

ORPHANED WORKS

These comments represent initial thoughts in my capacity as an attorney and do not represent the comments of any individual client or organization.

These comments are limited to particular difficulties of photographs, illustrations and other works of visual arts, but could apply to other works as well.

Photographs can be among the most difficult types of works to secure permissions. Photographers create a large body of work over a lifetime, easily in the many thousands, a select few published, the remainder unpublished. Photographs include prints, negatives, transparencies, and now digital files. Many photographs in the original material are not labeled by the name of the author. Even published photographs may not have the name of the author annexed to the published work. In some cases photographers may even use aliases. This is quite different than a novelist who may write a book or two a year, or a film producer where the credits are included.

Being sensitive to the difficulty does not mean that the public should be entitled to freely use any photograph, whether found in a book, located on a website or located in the archives of an institution without taking reasonable steps to ascertain the identity of the author. This would severely erode the rights granted to the author under the Copyright Act.

A system requiring the author to list all works would be too burdensome and unfair. As stated, photographers shoot images in quantity, and cannot be expected to maintain a list of each image or even have to scan each image to include in a sort of registry.

It would be more efficient and just if the person seeking to use the orphaned work was required to take steps and record what steps were taken to ascertain the identity of the owner. With search engines that identify names and images, this should be a first step.

Organizations that represent photographers such as ASMP (American Association of Media Photographers) and organizations that represent the licensing representatives of photographers such as PACA (Picture Archive Council of America), receive requests on a regular basis from picture researchers attempting to locate a photographer or the identity of an image. Contacting such organizations could be part of any due diligence. There are emerging technologies based on image recognition that could be employed in locating a source of the photograph.

Checking for registration with respect to photographs is not as helpful as with other works. Because of the quantity of works created by a photographer, works are either not registered or registered as collections of unpublished or published works. The titles of the works do not include the individual photographs and may not even describe the subjects.

A system should be a case-by-case basis without absolutes, such as the year of the work. It is not always possible to tell the year of a photograph unless you can identify a famous subject, the styling of clothes or hair or other objects in the image.

A minimum royalty should be paid for the use and held in escrow for a reasonable period of time. This fee can be based on standard licensing programs that are available in the stock licensing industry. A newly formed trade association, the PLUS Coalition, is creating standards for licensing terms. It will not include pricing but the Copyright Office could adopt a price schedule based on information provided by the image licensing industry.

As long as the user made a good faith attempt to find the user, pays the license fee and does not exceed the scope of use, the user should not be liable for copyright infringement and be subject to enhanced damages, penalties, costs or attorneys fees.

Who should collect and maintain the royalties is open for discussion. It could be the Copyright Office, a collecting body or that the user itself maintains the royalty in an account. If no one claims authorship within a reasonable number of years, the money, if maintained by the Copyright Office, could fund copyright education or grants for educational and library use. If held by the user, it could be reclaimed after a period of time. If the Copyright Office or other body maintained the license, it should receive a fee. The feasibility of this would have to be examined. I represent many photo libraries and it is not an insignificant task to maintain licenses and pay royalties. The least transactional manner would be if the user simply agreed to pay if approached by a legitimate owner. If the user makes payment promptly, no penalties or costs would be assessed.

The copyright owner should not have to go to federal court to obtain a fair license fee for an orphaned work. The cost of litigating copyright cases for the unauthorized use of a photograph is prohibitive. If a license fee is modest, the \$200 filing fee to the federal court, the fee for expedited copyright registration, as well as attorneys' fees, far exceeds the license in many cases. A tribunal would be more cost efficient if a dispute arose regarding ownership.