Re: Orphan Works Copyright Legislation

Dear U.S. Copyright Office:

The amendment to the Copyright Act proposed by the U.S. Copyright Office is a disaster in the making for independent photographers and other independent creators of visual works. We are different from all other copyright owners because, unlike other creators, it is the exception rather than the rule that our images are published with any kind of credit line, copyright notice or other form of attribution. Credits are unusual in print publications, and are virtually non-existent on the Internet. Without names attached to them, most published images will likely become Orphan Works.

The proposal for dealing with Orphan Works is based on an erroneous assumption on the part of the Copyright Office: See footnote 378 on page 115 of Copyright Office report, "…The likelihood of statutory damages or attorneys' fees being awarded in an orphan works case is probably low, given that for those remedies to be available, the work must have been registered prior to infringement, see 17 U.S.C. section 412, and if a work is registered it is unlikely that the copyright owner is unlocatable through a diligent search." This simply is not true for published works of visual images. Without credit lines or other attribution, there is no way to know a photographer's name in most cases. Without a name, there is no way to search the Copyright Office records for a photograph.

As written, the proposal might work for copyright owners of other types of works, but for independent creators of visual images, it will end up converting massive numbers of images, and probably the majority of published images, to Orphan Work status.

The situation is made even worse, with recovery for infringements of Orphan Works limited to reasonable compensation with no possibility of receiving attorneys' fees, leaving independent photographers and illustrators with no practical way of receiving compensation from a user who refuses to pay. It would simply cost more to sue than the possible compensation at issue.

I implore you to fix the proposed Orphan Works legislation so that it will not deprive photographers of protection under the Copyright Act. At a minimum, I ask that you please include a provision that will allow statutory damages and recovery of attorney's fees, when a user of an apparent Orphan Work refuses to pay after receiving a demand from the copyright owner. If not changed, this legislation may well put me out of business.
Thank you for your time, attention and, I hope, support.

Respectfully yours,
William Whitener