

From: [REDACTED]
To: [FN-OMB-IntellectualProperty](#)
Subject: The Fair Use Doctrine and Orphan Works
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To: Victoria A. Espinel
United States Intellectual Property Enforcement Coordinator

As a member of Advertising Photographers of America, a non-profit 501(c) (6) corporation, I appreciate the opportunity to submit comments on improving intellectual property right enforcement. My personal area of intellectual property is in the visual art field of photography. Professional photographers have been allowed to make a living in the United States because of strong copyright laws that allow for protection of our work and the ability to go after infringers of our copyrighted images.

With the advent of the web and internet commerce, photographers have been able to promote to far more potential clients, deliver completed work through private sites, and to even register with the US Copyright Office our published and unpublished work. Along with these advantages has come the rapidly and immensely worrisome issue of web theft. Frankly, web theft is killing us by contributing to the demise of our industry. Physical theft is quite easy to do by simply grabbing and copying images from the web. In addition, it is often improperly rationalized under the guise of Fair Use and Public Domain claims.

The Fair Use Doctrine incorporated into the Copyright Act of 1976, 17 U.S.C. § 106 and 107 has been so egregiously misinterpreted to mean "free use." The Fair Use Doctrine allowing for use in such things as news reporting, teaching and research is indeed fair however, it has been stretched to include derivatives of copyrighted images. Fair Use has also come into play with infringers claiming that the use is not for commercial purposes. The fact is that in most circumstances the alleged "fair use" does harm the potential market of the original. This fact alone is a major factor in the determination of Fair Use and how misinterpretation has had a negative financial impact on photographers being able to make a living.

The issue of Orphan Works is also a great concern to photographers. Because of my belief in copyright registration, knowing that my images are on record as mine, the ability to find the creator or owner of a copyrighted image is important. Every effort should be made by someone seeking the use of an image to be able to find the copyright holder. There are times when the copyright holder may not be found. Just as in Fair Use Doctrine libraries, museums, educational institutions, scholars and researchers should have the ability to provide educational use of images. A system that allows for the commercial use of published works without the permission of copyright holders, whom cannot be found, is not acceptable. The very foundation of copyright law, that when an image is created it is copyrighted, is threatened when images are used without permission of the copyright holder. Orphan works exclusions should be held to the same standards as Fair Use Doctrine; to libraries, museums, educational institutions, scholars and researches and only after a thorough search has been executed, and never for commercial applications.

As an APA member, I believe in the business of licensing images. Licensing is a contract between the copyright holder and a user of the image that may cover many

details such as a geographic region, an industry market, a set time period and of course, an agreeable usage fee. This business model allows for my clients to have the ability to use an image for a purpose that is agreed to by me, the copyright holder. It allows me to decide who uses my images, how they are used, and for how much money, all of which effect how I make my living. It is a practice that also allows for Fair Use within the framework of the law and would help in the search of copyright holders in the case of Orphan Works.

The IPEC is a welcome office in our government to help the intellectual property creator. Any effort to enhance and enforce the copyright laws of the United States in cooperation with countries throughout the world is greatly needed. As a photographer that depends on the copyright integrity of my images and a strong system to stop infringement I appreciate the opportunity to express my views.

Respectfully,
Jakob Skogheim

Jakob Skogheim Photography
734.660.3788

[REDACTED]
<http://www.jakobskogheim.com>

<http://blog.jakobskogheim.com>

[REDACTED] (twitter)