

**SUBCOMMITTEE ON COURTS, THE INTERNET AND
INTELLECTUAL PROPERTY**

COMMITTEE ON THE JUDICIARY

U.S. HOUSE OF REPRESENTATIVES

**HEARING ON “PROMOTING THE USE OF ORPHAN WORKS:
BALANCING THE INTERESTS OF COPYRIGHT OWNERS AND USERS”**

MARCH 13, 2008

**EXECUTIVE SUMMARY AND PREPARED STATEMENT
OF
VICTOR S. PERLMAN,
GENERAL COUNSEL AND MANAGING DIRECTOR,
AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS**

**AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, INC.
150 NORTH SECOND STREET
PHILADELPHIA, PA 19106**

215-451-ASMP EXT. 1207

FAX: 215-451-0880

perlman@asmp.org

<http://www.asmp.org>

PREPARED STATEMENT OF VICTOR S. PERLMAN
EXECUTIVE SUMMARY

ASMP's testimony today is made on behalf, not of just ASMP and its members, but of virtually every major trade association in the United States that represents the interests of freelance photographers, as well as several major organizations representing freelance commercial artists and illustrators.

1. **Fair and workable solution.** ASMP believes that the Orphan Works problem is a legitimate one that needs to be addressed. The last version of the Orphan Works bill in the 109th Congress came close to presenting a reasonable solution to the Orphan Works problem. However, a truly fair and workable bill must recognize and adequately address the realities presented by copyrighted visual materials and their creators.

2. **Most published images are likely to be “orphans.”** Orphan Works legislation is likely to “orphan” not just abandoned works, but probably a majority of published photos and illustrations. Visual artworks are generally published without identification of the creator and copyright owner. There is almost no attribution provided for visual images published on the web; in fact, an estimated 90% of photo uses on web are unauthorized. Identifying metadata is easily, and often innocently and unintentionally, deleted. In the print world, there are no photo credits given by clients for most published images. Identifying material, when it does appear in print media, is usually distant, and easy to separate, from the image. These facts are the results of trade practices that are counter to the desires of photographers and illustrators and that are beyond their control.

3. **Incorrect assumption.** There is a fundamental and erroneous assumption on which the Copyright Office's proposal and the bill in the 109th Congress were based: “...if a work is registered it is unlikely that the copyright owner is unlocatable through a diligent search.” This simply is not true for visual images. There is no way to search the Copyright Office's records for an image unless the searcher already knows the name of the creator or copyright owner, and that information is precisely what the prospective user of an Orphan Work is trying to discover.

4. **Image recognition search technology.** Image recognition-based digital search technology will be of some help now, but will provide a true solution only when the uncounted millions, perhaps billions, of visual images that currently exist only in analog media have been converted into digital media and uploaded into searchable databases. Sole practitioner photographers and artists do not have the resources to engage in a project of that scope while working every day to earn \$40,000. per year on average.

5. **Alternative dispute resolution needed.** Visual artists are already deprived of practical access to the courts for enforcement of their rights because of the huge disparity between the costs of copyright infringement litigation and the potential recoveries. The “reasonable license fee” cap on recovery in the bill introduced in the 109th Congress would limit relief to the point where no photographer or illustrator could afford to compel payment from a user. An alternative method of resolving such disputes is critical to a fair and reasonable solution to the Orphan Works problem.

6. **ASMP’s Proposed Solution.** In an attempt to resolve the many conflicting goals, and in particular the loggerhead that exists surrounding the safe harbor provisions, we offer as a suggestion leaving the safe harbor provisions in place along the lines that appeared in the last Orphan Works bill. Instead of changing the safe harbor provisions, we suggest the possibility of limiting the scope of the Orphan Works defense to:

1. Uses by individuals for non-revenue producing personal or community purposes, including uses on websites that do not generate revenues for the individuals using the Orphan Works; and

2. Uses in works of non-fiction, such as books, articles or documentary films or videos; and

3. Uses by non-profit educational institutions, libraries, museums or archives qualified for treatment under §501(c)(3) of the Internal Revenue Code as amended, --

a. in exhibits, including website displays, and

b. for uses that produce revenues and that are ancillary to exhibits, such as souvenir sales in connection with exhibits by such libraries, educational institutions, and archives.

The foregoing suggestions should be considered conceptual in nature, and not necessarily proposed legislative language. We hope that this proposal will contribute to a meaningful dialogue on Orphan Works and will lead to the passage of a fair and workable legislative solution.

PREPARED STATEMENT OF VICTOR S. PERLMAN

Mr. Chairman, Ranking Member Coble, and distinguished members of the Subcommittee, thank you for the opportunity to present our views on the Orphan Works problem and solutions.

Introduction.

The American Society of Media Photographers' mission is to protect and promote the interests of professional photographers who make photographs primarily for publication. ASMP is the oldest and largest trade association of its kind in the world. ASMP's testimony today is made on behalf, not of just ASMP and its members, but of every major trade association in the United States that represents the interests of freelance photographers, including Professional Photographers of America, as well as major organizations representing freelance commercial artists and illustrators.

ASMP believes that the Orphan Works problem is a legitimate one that needs to be addressed. It is our hope to help enrich this nation's visual heritage and help foster creativity, not to stifle them. In the last Congress, we participated in the drafting of legislation in this Subcommittee that approached creating a fair and workable solution. However, the last version of that legislation, before it was withdrawn from consideration, fell somewhat short of adequately addressing the unique challenges presented by visual artworks. Many of us in this room have spent a large part of our professional lives working on Orphan Works over the past three years. It is important to all of us to get this legislation done, but it is more important that we get it done correctly and fairly.

Orphan Works = Most Published Images.

For professional photographers and illustrators, unless crafted properly, Orphan Works legislation creates the potential for having the practical effect of both retroactively and prospectively invalidating copyright protection for the majority of published images. Worse, unless accompanied by provisions that would give creators a practical means of compelling recovery of reasonable licensing fees, Orphan Works legislation could compound that felony by leaving no viable way to obtain even the minimal relief contemplated by the legislation that was introduced in the last Congress.

The phrase "Orphan Works" is insidiously misleading. It connotes a few, neglected items that have been abandoned in some fashion and has no one to care for them. In fact, however, Orphan Works legislation would probably affect a majority of all published photos and illustrations. In order to be located, a copyright owner must first be identified, and most published images simply are not published with any identifying information. In the digital world, for example, there is virtually no photo credit or other attribution provided for visual images published at client or third-party sites on the web; worse, industry service

providers, such as PicScout, estimate that 90% of the photographs on the web are unauthorized uses.

In the print world, there are no photo credits given by clients for most published images; the only exception is for editorial uses, and even there, the use of credit lines is declining. Further, when editorial photo and illustration credits are provided in print media, they usually appear in places that are not physically adjacent to the images, such as the bottoms of pages, credit lists at the backs of publications, and in the “gutters” of bound publications. All of those locations make it difficult to associate an image with the name of its creator and make it easy for the credit to be completely detached from the image and lost.

These trade practices are counter to the desires of photographers and illustrators, are usually counter to their contracts with their clients, and are completely beyond the control of the image creators. Freelance photographers and illustrators want very much, and try very hard, to be found: that is how they earn their livings. If clients and prospects cannot find them, they do not work. However, their clients, the users of the images, are the ones with the market force to dictate the business practices, and providing meaningful image credits is not in their interest. Indeed, it could be argued that the users of images have a self-interest in helping to create as large a pool of Orphan Works as possible, thereby building an inventory of images that could be used for either zero or little compensation.

Incorrect Assumption.

One of the problems underlying Orphan Works legislation, as applied to the world of visual images, stems from the fact that, at least in the last Congress, the starting point was the legislation proposed in the Copyright Office’s report on Orphan Works. That report, and the Copyright Office’s proposed legislation, were based, at least in part, on a fallacious assumption: page 115, the Copyright Office Report on Orphan Works states, “... if a work is registered it is unlikely that the copyright owner is unlocatable through a diligent search.” This statement is simply and completely incorrect when applied to visual images. There is no way to search the Copyright Office’s records for an image unless the searcher already knows the name of the creator or copyright owner, and that information is precisely what someone is searching for when trying to track down an Orphan Work.

Digital Search Technology and Databases.

The Copyright Office’s search capability is limited to text searches for very limited fields. Recently, it has become technologically possible to digitize the Copyright Office’s archive of deposit copies and utilize image recognition software to allow someone to search by image, not just by text. In fact, the Library of Congress, of which the Copyright Office is a part, is currently in the process of digitizing its archive of images.

In the two years since the introduction of Orphan Works legislation in the last Congress, the interested parties, the Copyright Office and Congressional staff have spent a lot of time looking at the state of technology and the impact that it can have in dealing with the Orphan Works conundrum, particularly with regard to visual images. At the same time, ASMP has been working with software providers such as Adobe in an attempt to protect the metadata that is so crucial to identifying and locating copyright owners in the digital world. There have been discussions of image-recognition digital search technologies, on-line registries, digital databases, etc.

Unfortunately, digital storage, identification and retrieval technologies are only one half of the equation. They are not worth anything, unless they have the proper body of work in which to search, i.e., unless, as they say in the computer world, the database has been adequately populated. Because, in recent years, we tend to think in terms of a digital world, we forget the fact that there are uncounted millions, perhaps billions, of visual images that were created in conventional or analog media and that have not been converted to or stored in digital media. Digital search technology simply does not operate in the analog world.

For digital search technology to provide a meaningful solution to the Orphan Works problem, uncountable numbers of images have to be edited; then they have to be scanned into digital form; then the digital scans have to be “corrected” to match the analog originals; then the digital files have to be embedded with all appropriate metadata; then they have to be uploaded to the appropriate databases. Only then can image-recognition based digital search technology truly provide a solution to the Orphan Works dilemma.

That raises the question of who can and should do all of the work involved in the steps described above for the millions and millions of images that currently exist only in print form. The user community and the Copyright Office have said that the burden should fall on the creators of those images. Their rationale is that the creator community is the group that would benefit from the work. While that position appears on its face to have logic on its side, it is actually a red herring. That immense project would not exist in a vacuum: Actually, the trigger for such a project would be a change in copyright law to provide an Orphan Works defense to infringement claims and a limitation on remedies. It is the user community that would primarily benefit from Orphan Works legislation, not the copyright creator or owner communities. Viewed in context, the real beneficiaries of the Orphan Works/digital works database equation would be the user community, not the creators.

To a great extent, who the beneficiaries of such a project might be is irrelevant. The practical reality is that most professional photographers are sole practitioners, and many if not most of their businesses are “mom & pop” operations, where one spouse makes photographs, and the two of them share all

of the other responsibilities. We know from the Bureau of Labor Statistics that a professional photographer earns on average under \$40,000. per year. Given those facts, a photographer faced with the choice between finding and keeping clients and producing images for them, on one hand, or digitizing a lifetime's body of analog photographs to protect against possible Orphan Work usage on the other, does not really have any choice at all. That archive of work is likely to remain in analog form, no matter how badly the photographers, artists and other creators would like the situation to be otherwise. When the mortgage, tuition and doctor's bills come due, digitization of the archive will always remain on the wish list.

There is one alternative that would seem to provide a reasonable, albeit partial, solution. The Copyright Office is in the process of implementing an on-line, digital registration service. It would seem logical that the deposit copies that are received digitally could, and should, be searchable on line and that an image-recognition interface could drastically help users of works in search of the author. Further, the Copyright Office has an archive of many years' worth of deposit copies of published images, and even more of unpublished images. Since the Library of Congress has seen fit to digitize its inventory of print images, it would seem logical that the Copyright Office could be given the funding and the mandate to do the same and to make those digital files accessible to on-line searches utilizing image-recognition search technology.

The High Cost of Enforcement.

The Copyright Office has long recognized that visual artists are already deprived of practical access to the courts for enforcement of their rights because of the huge disparity between the costs of litigation and the potential recoveries. Copyright infringement litigation, in ASMP's experience, typically costs the plaintiff legal fees of at least five, and usually six, figures to take a case through to final judgment in the applicable U.S. District Court. The "reasonable license fee" cap on potential recoveries, and the elimination of awards of attorney's fees, statutory damages, and the infringer's profits, which would have been the effect under the Orphan Works bill introduced in the 109th Congress, would limit relief to the point where nobody could afford to seek payment under our current legal system.

Fortunately, the drafters of the Orphan Works legislation that was before this Subcommittee in the last Congress recognized the need to explore alternative ways in which creators and other copyright owners might be able to enforce their rights and directed the Copyright Office to engage in a study of ways to deal with this problem. The creative community greatly appreciates the understanding of this situation that underlay such a provision, and we hope that any Orphan Works legislation introduced in the current Congress will incorporate a similar approach to filling the need for alternative methods of dispute resolution for copyright owners.

The Gordian Knot.

The Orphan Works negotiations involving the interested parties, Congressional staff and the Copyright Office in the last Congress were extremely productive. We believe that the last version of the bill was a drastic improvement over the original proposal from the Copyright Office. Unfortunately, the parties ultimately came to an impasse over certain aspects of the bill, primarily the extent of the so-called "safe harbor." That impasse remained even after the bill was withdrawn.

In the time since then, ASMP has been exploring possible solutions to this problem. We believe that there is a relatively simple way around this roadblock. The creative community's primary concern is that for-profit entities engaged in commercial enterprises will be able to make substantial revenues from using Orphan Works, but will be substantially immune from having to turn over those profits to the copyright owners under the safe harbor and other provisions of an Orphan Works law. We do not wish to prevent hobbyists and other individuals from using Orphan Works, nor do we wish to penalize them for doing so. Similarly, we do not wish to impede the advancement of learning, nor do we want to penalize the creators of learning materials and media for their use of Orphan Works.

In an attempt to resolve these potentially conflicting goals, we offer as a suggestion leaving the safe harbor provisions in place along the lines that appeared in the last Congress. Instead of changing the safe harbor provisions, we suggest the possibility of limiting the scope of the Orphan Works defense to:

1. Uses by individuals for non-revenue producing personal or community purposes, including uses on websites that do not generate revenues for the individuals using the Orphan Works; and
2. Uses in works of non-fiction, such as books, articles or documentary films or videos; and
3. Uses by non-profit educational institutions, libraries, museums or archives qualified for treatment under §501(c)(3) of the Internal Revenue Code as amended, --
 - a. in exhibits, including website displays, and
 - b. for uses that produce revenues and that are ancillary to exhibits, such as souvenir sales in connection with exhibits by such libraries, educational institutions, and archives.

The foregoing suggestions should be considered conceptual in nature, and not necessarily proposed legislative language. We hope that this proposal will contribute to a meaningful dialogue on Orphan Works and will lead to the passage of a fair and workable legislative solution.

Thank you for your time and consideration.

Respectfully submitted,

Victor S. Perlman

General Counsel and Managing Director
American Society of Media Photographers, Inc.
150 North Second Street
Philadelphia, PA 19106
215-451-ASMP Ext. 1207
Fax: 215-451-0880
E-mail: <perlman@asmp.org>