



March 15, 2006

Mr. Joe Keeley, Counsel for the Majority
Ms. Shanna Winters, Counsel for the Minority
U.S. House of Representatives
Subcommittee on Courts, the Internet, and Intellectual Property

Dear Mr. Keeley and Ms. Winters:

On behalf of the Advertising Photographers of America and its members nation wide, we are submitting this letter and accompanying paper in response to the House Judiciary Subcommittee on Courts, The Internet, and Intellectual Property March 8, 2006 Oversight Hearing on the “Report on Orphan Works by the U. S. Copyright Office”.

Clearly, a dilemma exists with respect to orphan works. We do not oppose an orphan works amendment, but have grave concerns with the proposed language as it is currently written. We would support an amendment that provides access to verified orphaned works for certain uses, by way of procedures that are clearly defined in the statute or regulations, while retaining remedies for use by copyright owners in the event of abuse.

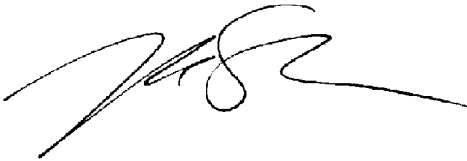
If this amendment is enacted into law without significant revisions, it has the very real potential to destroy the businesses and livelihoods of thousands of artists, cost thousands of jobs, and result in a massive wave of litigation related to the use of orphan works. In its current form, this amendment is a disaster in the making.

We believe, however, that with constructive participation by all stakeholders in the orphan works issue, a solution can and will be reached. Toward that end, we respectfully submit the attached paper, “The Orphan Works Dilemma: Challenges and Recommendations,” detailing our concerns with the language of the amendment as proposed, together with recommendations for potential solutions.

Given the complexity of this issue and the potential domestic and international repercussions involved in the enactment of this significant amendment to copyright law, we implore the Subcommittee to allow a more appropriate time period for the representatives of all stakeholders to adequately discuss the amendment and arrive at a consensus.

We appreciate the opportunity to submit the attached paper detailing our concerns and suggestions, and thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to be 'Jeff Sedlik', written in a cursive style.

Jeff Sedlik
Chief Advisor on Licensing & Copyright, Advertising Photographers of America

A handwritten signature in black ink, appearing to be 'George Fulton', written in a cursive style.

George Fulton,
National President, Advertising Photographers of America

A handwritten signature in black ink, appearing to be 'Constance Evans', written in a cursive style.

Constance Evans
National Executive Director, Advertising Photographers of America

The Advertising Photographers of America (APA), a leading non-profit trade association representing the interests of professional photographers, promotes the highest standards and ethics in the photographic and advertising community, provides educational resources, and fosters an environment conducive to achieving success in the industry. The APA membership reflects the diverse creativity and extraordinary talent of advertising photographers from across the country.



The Orphan Works Dilemma: Challenges and Recommendations

As Congress revisits the challenge of creating equitable orphan works legislation, the livelihoods of hundreds of thousands of artists and other creators are at stake. For most artists, the ability to create new works, to operate their businesses, and to support their families is inextricably tied to the rights and protections afforded them by Congress under copyright law. The Copyright Office faced a tremendous challenge in attempting to analyze and address this issue, and we appreciate the efforts of all concerned.

Most artists are not in the business of selling art. Their medium may be photography or illustration, but their business – and often their sole means of generating income, is the licensing of the copyrights in their creations. Among the smallest of this nation’s small businesses, artists are particularly vulnerable to any legislation that might serve to weaken or remove their rights or protections. In this time of rampant corporate consolidation and rapid market globalization, artists are more vulnerable than ever.

As you read this, many thousands of artists across this nation are struggling to pay their bills, fighting to earn enough revenue to keep their businesses afloat, to retain their employees, and for some - to simply earn enough so that they can afford to create new works.

Ironically, without the protections afforded creators by copyright law, artists could not afford to create new work, and the museums, libraries and scholars that have fought so hard to bring the orphan works issue to the fore would have no works to exhibit, no books to check out, and no art or literature to study. For many in Congress, the phrase “orphan work” might conjure up an image of a dusty, aged photograph of a long dead matriarch. But under the proposed amendment, works that are being created by artists working in their studios across this country right now, as you read this sentence, are destined to become “orphan works” under the law.

In recent years, and continuing this very day, there has been a torrent of legislation created expressly for the purpose of increasing the legal protection of the copyright interests of major corporations in the motion picture, music, and software industries. In that realm, there is an overwhelming legislative trend toward providing more and more protection, and greater and greater remedies for use by corporate giants in preventing the unauthorized copying of CDs, DVDs, screened films, and web downloads of songs and motion pictures. Anyone observing this never-ending festival of rights, watching bill after bill pass into law, year after year, closing every possible loophole that might allow a movie, song, or software program to be copied, could only conclude that the interests of copyright owners are held sacred.

Now, in a year in which Congress will consider and approve any number of enhancements to the copyright protections and remedies afforded to large corporate copyright owners, we have a proposed copyright law amendment on the table that will virtually eliminate all meaningful remedies afforded to individual artists in instances where an artist's name happens to be separated from an artwork, or where a search otherwise fails to locate the artist. The proposed amendment removes the remedies of actual damages, statutory damages, injunctive relief (for derivative works) and attorney's fees when an orphaned work is exploited without permission or license from its creator or owners. These remedies collectively represent the meaningful legal protections available to artists today and provide the protections that artists rely on to deter the unauthorized use of their works, encourage licensing, and generate the revenues on which they depend.

A Photograph, by any other Name, is an Orphan Work

The Copyright Office and others have suggested that artists and owners must bear the burden of identifying their works, and that artists are to be held accountable by the forfeiting of rights in the event that their names become separated from their works. The language of the proposed amendment conflicts with the both the spirit

and the letter of domestic and international copyright law, by not only requiring formalities as a condition for the enjoyment of property rights, but by effectively punishing artists when others remove attribution from their works.

Photographs, in contrast to most other protected works, are rarely published with credit to the author. With no author name attached, the vast majority of published photographs are destined to become orphan works immediately upon publication. Photographers have long been susceptible to the separation of authorship information from their works. Despite a photographer's best efforts, the author's name and contact information is frequently separated or removed from the photograph itself by parties handling the photographs after delivery of the work. This is particularly true with electronic copies of photographs, in which an author's name is often lost when the photograph is saved in various digital formats. Digital file names are frequently changed, and metadata bearing copyright information is often removed (intentionally or unintentionally), making the source of the files (along with the author's name) almost impossible to determine. Now more than ever, users combine (photo-compose) multiple photographs to create new works. One photograph of a couple on the beach may be combined with several other photographs of seagulls, a sunset, sand dunes, etc. to create a new composite photograph. In such instances, all attribution information from the individual photographs is lost, rendering each an orphan work.

A photograph delivered to a client in one format may eventually be distributed in a wide variety of electronic and printed media, and preservation of authorship information is the exception, not the rule. This is exacerbated by the fact that the United States is one of the few countries that recognizes intellectual property rights, but fails to guarantee all authors a right to attribution, as an element of moral rights.

A review of published photographs reveals that the vast majority of photographs are printed today without authorship attribution. Even where a credit is provided in a

published work, the credit is rarely on the photograph itself, but is often in a separate location within the publication.

Over the protests of artists, the Copyright Office has ignored the fact that photography and illustration are particularly vulnerable to the loss of attribution information, and that after a work leaves an artist's hands, the retention of authorship information is entirely out of the artist's hands. The proposed amendment punishes artists when their names are separated from their works by others, even where artists religiously add their name to each and every work before distribution. The punishment is extremely severe and unjustified: i.e., the removal of all legal remedies for the unauthorized use of a work, and the removal of the artist's right to set the value of one's own work at his or her discretion. These measures are draconian when considered in the context of the trend toward increasing the rights and protections afforded other copyright owners – those owners of works that are not vulnerable to becoming orphans.

We suggest that Congress revise the amendment to impose severe penalties and enhanced remedies on those who willfully remove attribution from a photograph. The Digital Millennium Copyright Act (DMCA) provides the precedent, stipulating that statutory damages and attorney's fees are available in the event of the removal of copyright management information from digital files. We propose that the language of the DMCA remedies be applied to orphan works as well, whether digital or otherwise. We further propose that Congress treat anonymous works as a separate category of orphan works, and apply provisions specifically designed to address use of such anonymous works. Specifically, the right to exploit such works should be more restricted, and involve more significant deterrents against abuse, than the right to exploit works bearing attribution. Notwithstanding the need to provide access to orphan works, we suggest that Congress, in all good conscience, should not punish artists for the deeds of others.

There are a number of special interests involved in the orphan works discussion, but in determining the motivation behind the involvement of each group, we need only to follow the money. With respect to works of art subject to the orphan works amendment, there are essentially two groups:

- (1) Those who earn their living by investing their skill, time, effort and funds in the creation of works that are most likely to be orphaned, and those who have acquired ownership or rights of agency in such works.
- (2) Those who earn their living by exploiting, preserving, studying or otherwise making use of works created or owned by others, whether for benevolent purposes or for commercial gain, or both.

Group One: Includes photographers, illustrators and other artists, as well as the “stock” agencies engaged in creating and licensing artworks. We have addressed their motivation above.

Group Two: Includes libraries, educational institutions, scholars, researchers, museums, the motion picture industry and publishers, among others. While it is true that some of these entities, such as publishers, are also be copyright owners, most have minimal if any exposure to the “orphanization” of their works, and thus their primary motivation with respect to the promotion of orphan works legislation, is the use (benevolent or otherwise) of the works of others. For the publishers, it is true that orphan works legislation will permit publication of works that are not currently available for use and have historical value. However, the orphan works amendment will also make millions of works available for gratis use in all manner of publications, allowing publishers to avoid licensing works from artists and stock agencies, and thus generate a tremendous windfall of profits.

Libraries, museums, educational institutions, scholars and researchers provide invaluable service to our society and culture, and face tremendous challenges in

preserving deteriorating works, duplicating works for educational purposes and in making works easily accessible to the public. Without a doubt, these groups stand to benefit tremendously from an orphan works amendment, and rightfully so. However, it should be noted that while many museums and libraries operate under the IRS 501(c)(3) non-profit designation, these institutions are increasingly engaged in commercial activities typical of for-profit organizations, such as the packaging, publishing, and licensing of works in their collections, so as to generate sufficient revenues to pay staff salaries, maintain facilities, and acquire more works. We mention this in light of the fact that in some instances, the orphan works amendment will serve to allow these non-profit institutions the exploitation of artists' works for the purpose of generating operating funds, at the expense of artists' ability to pay themselves by licensing their works. We believe that the orphan works amendment should be structured to benefit libraries, museums, educational institutions, scholars and researchers, while limiting commercial use by those institutions and individuals.

In addition, group two includes others who will abuse the orphan works amendment by exploiting the loopholes that this legislation will create. With infringement remedies removed, there is no deterrent to unauthorized use, provided that a user fails to locate a copyright owner. The orphan works amendment creates an incentive to fail in searching for an artist. Rather than paying to license works, users will have every incentive not to find the artist, and can proceed to exploit the artist's work with abandon, knowing that even in the remote likelihood that the use is discovered, the artist will only be able to collect a minimal fee, and will have little means of enforcing payment, and no means of stopping the unauthorized use of the work, if the use is a derivative.

The Orphan Works Black Hole

The proposed amendment provides that, in the event that a search fails to find an artist, that artist forfeits the right to stop the unauthorized user from exploiting the artist's work in new works, if the new works transform, adapt or recast the original

work and represent a work of original authorship. While we understand the basis for this provision, the elimination of injunctive relief will serve to create a giant black hole allowing almost any user to bypass injunctive relief merely by transforming an orphan work before use. The proposed language sets up a legal quagmire over the thin line that separates a derivative work from a non-derivative work.

The threshold for original authorship under copyright law allows almost any fixed original expression to be deemed a protected work. While we support this threshold, its application to the determination of a derivative work as designated in the orphan works amendment is highly problematic. For example, one artist may acquire rights in another artist's work simply by failing to find that artist, and may then transform that work and offer it in competition with the original artist's work. The original artist will have no viable means of stopping such use. The amendment will thus force artists to compete with their own works.

A poster company may possess a box full of photographs previously submitted by artists for proposed publication, but separated from attribution in course of review.

Under the proposed amendment, that poster company could then exploit the photographs on posters for commercial sale without limitation, and need only to manipulate the photographs prior to use so as to eliminate potential injunctive relief.

We believe that the exemption from injunctive relief, while well intended, will be widely abused, and will allow any user to avoid the prospect of injunctive relief by simply transforming the work sufficiently to meet the minimum derivative threshold.

We urge Congress to reconsider this exemption and to more expressly define the circumstances under which it may be applied, by setting a higher threshold for original expression in this instance, by providing enhanced remedies in the event of abuse, and by expressly limiting the use of derivative works based upon orphan works to non-commercial applications.

The “Come-And-Get-It” Factor

There is a viral component to the orphan works amendment that must not be overlooked in re-drafting the language. Once one user identifies and uses an orphan work, such use will serve as a “come-and-get-it” beacon to other users. Though we understand Congress intends to require each user to complete a diligent search for the owner of a work (this intent needs to be more expressly memorialized in the amendment), in reality, public use of an orphan work by any one user will serve to inform all other users that a diligent search for the owner has failed. It is reasonable to assume that when secondary users conduct their required searches, the owner is highly unlikely to be found. Thus, any public use of an orphan work will signal all other potential users that the work is ripe for the picking.

Without changes to the proposed amendment, we will soon see orphan works aggregators enter the marketplace, specializing in offering ultra-fast search and clearance services for orphan works. Commercial interests will develop large websites where anyone can browse through hundreds of thousands of works that have failed an ownership search, and select any number of works for unauthorized exploitation, knowing that their subsequently required search is certain to fail. Within two weeks of the issuance of the Copyright Office Report on Orphan Works, nearly all of the domain names associated with orphan works were registered by commercial interests, in preparation for the profit-taking that will result if the legislation is passed without significant revision. Among them: orphanart.com, artorphanager.com, orphanedphotos.com, findorphanworks.com, and dozens of others.

While neither the Copyright Office nor Congress intends the orphan works amendment to result in the rampant exploitation of works, it is a certainty unless exclusions to commercial use and protections are restored. We are aware that the proposed amendment requires each user to clear the work, but where there is profit, the market will find its way. Therefore, we suggest very stringent language prohibiting the aggregation or offering (whether direct or indirect) of orphan works

under the amendment, including but not limited to the offering of paid access (whether by one-time-fee or by subscription) to collections of “cleared” or suspected orphan works. We propose that Congress provide enhanced remedies in the event of such use, including actual damages, disgorged profits, statutory damages, attorney’s fees and injunctive relief, notwithstanding the copyright registration status of the work, thereby establishing a reasonable deterrent and providing artists with appropriate remedies in the event of abuse.

Orphan Works Free-for-All

The Copyright Office has proposed that non-commercial users of orphaned works should pay no fee when such use is discovered by artists. This effectively removes any barrier to exploitation of use and will result in users capitalizing on, profiting from, and taking credit for the works of other creators. Further, the distinction between commercial and non-commercial use is especially problematic. It is quite possible for a user of an orphan work to reap significant promotional benefit from the use of a work, while claiming that the use is non-commercial because no offering was made, and no commerce transacted. The amendment sets the stage for considerable litigation on this topic. We therefore suggest that Congress edit the language of the amendment so as to apply the precedent set by the Fair Use provisions of copyright law. Specifically, the use of an orphan work should be prohibited where such use might affect the market for or value of the work. We further suggest that the amendment expressly define commercial use, and limit the commercial use of orphan works.

A Model for Litigation: Rights of Publicity and Rights of Privacy

By opening the floodgates to unauthorized use of protected works, the proposed amendment will result in a tidal wave of litigation as the result of rampant and widespread violation of the rights of publicity and rights of privacy of persons pictured in the orphan works. A photographer’s right to exploit copyright in a photograph (and to grant licensed rights to others) is effectively limited by the right of any person

appearing in the photograph to control or otherwise limit the use of his or her likeness. State laws governing rights of privacy and publicity very often require that permission be obtained from pictured subjects prior to the exploitation of a photograph bearing likenesses of persons. Such permission is most often granted to photographers and their clients by execution of agreements known as “model releases.” The terms and conditions of model release agreements often limit the use of the photographs, and may specify certain excluded uses. For example, some model releases prohibit commercial use or use related to tobacco or alcohol products, pornography, or political causes. When a photographer or copyright owner controls the use of a photograph, the photographer acts as a gauntlet through which all use of the photograph must be approved. In this way, photographers carefully control and limit such use so as to avoid the violation of rights of privacy and publicity of pictured persons. Under the proposed orphan works amendment, that gauntlet no longer exists, and that control goes out the window. Parties making use of orphan works will serially violate the rights of publicity and privacy of pictured persons.

Photographers will be sued by models for allowing the works to “go orphan.” This wave of litigation between models, photographers and the users of orphan works over publicity and privacy rights will be a particularly disastrous consequence of the proposed amendment. We therefore propose that the amendment be revised so as to expressly limit the use of any orphan work bearing the likeness of a person or persons to personal, non-commercial use only, and to exclude the right to distribute, perform or create derivatives of such works, unless express written permission is obtained from the pictured subjects in advance.

In the Art World, “Fair Market Value” is an Oxymoron

As in other markets, pricing in the photography and illustration marketplace is determined by the fundamental market forces of supply and demand. In this free market, scarce, high quality images garner the highest fees, while the most common images typically garner the lowest fees. The market value of a particular license for a given photograph by a given photographer is often based upon a number of

contributing factors, most notably the quality and scarcity of the image and the location of the photographer, but also in great measure the brand equity of the photographer. In the proposed amendment, the Copyright Office upsets the apple cart of free market forces by legally sanctioning the flooding of the market with free product, and then mandating that upon discovering unauthorized use of a work, the owners are only entitled to receive “reasonable compensation” based upon a mythical “fair market value” of the work. The imposition of such artificial price controls will corrupt the entire marketplace, and is another disaster in the making.

The Copyright Office suggests that a license fee paid for a particular photograph or photographs determines the fair market value of reasonable compensation for the use of another photograph. The Copyright Office overlooks the fact that all photographs are not equal, and that by extension, the fees associated with the use of any one photograph or group of photographs does not necessarily determine the fair market value of the fees associated with the use of any other photograph. The Copyright Office also assumes that one photographer would agree to provide a particular license to a client at a certain price, or even for free, just because other photographers have done so. This assumption is both incorrect and unreasonable.

In a given publication, if one photograph pictures a seventy-one year old Elvis Presley, relaxing in seclusion at a Palm Springs estate, while another photograph features an egg on white background, would the reasonable compensation for both photographs be identical? Further, would a portrait by well-known photographer Richard Avedon garner the same “reasonable compensation” as a portrait by Joe’s Passport Photo Emporium or your Aunt Ida? While one photographer’s reasonable fee for a certain license might be \$25, another photographer’s reasonable fee for that same license might be \$2500, and yet another’s fee might be \$25,000 or even more. That amounts for a 100,000% variance in “fair market value” between licenses offered by different photographers, for different photographs. The Copyright Office proposal overlooks this considerable real diversity in fees.

The Copyright Office proposes that fair market value must be determined by the amount that a willing buyer would have paid a willing seller had they engaged in negotiations before the use commenced. In making this proposal, the Copyright Office relies heavily on *Davis v. The Gap Inc* 246 F 3d 152 (2d Cir 2001). We call your attention to *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977), later cited in *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505 (9th Cir. 1985), in which the court determined fair market value to be the amount that a seller would have “reasonably required” a user to pay before the use commenced. The distinction is all important – the court in both the Krofft and Frank matters established that it is the seller’s reasonable requirement, and not the buyer’s willingness to pay, that sets the standard for Fair Market Value.

The application of fair market value to orphan works is problematic. Under the proposed amendment, upon discovering an unlicensed use, a copyright owner is not a willing participant, has no accurate means of determining the relevant facts (the extent of the use) and is required to act. In addition, the copyright owner has few practical remedies, given that injunctive relief (for derivative works), statutory damages and attorney’s fees are eliminated by the proposed amendment.

It seems that the Copyright Office is proposing that fair market value be determined by the prevailing lowest fees for a particular use. This proposal is inconsistent with the definition of Fair Market Value, and is anything but “fair” to copyright owners.

Further, the determination of any prevailing fees would be problematic, as photographers are prohibited by anti-trust laws from discussing fees.

The proposed amendment effectively places all burden on the photographer to establish “reasonable compensation” based upon “fair market value.” This requirement will force photographers to divulge confidential and proprietary information and financial records, such as income tax returns, past licenses to other

clients, accounting books, and contracts with third parties. Photographers will be required to do this for each and every party that uses a photograph under the proposed amendment. This places an undue burden on photographers, who have limited resources and whose clients often require confidentiality.

Notwithstanding these considerations, the provision for reasonable compensation is almost entirely useless to photographers, as photographers will have no leverage to collect such fees. Without the remedies of injunctive relief, statutory damages and attorney's fees, photographers cannot afford to retain legal representation or to otherwise pursue collections. The cost of a suit will far exceed the amount owed, invoices will go unpaid, and debts will be uncollectible. We have no viable suggestion for addressing this challenge, but stand ready to explore potential solutions with other industry groups.

A Court of Orphan Works?

We are aware of a proposal for the creation of a new small claims court system dedicated to litigation of orphan works matters, to address the storm of litigation that will, without question, result from the proposed amendment. This would be a classic example of the tail wagging the dog. We believe that it would be more fiscally appropriate to seek a solution to the orphan works issue that does not result in the need to create, operate and fund an entirely new federal court system, indefinitely.

Further, we have significant doubt that copyright infringement matters can be adequately adjudicated in a small claims court environment. The federal rules of evidence and the discovery process are essential to determining the scope and circumstances involved in an infringement. The federal rules of evidence do not apply in small claims court matters. Without a discovery process, there can be no organized exchange of evidence, depositions, and information associated with the infringement. Nor can there be expert testimony as to industry standards and practices, or the fees that the seller would have reasonably required of the user under the circumstances. The court will have no means of making accurate determinations,

other than relying on hearsay and opposing statements and assumptions made by plaintiff and defendant.

In short, we believe that the proceedings will be a farce, and will place undue additional strain on an already overloaded court system. While small claims court may be an appropriate forum for landlord/tenant disputes and unpaid gardener's bills, intellectual property licensing issues based upon federal copyright law are far more complex, require considerable discovery and legal expertise, and have no place in such courts. We would, however, support the development of optional Alternative Dispute Resolution (ADR) for orphan works matters, only in situations where both the user and the owner agree to submit to ADR. This would avoid the need to establish a federal small claims court, and would provide a means of quickly and inexpensively resolving minor misunderstandings over small license fees associated simple uses of orphan works. If ADR is established for orphan works matters, artists must have the option of pursuing copyright remedies in federal court at the artist's sole discretion.

A Registry of Works and Authors

There are billions of photographs in existence, many of which have not been digitized, and millions of which have been published without attribution. There is no centralized registry of photographs or of photographers. The sheer numbers of photographs (both digitized and not) would almost certainly frustrate any effort to create a comprehensive registry allowing a meaningful search for the authors of anonymous orphaned works. The Copyright Office has no such database of images and to our knowledge has no plans to create such a database.

It has been proposed that centralized databases of orphan works inquiries be created, so that owners can monitor attempts to locate orphan works and connect with users. Most professional photographers have very limited resources, and to survive, must concentrate on creating and licensing photographs. At the same time, photographers must struggle to identify and police infringement of their works. This

challenge was difficult enough before the advent of the internet. Now that photographs may be easily scanned from printed matter and copied from the internet, the challenge is overwhelming. It is not reasonable to expect that photographers will dedicate precious limited resources to sift through huge numbers of orphan works inquiries in an attempt to identify their works and to reply before their works are exploited by third parties.

Imagine yourself a photographer. You create hundreds or thousands of images each month, tens of thousands of images each year. The Copyright Office proposes to remove copyright remedies unless you and your heirs undertake to monitor all requests for use of all of your many thousands of photographs, every day, for the rest of your life, and for 70 years after your death (the life of your copyright). Apparently the Copyright Office expects that you will wade through thousands upon thousands of such requests on a regular basis, with the hope that you might one day come across an inquiry that happens to describe one of your inventory of tens of thousands of photographs. Picture yourself scrolling through page after page of inquiries, including inquiries such as “I’m looking for the photographer who shot a picture of trees.

Please call me at...” or “I’m looking for the author of a picture of a man in a blue suit.” The fact is that as the author of hundreds of thousands of images during your lifetime, you might not recognize your own photograph in such a list, even if you happened upon the description.

Now imagine that you are a photography stock agency, with millions of images in your inventory. How can you possibly recognize a description submitted by a party seeking to identify the author/licensor of one of those millions of photographs? By memory?

The proposed amendment strips photographers of statutory damages and attorney’s fees in the event of unauthorized use of orphan works, even where the artists have registered their works with the Copyright Office in advance of the unlicensed use.

We find it extraordinary that the Copyright Office would move to eliminate the benefits of registering with the Copyright Office. An artist who has diligently complied with legal formalities so as to best protect his rights should not lose those rights based solely upon an utter stranger's desire to exploit the artist's protected works. As justification, the Copyright Office Report on Orphan Works asserts that registered works are unlikely to become orphan works, because a search of copyright registration claimants by name will locate the author. Unfortunately, this assertion by the Copyright Office is not rooted in the facts. Arguably, in the vast majority of cases involving orphan photographs, the name of the author will be unknown. In such situations, a successful search of copyright registrations without the author's name would be impossible. Even if a name were known, the contact information in an archived registration may not be current, and thus may not lead to the author. Further, searches by title are also nearly useless in locating specific photographs, due to non-specific titles used on copyright registrations of hundreds of works. Ironically, the Copyright Office has proposed the elimination of the primary incentives for copyright registration.

Primary Types of Visual Arts Orphan Works:

- (1) Attributed works (creator/owner name attached or known)
- (2) Anonymous works (works with no creator/owner name attached)

The considerations in addressing these two types of orphan works are entirely different, and should be treated separately under the amendment.

Regarding attributed works, a registry of authors/owners may be established using current technology and at minimal cost and burden to authors and owners. While such a registration requirement may be in conflict with international treaties, the benefits clearly outweigh the costs.

For anonymous works, the technology exists today that allows a search by image. The technology is currently imperfect and often requires human intervention. Thus, technology is not the answer to the current problem, and its usefulness should not be relied upon in drafting this amendment, as it does not allow for large scale/widespread mission-critical use at this time. Even if the technology were ready for such use, the burden on copyright owners would be far too great. Such a directory of works would by necessity need to include all works of all artists and copyright owners. Each copyright owner would need to digitize and upload many thousands of artworks, and to continue doing so on a continual basis. Even if the cost of registration were minimal, the costs in terms of preparation and registration would bankrupt most artists. Some artists, particularly photographers, have tens of thousands of works in undigitized form, and create works at such a pace that one or more full time employees would be required just to upload works to the registry.

We would support the creation of a registry of authors and owners by name, to allow users to locate authors/owners of attributed works. This, however, does not address the issue of locating the authors/owners of anonymous works, which is a very different and far more challenging task. We suggest that if Congress is to amend copyright law in such a way as to force the creation of registries so as to comply with the law, Congress should appropriate necessary funds for the creation and maintenance of the registry.

International Issues – A Pandora’s Box

With respect to this nation’s participation in international intellectual property treaties and agreements and our obligation to all other signatories, a Pandora’s Box of international conflict and bad faith dealing will be opened by exposing foreign works to exploitation under the orphan works amendment. The orphan works amendment conflicts with both the spirit and the letter of the Berne Convention, and will directly violate Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Specifically, the removal of copyright owner protections for orphan

works is a “limitation and exception to the exclusive rights” of copyright owners, and will both “conflict with the normal exploitation of the work,” and “unreasonably prejudice the legitimate interests of the rights holder.” In addition, by creating the expectation or requirement that owners of foreign and domestic works place attribution on their works and register themselves and their works so as to enjoy their exclusive rights, the orphan works amendment clearly violates both Berne and TRIPS. In the two following sections, we explain the effect of orphan works on the exclusive rights of the owner.

Loss of Exclusive Rights

Under copyright law, artists own the exclusive rights to copy, distribute, display, transform, and perform their works. Most artists earn their living by licensing elements of those rights to others, on an exclusive or non-exclusive basis. By allowing anyone to use a protected work simply by failing to locate the author, the proposed amendment effectively prohibits the granting of an exclusive license. When artists lack the ability to control and monitor use of their works, they will have no means to determine the use status of a work, and thus no means of guaranteeing or offering exclusivity to any customer. Without the ability to guarantee exclusivity to customers, the value of an artist’s works is significantly diminished. This proposed elimination of the most fundamental rights of a certain class of copyright owners is not only inequitable, but is a travesty.

Unauthorized Use of an Orphan Work Diminishes its Value

The proposed amendment will allow users to exploit orphaned works without limitation, and without the owner’s knowledge or permission. Each such unauthorized use will serve to diminish the value of the copyright in the work, by imposing limitations on the exclusive rights of the copyright holder. If an orphaned photograph were to be used on the cover of a book, it is highly unlikely that the copyright owner could ever interest another publisher in licensing the right to use that photograph on the cover of a book. In addition, certain objectionable uses of an

orphan work may damage or destroy the residual value of the exclusive rights in a work over its entire copyright life, leaving the owner with a worthless work. In such instances, and in many others, the limitations on rights and remedies imposed by the orphan works amendment conflict with the owner's normal exploitation of the work, and prejudice the legitimate interests of the owner, in direct violation of TRIPS.

Objectionable Use

Under the proposed amendment, an artist's work may be used by anyone, for any purpose, to promote any product, company or cause.

- A photographer whose wife died of lung cancer might discover that his photograph of a cowboy was used as an orphan work in tobacco company advertising to promote cigarette use.
- A photographer whose grandfather is a holocaust survivor might discover that his photographs were used under the orphan works amendment by the Aryan Nation to promote hatred of Jews.
- A mother's photograph of her infant daughter might be used under the orphan works amendment on an abortion website promoting pro-life or pro-choice, in opposition of the mother's views.

The orphan works amendment has no provision preventing the use of orphan works in a manner that might be held to be reprehensible by the owner. Thus, the orphan works amendment conflicts with the owner's enjoyment of his exclusive rights in his property -- another violation of TRIPS.

What Exactly is a "Good Faith, Reasonably Diligent Search?"

The Copyright Office proposes that users desiring to exploit a potential orphan work perform a "good faith, reasonably diligent search" to locate the owner. This description, if left unchanged, will mire both users and owners in litigation for years to

come. Specific procedures and requirements must be expressly defined for the required search. We look forward to working with all interested parties to arrive at an acceptable search. We further propose that a user's responsibility to locate the owner must not end with a single search prior to use. Rather, if the user is to acquire the right to exploit the work at no cost, we believe it is reasonable to expect that users will continue the search throughout the period of use of the work. We suggest that users be required to repeat the search every six months, indefinitely, until such time as the user locates the author, or ceases use of the work. We suggest that failure to comply with the search requirements should allow the author enhanced remedies in the event that the use is eventually discovered. Such enhanced remedies should include statutory damages, actual damages, profits, and injunctive relief, regardless of the copyright registration status of the work.

Mandatory Attribution

The Copyright Office has suggested that authors must bear the burden of including attribution in their works, so as to prevent their works from being orphaned. We discuss the problems with this suggestion elsewhere in this document. Setting Berne and current copyright law aside, if Congress is to amend copyright law in such a way as to create the expectation or requirement that artists must provide attribution on their works so as to avoid such works being orphaned, then it follows that to ensure the integrity of that attribution, Congress must also amend copyright law so as to require all users of all works (not just orphan works) to reproduce that attribution wherever works are copied, published, distributed, displayed, transformed or performed. We encourage Congress to provide artists with the remedies of statutory damages actual damages, profits, and attorney's fees in the event that a work is used without attribution. If Congress elects not to create such a burden on the users of works, then Congress cannot in good conscience pass the orphan works amendment, which leaves artists works completely exposed to being orphaned when works are used without attribution. We believe that the time has come to memorialize

the right of attribution in this nation, not just for limited edition works made for exhibition, but for all works.

Loss of Jobs

As an unintended result of the orphan works amendment, artists and other independent creators will suffer a significant loss of revenues, due to a preponderance of readily available of free orphan works on the marketplace. We expect that in this already challenging economy, the orphan works amendment will be the last straw for many of these small business owners. Many will be forced to lay off their employees and fold their businesses. While these small businesses typically employ between one and three staff members, the collective effect of numerous small businesses shedding their employees will have a significant impact on local economies. This unfortunate consequence will increase unemployment across this nation.

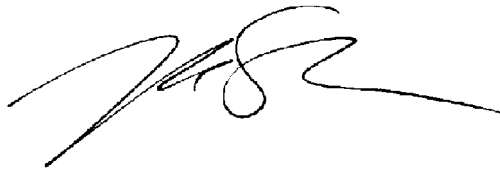
Conclusion

Clearly, the proposed orphan works amendment will require significant revision. In light of the aforementioned issues, we request your consideration in providing a suitable time period for all interested parties to discuss and explore the challenges presented by the proposed amendment, and to collectively arrive at a mutually acceptable solution. We request at minimum a six month period to address this very complex issue. We pledge to work steadfastly and in a cooperative spirit to resolve all issues.

Artists and their businesses hang by a thread, and that thread is copyright law. On behalf of thousands of artists across this nation, we implore you to leave the scissors on the table, and urge you to work with all parties towards the creation of an equitable orphan works amendment that provides access to certain works for certain use, while respecting the rights of artists and other copyright holders. Let's not kill the parents to save the orphans!

We thank you for your consideration, and request the opportunity to speak before any committees considering this amendment and any associated legislation.

Respectfully,

A handwritten signature in black ink, appearing to read 'JS', with a long horizontal flourish extending to the right.

Jeff Sedlik
Chief Advisor on Licensing & Copyright, Advertising Photographers of America

Edited by Constance Evans,
National Executive Director, Advertising Photographers of America

Jeff Sedlik serves as the Chief Advisor on Licensing and Copyright for the Advertising Photographers of America (APA). A past National President of the APA, Sedlik is a working professional photographer with twenty years experience, creating photographs for advertising and editorial use.

Constance Evans, National Executive Director of the Advertising Photographers of America, is also a working artist.

The Advertising Photographers of America (APA), a leading non-profit trade association representing the interests of professional photographers, promotes the highest standards and ethics in the photographic and advertising community, provides educational resources, and fosters an environment conducive to achieving success in the industry. The APA membership reflects the diverse creativity and extraordinary talent of advertising photographers from across the country.