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Orphan Works and Mass Digitization, Docket No. 2012-12

The College Art Association (“CAA”) appreciates the opportunity to provide reply comments in response to the Notice of Inquiry on orphan works and mass digitization, Docket No. 2012-12. CAA is a non-profit membership organization representing more than 12,000 artists, art historians, scholars, curators, collectors, educators, art publishers and other visual arts professionals who, by vocation or avocation, are concerned about and are committed to the practice of art, teaching and research about the visual arts and humanities. Another 2,000 university art and art history departments, museums, libraries and professional and commercial organizations are institutional members of CAA.¹

CAA played an active role in the Copyright Office proceeding that culminated in the 2006 Report on Orphan Works. It filed extensive comments,² joined in reply comments³ and participated in two round tables organized by the Copyright Office. CAA also was significantly involved in the legislative discussions that culminated in the Senate’s passage of The Shawn Bentley Orphan Works Act of 2008, S. 2913, and supported that bill.

As a number of commenting parties have noted, a great deal has changed since the 2006 Report and the Senate’s passage of S. 2913. The CAA 2005 Comments provided extensive documentation, through numerous examples, of the very significant difficulties that CAA’s members face in using orphan works for a range of artistic and scholarly purposes. Those difficulties have in no way lessened with time. Indeed, a number of the commenting parties have explained the extent to which the problems in using orphan works have worsened.⁴

¹ More information about CAA and its mission, bylaws and activities can be found at <http://www.collegeart.org>.

² OW 647-CAA, available at <http://www.copyright.gov/orphan/comments/OW0647-CAA.pdf> (“CAA 2005 Comments”).

³ OWR0127-Various, available at <http://www.copyright.gov/orphan/comments/reply/OWR0127-Various.pdf>.

⁴ For this reason, CAA strongly disagrees with those comments that assert, without foundation, that the orphan works “problem” is exaggerated or is non-existent or is that the invocation of a work as orphan is a ruse by which publishing and other commercial interests intend to take unfair advantage of copyright owners. CAA’s members experience a wide range of challenges in using orphan works in a range of creative, scholarly, educational and museum-related activities that all further the purposes of the copyright law.

For this reason, CAA continues to support the case-by-case approach set out in the CAA 2005 Comments, the 2006 Report and in S. 2913. In short, a) if a user, after undertaking a good faith, diligent search for the copyright owner of a work, is unable to identify or find that owner, then b) if feasible, attribution should be provided in connection with the use of the work, and c) if the copyright owner comes forward and prevails in an infringement suit based on that use, the defendant would be entitled to a limitation on remedies (no statutory damages, attorneys' fees, defendant's profits or injunction against the continued current use of the work), but (d) the copyright owner would be entitled to its demonstrated, reasonable and customary licensing fee for the continued use of that work. Importantly, that approach, as reflected in S. 2913, would not have affected and would have fully preserved the availability of all other rights and defenses, including that of fair use.

The above approach, which CAA endorsed in the CAA 2005 Comments and supported throughout the discussions on orphan works legislation during the 109th and 110th Congresses, remains appropriate today. First, it properly balances the legitimate interests of both copyright owners and users of orphan works. It advances a market in copyrightable works by encouraging users to find copyright owners and, if they are found, to enter into negotiations with them. Second, the approach largely removes the risks that today substantially chill legitimate uses of orphan works. Third, orphan works treatment should be available for all kinds of works, both published and unpublished, should not be tied to the age of the work, and could be invoked by all types of users, including individuals, not-for-profit enterprises and commercial entities.

CAA notes that numerous commenting parties support a case-by-case approach that would allow a user to determine, in light of the facts, whether a work is an "orphan," after a reasonable search and that they also would, at least potentially, support (or not oppose) legislation based on such an approach. *See, e.g.*, Comments of Association of American Publishers ("AAP"),⁵ American Association of Law Libraries, et al. ("AALL"),⁶ Berkeley Digital Library Copyright Project ("BDLCP"),⁷ Digital Media Association ("DMA"),⁸ Library of Congress,⁹ Art Institute of Chicago, et al. ("Museum Consortium"),¹⁰ Museum of Fine Arts Boston,¹¹ International Documentary Association

⁵ OW 16, pp. 2-3 and 4.

⁶ OW 4, p. 2.

⁷ OW 21, p. 3.

⁸ OW 35, p. 4.

⁹ OW 60, p. 3.

¹⁰ OW 13, pp.2-3.

¹¹ OW 68, p. 3.

et al. (“IDA”),¹² Software Information Industry Information,¹³ and Rutgers University Library.¹⁴

In addition to the above summary of CAA’s position, it offers the following specific comments.

No Fixed Set of Statutory or Regulatory Criteria to Determine When a Copyright Owner Cannot Be Found

Given the myriad possible circumstances that can lead to orphaning a work, including the variations among types of works, there should be no fixed set of statutory or regulatory criteria used for a search to determine whether or when a copyright owner cannot be identified or found. CAA believes that individual sets of best practices for reasonable searches can best be developed by the private sector – rather than by regulatory fiat – to assist users in identifying and locating owners of works and in documenting their searches. That is because such searches may be highly context-specific and the tools may vary depending on the type of work to be used. A number of commenting parties, such as the AALL¹⁵, IDA,¹⁶ the Museum Consortium,¹⁷ Electronic Frontier Foundation/Public Knowledge (“EFF/PK”),¹⁸ have urged that the guidelines for a due diligence search be flexible and not unreasonably burdensome or imposed externally. CAA agrees with these views because specific, mandatory requirements would not take account of the various types of works that could be orphans and the inevitably evolving resources that might be available to users conducting such searches. Requirements for searches that are prescriptive or unduly rigid could prove to be inappropriate or unnecessarily burdensome in various contexts, making it difficult to conclude that a work is an orphan for purposes of a statutory provision that would limit remedies.

With regard to having the private sector develop appropriately tailored and flexible guidelines for searches, CAA, which represents a broad spectrum of interests in the visual arts, has previously expressed its willingness to work with other interested parties in developing such guidelines for the visual arts sector and remains ready to do so.

¹² OW 55, p. 7.

¹³ OW 86, pp. 4-5.

¹⁴ OW 80, p. 3.

¹⁵ OW 4, p. 2.

¹⁶ OW 55, p. 8.

¹⁷ OW 13, pp. 2-3.

¹⁸ OW 40, p. 5.

No Requirement to Register Works to Prevent Orphan Works Treatment

CAA would not support requiring copyright owners to register their works to prevent them from being treated as orphans. That would place an unfair and undue burden on copyright owners, even leaving aside whether such formalities would be consistent with United States treaty obligations. From a user perspective, moreover, an approach that would require a new registration after a set number of years after publication would not necessarily offer a solution to the problem of identifying and using orphan works. That is because even works that are created recently can be orphaned and, for such works, if no copyright owner is identified or found after a reasonable due diligence search, the user should, notwithstanding the age of the work and the presence or absence of a new registration, be able to use it under a limitation of remedies regime, as described above.

No Filing and No Registration of Intent to Use

CAA believes that it would be unnecessary and wasteful to require that users of orphan works file a notice of intent to use an orphan work, or that users must file the results of a reasonable search with the Copyright Office as a precondition for being eligible for limited remedies. In many situations, it is improbable that copyright owners would search an intent-to-use database to see if their orphaned works are being used. Moreover, such an approach would hinder the types of uses of orphan works that the copyright law should be encouraging.

Types of Works That Might Be Subject to Orphan Works Treatment Should Not be Limited

CAA believes that there should be no limitations on the types of works for which users might be eligible for a limitation on remedies after conducting a reasonable search. For this reason, the legislation should not distinguish between published and unpublished works, older works or newer works, or United States works and foreign works. In no event should works of visual art be treated differently or excluded from orphan works treatments that might be available to other types of copyrighted works.

Limitation of Remedies Approach

CAA continues to believe that if a work is used after a reasonable, but unsuccessful, search for its copyright owner, a defendant should be eligible to invoke a statutory

provision that limits the remedies available to a copyright owner who subsequently emerges and prevails in litigation challenging such use as infringing. Such an approach is necessary to remove the uncertainty and risks that now prevent scholars, artists, publishers and other participants in the U.S. intellectual property communities from using such works. In this regard, the basic framework set out in S. 2913 is not unreasonable and properly balances the interests of users with those of copyright owners.

Legislation should not prevent a copyright owner from surfacing and asserting legitimate rights, including seeking a license from the user of an orphan work. If the parties do not reach an agreement, the copyright owner would not be prevented from bringing an infringement suit, but, as noted below, the user could assert a fair use defense in appropriate cases. If that defense is not successful, however, the user should be able to continue to make the same use of the work as before. A copyright owner prevailing in any such litigation should not be entitled to recover statutory damages, attorneys' fees, defendant's profits and an injunction against continued use of a work that had been deemed to be orphaned.

Availability of a Safe Harbor

Not-for-profit entities should be able to avail themselves of a complete safe harbor from liability, along the lines of what would have been Section 514(c)(1)(B) of S. 2913. However, that provision was too limited because it did not include scholarly publishing and other similar, not-for-profit activities.

Commercial Users Should be Able to Avail Themselves of the Benefits of Orphan Works Treatment

CAA's members include working artists, scholars, museums, commercial galleries, and other institutions. Individuals and institutions may seek to sell or exhibit artworks or publish them in commercial publications, or otherwise involve themselves in creative or educational activities that are commercial or profit-making. For this reason, it is important that eligibility for the limited remedies that might be available for uses of orphan works not be confined to not-for-profit entities or non-commercial uses. In this respect, CAA disagrees with the approach reflected in the Directive of the European Parliament and of the Council on Certain Permitted Uses of Orphan Works, which limits the use of orphan works to libraries, educational institutions, museums and other similar

organizations that have a public service mission. It also disagrees with those commenting parties, such as the Graphic Artists Guild,¹⁹ that have expressed similar views.

Orphan Works Legislation and Fair Use

Orphan works legislation should not displace the fair use doctrine, which remains central to the kinds of creative activities – including art historical scholarship, creation of new works of art, and museum exhibitions – in which many members of CAA are actively engaged. CAA agrees with the comments of the AAP²⁰ and the BDCLP²¹ that any orphan works legislation should have a provision similar to Section 2(d) of S. 2913, which expressly recognized the independent significance of the fair use doctrine and that any such legislation should not affect any of the existing rights and defenses under the copyright law.

CAA also agrees with parties that have observed that fair use is not a panacea or, on its own, necessarily sufficient to address all legitimate concerns with respect to uses of orphan works. To be sure, in many cases, as the comments of EFF/PK recognize,²² the status of a work as orphaned frequently should be taken into account in the fair use calculus. *Cf.* S. Rep. No. 94-473, 94th Cong., 2d Sess., at 64 (1975) (fair use may be appropriate because the work is out of print or is unavailable to purchase). But, it is quite possible that the use of an orphan work may not obviously qualify as fair use. In any event, users and gatekeepers may be uncertain as to whether the fair use doctrine would apply in particular circumstances; in such cases, the fair use doctrine may be an insufficient basis on which to make critical decisions about whether to include third-party copyrighted material in artistic production or publications absent permission. CAA agrees with a number of comments, including those of the Museum Consortium,²³ the IDA,²⁴ the Library of Congress,²⁵ and DMA,²⁶ that make this point.

¹⁹ OW 48, p. 9.

²⁰ OW 16, p. 3.

²¹ OW 21, p. 16.

²² OW 40, pp. 2-4.

²³ OW 13, p. 2.

²⁴ OW 55, p. 3-4.

²⁵ OW 60, p. 3-4.

²⁶ OW 35, p. 9.

CAA also notes that the Library Copyright Alliance,²⁷ which includes some members of the library community, and some university libraries believe that the fair use doctrine, without more, presently provides adequate protection to address the concerns of libraries and archives regarding their specific types of uses of orphan works. Other library associations, such as the AALL,²⁸ and other university libraries appear to believe that orphan works legislation, which couples a reasonable due diligence search with a limitation of remedies approach, continues to be sensible. As BDCLP cogently recognizes, users of orphan works vary significantly, both in terms of their resources and the types of uses that they make of orphan works.²⁹ Thus, whatever may be the views of the library community, CAA, which represents thousands of individuals and institutions, would prefer the greater certainty that legislation would afford with respect to uses of orphan works by its members.

CAA Does Not Support Extended Collective Licensing, Statutory Licenses or Other Schemes Requiring Payment of Fees Into Escrow

The Notice of Inquiry asks whether extended collective licensing or statutory licenses would be appropriate for orphan works. For many of the sound reasons noted by other commenting parties, including the IDA³⁰ and EFF/PK,³¹ and the Society of American Archivists,³² CAA would not support legislation that embodies such approaches, particularly if they are confined to cultural institutions, restricted to certain types of uses and/or require users to pay fees. In particular, CAA agrees with the detailed analysis and critiques of the extended collective licensing approach provided by the BDLC.³³

Extended collective licensing or other statutory licenses requiring payments to use orphan works after a reasonable search would place undue economic obstacles on uses of orphan works. The same would be true of the Graphic Artists Guild's proposal that users post payment of a bond into an escrow account that would be retained for a statutory period of years, during which time the copyright owner could come forward and potentially

²⁷ OW 61, pp. 3, 7-8.

²⁸ OW 4, pp. 1-2.

²⁹ OW 21, p. 19.

³⁰ OW 55, pp. 9-12.

³¹ OW 40, pp. 5-7.

³² OW 85, p 7.

³³ OW 21, pp. 37-41.

demand even more than the amount of the bond.³⁴ If such schemes were adopted in the United States, users may well choose to forego using orphan works in lieu of making the required payments. That result, however, would thwart one of the principal purposes of orphan works legislation – to make such works available for the broad ambit of creative and intellectual enterprises that the copyright laws are intended to further.

Furthermore, payments into a fund are highly unlikely to go to copyright owners, so such a scheme would not create incentives to creative production by the copyright owners of the works being used, which is one of the central purposes of the United States Copyright Act. Thus, whatever might be the legal bases for the schemes that have been adopted in a handful of countries in Europe, it is far from clear that they are appropriate for, or consistent with the copyright law traditions of, the United States. Similarly, and as the Notice of Inquiry itself notes, the system adopted in Canada both is burdensome and has not been much used. As CAA explained in the CAA 2005 Comments, that system should not be adopted in the United States.³⁵

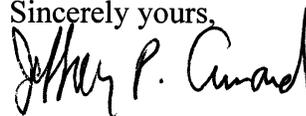
Mass Digitization

The Notice of Inquiry asks for comments on the use of orphan works in mass digitization projects. CAA has read with interest the comments of others on this subject but presently does not have a view on what legal framework might be appropriate to enable use of orphan works in such projects.

Conclusion

We thank the Copyright Office for launching this important proceeding. CAA looks forward to participating in further discussions, including with respect to potential legislative proposals relating to orphan works.

Sincerely yours,



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³⁴ OW 48, pp. 7-8.

³⁵ CAA 2005 Comments, pp. 39-40.