

U.S. Copyright Office
NOTICE OF INQUIRY
77 F.R. 204, Docket No. 2012-12
ORPHAN WORKS AND MASS DIGITIZATION

REPLY COMMENTS OF
PHOTO MARKETING ASSOCIATION INTERNATIONAL (“PMA”)
March 6, 2013

Ms. Maria Pallante
Register of Copyrights
United States Copyright Office
101 Independence Avenue S.E.
Washington, DC 20559

Dear Ms. Pallante:

These comments are submitted by Photo Marketing Association International (“PMA”), the photo industry trade association. It has over 10,000 members located within the United States and in over 80 other countries. The membership includes professional school photographers, sports and events photographers, and photo labs, both wholesale and retail.

The essential nature of the photo processing business is to produce images. Every customer and every job raises the question of copyright ownership. Every image has a copyright owned by someone. These images usually do not contain information that adequately or verifiably identifies the owner of the work. The owners are “difficult or impossible to locate.” The images where the copyright holder cannot be identified are “orphan works.” That is true regardless of the age of the image, whether it is published or not, and without regard to how many such images were produced by the original copyright owner.

The submission by the Library Of Congress on February 4, 2013 noted that since 2005, Library patrons and donors increasingly expect to find materials online. That is also true of photographers and other photo consumers, both amateur and professional. They all expect to be able to conduct all their business online.

The photo industry participants produce over 28 billion images annually, with a commercial value of over \$16 billion in 2011. In 2011, about 13 billion prints will be made of images taken with digital cameras. About 34% of all digital images requested to be printed at retail were ordered "online" in 2011. Today nearly 90% of the work involves images created or provided in electronic format. The photo items purchased include traditional photo prints and enlargements, photo books, collages, coffee mugs,

coasters, t-shirts, greeting cards, key chains, and virtually any other product that can be personalized by adding an image.

Since the 2005 study by the Copyright Office, the technology has also adapted to make it even easier to handle all of these transactions electronically, without much, if any, human intervention. The opportunity and ability to detect and prevent copyright infringement of another's photo has greatly decreased.

Obviously, if a photo lab's customer actually took the photo, permission to copy is reasonably assumed. However, if the image is not marked to indicate another's ownership, the fact of someone else being the copyright owner is extremely difficult, and often impossible, to determine. The photo lab is heavily dependent upon the representations of the customer. The customers are asked if copyright of the image submitted is owned by them or someone else. The customer is one of the few who knows that he or she did not create the image.

With \$16 billion revenue on 28 billion images (about \$0.57 each on average), the margin per image is very small. Email advertisements regularly offer consumers promotions such as 5x7 prints for 50¢, or 4x6 prints for a penny. Consumers can login and print photos from their Facebook account or from a friend's account. Cell phones send images with text messages, and are easily shared and often printed. In such an environment, a lab's ability to police all transactions to determine copyright ownership of the image is a difficult challenge.

PMA initially addressed this problem in the photo industry in 1995 by bringing together the industry associations for the joint adoption of the Photo Industry Copyright Guidelines. Those guidelines included an agreement to recognize good faith efforts to mark images with copyright notices as well as to examine images for a copyright notice in an effort to avoid unauthorized copying. Where no markings were present, it provided some guidance to try to determine, in good faith, the copyright ownership and to act in accordance with the reasonable facts.

The problem of compliance with the Guidelines has been compounded by the advance of the digital age. Rather than being asked to reproduce a print on which a copyright mark might be located, electronic images are presented, and then processed in new ways - frequently by the self-service customer using equipment made available, or electronically without benefit of human examination or intervention.

Due to these problems, the ability to protect copyright holders rights as well as avoid liability as an infringer is very limited. The copyright law has ceased to provide any significant value or guidance to the photographer or the photo processor. A new system is needed to provide a method to identify works of professionals, as well as a method to inexpensively and rapidly resolve the disputes that may arise.

The 2008 proposed legislation was a good compromise of many competing interests. The key components included:

- (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.

The potential problem with these components was the “good faith, reasonably diligent search” requirement. For photo labs, if a customer presented a hard copy for duplication that contained some indications of ownership by someone else, then a search was at least possible. For self-serve or electronic service, detection was virtually impossible, and no search was feasible.

Among the recent comments provided to the Copyright Office regarding “orphan works” were the comments from the Professional Photographer’s of America (“PPA”). PPA stated that a reasonably diligent search should include (but is not limited to) the following characteristics:

- a) A definition of "reasonably diligent search" that is flexible enough to adjust for technological and marketplace evolution, and updated as necessary;
- b) Policing of bad faith searches with legal consequences for such;
- c) Inclusion of unique identifiers, metadata, and digital watermarks as elements of the search;
- d) Inclusion of a search of relevant key words (e.g., the artist’s name) as well as visual fingerprint searches;
- e) A requirement for updated searches for secondary/subsequent uses;
- f) Application to all prospective users;
- g) A philosophy that searches are for the purpose of finding and contacting the rights holder, rather than to check the box for unlicensed use.

To the extent that these characteristics are technologically available and affordable for photo labs, both large and small, they make basic sense. However, conducting such a search on every image presents a very substantial burden when all but a very small portion are owned by the customer who uploaded the images. Any definition of a reasonably diligent search needs to allow for the context in which the images are received and the product that will be produced. Images to be included in a photo book or a set of 4 coffee mugs, for example, will likely be transformative and fair use as opposed to infringing, even if the image is owned by someone other than the

customer.

Another comment by PPA dealt with the remedies that should be available. It is agreed that the greatest problem is the tremendous cost of regular copyright litigation, whether as a plaintiff or a defendant, and the risk of enormous penalties as statutory damages for what is likely to be “innocence in fact” even though the infringer may not qualify as an “innocent infringer” under the law because the copy relied upon was not authorized by the copyright owner.

PMA agrees with PPA that a “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.” It is agreed that it is appropriate to limit, but not eliminate, the monetary relief available to the creator. That relief, however, should come from the actual infringer, the customer who illegally presented the image for duplication in the first place.

The photo lab, as an intermediary, without actual knowledge of the infringement, should not have to bear the brunt of the violation. Thus, the amount of the relief can appropriately be, as suggested by PPA, the licensing fees for similarly situated uses. Upon proof of such regular fees, the creator could enjoy a rebuttable presumption of the amount of the reasonable royalty. The unknowing intermediary who has acted reasonably should not be liable.

The forum for obtaining such relief can also be modified. For the creator, lab and consumer who are willing to obtain the benefit of a prompt and inexpensive forum to determine liability in exchange for reasonable, more limited penalties for infringement, a small claims forum would be appropriate. No longer would entire businesses be at risk due to inadvertent infringements.

In its comments, the American Society of Media Photographers supported the concept of “orphan works legislation that required consent to the jurisdiction of a small copyright claims system as a quid pro quo for seeking the reduction in liabilities that would be afforded by a defense based on a claim that the copyrighted work was an orphan work.” This approach makes sense as an alternative to the expensive and difficult federal court litigation that is currently required to enforce or defend a claim that normally involves tens or hundreds of dollars rather than millions.

The availability of such a forum, however, should not be limited to orphan works. It could serve an equally valuable purpose in litigating all small claims, regardless of the orphan status or other reasons for the infringement. Any creator who believes the infringement was willful and/or fraudulent can still opt for regular litigation where the full array of remedies are available to recover a full measure of

relief. A potential defendant runs a significant financial risk if it opts-out of the small claims forum selected by the plaintiff.

PMA remains available and willing to meet and discuss potential solutions to the difficult issues that remain.

Sincerely,

James Esp, Executive Director
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