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Via Electronic Submission
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US Copyright Office
Copyright GC/I&R
P.O. 70400
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Washington, DC 20024

Re: Response on behalf of the Picture Archive Council of America, Inc. (PACA) to published comments on Orphan Works/70 CFR 3739

Dear Mr. Sigall:

Introduction and Background:

I am legal counsel to the trade association Picture Archive Council of America, Inc. (“PACA”). PACA’s members consist of entities and individuals that are engaged in the archiving and distribution of images for purposes of licensing, either directly or indirectly. PACA’s mission is to foster and protect the interests of the picture archive community through advocacy, education and communication. A primary purpose is to actively advocate copyright protection and copyright education.

PACA currently has more than 120 members located in the United States and Canada and international members located throughout the world. Through its members, the images, illustrations and film of thousands of professional photographers and other visual artists are distributed or made available for licensing. These members are often, but not necessarily, referred to in the industry as “stock libraries” because they offer users of

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images (such as publishers, designers and advertisers) the ability to license pre-existing images works for publication. These stock libraries include photographs, film, digital images, illustration and motion film. For purposes of this response letter, all content will be referred to as “images” or “imagery”. Increasingly, images are made available for licensing in digital format via websites, rather than physical delivery of content.

Most member organizations manage a large library of visual content. The content includes the works of both living and deceased photographers and other artists whose works are protected by copyright. Some members have collections of historical images, covering news and entertainment, much of which is presumed to be in the public domain or of unknown copyright ownership. Other members offer photo research services to publishers and others, finding suitable imagery to illustrate text books, documentaries and other projects. As a result, PACA members recognize both the importance in providing access to images for licensing purposes, including scholarly and commercial purposes and the need to provide real copyright protection to images. The ease in which images can be downloaded off the Internet without appropriate licensing is increasing the number of infringing uses and causing economic harm. A solution to orphan works must balance the difficulty encountered in determining orphan work status with maintaining effective copyright protection to images.

The number of comments filed in response to the Copyright Office’s Notice of Inquiry was overwhelming. In preparing this response, I reviewed the comments of most libraries, archives, universities and other trade associations to get an overview of the various proposals. I reviewed a small sampling of individual comments as well.

Overall, there appears to be a consensus (other than some artists and artists’ organizations) that orphan works do present a problem and a corresponding recognition of a need to address the problem. However, many proposals offered by various organizations and entities would place an undue burden on photographers and other visual artists, as well as their representatives. This burden to owners and representatives

of visual works is disproportionately greater than other copyright holders and if future regulations or legislation adopted these proposals, it would likely have a severe negative impact on the stock library community and the underlying visual artists it represents. For this reason, PACA would like to maintain an active participatory role in any proposals or future regulations involving orphan works.

Our comments and responses will address both the questions posed by the Copyright Office in its initial Notice of Inquiry and some of the comments that pose the most significant potential impact on PACA members:

1. Nature of the Problem Faced by Subsequent Creators and Users:

We do not disagree that images, as a category of work protected by copyright, can be more difficult than some other categories, such as musical compositions, to trace copyright ownership and to seek permission. It is particularly difficult with older works and may not necessarily be much easier with newer works. Images may be published without the name of the photographer and there is no central registry of photographs. Even if photographs are registered, the individual title of the photographs may not be included in the registration. Since images are in the class of works of visual arts, descriptive titles may never be an accurate way to describe and identify images. The costs of obtaining permissions to use many images can be high. The PACA office does on occasion receive requests for the location of a creator or the source for types of images which it shares with its members via a list serve. This is helpful in finding the owner of a photographic collections that may have changed as a result of time, mergers and other changes.

We are sympathetic to the problems faced in particular by with institutions, such as museums, libraries and other archives that have been donated works which includes images. Clearly there is a benefit to society if these institutions can reproduce, preserve and make these works available to the public for scholarly and educational purposes. It

may be that museums, libraries and institutions receive broader exemptions from copyright infringement under a revised Section 108 of the Copyright Act, rather than providing a broad exemption to all users that would undermine copyright protection to images.

2. “Nature of Orphan Works”: Identification and Designation of Orphan Works:

The type of due diligence that would be required of users before a work would be classified as “orphaned” is of paramount importance. The concern of PACA members is that the “inconvenience”, including the cost of investigating and obtaining permission to use images, of seeking permission will be purposely avoided by claiming that images are “orphan works”. We would support regulations that would require a proposed user of an image to make a meaningful investigation of the status of a work before making a use without permission.

In that regard, a case by case approach to “orphan works” is recommended over a formal approach. Because of the difference between classes of works, such as music, film, literary works and photographs, the steps any user takes to determine whether a legitimate copyright owner exists will differ depending upon the nature of the copyrighted work. These steps will also change as technology changes and different search tools develop that are readily available to the public. Regulations should require that any user relying on orphan work status maintain records as to the nature and extent of its search. Samples of reasonable searches should be provided in regulations to give guidance to users. These examples would require updating over time. However, many would be users of copyrighted work seem to think that even a very limited search is reasonable and too inconvenient, based on a review of comments by a few individuals.

As an example, PACA has a copyright education program and through it has learned how little many designers, students and other users understand copyright law or proper image

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licensing. Misconceptions abound such as “ I found it on “Google” and thought I could use it”, or “I am not making any profit”, or “I thought the Internet was public domain” to name just a few. Orphan works should not be an excuse to simply use an image because it is “found” and the name of the copyright owner is not physically attached to the image.

Some organizations have suggested that if a work is registered that it can never be designated “orphaned”. This may not be realistic given the large number of photographs that may be registered together, either in published collections, as group registration or unpublished without individual identification. Searching the copyright office records may be an aspect of due diligence but it may one method of due diligence, particularly with older works that are not as easily searched.

Technology may provide a tool for finding the copyright holder or his or her representative for licensing. Digital images include “metadata” that allow for image identification. New search tools are being developed that allow an image to be “fingerprinted”. The fingerprinted file can search a large database of images on the Internet to come up with a relevant “match”. This tool can be useful if a user has an image that has no identifying information. A rapid search can be made to find the source of the image. This will of course apply to works that have been digitized and included in an image database. With respect to older works that may not have been subsequently scanned and included in an image library, different criteria of “reasonable Inquiry” would necessarily apply. These search tools could eventually be employed by the Copyright Office.

Many suggestions that would make it easier for users to find copyright owners would have a severe impact on both photographers and the stock photo industry and could potentially burden the photo industry unnecessarily or jeopardize the commercial viability of works.

Registry of Works:

There is a complaint that there is no registry to search for photographs. Song writers file their works with music publishers such as BMI or ASCAP. Book publishers in general register published works. There is no comparable registry of photographs.

However, a requirement, as many suggested, that creators register copyright ownership or “non-orphan status” with either the Copyright Office or other independent agency imposes as great a burden on image creators as copyright registration. The Copyright Office is aware how difficult it is for a photographer, as opposed to other types of authors, to register works effectively and economically. Photographers and other image creators are capable of producing hundreds if not thousands of copyrightable images in a very short period of time. It may not be easy for a photographer to identify which ones were published after submission to a publisher or photo library. Contrast this to an author of novels who may complete one or two copyrightable works a year. Registration to a photographer is a burden both in terms of administration and expense. To ease this burden, the Copyright Office enacted regulations a few years ago to permit photographers to register groups of published photographs (now limited to 750). Despite this easement, it is still the experience of PACA members that their contributing photographers still find the difficulty in registering photographs a barrier to registration.

Photographers and photo libraries that manage licensing of photographs, represent thousands of images. To require any voluntary or mandatory “listing” of works to establish the intent to maintain copyright protection is in contravention of our obligation under the Berne convention and TRIPs to prohibit the existence of formalities to afford copyright protection. If such a registry or listing was either required or encouraged it would be tantamount to placing these works in the public domain. In sum, it is an undue burden to owners of images to declare works as “non-orphans” in order not to be exploited. The argument that Creative Commons is asserting that a creator does not value a work unless it bothers to make the effort to register is not realistic. With respect to

professional photography, registration does not equate to value. While PACA attempts to encourage registration, copyright attaches upon creation. This is the underpinning of the 1978 Act and no registration concerning orphan works should alter this.

Similarly, a notice requirement by users seems unreasonable for both users and copyright owners. It seems impractical and onerous to post all intended uses of orphan works by subsequent creators and to require creators to check at regular intervals an “intent to use site” where they would have to see if anyone had plans to use their works. Again, the quantity of photographs one creator can create during his or her lifetime makes this suggestion unreasonable.

3. Nature of “Orphan Works”: Age

With respect to photographs, the age of the work should not determine orphan status. The age of a photograph is not always easy to determine. If one does not know the identity of the author, it is impossible to determine if a work is in its last 20 years of protection. Arbitrary benchmarks will not resolve enough orphan works issues. The age of a work may be a factor in the method of searching for the copyright owner and the reasonableness of the search but we do not believe that there should be any lapsed time before a work could be considered orphaned.

4. Nature of “Orphan Works”: Publication Status

The publication status of an image is not easy to determine, particularly if you are a museum or other institution with a collection of prints or photographic slides. Although the Copyright Act treats unpublished works differently for registration purposes, there are exceptions even under fair use that permit the publication of an unpublished work. The uncertainty of publication status could be as difficult as the uncertainty of ownership. Consequently, meaningful regulations regarding orphan works should apply whether the publication status of a work is known or not.

5. Effect of a Work Being Designated “Orphaned”

The effect of a work being treated as “orphaned” by a subsequent creator should not affect the copyright status of the work or result in the loss of subsequent copyright status. If a legitimate copyright owner subsequently “discovers” the use of a work believed to be orphaned, it should be able to recover a fair market royalty or license fee for the use. How the license is administered is the relevant question.

PACA does not agree with the proposals that suggest that a royalty or license be paid to a collecting body prior to use, which is the Canadian approach. Any solution to orphan works should have a practical approach that limits the amount of unnecessary transactional costs after a reasonable search has been undertaken. Experience by many European members of PACA is that collecting agencies are not practicable for photographic works. It is difficult and expensive to administer.

While we understand the desire of museums and other institutions to have financial immunity if they invest in making reproductions of works in their own collections, we do not agree that an across the board exception for all users is appropriate. Whether a documentary film maker has a budget to include many images should not excuse it from paying a reasonable royalty if the images are managed by copyright owners or its representatives. As previously noted, museums and libraries that have collections and want to make them available to the public for scholarly research and educational use may seek relief under section 108 rather than offering all users a safe harbor where they can use images for a period of time without any payment if a copyright owner subsequently discovers the use.

PACA would support a limitation of remedies under the Copyright Act for those who use orphan works after making a reasonable search if there was an administrative agency that would resolve disputes or enforce the payment of license fees in a manner that was cost

effective. If there is regulations that protect users of orphan works from the risk of injunctive relief and statutory damages, there must be an incentive for them to pay the appropriate market value rate to the copyright holder. In our experience, Federal Court is not a realistic forum to enforce royalty fees or collect actual damages for unregistered works. Because registration is relatively more burdensome to photographers than other creators, many photographs are not registered. If the unauthorized user only has to pay a license fee, the costs of enforcing the fee can easily exceed to the reasonable royalty rate or license fee. Because of the current requiremet that registration is a prerequisite for statutory damages and attorney's fees, images are frequently infringed with impunity. The high cost of enforcement prevents most creators from enforcing their rights in federal court where the recovery is so limited. If users are to have relief under any limitation of remedy, there must be a forum for copyright holders to resolve disputes that does not require the filing of a copyright registration on an expedited basis or a complaint in federal court. If this tribunal would hear any case where a creator agreed to seek actual damages rather than statutory damages and attorney's fees, whether a work was deemed orphaned or not, it would go a long way in balancing the rights of image owners against unauthorized users.

The proposal of the Professional Photographers of America contains such an enforcement scheme.

Sunset provisions:

To review the impact of any regulations that permit the use of orphan works on various industries, any regulations should have periodic review of the Copyright Office to determine if changes are necessary.

6. International Implications:

Any regulations that would provide an exception to orphan works would have to be narrowly drafted and consider the economic impact on the works in order not to run counter to the US obligations under Berne and TRIPs. Because of the ability to distribute

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via the Internet, works using orphan works would necessarily be distributed worldwide. How territorial issues of copyright protection will affect non US works that are treated as orphan works or distributed outside the US will need to be examined.

Other Issues:

Any regulations or limitations of remedies should not affect remedies for removal or altering copyright management information as provided under Section 1202 of the Digital Millennium Copyright Act. Many members offer licensing of digital image files under license agreements and attach metadata or imbed copyright management information (CMI) in the digital file. It would defeat the purpose of this section if users of images removed any CMI to assert that copyright ownership was unknown or difficult to obtain. Moreover, there should be no additional penalties if historical libraries continue to offer access to older images on a good faith belief that copyright protection does not exist if they do not first go through a search for copyright owners.

Respectfully submitted,

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