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SUITE 1114  
NEW YORK, NY  
10004-1612



(212) 791-3400



(212) 791-0333



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**LIBRARY OF CONGRESS Copyright Office**  
**[Docket No. 2012-12]**  
**Orphan Works and Mass Digitization**  
**AGENCY: Copyright Office, Library of Congress.**  
**ACTION: Notice of inquiry.**

January 31, 2013

LIBRARY OF CONGRESS

Copyright Office

[Docket No. 2012-12]

Orphan Works and Mass Digitization

Notice of inquiry.

Comments Submitted by the Graphic Artists Guild

by electronic filing

Re: Federal Register /Vol. 77, No. 204 /Monday, October 22, 2012 /Notices

**INTRODUCTION**

Visual art organizations, including the Graphic Artists Guild (GAG), American Society of Media Photographers (ASMP), Picture Archive Council of America (PACA), Professional Photographers of America (PPA), North American Nature Photography Association (NANPA), National Press Photographers Association (NPPA), and the American Photographic Artists (APA) have formed a joint committee to work on this issue and other legislative issues of concern to visual creators. We look forward to working with the Copyright Office and the legislation in finding a workable solution to this important issue. Although we are filing individual Comment Letters, we share the common goal of working together to address the economic, marketplace and legal concerns of visual creators regarding allegedly orphaned visual works.

The Graphic Artists Guild supports the need for legislation to address genuinely orphaned copyrighted works. We as a group are in favor of orphan works legislation because orphan works continues to be a problem for both image users and visual creators. We believe the need for orphan works legislation is real and that there are legitimate uses of orphaned



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works by museums, libraries, and archives. Properly determined orphan works legislation would be in the best interest of the general public, and would not harm the legitimate interests of creators and rights holders. Poorly framed legislation would be to the public's detriment.

The Graphic Artists Guild opposes any allowance of orphan visual works by commercial for-profit businesses and profit-generating endeavors by individual users for commercial purposes.

The very nature of how some visual works are created, and/or how they are used in the marketplace, results in many visual works in a variety of media that have no attribution and therefore would be considered "orphaned" because the rights holder cannot be identified.

Attributed visual works may be transformed from one medium to another in the course of reproduction, while attribution to the rights holder is either accidentally deleted or deliberately omitted as is customary for that end use in the marketplace.

Additionally, internet use and the digitization of visual works often strips metadata or other identifying information about the creator or rights holder.

The European Commission Directive on orphan works, (Council of 25 October 2012), permitted certain uses of orphan works.

*"Article 1*

***Subject-matter and scope***

*1. This Directive concerns certain uses made of orphan works by publicly accessible libraries, educational establishments and museums, as well as by archives, film or audio heritage institutions and public-service broadcasting organisations, established in the Member States, in order to achieve aims related to their public-interest missions."*

The European Commission has already defined necessary use by these cultural institutions; the same use that we support. Our concern is what use is allowed, ensuring that the



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creator or rights holder is paid reasonable compensation for use, how such reasonable compensation is determined, enforcement of a diligent search prior to use, and ensuring payment for use to rights holders.

### ***I. Orphan Works on an Occasional or Case-by-Case Basis***

#### ***From the Notice of Inquiry:***

*The 2008 proposed legislation included several key components: (a) A good faith, reasonably diligent search for the copyright owner; (b) attribution to the author and copyright owner, if possible and appropriate under the circumstances; and (c) a limitation on remedies that would be available if the user proves that he or she conducted a reasonably diligent search.*

### **SEARCHES:**

The primary purpose of any diligent search must be to find and contact the creator or rights holder, rather than to deem the work orphaned and/or to add the work to a collection of orphaned content for distribution, or licensing purposes, or for any other offering. In the event that a diligent search fails to identify a rights holder, we strongly suggest a requirement for continued reasonable diligence throughout the period of use of an orphaned work (e.g., periodic repeat searches).

The Graphic Artists Guild supports the non-profit registry, PLUS (Picture Licensing Universal System), to be the hub search engine of registries in different countries. The PLUS registry will only connect various registries globally to help locate rights holders or licensing agents. The PLUS registry will enable users to search all registries internationally without the need for time consuming individual searches in each country. The PLUS registry will not be used to establish licensing fees.

- I. The United States Copyright Office should be charged with the responsibility for maintaining a list of possible diligent search mechanisms. The U.S. Copyright Office



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should maintain and publicize search standards. A process for defining a reasonably diligent search must be developed and updated on a regular basis.

2. Search Engines should contribute to, but not control, a diligent search.
3. A diligent search should include thoroughly investigating, by whatever means practical, the LOC records.
4. A diligent search should include Copyright Office Registrations and association databases in addition to general online searches (includes artist's name and keyword searches).
5. Unique identifiers, metadata or digital watermark must be used to effectively find images.
6. A diligent search should also include a visual fingerprint (or similar technology) search of the Internet, along with searches for any available and relevant key words, such as artist's name, and/or the description or title of the image.
7. A diligent search should include fee-based search services as applicable. A search of fee-based services only does not constitute a diligent search, and fee-based searches must have preset criteria to ensure a cottage industry of "false diligent searches" does not emerge.
8. A search of analog records, including books and collections, must also be a component of diligent search efforts. This includes contacting previous known users. For example, publishers, if the visual work appears in publication electronically or in print; manufacturers, if the visual work appears on products or packaging; ad agencies, if the visual work was used in advertising, books, microfiche, and other analog media not searchable online.
9. Search must also explore visual clues and contextual elements in visual artwork where possible. For example, is there a street sign or other marker that might identify a location? Is there any identifying element(s) in the work that would offer clues or specific information that may help to identify the creator?
10. A search that results in outdated information does not alleviate the need for continued research. Users should engage in any, and all, available digital and analog technologies to identify and/or locate copyright owner.



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11. Searches should be replicated for simultaneous and/or secondary uses. For example, book publishers who may issue multiple releases, or feature a visual work in multiple publications by different authors.
12. Particular user groups, such as non-profits, educational institutions, museums and archives, are not exempt from completing a diligent search based on type of use. For example, for use in fundraising or limited display.

### **ATTRIBUTION:**

A user should always include attribution to the creator or rights holder if the name is known. It is imperative that a user provide contact information so that the creator or rights holder may reach them to claim their work and receive compensation for usage.

We believe that education about copyright needs to be an integral part of a solution to orphan works and the requirement of users to conduct a diligent search. The U.S. is in dire need of education aimed at the public (users and consumers) about copyright and licensing, including a clear message that using a copyrighted work for any purpose without permission and simply providing attribution to the author/creator/rights holder alone is not acceptable under international copyright laws. The music industry has engaged in this public information about musical works for over a decade. The same effort must be made to educate Americans about using all classes of copyrighted works.

### **LIMITATION OF REMEDIES:**

#### ***From the Notice of Inquiry:***

*Good faith users were expected to consult the Copyright Office Web site for practices proffered by copyright owners and users alike under the direction and coordination of the Register of Copyrights. The legislation included special provisions for certain noncommercial actors using orphan works in a noncommercial manner, as a further attempt to reduce liability for those perceived to be most risk-averse under current law. Moreover, the legislation would have applied to all kinds of*



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*copyrighted works, published or unpublished, from photographs to manuscripts to music and books.*

A genuinely orphaned work—where no copyright owner exists, for example a work owned by a corporation that is defunct and the rights were never assigned or bought by someone else—poses no usage risk or liability to any user. These orphaned works are typically very old works, whose rights holders included now defunct motion picture studios and publishers. The age of the allegedly orphaned work should always be considered by any user when speculating moral and economic harm to the creator/rights holder and use of his/her work in the market. Any orphan works legislation must be carefully worded so as not to be overly broad in allowance, allowing commercial use or easy use of recently created works by living creators/rights holders.

Under copyright law, creators have the right to decide if, and how, their works are used. Creators also have the right to deny use by any entity, or for any purpose, that would be objectionable to them. Creators may not want certain unpublished works made available to the public for any number of reasons, because those works were never intended for display or distribution in the first place.

Fair Use already permits preservation and archival purposes. We are very concerned that Fair Use not be expanded to accommodate further uses of orphan works, especially for commercial purposes, or any new allowance for subjective judicial discretion of damages or other recourses of the rights holder if an infringing use of a work that is not truly orphaned is made.

An unknown or unidentifiable creator/rights holder is not equivalent to an un-locatable rights holder. Visual creators should not lose the intellectual property rights to their works simply because a user finds the visual work without attribution.



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As we have described in the past, the Guild supports the creation of an Orphan Works User Registry, where users will be required to register/list the allegedly orphaned work they intend to use, the purpose for which they intend to use the work, documentation of the diligent search made to find the rights holder, and contact information so that the rights holder can reach them.

Attribution to the creator must always be provided with the visual work when an allegedly orphaned visual work is used if the rights holder is simply un-locatable.

The Guild supports the establishment of a special small value copyright infringement court to enable creators/rights holders to seek recourse for infringing use in the event that a user acts in bad faith, does not conduct a responsible and diligent search, or refuses to pay the creator/rights holder for use and/or cease use after the creator/rights holder has come forward.

We support this provision in the European Directive:

*“(18) Rightholders should be entitled to put an end to the orphan work status in the event that they come forward to claim their rights in the work or other protected subject-matter. Rightholders that put an end to the orphan work status of a work or other protected subject-matter should receive fair compensation for the use that has been made of their works or other protected subject-matter...”*

The Graphic Artists Guild unequivocally demands payment to creators and rights holders for use of visual works and a clear provision incentivizing the user to make payment.

All visual works still protected by copyright have monetary value to the creator, or rights holder, particularly when that work is displayed or reproduced. According to copyright law, the rights holder has the right to determine whether to charge a fee for use and how much that usage fee should be. Users have no legal right to decide to use the work for free without permission. In keeping with the letter and spirit of the law, all users of copyrighted



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works, including orphan works, should pay for usage prior to use unless the rights holder has given permission to them for free use. Users of orphan works must post payment of a bond first, at the time of use, to be paid into an escrow account and held for a statutory period of years for the rights holder should they come forward. The rights holder then has the right to determine fee for use depending upon his/her customary fee for the use already made by the user, including the amount of the bond already paid.

Creators license usage to for-profit and non-profit businesses alike. Creators license use for display in exhibits and on websites, regardless of whether reproductions of their visual works are sold, or the visual work itself is generating revenue, such as use in an advertisement. Non-profit cultural and educational institutions should not be granted free use of any copyrighted work they themselves deem orphaned. Use by a non-profit should only be considered for safe harbor if their use has no foreseeable commercial purpose, and they had no reason to believe that the creator would have charged a fee for that particular use.

Allowing use of allegedly orphaned visual works without payment of any fee at the time of use literally creates a category and body of free visual works that are still protected by copyright and not in the public domain including many works that may have been created recently by living creators. This would easily lead to two problems for visual creators.

- a) Without enforcement of payment built into orphan works legislation, creators' only recourse to infringement would be to file a lawsuit. Litigation (against a user of an allegedly orphan work who refuses to pay the creator/rights holder for use made) is expensive, and would likely cost far more than a customary usage fee. Considering that most visual works are not registered with the Copyright Office, and some visual works considered to be orphans may be owned by foreign rights holders, the cost of litigation for the creator/rights holder would far outweigh any damages he/she would be awarded. Creators and rights holders typically charge lower licensing fees for non-commercial use—the sort of use by museums, libraries, and archives the Guild would





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find acceptable for orphan works. Without the potential to recover significant actual damages for unauthorized use, the cost of litigation against a user who has refused to pay a usage fee or cease use would be prohibitive. The result would be that creators would have no practical legal recourse against a user if the user refuses to pay for use already made. If a user can steal copyrighted work without recourse from the creator or rights holder, then orphan works legislation is unnecessary.

- b) Visual works established as orphans by users will be deemed “free” to use. These copyrighted orphans will be aggregated by newly established internet image collections offering free images, whose business model will generate profit from other means on their websites (such as advertising). It won’t be long before online free image collections are competing with individual creators, small businesses, and established stock image licensing business. No business can compete with “free.”

### **COMMERCIAL AND NON-COMMERCIAL USERS AND USE:**

The Graphic Artists Guild absolutely opposes any commercial use by commercial users. A definition of non-commercial use must be developed.

Professional artists earn our living from licensing our creative works. Creators of visual arts, such as illustrators, graphic artists, surface and textile designers, animators, cartoonists, and photographers would be at risk of losing a substantial part of our income from licensing our copyrighted works if commercial use of orphan works by commercial users is permitted.

We support this provision in the European Directive:

*“Article 6*

#### ***Permitted uses of orphan works***

1. *Member States shall provide for an exception or limitation to the right of reproduction and the right of making available to the public provided for respectively in Articles 2 and 3 of Directive 2001/29/EC to ensure that the*



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*organisations referred to in Article 1(1) are permitted to use orphan works contained in their collections in the following ways:*

2. (a) *by making the orphan work available to the public, within the meaning of Article 3 of Directive 2001/29/EC;*
3. (b) *by acts of reproduction, within the meaning of Article 2 of Directive 2001/29/EC, for the purposes of digitisation, making available, indexing, cataloguing, preservation or restoration.*
4. *2. The organisations referred to in Article 1(1) shall use an orphan work in accordance with paragraph 1 of this Article only in order to achieve aims related to their public-interest missions, in particular the preservation of, the restoration of, and the provision of cultural and educational access to, works and phonograms contained in their collection. The organisations may generate revenues in the course of such uses, for the exclusive purpose of covering their costs of digitising orphan works and making them available to the public.*
5. *3. Member States shall ensure that the organisations referred to in Article 1(1) indicate the name of identified authors and other rightholders in any use of an orphan work.”*

The cultural non-profits, including educational institutions, libraries, museums and archives, want to make old orphan works available to students, researchers, the general public, and for restoration/preservation purposes. Generally, these uses are already permitted under the “fair use” doctrine in copyright law.

While we agree that there should be a safe harbor for non-commercial users of orphan works, we believe that an absolute safe harbor is contrary to the intent of orphan works legislation. Some appropriate acknowledgment (i.e. compensation) of the creator should be included in instances where the creator emerges after a presumed orphaned work is used.

## **CLASSES OF WORKS:**



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SUITE 1114  
NEW YORK, NY  
10004-1612

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***From the Notice of Inquiry:***

***Please comment on the continued viability of the above framework in the case of occasional uses of orphan works.***

The Graphic Artist Guild is particularly concerned about the use of visual works. Visual works inherently have unique problems as allegedly orphan works.

Professional visual creators are more prolific than most people realize. Most works created are not registered with the Copyright Office. A visual work with little commercial value in the past may find high demand and become very valuable at any time due to market trends, consumer interests, or current events.

Often, the type of use of the work in publication, production, or advertising on products or packaging, dictates that the name of either the creator or rights holder is not placed, produced, or displayed with the graphic art or illustration. Illustrations and graphic art created digitally includes identifying metadata that often gets lost as the image is transformed for output, production, or display. Art created in traditional media may quite easily lose the artist's identification when the work is scanned or photographed for output or production. In other words, it is not unusual for illustration and graphic art to exist without attribution to the creator or rights holder. These visual works would falsely be considered orphaned even though they'd been created recently and the creator is very much alive and still earning income from primary licensing of that work.

Many commercial images and patterns are published or manufactured without any attribution to their creators according to common industry practices, and are at great risk of becoming classified as orphan works.

***2. Orphan Works in the Context of Mass Digitization***



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**From the Notice of Inquiry:**

*Please comment on potential orphan works solutions in the context of mass digitization. How should mass digitization be defined, what are the goals and what, therefore, is an appropriate legal framework that is fair to authors and copyright owners as well as good faith users?*

*What other possible solutions for mass digitization projects should be considered? If there are any pertinent issues not discussed above, the Office encourages interested parties to raise those matters in their comments.*

Under the advice of counsel at the time, the Graphic Artists Guild declines to comment about mass digitization projects as we are involved in litigation.

**CONCLUSION:**

Visual creators are not worried about the motion picture archive that wants to preserve a deteriorating celluloid silent film or the library that wants to scan an out-of-print book to make it available for academic research. What concerns us as creators who earn income from our work are the commercial users who will produce copies, or pieces, for the retail market. Everything from greeting cards, spot illustrations on packaging, textile prints, ceramic tableware, jewelry, to furniture, and so on. Orphan Works legislation should be carefully written so that the same provisions that would permit non-profits to use an allegedly orphan work for non-profit purposes would not also open the door for commercial, for-profit use. Why would a publisher, manufacturer, or other type of client commission a visual creator to create a new work for them, or license one of our existing works, when they could use an allegedly orphaned work for free?

**ABOUT THE GRAPHIC ARTISTS GUILD**



32 BROADWAY  
SUITE 1114  
NEW YORK, NY  
10004-1612



(212) 791-3400



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In the course of its 46-year history, the Graphic Artists Guild has established itself as the leading advocate for the rights of graphic artists on a wide range of economic and legislative issues, from copyright to tax law. Through its publication of the *Handbook: Pricing & Ethical Guidelines* (now in its 13th edition), the Guild has raised ethical standards in the industry, and provides an invaluable resource on pricing information that is relied on by both artists and clients. The Guild's newsletter, the *Guild News*, provides lively, provocative, and useful coverage of developments in the visual communications industry for its readers.

The Guild also provides a wealth of services and benefits for its members, including educational programs, discounts on a multitude of products and services, a legal referral network, and grievance handling. The Guild's website offers up-to-date information on Guild activities, updates on advocacy issues, members' portfolios, individual chapters, and links to related organizations.

Respectfully submitted,

Haydn Adams, President  
Todd LeMieux, National Advocacy Committee Chair  
Lisa Shaftel, National Advocacy Committee  
Tricia McKiernan, Executive Director