

February 4, 2013

Submitted Online via Submission of Comments Procedure

Maria A. Pallante  
Register of Copyrights  
U.S. Copyright Office  
101 Independence Avenue, SE  
Washington, DC 20559-6000

**Subject: Orphan Works and Mass Digitization  
Response to Notice of Inquiry  
Copyright Office Docket No. 2012-12**

Dear Register Pallante:

As you know, the museum community was an active participant in the Copyright Office's extensive inquiry into the Orphan Works issues from its beginning in 2004 to its culmination with legislative activities in 2008. Many of the points raised by museums in earlier filings and at roundtable meetings remain valid today. In this letter, we will highlight changes in museum practice that might inform the orphan works and mass digitization discussions and share our thoughts on what the next steps might be. We thank the Copyright Office for undertaking this inquiry.

## **ORPHAN WORKS**

Since we last visited this issue in 2008, the museum community, represented in this submission by the Art Institute of Chicago, the J. Paul Getty Trust which operates the J. Paul Getty Museum, the Los Angeles County Museum of Art, The Metropolitan Museum of Art, The Museum of Modern Art, and The Solomon R. Guggenheim Foundation, which operates the Solomon R. Guggenheim Museum in New York, the Guggenheim Museum Bilbao, in Spain, and the Peggy Guggenheim Collection in Venice, Italy, possesses a better understanding of the challenges presented by orphan works in general, and with conducting a good faith search to locate the rights holder of such works in particular. Since 2008, most institutions have expanded their presence online and are making broader use of images on the Web. Museums have also focused on their recordkeeping practices regarding rights, through, for example, digital asset management systems that are useful resources for managing rights holder information. Some institutions identify a work as an orphan work if no rights holder was found after a diligent and reasonable search; the date of search is also documented.

While orphan works continue to be a problem for museums, with experience, the problem has arguably become more manageable. Notwithstanding the lack of orphan works legislation, many museums have come to accept a certain degree of legal uncertainty by, for example, posting

images of orphan works on their websites and using them for other mission-related purposes, if, after searching in good faith, no rights holder is found. In some cases, museums are also relying on fair use, but, as noted below, that is not a sufficient solution to the problem. Anecdotally, we believe such uses have minimal adverse consequences from the sudden appearance of previously unknown rights holders.

As a result, we believe that museums are conducting reasonable searches for rights holders without the need for externally imposed search requirements. Therefore, most members of the museum community would not support the legislation that was passed by the Senate in the 110<sup>th</sup> Congress, which would impose layers of proscriptive requirements to qualify for the protection the statute would provide. Going forward, many museums will continue to use orphan works in order to fulfill our educational missions to our various communities. We remain a risk-averse community and we prefer to pursue our activities without the specter of significant legal actions, whether for damages or injunctive relief, hanging over us. Therefore, we would embrace a straightforward orphan works solution, believing that, in the end, the public will benefit through the prudent and positive actions of museums when using orphan works.

Below are comments reflecting our thoughts about fair use, remedies, and diligent search requirements.

#### **Fair Use is not a total solution.**

In our 2005 Initial Comments, we stated that “. . . while fair use and other exemptions are valued by art museums, they are of limited application.” While some recent court decisions have upheld the defense of fair use (many of which were described in the Notice of Inquiry), fair use cannot be a completely satisfactory answer to the orphan works dilemma. After all, fair use is not a license or a remedy, it is simply an affirmative defense that museums or other users can assert against the copyright holder should he or she allege that the museum has infringed a copyright. In this way, fair use, famous for its lack of certainty and for the high cost of pursuing as a defense in litigation, is not a panacea for all museum uses of orphan works.

#### **The safe harbor approach on remedies.**

In the last examination of the orphan works issue by the Copyright Office and subsequently by Congress, the proposed solution focused on a reduced remedies approach rather than a “limitation on exclusive rights.” We agree that such an approach has real potential to encourage wider use of orphan works, but only if the safe harbor and reduced or eliminated damages are realistic and attainable, in terms of the time and money required to enjoy them. Otherwise, museums that would use orphan works responsibly today might no longer be able to use them, because they simply lack the resources required to comply with an overly complex law.

### **What is a reasonable search for rights holders?**

We are well aware that some rights holders and their organizational representatives are concerned that an orphan works solution will hurt them and, therefore, detailed and extensive due diligence searching requirements must be articulated. Unfortunately, the greater the level of complexity built into the orphan works solution, the less cultural institutions and scholars will be able to make use of it.

This does not mean that the museum community feels its institutions should be able to use copyright protected works without reasonable efforts to find the rights holder and obtain permission. To the contrary, museums value and recognize the enormous contributions artists and creators make to society. We collect, preserve, curate, exhibit, loan, study, and publish (in print and electronic formats) the works created by these same artists and creators. For reasons other than copyright, we want to know who the creator is or was, and we want to have the ability to contact the rights holder. We will do our best to find the rights holder based on our knowledge of the artist, the proposed uses for the orphan work, and our resources. Sometimes, however, despite exercising good faith efforts, finding people who died without descendants or representatives for companies that have gone out of business is not possible.

In the years since 2008, we have tried to chart a course that results in a reasonable search as opposed to one that is extraordinary. Both personally and anecdotally, we know of many searches that have been reasonable; some were successful and others were a waste of time and money. We are optimistic that as more and more databases become available and people are trained in more efficient searching methods, rights holder information will be easier to find for identifiable creators. Social media websites have added to the tools we have for finding people. We expend time and resources attempting to identify unknown creators, but if we cannot identify the creator, we do not see how a reasonably diligent search can be conducted.

### **MASS DIGITIZATION**

An orphan works solution for those digitization projects for which fair use is not appropriate would be greatly beneficial to scholars and the public.

Museums digitize images and text materials in their collections. To date, many of those efforts have focused on public domain works. Distribution to the public of digitized copies of copyrighted materials and even “born digital” works tends to be limited to works for which the institution holds the copyright or permission has been obtained.

Probably the most common “mass digitization” projects undertaken by museums to date are digitization and distribution of materials for online collection databases that include images, out-of-print museum publications, and archival materials. Depending on the context, these uses may or may not be fair uses. While museum publishers typically own the rights to the text in their

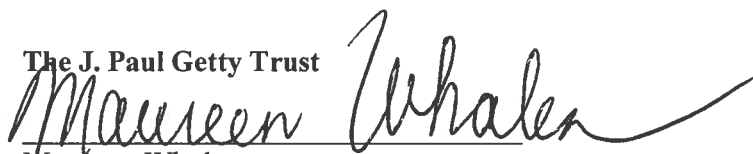
publications, they infrequently own the rights for all the images. These projects pose serious tensions between possible legal risks and mission-related objectives.

## CONCLUSION

The museum community welcomes a reasonable and straightforward solution to the orphan works problem, not just for their individual institutions, but also because such a solution will benefit the public. We will continue to participate in this important public policy discussion and, once again, we thank the Copyright Office for undertaking this project.

Sincerely,

**The J. Paul Getty Trust**



Maureen Whalen

Associate General Counsel

**Los Angeles County Museum of Art**

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Fred Goldstein

Vice President and General Counsel

**The Metropolitan Museum of Art**

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Cristina Del Valle

Senior Associate Counsel

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Nancy Adelson

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Sarah G. Austrian

Deputy Director, General Counsel and Assistant Secretary

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Submitted by: The J. Paul Getty Trust, the Los Angeles County Museum of Art, The Metropolitan Museum of Art, The Museum of Modern Art, and The Solomon R. Guggenheim Foundation

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**The Art Institute of Chicago**



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Troy Klyber

Intellectual Property Manager