



**Professional Photographers  
of America**

Jule L. Sigall  
U.S. Copyright Office, Copyright GC/I&R  
P.O. Box 70400  
Southwest Station  
Washington, DC 20024

March 25, 2005

Dear Mr. Sigall:

We are writing today in response to the Copyright Office's notice of inquiry regarding orphan works. Our comments represent the position of Professional Photographers of America, Commercial Photographers International, the International Association of Professional Event Photographers and the Student Photographic Society. These organizations, together with their affiliates and chapters, represent some 28,000 professional photographers and photography students.

At the outset, it is important to note that a significant majority of our members do not oppose allowing at least some limited reproduction of an orphan work where the rightful copyright owner cannot be located. The primary concern is ensuring that any orphan works exemption does not open the door to even more rampant infringement of photographic copyrights. The second element that urges caution is the possibility that an orphan works exemption would result in the inadvertent and unfair loss of copyright protection for many artists. This is particularly true of those who, like commercial and media photographers, have little control of how their works are ultimately presented to the public.

Because of these difficulties, members of the photography profession would be willing to consider an orphan works provision that requires a reasonable search for the rightful copyright owner, requires the copier or user to maintain a record of that search and, if that search is unsuccessful, only allows a limited range of reproduction or uses. If

the copyright owner discovers this use of a work that was deemed an orphan, he should be entitled to recover a reasonable fee for that use.

As an element of a reasonable search, photographers support the creation of a voluntary or optional copyright owner registry that must be consulted by the person seeking to use the work.

Finally, we also propose that orphan works claims, together with certain other classes of infringement claims, be submitted to an alternative forum rather than federal district court.

Our responses to the specific questions posed by the Copyright Office follow:

## **1. Nature of the Problems Faced by Subsequent Creators and Users**

### Difficulties faced by creators or other users of pre-existing works.

Professional photographers face a minimal burden in regard to orphan works. This is because most of the incorporation of prior works into photographs is done at the idea level of abstraction.

However, there are instances where a photographer does incorporate the work of another artist into one of their images. The classic example is a streetscape that includes a copyrighted sculpture, a painting or an excerpted page from a literary work. In the majority of these instances the photographer is either able to locate the creator of the work or depends on the transformative nature of their work to bring it within the bounds of the fair use doctrine.

Among photographers, those involved in restoring damaged or degraded photographic prints are in perhaps the most delicate situation of all. This type of restoration work presents unique problems since the artist is literally creating a replacement for—rather than transforming—the original work. These photographers and artists would benefit from a properly constructed orphan works exception.

It is our view that orphan works create a higher burden for consumers than artists if for no other reason than the differing nature of their proposed uses. Unlike an artist who negates the need to locate the rightful copyright owner by using pre-existing works in transformative ways, the majority of proposed consumer uses are simple reproductions that add nothing new to the marketplace of ideas or expression.

While orphan works present greater difficulties for consumers than artists, the present scope of the problem should not be overstated. At present, we know of no situation where a consumer has been subject to a copyright infringement suit based on a photograph that would otherwise qualify as an orphan work. In addition, identification and location of the copyright owner of a work that was recently created or distributed is rarely a problem.

If the person seeking a copy does not recall or know the source of the work in question, the original artist or copyright owner can usually still be discovered since most continue to mark their work. Even though this is no longer a legal requirement, artists continue to see it as a good business practice. We do not know how widespread the practice is in other creative fields, but 89% of professional photographers mark their work in some fashion. As a result, the vast majority of consumers that contact our organization looking for information on a recently created work are those that are not willing to take the time to seek out the copyright owner to obtain proper permission or who have contacted the copyright owner but refused to accept the artist's terms for granting permission. Neither of these scenarios rises to the level that would allow for copying under any reasonable orphan works paradigm.

While the problem is not yet widespread, we acknowledge that the number of orphan works is likely to grow as time goes on. Anecdotally, problems with finding the copyright owner to a photograph—at least for the retail photography market—start to increase about 15 to 20 years after the distribution of the work to the client.

#### Steps Usually Taken to Locate Copyright Owners

Professional Photographers of America has long recognized that the inability of a consumer to find a copyright owner serves no one's interests. The copyright owner loses a licensing or reprint sale opportunity and the potential user of the work is left frustrated – which ultimately undermines that person's respect for copyright law.

In order to address this issue, Professional Photographers of America provides retailers with a toll-free line that consumers can call in an attempt to locate the photographer that created an image. As an added benefit, this toll-free number also makes

it as easy as possible for retailers to re-direct their customers to proper channels to obtain rights clearance in a non-confrontational manner.

Our database file contains more than 50,000 names and gives us a reasonable chance of assisting a caller in locating the creator of an image. If the photographer's contact information is not in our database, our staff will often assist the consumer by using Internet resources to track down any potential leads (basic web searching, online telephone directories, directories of state or local photography organizations and the Copyright Office records online). This process takes, at most, five minutes to complete.

Even when taking this approach, there are occasions where 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—or was at least willing to—play by the rules that under the current copyright regime there is no provision that will allow them to make copies. The reality is that when this situation arises, the consumer takes the initiative and ends up shopping around until they find a retailer, or a retailer's rogue employee, who will make the copy without even asking about the work's copyright status.

## **2. Nature of “Orphan works”: Identification and Designation**

### Definition of Orphan Works

At the most basic level we consider an orphan work to be a work which is presumed to be within its copyright term; and where the rightful owner of the rights in that work cannot be identified; or if identified, cannot be located, after a diligent search by the party that has possession of a non-infringing copy of the work and wishes to make use of it. Because this definition relies heavily on the facts surrounding request for usage, determinations of a whether a work is “orphaned” should be subject to a case-by-case analysis.

### **2A. Case-by-Case Approach**

When combined with a voluntary registry of copyright owners, the “ad hoc” or “case-by-case” approach appears to be part of workable solution to the orphan works issue. However, it is only a partial solution. In addition to the case-by-case determination

of whether a work is orphaned, there is a strong belief in the photographic community that the use of orphan works should be limited to certain non-commercial and archival purposes. Our commentary on what constitutes a proper search for a copyright owner is made with those restrictions in mind.

A majority of photographers polled on this issue deemed that a reasonable search would, at a minimum, consist of:

1. Checking the print, digital media or file for identifying information.
2. Contacting trade associations for that profession to determine if contact information for the artist or current copyright owner.
3. Searching online to locate the copyright owner
4. Using Copyright Registration records to locate the copyright owner.

We believe that the “intent to use” requirement, standing alone, would be a poor model for giving notice to owners of works that might otherwise be considered orphans. Individual copyright owners simply do not have the resources to actively police such a list. Moreover, we believe that such a system improperly shifts the burden of complying with the law away from the person making copies or use of a protected work and onto the artist. At most, intent to use might be the final step in a protocol that prospective users of “orphan works” must follow to get clearance.

It should also be noted that in addition to the search protocol, photographers believe that a potential copier or user should be required to maintain a record of their search in order to qualify for the exemption.

The Copyright Office also mentions checking inheritance records and placing advertisements seeking the owner of the work as options. Because we view orphan works as only being subject to limited non-commercial and archival purposes, we believe that requiring a search of inheritance records places too high a burden on potential users. Moreover, other than an intent to use notice filed with the Copyright Office, we believe that there is little utility in requiring a potential user to purchase advertising.

In the final part of section 2A, the Office asks if the age, obscurity or date of publication should be a consideration in whether or not a work is considered orphaned. We are adamant in our belief that the enforceability of an artist’s right should never rest

on the fame or notoriety of his work. Nor should a work's date of publication—a concept which continues to grow more unclear—have a direct impact on its protected status.

## **2B. Formal Approach**

Returning to an inflexible, iron rule of copyright forfeiture for failure to adhere to a renewal formality will do manifest harm to creators and do little or nothing to solve the problems posed by orphan works.

Indeed, requiring mandatory registration of a continuing claim to copyright will, in some ways, make the problem of orphan works more acute. Take the following example: A copyright owner distributes a work and just four years later becomes a recluse and cannot be located or contacted. However, during the 28<sup>th</sup> year after publication of his work he makes his renewal claim. A year or so after the renewal filing, that copyright owner either goes back into hiding or passes away. Using the 95-year presumption, the work—which would qualify as orphaned under most ad hoc systems relying on owner locatability—becomes utterly unusable for 90 of the 95 years it is subject to copyright protection. While this is an extreme example, it is very likely that the owners of many renewed works would become unreachable long before the presumptive or real end of the copyright term. This leaves the person seeking permission to use the work in no better position than when there was no renewal requirement.

For small and individual copyright owners, a mandatory registration requirement also bears a particularly unfair burden. As a class, professional photographers are hard-pressed to initially register and deposit their works with the U.S. Copyright Office. Despite a strong desire to protect their rights and a significant economic interest in those rights, 91% of professional photographers have never registered so much as a single image with the U.S. Copyright Office due to the disproportionate amount of time required to assemble and deposit the thousands of works they create each year. How much more difficult will it be for them or their heirs to track publication dates for hundreds of thousands of images in order to properly file a continuing claim of copyright in a 365-day window that occurs nearly three decades after the initial distribution of the work to clients?

As such, photographers have a strong preference for a voluntary, optional registry of copyright owners that is not a prerequisite for ongoing copyright protection and that does not require the deposit of the works to be protected. Searching the registry should be a required step in any orphan works protocol.

The incentive for a copyright owner to participate in such a registry is strong. While owners would not automatically forfeit their rights by failing to participate, they would know that non-participation would greatly increase the chance that someone seeking permission to use one of their works will be unable to locate them – which in turn, increases the user’s chances of qualifying for an “orphan works” exemption. In November 2003 and March 2005 we surveyed photographers about a similar registry. In each instance a significant majority, 79% and 87% respectively, expressed a willingness to participate in a central information clearinghouse that would, after the death of the photographer, either direct consumers to the current owner of the copyright in the work or notify the consumer that no permission is needed to make copies.

Finally, we point out that mandatory formal registration in a copyright owner’s registry or orphan works database would be the equivalent of reinstating the concept of a copyright renewal. Not only was this idea rejected by the drafters of the 1976 Act, recent attempts to re-institute such a renewal requirement have failed to gain any significant Congressional support.

#### Private or Publicly Operated Registries; Identification of Works

While it is tempting to centralize all resources with the U.S. Copyright Office, doing so would require many copyright owners to duplicate information already on file with other entities. For instance, in the realm of music, performing rights organizations already possess mountains of data regarding the copyright ownership of the works in their collections. Similarly, the major trade associations for various artists already have databases filled with contact information for their artist-members. Designating certain entities as official registries and then having those entities add next of kin or other copyright ownership information fields, while challenging, would be far less disruptive and costly than creating a new system from scratch.

Another factor favoring privately operated registries is the wide variation in the types of information that each registry may need to include to meet the needs of artists and potential users.

The photography community's experience under the existing copyright registration and deposit system tells us that a one size fits all approach is inadequate to produce a useful and usable registry of copyright owners. The reason goes back to the volume of works produced. It is entirely reasonable for a registry of owners in book copyrights to list every work, the name of the author, year of original publication and current ownership information.

While this would be a large amount of data, it would be dwarfed by the number of records for photographers who can easily generate more than 20,000 works a year. A registry for high-yield creators might, for instance, be limited to the name of the author, a range of dates and general types of works created, geographic area served and either contact information for the current owner of his body of work or an indicator of whether or not that photographer has issued a blanket release for the reproduction of his or her work.

These infrastructure issues and wildly different business models among groups of artists strongly suggest that separate, privately administered registries would be appropriate.

### Avoiding Fraud and Abuse of the Registry

The unfortunate truth is that all registration systems are subject to fraudulent use. Even the existing copyright registration and deposit system does not prevent a bad actor from fraudulently claiming a work as his or her own. Perjury or other penalties for those who fraudulently register a claim with a copyright owner's directory should be provided.

### **3. Nature of "Orphan Works": Age**

Assuming an orphan works protocol that depends on the user's ability to locate the owner of a work (rather than one that depends on the owner's mandatory renewal registration), granting a work immediate orphan status seems contrary to the very nature of what an orphan work is or should be. Where little time has elapsed from the



distribution of a work and an attempt to copy or incorporate that work into another, there is little or no reason to provide an orphan work exemption.

While we make no specific recommendation as to an age threshold, it has been our experience that copyright owner identification and location problems with some classes of photographs begin to occur after 15 to 20 years and increase as the works continue to age.

Regardless of what standard might ultimately be recommended or adopted, we believe that the time threshold should be uniform for all classes of works. To do otherwise would create situations where a stand-alone photographic image qualifies for the orphan time threshold, but that same image used in a book published simultaneously with the image is not since it is subject to a different pre-orphan term.

#### **4. Nature of “Orphan Works”: Publication Status**

In this era of the decentralized dissemination of works, the line between published and unpublished works is increasingly fuzzy. As such, the distinction should either be obliterated or the statutory definition made to be more clear—particularly for artists that sell copies of certain works to one or two persons with no intent of further distribution or publication.

In keeping with our position, we believe that any copyright exemption for orphan works could be applied to both published and unpublished works but only if the uses of orphan works are adequately restricted to personal, non-commercial and archival uses. If the goal of copyright law is to bring lost works into marketplace of ideas, a 40-year-old unsigned and unpublished manuscript found in someone’s attic should be subject to an orphan works classification.

#### **5. Effect of a Work Being Designated “Orphaned”**

Regardless of whether a formal or ad hoc approach was taken, we would object to any orphan works exception that results in a total loss of copyright or its associated remedies.

Our opposition to such a total loss of rights and remedies is rooted in the realities of the marketplace. Oftentimes, particularly in the context commercial and media

photography, the photographer is dependent on a third party to either attribute his work or to direct those seeking reprint rights to the photographer. Experience teaches that a large percentage of third parties do not take these steps. As such, there is a very good chance that an image presented to the public without attribution will be deemed an orphan work since there is little or no means of tracing the work back to its rightful owner. This common situation poses too high a risk of inadvertently and unjustly stripping artists of their rights.

#### The Canadian Copyright Board Approach

As a group, professional photographers are split evenly on the issue of a government panel determining the reasonable license fee for an orphan work. This is a reflection of the highly individualized pricing methods used in both commercial and retail photography, which rely on a variety of factors such as the skill of the photographer, the cost of doing business and the specifics of the desired use.

From the copyright owner's perspective the sole, but rather significant, advantage of the Canadian approach is that it does eliminate the time and expense involved in filing a federal district court action to recover for an infringement of an orphan work.

For photographers, any system that requires filing a suit in federal district court to obtain actual damages acts as a total bar to recovery. Unlike other art forms where one work is sold a million times over, most photographers create thousands of works that will be sold or licensed only one or two times. This means that actual damages for the vast majority of photographic infringements, while economically significant to the copyright owner, do not rise to the level that would interest an attorney.

Moreover, photographers generally earn about \$30,000 a year, which puts them well below an income bracket that would permit them the luxury of obtaining a pyrrhic victory over an infringer in federal district court.

#### The Glushko-Samuelson Approach

Under the current enforcement scheme, the Glushko-Samuelson approach limiting recovery on orphan works to that of a reasonable royalty renders the copyrights of thousands of small and individual copyright owners unenforceable.

As a group, professional photographers are uniquely qualified to comment on the effects of a “reasonable royalty only” recovery scheme. As a class of creators, photographers have been unable to take advantage of the statutory damage and attorney fee provisions of Title 17 due to the onerous burden of depositing thousands of works to the U.S. Copyright Office each year. As such, these artists have more than 25 years of collective experience living under a de facto system where statutory damages and attorney fees are unavailable. The value of almost all photographic infringements, while they represent a significant loss of income to the photographer, is far too small to cover the cost of filing suit in federal district court.

This unintended consequence of the 1976 Act has thrust photographers into an environment in which someone can commit a blatant act of infringement and safely ignore reasonable requests for payment, secure in the knowledge that the photographer’s practical ability to bring a suit for actual damages is nil.

The Glushko-Samuelson approach would expose all copyright owners to this risk any time a defendant put forth a defense based on orphan work status. As such, the risks of financial loss for plaintiffs in copyright actions would increase tremendously.

We do believe, as explained below, that the Glushko-Samuelson approach may have merit outside the context of the traditional infringement suit filed in federal district court.

#### A Viable Alternative to District Court

In our view, federal court litigation is the wrong dispute mechanism for setting licensing fees for orphan works – just as it is the wrong forum for most copyright infringement claims and disputed counter-notifications arising out of §512(g).

The tremendous costs that both parties face in district court litigation tends to result in outcomes that serve neither the best interests of individual copyright owners nor those of consumers or small businesses accused of infringement. Copyright owners with perfectly legitimate “small” claims never make it to the courthouse because of the economics of an infringement lawsuit. Similarly, the rounds of litigation against consumers by the motion picture and recording industries, while perfectly justified, have shown that even in those cases where an individual believes they have a good defense

against the infringement claim, their only viable option is to capitulate and settle without ever darkening the courthouse doorway.

This situation is untenable in that it denies justice to the interested parties and undermines respect for intellectual property rights – either by giving wanton infringers a license to steal or by making those owners with the means to enforce their rights look like extortive bullies.

We believe that these difficulties can be eliminated or substantially reduced by developing a special administrative law or arbitration procedure for “small dollar” infringements. Such a proceeding would also provide an excellent forum for disputed §512(g) counter-notifications.

Regardless of the actual mechanism employed, we envision a “court of small copyright claims” that would offer the following features:

1. If the actual damages claimed by a copyright plaintiff are below a certain dollar limit, he or she may elect to submit the claim to the court of copyright claims, rather than federal district court.
2. The copyright court shall also have original jurisdiction over all disputes regarding counter-notifications issued under 17 U.S.C. §512(g). This will allow both sides to get an official determination as to whether online access to a particular work must be disabled in a timely fashion.
3. By submitting the dispute to this type of copyright proceeding, the plaintiff will not be eligible for statutory damages.
4. Damage awards in this proceeding would be tied directly to the value of the infringement. In order to produce a sufficient deterrent to infringement—and to avoid the creation of a de facto compulsory licensing scheme—damages for an infringement should be set at a small multiple of the actual damages, with a higher damages multiplier applied when infringement is found to be willful.
5. A defendant that successfully offers a defense based on the orphan status of a work would only be liable for a reasonable royalty as determined by the tribunal.
6. All other defenses available under Title 17 would apply.
7. If the tribunal determines that an infringement claim was brought frivolously, or if the defendant offered no non-frivolous defense, the tribunal may award costs and fees to the opposing party.

8. Copyright registration shall have no effect on the availability of damages available these proceedings. However, in order to preserve and further the mission of the Copyright Office and Library of Congress, a work must be registered prior to submitting a claim to the tribunal—but not prior to the infringement.

We believe that this, or a similar adjudication mechanism, would cure to the two major unintended consequences of the 1976 Act: orphan works and the de facto inability of individuals to vindicate their rights. Such a system would also provide a good forum for allowing owners and alleged infringers an opportunity to receive final adjudication of §512(g) disputes in a more timely manner.

### **Conclusion**

Balancing the needs of copyright owners and potential users of those works is rarely an easy task. However, we firmly believe that enough common ground exists on the issue of orphan works to hammer out a reasonable solution that serves the legitimate needs of all parties involved.

Respectfully submitted,  
PROFESSIONAL PHOTOGRAPHERS OF AMERICA  
COMMERCIAL PHOTOGRAPHERS INTERNATIONAL  
INTERNATIONAL ASSOCIATION OF  
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