

U.S. Copyright Office

**Orphan Works and Mass Digitization
[Docket No. 2012-12]**

**COMMENTS OF THE
PROFESSIONAL PHOTOGRAPHERS OF AMERICA**

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On behalf of:

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Introduction

Thank you for this opportunity to offer comments on behalf of Professional Photographers of America (PPA) on this important subject. We appreciate the Copyright Office's longstanding interest in and dedication to finding a fair and reasonable resolution to the orphan works issue that promotes the lawful use of photographs, while continuing to respect the rights of creators. We hope that you find these comments helpful and we look forward to continuing to work with the Copyright Office and other stakeholders to reach a mutually satisfactory conclusion.

Founded in 1869, PPA is the world's oldest and largest non-profit trade association for professional photographers and photographic artists from dozens of specialty areas including portrait, wedding, commercial, advertising, and art. One of our critical concerns is ensuring respect for the copyright interests of those members.

The vast majority of our members consider themselves portrait and/or wedding photographers. They are quite literally the copyright holders next door, giving us lasting images of the people dearest to us, at the most important times of our lives. Their works are not just enduring memories of special occasions for those who were there, but a tangible glimpse into who we are and where we are from; images of those who came and went before us, and of our parents and grandparents that one day we will share with our children and grandchildren to teach them their most personal heritage.

PPA's membership consists of some 25,000 individual members and includes over 150 independent organizations (cumulatively representing an additional 20,000 photographers) that have elected to affiliate themselves with PPA. For more than 140 years, PPA has dedicated its efforts to protecting the rights of photographers and to creating an environment in which these members can reach their full business and creative potential.

PPA members live in every nook and cranny across the U.S. -- in cities, suburbs, and rural areas. Some work out of their homes, others have studios. Overwhelmingly they are small businesses with fewer than five employees.

Like the rest of America, photographers have felt the effects of the economic downturn. In our last survey of our members (2011), sales were down dramatically from the 2008 survey and even lower than sales in 2005 in real dollars. The average photographer works over fifty hours a week and makes about \$29,000 a year. Assuming they work fifty weeks a year; that works out to an hourly wage of about \$11.60.

Yet, photographers are among the most prolific creators in any industry. Every weekend as many of us relax and enjoy time with our family, PPA members are working to create the memories that we will cherish for generations. Wedding photographers can create up to a thousand images at a single event.

This combination of circumstances; small businesses with high volume/comparatively low- margin business models is a potential perfect storm if orphan works legislation is not carefully crafted. The lost opportunity for even a few hundred dollars in licensing revenue makes a noticeable difference to a family depending on \$29,000 of income. And to our members who are struggling the most, it could mean the difference between staying in business or closing shop.

Conversely, properly drawn orphan works legislation could be a productive tool that enhances public enjoyment of creative works and through diligent searches puts users in contact with artists to generate new licensing income.

The Photography Industry in 2013

The transition from film to digital is now complete. Digital technology is now virtually universal with only a small handful of photographers continuing to use film. This has

lowered costs by allowing photographers to capture and deliver more images and has similarly lowered the cost of entry into the business.

While we have all taken “good pictures”, the reality is that it takes years, even decades, to develop the skills of a true professional photographer. Which means that while the equipment is affordable, the skills are not so easily developed. Thus, new entrants to the market, particularly those who have little or no experience, face a particularly difficult challenge. These challenges, combined with the reality described above that the business of photography is so low margin/low profit, result in many new entrant businesses failing in the first two years. When these businesses disappear, it not only takes jobs out of our economy and leaves creators unemployed, it further exacerbates the orphan works problem because the creator is no longer reachable through the company and contact information his previous clients hold.

Protecting their Rights

When images are posted on the photographer’s website for client review, they are usually DRM protected. This is critical because approximately 90% of wedding and portrait photographers make their money when the pictures are first delivered. Upon delivery, consumers often want a DVD of the images and photographers are all too cognizant that consumers make unauthorized use of those images.

Nonetheless, photographers take what steps they reasonably can to protect their rights and avoid circumstances that potentially lead to a perception of orphaned status. It is industry practice to mark photographs with the photographer’s name and contact information. To the extent these remain available to the consumer, this goes a long way toward avoiding orphan works questions. Unfortunately, these markings can be (and often are) removed by consumers. The markings may also be hidden as consumers place photographs into adhesive albums.

Copyright registration is uncommon among our members. Only about 1% of photographers regularly register their copyrights, notwithstanding the Copyright Office’s group registration rules. Indeed, 84% of professional photographers have never registered even a single image with the Copyright Office. The average photographer creates over 20,000 images a year – that is simply too many photographs for a struggling small business to take the time to assemble and deposit.

PPA Supports a Solution

We believe the orphan works issue is real and that there are legitimate uses of orphaned works by museums, libraries, and archives. As the Copyright Office well knows, one of the most fundamental aspects of orphan works legislation is the definition of a “reasonably diligent search.” The key is to develop a standard that will, as reliably as possible, classify only true orphans as orphans. The prospect of photographers’ works being inaccurately classified and treated as orphaned is perhaps the greatest concern we have about an orphan works regime.

A Viable Orphan Works Solution

Any viable orphan works solution begins with a carefully defined obligation for a “reasonably diligent search.” As we have said, it is critical that we do our best to ensure that only truly orphaned works are considered as such by the law.

Reasonably Diligent Search

We believe that a reasonably diligent search should include (but is not limited to) the following characteristics:

- A definition of “reasonably diligent search” that is flexible enough to adjust for technological and marketplace evolution, and updated as necessary;
- Policing of bad faith searches with legal consequences for such;

- Inclusion of unique identifiers, metadata, and digital watermarks as elements of the search;
- Inclusion of a search of relevant key words (e.g., the artist's name) as well as visual fingerprint searches;
- A requirement for updated searches for secondary/subsequent uses;
- Application to all prospective users;
- A philosophy that searches are for the purpose of finding and contacting the rights holder, rather than to check the box for unlicensed use.

Remedies

Another key component of a viable orphan works solution is a properly balanced limitation on the remedies that are available in instances in which the photographer comes forward after a reasonably diligent search is completed (but does not bear fruit) and the unlicensed use of the work has begun.

We accept and agree that in such instances, it is appropriate to limit the availability of injunctive relief. We also accept and agree that it is appropriate to limit, but not eliminate, the monetary relief available to the creator.

Monetary relief for the creator should be both meaningful and accessible. In the past, some have proposed a "reasonable royalty" standard. While this might produce a fair calculation of the amount properly owed to the creator, it suffers from certain flaws. In our industry, the "reasonable royalty" for the use of our members' works is so low that it is impractical to enforce. The result risks being a de facto loss of any income from the use of the work. At the same time, we understand why users might object to paying more than a "reasonable royalty."

We suggest that two elements could bridge the gap. First, upon supplying evidence of the licensing fees for similarly situated uses, the creator should enjoy a rebuttable presumption of the amount of the reasonable royalty.

The second element arises from the great expense of federal litigation. There is no logic in spending tens of thousands (if not hundreds of thousands) of dollars litigating a claim for a royalty that is far less than that. “Reasonable royalty” makes sense from a market perspective, but it has to be applied in concert with a small claims process that makes it feasible for copyright owners to vindicate their rights.

We appreciate the Copyright Office’s continuing interest in evaluating a small claims procedure. It was our pleasure to provide comments in that inquiry as well, and we refer you to those comments for a fuller discussion of the relevant issues.

In the context of uses by non-profit entities, some previous approaches would have denied any form of remedy to creators, even after they came forward as the copyright owner. We strongly believe that this is unjustified and unfair.

Complete immunity from damages must be avoided. As we have set forth in this submission, the margins for photographers are razor thin. For the law to envision a circumstance in which the creator has become known and reachable, but to then deny that creator any remedy for the unlicensed use of their work is both harmful to the legitimate interests of the right holder and inequitable as a matter of fairness in the law.

That is not to say we are unsympathetic to the distinction between commercial and non-commercial uses. We could accept a lower basis for royalties in such circumstances, so long as it remains meaningful. In this context, we also wish to clarify that not every act of a non-profit organization is non-commercial in its nature and marketplace effect. Accordingly, the availability of this reduced royalty obligation should turn on a definition of “non-commercial” that takes into account those factors and not merely by reference to an organization’s tax status.

Relationship to other Exceptions and Limitations

As prospective users of works consider the legal basis for unlicensed use of a work, they should have the option to consider the strength of their legal position under any relevant exception in the Copyright Act, including fair use or a new orphan works limitation to the exclusive rights of creators.

Unfortunately, we have increasingly seen a tactic in which users eschew the negotiating table and the open debate in Congress, and instead take expansive arguments of what is permitted under existing exceptions, such as fair use, to the courts in the hope that they will eventually find a sympathetic judge. This strategy generates wasteful, expensive litigation and does nothing to bring the parties together.

On occasions when matters reach the courts, unlicensed users should not have multiple bites at the apple – they should have chosen which exception they are utilizing and make their best case. Those who choose the new orphan works provision can signify that with a prescribed marking on the reproduced copies that could accompany attribution when possible and appropriate, as PPA has proposed in the past.

If PPA and other creator and publisher organizations come to the table in good faith, volunteering to limit their members' rights in order to work out a reasonable solution to the orphan works situation, they ought not be punished by allowing users to make scattershot arguments before the courts.

What PPA is Already Doing to Help

PPA does not believe it has to wait for Congress to act in order to start improving the orphan works situation.

PPA Call Center

We have created a call center at our own expense with a toll-free phone number that anyone can call to try to connect users with creators. We have a database of over 50,000 creators, and if the photographer's contact information is not in our database, our staff will often assist the consumer to track down any potential leads. Our staff fields as many as 40-50 calls a week.

Even when taking this approach, there are occasions where the information on the copyright owner is simply unavailable – usually as a result of a business closure. In those instances, we are faced with the unpleasant prospect of explaining to someone who wanted to play by the rules and was potentially willing to pay a creator, that we cannot help them make an authorized use of the photograph.

The PLUS Coalition

An important component to addressing the orphan works situation is the existence of accessible, vibrant registries. The Copyright Office earlier suggested that stakeholder groups should, among other things, jointly create a global registry and hub. In response to that suggestion, stakeholders from the photography, illustration, publishing, graphic design, advertising, museum, library, and education communities formed the Picture Licensing Universal System (PLUS) Coalition.

The PLUS Coalition is a neutral, apolitical 501(c)(6) non-profit organization, governed by a Board providing equity and representation for all industries involved in creating, distributing, using, and preserving images.

At the recommendation of the Copyright Office, the PLUS Coalition first created standards for identifying rights holders and for communication of rights information. Also at the recommendation of the Copyright Office, the PLUS Coalition then

commenced development of a global image rights registry and registry hub, collectively called the “PLUS Registry.”

The PLUS Registry is operated on a non-profit, cost recovery basis by and for its users. Its participants are in 88 countries. The PLUS Registry utilizes unique identifiers and visual recognition, and searches are available in any language and are free. It provides both human readable and machine interpretable information and interoperates with other registries and applications. The PLUS Registry is cloud-hosted, incorporates security measures to prevent abuse, and protects the privacy of its users.

Conclusion

PPA appreciates this opportunity to provide these comments. We commend the Copyright Office for its continued commitment to these important issues and for the open process that the Notice of Inquiry is designed to initiate. We look forward to continuing this discussion and to working with the Copyright Office and other stakeholders to produce an approach to the orphan works situation that is productive for all parties.

Respectfully submitted,

A handwritten signature in black ink that reads "David P. Trust". The signature is written in a cursive style with a large, prominent 'D' and 'T'.

David P. Trust

Chief Executive Officer

Professional Photographers of America