
**BEFORE THE
U.S. COPYRIGHT OFFICE**

WASHINGTON, D.C.

REQUEST FOR COMMENTS REGARDING ORPHAN WORKS AND MASS DIGITIZATION
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**COMMENTS OF THE
NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION**

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ABOUT THE NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION

Founded in 1946, the National Press Photographers Association (“NPPA”) is a 501(c)(6) non-profit professional organization dedicated to the advancement of visual journalism, its creation, editing and distribution in all news media. The NPPA encourages visual journalists to reflect high standards of quality and ethics in their professional performance, in their business practices and in their comportment. As one of the largest journalism organizations in the nation, the NPPA vigorously promotes freedom of expression in all forms. Its more than 7,000 members include still and television photographers, editors, students, and representatives of businesses serving the visual journalism industry.

COMMENTS

I. Preface

These comments are being submitted in response to a Notice of Inquiry issued by the U.S. Copyright Office (the Office) regarding the issue of Orphan Works. The NPPA notes at the outset that unless any proposed Orphan Works legislation adequately addresses the concerns of our members and other authors of visual works we may be unable to support such a bill. If that were the case, rather than create a new law that would limit current remedies available to copyright owners without providing commensurate protections, the NPPA would request that no new legislation be enacted.

The Office has articulated the concerns of some in the copyright community regarding “the uncertainty surrounding the ownership status of orphan works” by stating this ambiguity “does not serve the objectives of the copyright system.” The NPPA is gravely concerned that in seeking to address the frustration of “good faith users” of Orphan Works in order to cure their potential liability and “gridlock in the digital marketplace,” the Office may create a far more serious problem for authors/rights holders of visual works.

While the movement against copyright enforcement has continued to grow over the past few years, other economic pressures on photographers, and visual journalists in particular, have continued to mount. As visual journalists, our members are squeezed from every side by onerous contracts seeking all rights for little compensation, the proliferation of user generated content by publishers and the widespread infringement of visual works by individuals and organizations. While we understand and appreciate the concerns of those in the copyright community who need to use Orphan Works, we believe it is crucial to protect the copyright of recently created visual works that, for whatever reason, appear to be orphaned when, in fact, they are not.

The other side of the Orphan Works coin is that within seconds of its creation an image may be downloaded and re-posted becoming “viral” in short order.¹ It is absurdly easy for a digital image to be stripped of its metadata, preventing good-faith users from identifying the

¹ See, e.g., *Agence France Presse v. Morel*, 10 CIV. 02730 AJN, 2013 WL 146035 (S.D.N.Y. Jan. 14, 2013) (describing how news photos of the Haitian earthquake of 2010, posted online by professional photographer Daniel Morel were claimed by Twitter user Lisandro Suero as Suero’s own, within hours of being uploaded).

rights holder or being able to legally license the work. Under increased competition some users publish photos without permission under the premise “use first, ask for permission later.” As part of that cost/benefit analysis, publications weigh the probability of discovery and resulting litigation against the time and cost involved in obtaining prior permission and licensing.

This ever-increasing misappropriation of visual content also threatens the country’s public health and safety by undermining a profession America has traditionally relied upon to provide the public with compelling images and stories that communicate critical information. Most visual journalists view their profession as a calling. No one really expects to become wealthy in this line of work, but most do expect to earn a fair living, support themselves and their family, and contribute to society.

Copyright infringement reduces that economic incentive dramatically. This in turn may discourage participation in this field. It also devalues photography as both a news medium and art form, thereby eroding the quality of life and freedom of expression that are part of the foundation of this great nation.

For any new legislation to be considered it must contain mutually acceptable language that would provide peace of mind to both groups and allow for the use of truly orphaned works while protecting authors from potentially predatory practices by those who would infringe upon our members’ work with impunity under the protection of a new law.

II. Introduction

The NPPA thinks it useful to begin with some fundamentals of copyright and the so-called Orphan Works problem.

Copyright is, at its most basic, a property right, that must be assertively protected in order to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”² When a proposed use goes beyond current copyright exemptions or limitations, users risk liability for a claim of infringement. The Orphan Works problem in question arises when a “good faith user” (one who had made a “reasonably diligent effort to find the owner”) wishes to use a work by someone who allegedly cannot be identified or located.

The repeatedly stated concern by those favoring an Orphan Works exemption is that, in such situations, a productive or beneficial use of the work would be delayed or prevented. The Copyright Office stated in 2006 (*Report on Orphan Works*, U.S. Copyright Office, page 1, January 2006) that “such an outcome is not in the public interest, particularly where the copyright owner is not locatable because he no longer exists or otherwise does not care to restrain the use of his work.” The NPPA asserts that with regard to visual works there are many reasons why an author/rights holder may be difficult to locate, including prior unauthorized use, or separation of the authorship information from the work. In those cases any new law that would limit current remedies available to rights holders would undermine their interests.

² United States Constitution, Article I, Section 8.

For authors, copyright is not just about receiving compensation for use. Copyright also protects them from having their work used in ways they do not approve and in ways that they never intended. This is particularly true for photographers. Subjects depicted in a photograph may have only consented to being photographed for certain purposes. Unauthorized use of photographs, therefore, affects more than just photographers.³

Another important consideration under copyright law and the First Amendment is the right to *not* publish or speak. There are many situations in which a visual work was created solely for private use and was never intended for public consumption. That work may contain no identifying information (because those limited people with whom it may have been shared know who created or owns it). Due to the insidious nature of the Internet, many images so created have found their way into public view without any identification.

In the case of works in which information about the author/rights holder have been truly obscured or have actually disappeared – in other words, if the work is truly an orphan with no copyright “parent” – no claimant exists. Thus, the actual liability risk to the user of a work, in the case of a work that has outlived its chain of ownership, is non-existent.

The desire of libraries and historians to avail themselves of historical works without fear, however remote, of copyright infringement claims has been widely touted in the call for Orphan Works legislation. Yet the sweeping proposals found in prior bills left open a massive gap for commercial use of images by large, for-profit corporations. There was no limit on the age of the work. Under previously proposed bills, a photograph could be circulated online and become an “orphan” within days, even moments of its creation. While the NPPA understands the arguments advocating a broad approach to Orphan Works we urge the Office and Congress to proceed with caution and ensure any proposed legislation does not create an overly broad exception that would subsume the rule and encourage widespread infringement.

In their recently submitted comments, it appears the library associations are now taking the position that Orphan Works legislation is no longer necessary. Instead, they assert “fair use” offers the protection they seek. They also state that any legislative remedies should be a minimal, “one sentence amendment to 17 U.S.C. § 504(c)(2) that grants courts the discretion to reduce or remit statutory damages if the user conducted a reasonably diligent search prior to the use.” They justify these proposals by explaining that “these uses would significantly benefit the public without harming the copyright owner” (Comments of the Library Copyright Alliance (<http://www.arl.org/bm~doc/lca-orphanworks-comments-14jan13.pdf>)). The NPPA strongly disagrees and believes the unintended harm to visual authors/rights holders would far exceed any social benefit derived, particularly without any definitions or other requirements for satisfying a “reasonably diligent search.”

³ See, e.g., Alicia Calzada, *A strong example of why copyright matters*, NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, July 13, 2012, available at <http://blogs.nppa.org/advocacy/2012/07/13/a-strong-example-of-why-copyright-matters/>; *Kristina Hill, et. al v. Public Advocate for the United States*, Case No. 1:12-cv-02550, filed Sept. 26, 2012 (USDC Colorado), available at http://cdna.splcenter.org/sites/default/files/downloads/case/Hill-v-Public_Advocate.pdf;

Additionally, when a use is authorized, economic market forces come into play where the rights holder and the user negotiate a fair rate under relevant contract law. An unauthorized use negates the dynamics of contract in a way that can negatively influence good-faith bargaining and price.

The Orphan Works problem may be better understood by analogy to estate law, where the question of “unknown heirs,” differs from “heirs whose whereabouts are unknown.” Applying similar logic to copyright, there are works where it is unclear who the author/rights holder is, as distinguished from works whose author/rights holder is known but cannot be located. The former is more problematic for visual works where information about authorship can be removed from the work despite the author’s best efforts to include it. The latter is less of a problem because the author/rights holder may assume some of the risk for being unlocatable.

Finally, because the Orphan Works issue is not limited to the United States, we also urge that any bill must take into consideration the impact of foreign Orphan Works laws as well as treaties to which the U.S. is a signatory.

III. Scope of an Orphan Works Law

A. Works

The NPPA believes that in order to limit the potential for harm to authors/rights holders, only certain types of works should be protected by an Orphan Works exception. Specifically, we recommend that any such measure should apply only to works in which the author/rights holder is identifiable but unable to be located after a diligent search. Allowing a diligent search to trigger Orphan Work protection for a user in cases where a visual image contains no identifiable information as to its author/rights holder negates the very definition of “diligent search.”⁴

Similarly, any visual works clearly created or depicting scenes within twenty (20) years (or another mutually acceptable period) prior to the proposed use should not be considered for Orphan Works protections. For example, in 2013 an image of President Bill Clinton (1993 – 2001), should not be deemed an orphan because it is only 20 years old.

B. Users

If the goal of new legislation is to limit risk and reduce uncertainty for “good faith” use of works, the NPPA asserts that such use should be limited to a defined set of users. For

⁴ At this time, the NPPA does not endorse a system which would require rights holders to upload their work to visually searchable registries (in order to make searching visual registries part of a diligent search) because we believe that requiring photographers (particularly those who have already registered their work with the Copyright Office) to upload their entire lives' work - whether it is digital or analog - to a third-party registry would be unfairly burdensome. However, we do acknowledge that technology is advancing rapidly and the ability to perform an image search online is available and becoming more practical, if still incomplete. That said, the duration of copyright far exceeds the history of digital photography, which has only been in regular, systematic use by professionals for about twelve (12) years.

example, libraries and museums meeting established definitional requirements might qualify for protection when using such works. But that use must also be clearly defined and limited.

Questions to be considered in such a draft are public vs. private entities, and whether the organizations seeking to use work(s) are non-profit or for-profit.⁵ Any exemption should also consider the degree to which such entities – and their uses of Orphan Works – benefit the general public.

C. Types of Use

As noted above any Orphan Works legislation must define the types of uses to be included. The distinction between prohibited (or severely restricted) commercial and permitted non-commercial use would be one of the determinative requirements. Orphan Works protection should not be available for use in advertising or corporate promotion.

IV. Orphan Works Status & Eligibility

The NPPA believes users should only be eligible for Orphan Works protections when they satisfy certain requirements, including, but not limited to, three (3) important elements:

- 1) They must conduct a diligent search for the author/rights holder of the work(s) they wish to use.
- 2) They must register any works they wish to use as an orphaned work.
- 3) They must include certain information with their use of such orphaned works.

A. Diligent Search

A diligent search by a user must include the following:

- 1) A search using all related metadata, if the work is a digital file.
- 2) A search of *all* appropriately certified third-party registries. (The Office shall review, approve and certify said registries, which shall also be limited in number).
 - a. Third-party registries must obtain Office records and the Office shall be required to assist in this process.
 - b. Orphan Works legislation shall not become effective until said registries are appropriately established and functioning for a minimum of six (6) months.

B. Registration/Bond

The NPPA believes that in order to qualify for Orphan Works protections, users must register their uses in an Orphan Works User Registry. As a part of said registration process, a user shall be required to:

- 1) List in the registration every intended use for the work being registered.
- 2) Consent to pay the rights holder at a minimum the survey rate⁶ for the use, plus

⁵ It is important that an exemption not be broadly applied to “non-profits,” because non-profit is a tax designation, not a determination of whether or not an organization is operating in the public good.

⁶ The survey rate would be a rate listed in a survey conducted by the copyright office, as explained below in Paragraph IV.D.

- reasonable interest, should the rights holder come forward with evidence of ownership.
- 3) Consent to jurisdiction of any dispute in a copyright small claims court located in the federal jurisdiction where the rights holder resides.
 - 4) Post a bond or proof of insurance for an amount that corresponds with listed use.
 - 5) Include a notarized affidavit as outlined below.
 - 6) Pay a filing fee in order to register, which would help defray the Administration costs of this new system.

C. Affidavit

The required affidavit should indicate:

- 1) Every intended use of the work.
- 2) Any information available regarding the author/rights holder.
- 3) A list of the steps undertaken in a diligent search.
- 4) The user's consent to jurisdiction in any federal district court in the United States.
- 5) The user's consent to adjudication of any resulting disputes in copyright small claims Court.⁷
- 6) Agreement that if the rights holder comes forward, the user will pay, at a minimum, the survey rate plus interest.
- 7) The user's agreement to post the work's registration number with each use.
- 8) The user's insurance company and policy number, or location and number of its bonding agent.
- 9) Contact information for the user, which must be current at the time of use.

D. Survey

One of the concerns regarding Orphan Works is that when a rights holder comes forward, the user may wish to pay less than the rights holder wants to charge. Thus, a dispute may arise, making it very expensive for the rights holder to get a fair, negotiated payment for the use after-the-fact. In order to determine the appropriate bond amount and the appropriate amount that should be paid if the rights holder comes forward, the NPPA believes the Office should conduct or contract for a survey, to be updated every two to three years. The survey results would identify types of uses and market rates for each type of "rights-managed" use (Rights-managed pricing is based on the specific scope of a use, considering such factors as elements, size, medium, prominence and audience size).

Royalty-free rates should not be included in this survey or applied to Orphan Works uses. Industry professionals should be permitted to weigh in on the survey results to address any skewed findings. This survey would factor into the registration process described above.

⁷ The "copyright small claims court" refers to a theoretical solution to provide better remedies for smaller copyright claims. The Copyright Office is in the process of developing a proposal to provide solutions for smaller copyright claims and the NPPA has submitted official comments on the issue twice.

E. Registration number

As noted above, when a user registers a work as an orphan, a registration number should be generated, assigned, logged and paired with any such use. The general public should have access to the Orphan Works User Registry, so as to be able to search for a registration number linked to the contact information of the user, as well as a copy of the filed affidavit. Anytime a work is published (in any form), it must include a credit line with the name of any believed author or rights holder, a written acknowledgement the work is registered as an Orphan Work and the Orphan Works registration number.

F. Attribution

The NPPA also believes every use must include attribution to any known author and/or rights holder, as well as a notation that the work is being used in the belief that it is an orphan. The registration number of each user should also be required in the attribution and it should also be included in the Orphan Works User Registry. If the work is reproduced in printed form, the registration number and information should be printed adjacent to the work. If the work is reproduced in digital form, the registration number and information should be imbedded in the metadata *and* be visibly printed adjacent to the work used.

V. Orphan Works in the context of mass digitization

Due to ongoing litigation, the NPPA declines to comment at this time.

VI. Additional comments

A. Small Claims Court

The NPPA has previously submitted comments to the Office regarding the development and implementation of a Small Claims Court. We strongly believe that any proposal for Orphan Works legislation should contain provisions that such claims are automatically subject to the jurisdiction of a copyright small claims court (in whatever form that becomes). Given the proposed limitation on remedies available to rights holders under Orphan Works, we believe that as part of a fair tradeoff and in the interest of judicial economy, these matters should be adjudicated in this manner, if the rights holder so chooses.

B. Issuance of a Bond or Insurance

The NPPA believes that in order to be eligible to seek Orphan Work protection, the user must either post a bond or purchase some kind of Orphan Works insurance, so that if a right holder comes forward and makes a claim, there is a fund to guarantee payment should the user default or file for bankruptcy. Such a requirement would help expedite monetary resolution, support proposed Orphan Works initiatives and act as a disincentive for those seeking Orphan Works status as a means of avoiding payment to a rights holder.

In so doing, the actuarial market would be involved in this process and could help develop a cost for their product based on the likelihood of a rights holder coming forward. Such involvement would likely come with additional due diligence requirements.

Alternatively, the Office or some other agency could offer such insurance, with the funds going into a special trust account that could be used to compensate rights holders and fund further initiatives.

VII. Conclusion

Members of the NPPA and other visual journalists create images that are critical to our democracy. They inform and educate our electorate on the important issues of the day. Photojournalists are also small business owners with extremely tight schedules and tighter profit margins, struggling to make ends meet, with little time or money to pursue unauthorized use of their work. Limitations of their copyright remedies without concomitant protections would be extremely detrimental to their livelihood.

The primary concern the NPPA has with any Orphan Works legislation is that it might create an exception or limitation to current copyright remedies that would severely undermine the ability of visual journalists to recover a fair amount for the unauthorized use of their work. Such well-intentioned legislation will also remove the codified deterrent component of copyright law that currently protects our members in order to satisfy the “public interest” or advance “social policy.” These proposed impingements on copyright law may provide greater access to older visual works but in so doing may dramatically curtail the rights, livelihood and creativity of contemporary authors.

While acknowledging that any uncertainty surrounding the ownership status of Orphan Works may not serve the objectives of the copyright system, the NPPA believes it is counterproductive to undermine the copyright remedies of authors who have also acted in good faith.

Finally, any Orphan Works legislation must include remedies for small copyright infringement claims and consideration of alternative means of resolving disputes currently heard in the United States district courts. Should proposed Orphan Works legislation fail to adequately address the concerns outlined above, the NPPA would decline to support it.

The NPPA greatly appreciates the opportunity to be heard on behalf our members and other authors of visual works.

Thank you for your time and consideration.

Respectfully submitted,

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