

12/29/2012

Dear Copyright Register Maria Pallante,

The problem of orphan works is a *significant* one for photographers. For this group, protection and control of one's intellectual property is what is at stake in the discussion over orphan works. A recent notice of inquiry by the Copyright Office concerns the mass digitization of media¹. The Office requested responses in two specific areas:

1. ORPHAN WORKS ON A CASE-BY-CASE BASIS

As a part-time photographer and full-time science educator, I am unable to comment on the changes in the legal landscape or legal thinking regarding orphan work use since the 2008 proposed legislation.

2. ORPHAN WORKS IN THE CONTEXT OF MASS DIGITIZATION

Again, I am not in the best position to provide a legally-informed account of developments in mass digitization. The largest players and most influential Internet companies, those who use massive automation and economies of scale to conduct searches for owners of orphan works, are those who stand to gain the most from illegally leveraging copyright-protected content that has become orphaned. For photographers, this will mean that their works are often exploited without their consent as a matter of course. In turn, this will have a stifling effect on the pictorial content that image makers are willing to post online, depriving the public of a resource that has helped define the Internet. The Internet has been a vital economic engine in the past decade and impacts traditional and emerging enterprises across the spectrum². Because of its global presence and distributed infrastructure, the Internet has also become a hotbed for infringing use of pictorial

¹<http://federalregister.gov/a/2012-25932>

²http://www.mckinsey.com/insights/mgi/research/technology_and_innovation/internet_matters

content. Among media types, images are particularly susceptible to becoming orphaned, whether through accident or nefarious agency. The ease with which a digital image may be stripped of identifying marks and metadata, altered, defaced, or used in a manner inconsistent with the photographer's intent is all too clear.

3. PERTINENT ISSUES RELATING TO ORPHAN WORKS

The Copyright Office has asked that issues not covered in the above two points be formally addressed in responses to the inquiry. Please see below.

A recent position paper by the Republican Study Committee³ promulgated misinformation regarding the original intent of copyright and regarding the value of copyright to content creators. Subsequently, this group retracted their study brief, stating that it was, "published without adequate review."⁴ This brings to light an interesting point: the document remains available from multiple sources^{5,6}, despite being taken down at the source by its creator. Media that enter the Internet often escape the creating party's control. The situation is very dire for photographers, whose pictures may be stolen by an entity in a foreign country, reposted or used commercially, and then reappropriated by another party anywhere in the world as an "orphaned" work that can be exploited commercially. Allowing the use of orphaned works will drastically change the way that individuals and corporations seek out photographic content. By default, they will seek the images that are most free of incumbrances like recurring license fees, contracts, limitations on usage, etc. Orphan images will fit the bill and will be preferred to commercial, paid images on a grand scale⁷. The loss of revenue to image makers will be large in magnitude.

The following considerations deserve deliberation by the Copyright Office and the Congress at this time:

1. Please *do not* recommend that Congress limit the remedies available to photographers for unauthorized use of their copyrighted material. Limiting the remedies that an owner of copyrighted

³<http://www.scribd.com/doc/113633834/Republican-Study-Committee-Intellectual-Property-Brief>

⁴<http://arstechnica.com/tech-policy/2012/11/influential-gop-group-releases-shockingly-sensible-copyright-memo/>

⁵<http://marylandpirates.com/wp-content/uploads/>

⁶<http://archive.org/details/RscThreeMythsAboutCopyrightLaw>

⁷See point #3 at <http://photobusinessforum.blogspot.com/2012/10/orphan-works-returns.html>

photographs may pursue incentivizes image theft by removing a very strong deterrent. The message this sends to current and would-be image appropriators is like saying, “Look, we *know* the posted speed limit is 70 mph. However, because you have the appropriate speed-rated tires, are not under the influence of any substance, are using a vehicle that is capable of handling high speeds, and are operating your vehicle in good faith (without apparent malicious intent) we will lower your ticket for going 120 mph to just \$1.50. If you habitually repeat this offense and are caught, you may face a similarly trifling fine. Happy motoring – Don’t be evil!” Copyrights are like speed limits and statutory damages are like the fines that breaking them incurs. Both are tools of government that act as deterrents to prevent individuals who are operating in self interest from damaging themselves and others. Taking something which is another’s property is theft!

2. A truly conservative approach is one that does not alter longstanding practices abruptly. Changes to the way that photographers and would-be image users carry out their work may require significant adjustments in practice and the opportunity to bring whole catalogs of information up to date in response to changing legislation.
3. Nordic-style collective licensing schemes are a slippery slope. A down-to-earth analog of this system would prescribe that finding a wallet with no ID on a park bench entitles you to the all the contents, as long as you leave a small fee in a “lost wallets” jar.
4. The resources that photographers must expend in order to track down, take down, and seek compensation for infringements is a drain on all aspects of their livelihood⁸. Adding orphan works provisions complicates an already convoluted and difficult situation⁹ for those who are presently under constant vigilance to protect their creative works. This adds another economic pressure to those in an industry whose state is in turmoil due to, “strong competition for most jobs. . . many qualified candidates for relatively few positions. . . as companies increasingly contract with freelancers rather than hire their own photographers.”¹⁰
5. Freelance, independent, small-business photographers are the ones most likely to be injured by

⁸<http://blog.creativeamerica.org/2012/high-volume-of-googles-copyright-removal-requests-reveals-magnitude-of-piracy-problem-onerous-burden-on-creators/>

⁹<http://googleblog.blogspot.com/2012/05/transparency-for-copyright-removals-in.html>

¹⁰<http://www.bls.gov/ooh/media-and-communication/photographers.htm>

orphan works legislation that limits remedies for copyright infringement of “orphaned” works. In addition, many photographers are part-time workers in the industry and lack the resources of larger media companies to track and pursue infringements.

For the very same reason, the number of photographers who will take the time to articulate the hazards of orphan works legislation on their industry and revenue is small, but does not change the damaging effects that it may have on their bottom line and on respect for the integrity of their copyrighted works. I feel that I speak for many other photographers in voicing my great concern.

Sincerely,

A handwritten signature in black ink, appearing to read "Matthew Croxton". The signature is fluid and cursive, with a long horizontal flourish at the end.

Matthew David Croxton, M.S. (Forest Resources and Conservation)

PHOTOGRAPHER AND PRINTER

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