

**Statement of Karen Coe  
Associate Legal Counsel  
United States Holocaust Memorial Museum**

**Subcommittee on Courts, the Internet, and Intellectual Property  
Committee on the Judiciary  
U.S. House of Representatives**

**“Balancing the Interests of Copyright Owners and Users”  
March 13, 2008**

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Chairman Berman, Ranking Member Coble, and Members of the Subcommittee:

My name is Karen Coe. I am the Associate Legal Counsel of the United States Holocaust Memorial Museum (Museum) and will be speaking today about the Museum's experience with orphan works. My comments will also reflect the experiences of other museums, archives, libraries, and educational institutions that have previously provided comments to you and the Copyright Office about the problem of orphan works, and their comments will provide the background for my statement today.

I wish to thank the Copyright Office for its thorough and comprehensive Report on Orphan Works<sup>1</sup>, for dedicating extensive time and resources to its preparation, and for providing multiple opportunities for public comment and discussion of this issue.

The United States Holocaust Memorial Museum is an independent establishment of the United States Government.<sup>2</sup> It was established by Congress to operate and maintain a permanent living memorial museum to the victims of the Holocaust. In its Permanent Exhibition, the Museum presents the history of Holocaust through pictorial accounts, films, and other visual exhibits. The Museum also houses a library, an archive of Holocaust materials, to enable the general public and scholars to study the record of the Holocaust. It contains an educational unit to disseminate knowledge and understanding of the Holocaust in all sectors of society, and it has a publishing program, with priority given to new works, survivors' accounts, and documentary or photographic publications, with an emphasis on scholarly studies that are not commercially viable.<sup>3</sup>

Since its establishment, the Museum has acquired and currently maintains approximately 42 million pages of archival documents, 77,000 photographs, 9,000 recorded oral histories, 985 hours of historical film footage, and its library contains 72,000 items in 55 languages. The majority of these materials are

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<sup>1</sup> U.S. Copyright Office, Library of Congress, Report on Orphan Works: A Report of the Register of Copyrights (2006).

<sup>2</sup> 36 U.S.C. §2301 (2001).

<sup>3</sup> President's Commission on the Holocaust, Elie Wiesel, Chairman, Report to the President 9 – 10 (1979).

foreign works, many of them are unpublished works, and many of them are orphan works.

Like other museums and archives, the Museum acquires orphan works in many and diverse ways. We recently acquired an album of photographs that was found in a hotel room in Germany after World War II. The individual who found it gave it to the Museum shortly before his death. The photographer is unknown. We have received a diary that was written in a Polish ghetto by a young woman who did not survive the war, but we do not know the whereabouts of surviving family members or other heirs. The Museum has obtained artwork and even musical scores created in concentration camps that were given by their creators to other inmates for safekeeping and these surviving inmates or their families brought them to the Museum. It is not known whether the artist or the composer is dead and, if so, who or where his family or other heirs might be.

When a member of the Museum's staff calls me or one of my colleagues in the General Counsel's office to ask if they can make such orphan works available to the public in a manner that requires copyright permission, our first response is to ensure that they conduct and document a good faith search to identify and locate the copyright owner. If the copyright owner is known, a good faith search might require sending a certified letter, return receipt requested, to the copyright owner at his last known address. It might require searching a number of online databases to obtain a more recent address or to confirm that the copyright owner has died. If the copyright owner is not known, it might require going back to the Museum's source for the work to obtain more facts about how and from whom our source acquired the work and then to contact those sources. Quite often a good faith search will require all of these efforts.

The methods of conducting these good faith searches will vary, depending on whether the orphaned work is a painting, a book, or a collection of photographs, whether it has been published or unpublished, and whether it is a work of foreign origin or a domestic work. And each search will be different because we typically have varying levels of information about the circumstances in which each orphan work was created.

Because of these different circumstances and levels of knowledge, it is important to the Museum and other museums and cultural institutions that we have the flexibility to structure a good faith search on a case-by-case basis. Guidelines, minimal requirements, and research suggestions and tools will be very helpful to all of us, especially to smaller institutions and individual creators and scholars. But the ability to structure a search appropriate for the unique circumstances of each orphan work or each class of orphan works is critical to the success of these searches.

Often even a diligent, good faith search is not successful: a copyright owner is not identified, or he is identified but cannot be located. We then have to decide

whether to allow the work to be used in spite of the risk of copyright infringement. If there is another work that can be substituted for the orphan work, we will require that this be used instead and we can thus avoid the risk of infringement without compromising the integrity of the intended use. If a work is historically or culturally unique, we might allow it to be used but in doing so we expose the Museum to an unknown liability. Even if the risk is minimal, we do have to account for the fact that only one lawsuit or one public allegation of infringement could have a permanent, negative impact on the institution. Thus even a minimal, unknown risk has a chilling effect on all our decisions regarding the use of orphan works.

It is for these reasons that we are interested in the “safe harbor” that is proposed in the Report. It would allow the Museum to explore how to make these works available to the public in accordance with our statutory mandate without assuming a risk of liability, and it will allow the public access to works of considerable historical and cultural significance.

In the few circumstances that we allow an orphan work to be used, we are prepared to negotiate with any copyright claimant that comes forward. Because the work may have already been published in an academic journal or by a small university press whose publication of the work the Museum has sponsored, it is often difficult for us to stop its use expeditiously. It also may be that the copyright claim proves to be invalid: the claim cannot be verified or it is contradicted by other provenance or copyright information that we have. We would therefore appreciate the flexibility to continue the use of the work or not and, if we choose to continue the use, to pay a reasonable compensation to the copyright claimant whose claim proves to be valid.

Like other museums and nonprofit cultural institutions, the Museum is quite willing to reasonably compensate a copyright owner for the use of his work. Our respect for the integrity and the cultural and historical value of the works that we collect carries over to their creators, and we consider it part of our public service to recognize and reward artists and authors who would otherwise not be noticed or compensated.

However, the license fees that the Museum pays to use copyrighted works for its program purposes do have to be reasonable. They have to account for the fact that while the Museum’s works have considerable historical and cultural value, they are rarely works of intrinsic artistic value such that they could compete in a fine arts market. A reasonableness determination should also account for a nonprofit cultural institution’s large scale use of individual works in a single collection.

For example, the Museum has one collection on display in its permanent exhibition that consists of 1,500 family photographs. Each one of these photos alone has minimal value for the Museum, but the entire collection creates a

moving image of a community that was destroyed in the Holocaust. It would not be reasonable to value this collection per individual photograph; rather, it should be valued in its entirety. It also would not be reasonable to value this collection as comparable with a collection of Ansel Adams photographs; they are family photographs and, but for the Museum or another Holocaust museum, they would likely not have been made available to the public at all. In this context, as the Report has suggested, reasonable compensation to the copyright owner of one of these photographs might well be zero.<sup>4</sup>

The Museum does not charge admission fees to its exhibitions, but most private, nonprofit museums must charge fees to defray their costs. The Museum does sell books and other materials in a small museum shop and it receives royalties on the sale of works published under its sponsorship. However, because the Museum's publishing program gives priority to scholarly works that are not commercially viable,<sup>5</sup> the Museum typically loses money on these projects – it expends more money than it receives and frequently passes on all or a portion of its royalties to an outside author. Our published works are typically priced quite modestly and have a limited distribution among scholars and educational institutions. For these reasons, like many of the nonprofit institutions that have previously commented on this point, we do not want to be forced to discontinue use of the work because the compensation required for its continued use is not reasonable within the context that I have just described.

As noted earlier, the majority of the documents, photographs, and artifacts in the Museum's collection are works of foreign origin, and the Museum anticipates acquiring even a greater number of foreign works in the coming years. We expect to soon acquire approximately 35 – 50 million pages of documents from the International Tracing Service in Germany, and in recent years the Museum has acquired many documents from Eastern European countries that were once part of or dominated by the former Soviet Union and had closed their archives to public access. A solution to the problem of orphan works that does not account for our international treaty obligations would be of minimal use to the Museum and other museums with extensive collections of foreign works.

Mr. Chairman and Members of the Subcommittee, I thank you for this opportunity to comment on the orphan works problem. The authority to make these works available to the public in a legitimate and constructive manner will be of considerable value to the Museum in enabling the use of our current and future collections in furtherance of our educational and memorial mission.

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<sup>4</sup> Report at 117-118.

<sup>5</sup> See note 3.