



National Press Photographers Association

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Library of Congress
Copyright Office
Docket No. 2012-12
Orphan Works and Mass Digitization

Re: Reply Comments by the National Press Photographers Association

The National Press Photographers Association appreciates the opportunity to submit a Reply addressing some of the issues raised by other commenters to the Notice of Inquiry (NOI) on Orphan Works. We also sadly note along with some other groups that a disappointing number of the submitted comments were dismissive of any positions other than their own and lacking in any spirit of goodwill or compromise, but rather took the opportunity to set forth a regressive agenda to the detriment of creators, rights holders and ultimately the general public.

Commercial Value of Photography

Some groups have suggested that creative works such as personal photographs lack commercial value and therefore are not entitled to the full benefit of copyright protection. It is our position that even works that are not currently being commercially marketed still have future potential value. As we have previously stated, an important element of copyright protection is the right to choose whether or not to publish a work. Commercial use should not define what is, or is not protected by copyright. The NPPA is deeply troubled by comments that make this assertion.

Those submissions that propose a draconian “commercial value” redefinition of copyright protection are an affront to visual creators and go far beyond the scope of the NOI in a blatant attempt to finagle protection from infringement for the use of images without permission or compensation by those who should know better. Copyright vests at the moment the work is fixed in tangible form and is not conditioned on its marketplace value. That a creative work is of a personal nature, or has never been published or was first published but is now out of print is also of no consequence under copyright law. The NPPA asserts that such remarks should be completely disregarded by the Copyright Office as incompatible with its intended request for constructive

comments in an orphan works discussion.

The NPPA wishes to note that in contrast to the comments submitted by some groups the Copyright Clearance Center (CCC) properly argues in its comments that whether a creative work is in, or out of, print is irrelevant to copyright law and orphan works. The International Association of Scientific, Technical and Medical Publishers also discusses how defining an orphan work as one which is out of print and/or has lost its commercial value violates copyright law. The NPPA agrees with both organizations in our belief that the principles of current copyright law must be maintained and that a creative work's commercial viability has no place in this discussion.

Overstatement of Case Law

The NPPA notes that several comments submitted on the subject of orphan works made statements asserting that recent case law protects a library's inclusion of orphan works under the fair use doctrine. Those comments prominently cite two (2) cases: *Authors Guild v. Google*, 282 F.R.D. 384, 2012 U.S. Dist. LEXIS 76080, and *Authors Guild v. HathiTrust*, 2010 U.S. Dist. LEXIS 146169. The NPPA staunchly contends that these cases do not support a blanket expansion of the fair use exception by providing libraries safe harbor against claims of copyright infringement.

In *Authors' Guild v. Google*, a confidential settlement was reached this past fall. NPPA believes it is highly inappropriate for any group to allude to the undisclosed terms of that agreement to support its position supporting fair use. More importantly, in the last ruling in the case (which still stands), the Court rejected an initial settlement proposal that included an "opt-out" solution. The Court stated that copyright protection extended to orphan works in the same manner as any other type of copyrightable work. In NPPA's view, the Court's opinion clearly does not imply that use of orphan works by libraries (or any other user for that matter) falls under fair use unless existing fair use requirements within the Copyright Act are met. It is erroneous and presumptive for any party to cite *Authors Guild* as a "victory" regarding mass use of orphan works.

The second case cited, *Authors Guild v. HathiTrust*, is also inapposite. Although the lower court in *HathiTrust* ruled in favor of the defendants, that decision is being appealed, making the libraries' fair use claim regarding orphan works tentative at best. Moreover, NPPA asserts that the facts in *HathiTrust* limit the lower court opinion regarding the digitization of copyrighted works to the facts in that case. Should the decision stand it would only permit such action as a way to make material more accessible to library patrons with disabilities and would not condone a more expansive use of orphan works.

The *HathiTrust* court did not support the library's newly espoused position that orphan works

fall under the ambit of fair use. The *HathiTrust* decision clearly states that the issue of orphan works was not yet ripe. It is for these reasons the NPPA believes that reliance on *HathiTrust* is premature and inappropriate.

Opt-Out Provisions

The NPPA also views comments submitted by some groups advocating for an opt-out provision as being beyond the scope and nature of the NOI. The very concept of visual journalists expending countless hours ensuring that their works are “not” being included for use turns copyright law on its head. This issue is of particular concern to the NPPA, as an opt-out provision would severely chill creative efforts by visual journalists whose work is in high demand for historical purposes. If such a concept should be enacted by Congress or upheld by the courts, there will be no limit to the commercial efforts to exploit creative works under an opt-out plan.

Attribution

The NPPA continues to assert that the use of any copyrighted work under a claim of orphan works status should require attribution. This is of particular importance as credit is critical to help future efforts to identify and connect with the authors and rights holders of these works. Because photographs are particularly susceptible to appearing “orphaned” through the (intentional and unintentional) loss of metadata and other identifying information, the NPPA urges the Copyright Office to require that all orphan works receive proper attribution to help protect these works from becoming “involuntary orphans.” Although the author of a supposedly orphan work may be unknown, appropriate attribution should still include information such as where the work was located (library, university, etc.), as well as any other information known about the work. The NPPA also objects to the proposition by some groups that a work should automatically lose the full benefit of copyright protection if it is not already accompanied by attribution.

Mass Digitization

The NPPA is concerned by comments that equate orphan works and mass digitization. Although mass digitization efforts sometimes include works whose owners are unidentifiable, the issue is completely different in context and scope. Of concern to the NPPA are comments that not only confuse orphan works with mass digitization, but that support the elimination of a diligent search provision for mass digitization efforts. Although the NPPA declined to comment on the subject of mass digitization in its initial comments because of pending litigation we wish to remind the Copyright Office of the importance in keeping the issues of orphan works and mass digitization

separate.

Return to Formalities

The NPPA strongly disagrees with comments which advocate for a return to copyright formalities as a prerequisite to copyright protection. The NPPA feels that these proposals have no place in this discussion and are without merit. This regressive proposal would also violate U.S. obligations under the Berne Convention which states that registration formalities are not required for copyright.

Contact Information Updates

The NPPA also strongly disagrees with the proposals which urge the removal of attorneys' fees and statutory damages if an author fails to update their contact information with the Copyright Office. Requiring authors to update their personal registration information places an unjust burden on authors, as each amended registration currently costs an author \$100. It would also place an additional burden on the Copyright Office to update that information. Both copyright and case law have established a clear presumption of copyright ownership for the author/plaintiff in an infringement claim, even where a copyright holder's information has changed since the time of registration. Requiring copyright holders to update their registration as another hurdle to the recovery of attorneys' fees and statutory damages puts an unfair burden on these authors – one that can be particularly devastating to photographers who may have hundreds of works registered with the Copyright Office and no formal mechanism for easily and affordably updating their contact information. The requirement for locating the author of a work should remain with the user and not somehow be shifted to the author or rights holder.

Internet Freedom

Finally, NPPA would like to briefly address the general idea expressed in some comments that Internet freedom equals freedom to violate copyright law. On the contrary, the NPPA believes the Internet creates a valuable outlet for expression. Any legislation that dilutes protection of an author's intellectual property rights will create a disincentive for authors to use the Internet to express their ideas and share their creative works. To see the impact that a loss of copyright protection has on an author's continued use of a platform, one need only look to recent backlash on various social media outlets, such as Instagram, when those companies attempted to expand rights

granted to them through changes in terms of service.¹

Conclusion

After decrying the dire need for orphan works legislation for so many years we find it more than a little disingenuous that so many of those same voices now seek to supplant those requests with such regressive and self-serving proposals to the detriment of so many others. While the NPPA understands and appreciates the concerns of those in the copyright community who need or desire to use works that are “orphaned” in the true sense of that word, we believe it is crucial to protect the copyright of visual works. We do not believe that these two interests are mutually exclusive but rather are ones that must be fairly balanced in crafting any meaningful orphan works legislation.

Respectfully submitted,

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On Behalf of the National Press Photographers Association

¹ See: http://www.washingtonpost.com/instagram-reviews-advertising-plan-after-public-outcry/2012/12/19/a7a568b4-49e0-11e2-8af9-9b50cb4605a7_video.html; <http://econsultancy.com/us/blog/11403-tracking-the-impact-of-instagram-s-confusing-wording-through-social-media>)