrighted works, such an inquiry would raise myriad issues well beyond the scope of those considered in the context of the 2008 legislative framework on orphan works. It is undeniable even from the discussions concerning isolated and incidental uses of orphan works that numerous harms flow to authors from such uses. Such harms will only be magnified in the context of mass digitization of copyrighted works. Accordingly, the Copyright Office, and Congress should wade into these waters only very carefully, and with due consideration. Rather than seeking to address a series of complex issues such as these as an afterthought to an inquiry on a topic, which has little direct common context, the Copyright Alliance urges the Copyright Office to open a separate inquiry, and convene a separate study group to help elucidate the issues to be considered.

We would be pleased to offer our service in any such endeavor.

Respectfully submitted,



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to seek copyright owner’s permission); *Authors Guild, Inc. v. Google Inc.*, 770 F. Supp. 2d at 670 (finding that “Google did not obtain copyright permission to scan the books”).

<sup>6</sup> *Section 108 Study Group Report*, at 1, 3 (2008), available at <http://www.section108.gov/docs/Sec108StudyGroupReport.pdf>.