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Submitted By Online Submission Procedure

Maria A. Pallante
 Register of Copyrights
 U.S. Copyright Office
 101 Independence Ave., SE
 Washington, DC 20559-6000

**Re: Orphan Works and Mass Digitization: Response to Notice of Inquiry
 (77 F.R. 204) (Docket No. 2012-12)**

Dear Register Pallante:

I. Introduction and Background:

These comments are submitted on behalf of the trade association Picture Archive Council of America, Inc. (“PACA”) responding to the Copyright Office’s October 22, 2012 Notice of Inquiry (“NOI”) concerning orphan works and mass digitization. Founded in 1951, PACA’s membership includes 120+ companies worldwide that are engaged in the aggregating and distribution of images, footage, animation, and illustration (collectively “images”) for purposes of licensing. PACA members either own or represent owners of images. Members maintain databases of images in digital format and offer users search capabilities to locate appropriate imagery for licensing in editorial and/or commercial projects. PACA members require a robust copyright system to insure that users pay reasonable compensation when images are used and that there is effective enforcement for those who use images without licensing. PACA’s interest in orphan works legislation is to insure that works that are actively managed and licensed are not inadvertently considered “orphans” and used without permission and licensing.

Over the past two years, PACA has been meeting regularly with a number of leaders of various associations representing authors of visual arts, including photography, graphic arts and illustration (collectively “Visual Art Associations”) in anticipation that legislation concerning what is known as orphan works will be



introduced in the near future. As the past proposed orphan works legislation raised particular challenges to authors of visual arts, the Visual Art Associations wanted to create a joint committee in order to work with the Copyright Office and the Congress on this and other issues affecting the rights of visual artists and their licensing representatives. Organizations participating in the committee include PACA, Professional Photographers of America [PPA], Graphic Artists Guild [GAG], American Society of Media Photographers [ASMP], North American Nature Photography Association [NANPA] and the American Photographic Artists [APA]. Each association intends to file separate responses to the NOI, and while there may be differences in approaches, we have worked together in examining issues of diligent search, restrictions on any safe harbor and comments on limitation on remedies.

As noted in the NOI, orphan works legislation previously proposed created unique issues for those in the visual arts, as works of visual arts are more likely than other classes of work to be considered “orphaned”, even if the owner or his or her heirs actively exploits and protects the copyright in the works. Even the term “orphan” may be inappropriate for many works of visual art as it implies that there is no one interested in managing the copyright to the work. More realistically, the owner of the copyright is difficult to locate, not because the owner does not want to be found, but rather due to the fact that works of visual arts typically are published without attribution, or if published in digital format, any relevant metadata that would identify ownership is either missing or stripped as a result of software used in uploading and transmitting images. Moreover, even if visual artists are diligent and register works with the Copyright Office, the registration application merely identifies works by a text based title, which does not lend itself to locating the owner of, or identifying works of visual art.

Because of these challenges, PACA worked closely with the legislative committees concerning the 2008 bills in crafting language that would not unduly burden the owners and representatives of works of visual art or harm the market for the visual arts. Specific concerns raised in 2008 include a) the scope of any safe harbor for non-profits, b) that a good faith diligent search was made and documented before any use, c) that the lack of attribution alone would not classify a work as an orphan and not justify a diligent search; d) that if a rights holder emerged, adequate compensation would promptly be made to the rights holder and e) that there were adequate incentives to encourage compensation such that a rights holder would not be burdened with expensive litigation in order to collect compensation.

These issues continue to require thoughtful consideration in fashioning any orphan works legislation. The issue of effective enforcement continues to plague the owners and representatives of visual artists, and access to a copyright small claims court would be integral to



any proposed orphan works legislation. Provided that any proposed orphan works legislation did not unduly burden or harm the rights of visual artists, PACA would continue to work with and collaborate with the Copyright Office and Congress in fashioning appropriate orphan works legislation that would permit the use of true orphan works for productive uses and provided that rights holders were fairly and easily compensated should they emerge. The ability to bring claims of lesser value in a convenient and cost effective forum (“Copyright Small Claims”) would be key to its support of legislation.

II. Subjects of Inquiry:

1. Orphan Works on an Occasional or Case-by-Case Basis

It is clear that orphan works has become a global issue which requires the view of the global landscape. While PACA is not in a position to comment on all the various approaches and initiatives other countries are considering or have enacted with respect to orphan works, it is apparent that registries of some sort will become more critical going forward, and that attribution and the ability to be located will be even more significant in order to avoid having works used without permission under the umbrella of orphan works legislation. PACA is concerned that formalities may be considered that would extend to US authors and that would unduly burden visual artists in requiring participation in certain registries. PACA has concerns regarding the proposed changes to UK law in which the failure to be part of a particular registry could result in use of works without permission, a requirement of rights-holders to “opt-out”, as well as permitting the extended collective licensing for works.

PACA notes that libraries and archives that were active in seeking orphan works legislation in the past are now less supportive and appear to favor reliance on fair use under Section 107. PACA believes that any exceptions for libraries and archives should be the result of well-considered legislation under Section 108 reform. Legislation is preferred where all stakeholders can participate in the discussion regarding change to copyright exceptions and protection and any change that can have a dramatic effect on rights holders should not be left to individual judges on a case-by-case basis.

Assuming that any proposed orphan works legislation will be based at least in part on the proposed legislation introduced in 2008, PACA will provide comments to the key components of the past legislation and its current thinking based on the resources and technology available today.



Diligent Search Provision

While PACA actively supports and recognizes the importance of the Register's plans to improve the quality and searchability of Copyright Office records, in the short term it does not seem likely that the Copyright Office will have the capability, particularly for works previously registered, to offer a registry in which works of visual art can be easily searched by a user to determine ownership or representation. To do so would require a visual database with image recognition capability. As a result, PACA encourages the Copyright Office to be the source of information for users to be directed to legitimate and appropriate registries that may emerge in the future in order to locate copyright owners for various classes of work. The following is a summary of our thoughts on diligent search:

- The United States Copyright Office should be charged with the responsibility for maintaining a list of certified registries as well as best practices in locating owners of works in various industries. We recognize that any information on conducting a diligent search will require updating on a regular basis as information and search capabilities evolve. For example, a diligent search for works of visual arts should include, among others, a search of the Copyright Office records, Visual Art Associations databases, general online searches (includes artist and keyword searches), and contacting publishers, ad agencies and other last known users.
- The primary purpose of any diligent search must be to find and contact the rights holder, rather than to create a massive collection of works considered orphaned and therefore "free" to use. PACA is concerned that for profit entities will attempt to aggregate "orphans" for commercial licensing purposes without a good faith attempt to locate the rights-holder, causing unfair competition with rights holders and their representatives who license the same copyrighted works on their behalf.
- The lack of attribution should not excuse a diligent search.
- A diligent search must be made and documented before any use.
- If applicable based on the work in question, a user may need to include as part of its search fee-based search services. However, a search of fee-based services only should not be sufficient to constitute a diligent search. Any fee-based search should be certified as a legitimate registry by the Copyright Office to discourage the emergence of a cottage industry of "false diligent searches" to avoid finding rights holders.



- The lack of response from a rights holder should not be deemed approval or a good faith diligent search. The right of a copyright owner not to permit the use of a work must be respected. There should be no presumption that anyone is entitled to use a work without permission or payment. In addition, rights holder can license works at a premium if a work is licensed to a user on an exclusive basis. If orphan works permits the use without a good faith diligent search, the ability to license on an exclusive basis will be eroded and the compensation to creators and their representatives diminished.
- Search of analog records must also be a component of diligent search. This includes contacting previous known users (i.e. publishing if in book, manufacturers if on packaging, ad agencies if used in advertising, books, microfiche, and other analog media not searchable online).
- Users should not be able to rely on a diligent search performed by a prior user and should be required to conduct an independent search. It can be expected that registries will improve over time and that a rights holder that could not be identified might be subsequently identified.
- All user groups, including non-profits, educational institutions, and museums, should be required to conduct a good faith search, based on type of use and there should be no blanket exceptions.
- Attribution, when known, must be used with any use of a work after a diligent search has been made and no rights holder located.
- Incentives to perform a good-faith search must be part of any effective legislation. Loss of any limitation of remedies and court costs, including attorney's fees, should be available to rights holders whose works have been used without the user conducting a good-faith search.
- Search engines should be part of the search process but should not be able to control the search, the ownership of databases or qualify as registries.
- If visual images contain unique identifiers, metadata or digital watermarks, those identifiers must be used to effectively find rights holders.

Limited Safe Harbor

The prior legislation contemplated a limited safe harbor for non-profit institutions that performed a diligent search in cases where a rights holder later emerged. The non-profit, provided it



discontinued the use upon notice, was exempt from having to pay even the limited remedy of reasonable compensation.

PACA would support a limited safe harbor for predominately cultural non-profits for which visual works are part of the mission of the non-profit (NP) provided such NP performs a diligent search using best practices available at the time; the use is a use that is appropriate under the mission of the NP and is not one for which a rights holder would typically expect to grant a license; the work is protected from further piracy; and use is removed upon notice.

An example of an appropriate use of a work is a use within the cultural mission of the NP. For example, for public display at the NP institution; or a low-resolution display on a website. Uses that should not be covered by the safe harbor would be uses that are solely for aesthetic use (i.e. website design) or product uses such as merchandise, gifts, books, calendars, films, etc. for which the owner would usually grant a license, or for use as part of a profit center such as fund raising. A reasonable license fee should be paid for those uses. With respect to any uses, the NP should be required to use currently available technology to discourage piracy of the works.

Registries

In order for a registry to qualify or be “certified” by the Copyright Office as part of a diligent search, PACA recommends the following.

- Registries should be easily accessible to any user and should not be cost prohibitive to users to discourage good faith searches.
- Whether registries are non-profit or for profit, registries should allow for an appropriate measure of input from non-profit associations representing stakeholders in associated industries.
- An important purpose and goal of a registry or hub must be to allow users to identify and contact the rights holders for a work as a means of avoiding orphan works status or removing the work from orphan works status.
- Registries should not be presented or marketed as copyright registration authorities or as alternatives to copyright registration.
- Registries should not require that rights holders repeatedly search listings or databases of allegedly orphaned works or works which may be orphaned if not “claimed” by a rights



holder. Rights-holders should not be required to register in multiple registries in order to prevent the status of their work from being claimed orphaned. Ideally, hubs should be developed to link similar registries on a global basis.

PACA currently supports the PLUS registry system, a system comprised of stakeholders from the photography, illustration, publishing, graphic design, advertising, museum, library and education communities forming the PLUS Coalition (“PLUS” stands for the Picture Licensing Universal System).

The PLUS Coalition is a 501(c)6 non-profit organization, governed by a board providing equity and representation for all industries involved in creating, distributing, using and preserving images.

The PLUS Coalition has created standards for identifying rights holders and for communication rights information.

The PLUS Coalition is currently developing a global image rights registry and registry hub, collectively titled “PLUS Registry:” Attributes include the following:

- Operated on a non-profit cost recovery basis, by and for its users.
- Industry neutral: operated by a coalition with representation for all related industries.
- Global: participants currently in 88 countries, facilitating international registration and search.
- Designed to serve as a global registry “hub” allowing a search of one registry to search all connected registries.
- Allows users to find and contact rights holders for visual works
- Allows users to find and access rights information for visual works
- Employs unique identifiers to images
- Employs visual recognition search as a backup to the loss of metadata including identifiers.
- Provides an API allowing any registry or application to connect for search and registration functions.
- Provides both human readable information and machine interpretable information.
- Fully multi-lingual – allows for registration and search in any language
- Standards based – adheres to the PLUS standards for identification and for expressing rights information. Provides additional standards based metadata used in each related industry.



- High Security –incorporates security measures designed to discourage abuse.
- High Performance – utilizes highly efficient code and is hosted in the cloud to maximize performance, reliability and scalability.
- Sustainable – operates on a self-funding, cost-recovery, cooperative model.
- Accessible – Searches are free. Rights holder listings are free. The storage of image records and rights records involves nominal cost, as do certain usages of the APIs. These costs are minimized by the cooperative cost-recovery model on which the Registry operates.
- No display of orphaned works – it does not display copies or listings of allegedly orphaned works.
- Terms and Conditions – Requires that users agree to terms and conditions discouraging invalid claims to ownership and discouraging unlicensed usage of images.
- Privacy Respected– Includes extensive privacy protection measures for users.
- Easy to find – as all industries are jointly developing and operating the PLUS Registry, the broadest possible awareness is ensured.

In addition, in the past number of years, PACA members have been successfully using image recognition technology to identify uses of images online and to verify that the uses are properly licensed, and to seek compensation in the event the uses are not authorized. This technology can be leveraged to be used with registries to identify orphan works. PicScout, a leader in image recognition technology, is a subsidiary of PACA member Getty Images, Inc. and its technology is supporting part of the PLUS registry system.

Lastly, effective enforcement is essential to a copyright system that serves all rights holders. The prior proposed legislation contemplated a study on whether there should be a Copyright Small Claims to provide rights holders with a cost effective means to enforce its rights under copyright and seek compensation for unauthorized use. PACA has responded to requests from the Copyright Office for its input on such a system and believes that an effective, cost efficient copyright tribunal is essential to the members of PACA and the Visual Art Associations. Any orphan works legislation that would limit remedies for users should incorporate a copyright small claims court and provide incentives so rights holders do not have to bring claims in order to receive reasonable compensation if works are used in accordance with any orphan works legislation. Users relying on a diligent search and the benefit of limited remedies if a rights holder emerges should be required to submit to an alternative small claims system at the election



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LETTER TO MARIA A. PALLANTE
RE: ORPHAN WORKS AND MASS DIGITIZATION: RESPONSE TO
NOTICE OF INQUIRY (77 F.R. 204) (DOCKET NO. 2012-12)
PAGE 9

of the copyright owner if the user fails to timely compensate the copyright owner or its representative for the use of a work thought to be orphaned.

2. Orphan Works in the Context of Mass Digitization

PACA is currently a party with other Visual Arts Associations in a class action copyright claim against Google in respect to its massive book-scanning project. Other than its commitment to copyright and its belief that mass digitization is neither permitted under the Copyright Act, nor a fair use, PACA has been advised by litigation counsel not to comment any further on the question of mass digitization.

III. Conclusion:

We thank you for this opportunity to respond to your NOI and welcome the opportunity to either meet with the Copyright Office or respond to additional questions on this important issue.

Respectfully submitted,

A handwritten signature in black ink that reads "Nancy E. Wolff". The signature is written in a cursive, flowing style.

Nancy E. Wolff

Counsel for

Picture Archive Counsel of America, Inc.