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March 6, 2013

**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: Reply to Responses to Notice of Inquiry (77 F.R. 204) (Docket No. 2012-12)**

Dear Register Pallante:

The Picture Archive Council of America, Inc. (“PACA”) appreciates the opportunity to reply to the comments submitted with respect to the initial Response to Notice of Inquiry (“NOI”) concerning orphan works and mass digitization. PACA filed an initial response to the NOI.

As a reminder, PACA’s membership includes companies worldwide that are engaged in the aggregating and distribution of images, footage, animation, and illustration (collectively “images”) for purposes of licensing. As stated, 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. PACA, together with a number of leaders of various associations involving photography, graphic arts and illustration (collectively “Visual Art Associations”) including the National Press Photographers Association (NPPA), 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) are in active discussions relating to orphan works and industry practices and solutions. As with the initial filing, each association intends to file separate responses to the NOI, and while there may be differences in approaches, we have a common interest in working together with the Copyright Office and Congress in examining issues of orphan works in a manner that preserves the incentives for authors of visual works and does not harm the market or potential market for these works.

PACA supports the comments filed by the NPPA. This reply supplements comments filed by the NPPA and is not intended to be a reply on a case-by-case basis to all of the 99 submissions filed but rather provide general comments on some of those responses



that raise issues of particular concern to our members. In general, PACA is concerned that many of the comments are directed to issues that fall well outside the issues requested in the NOI, and seek a very different copyright ecosystem, where the rights of individual authors are supplanted by the desires of users to have access to in copyrighted works without risk of infringement, and without compensation to creators.

**Legislation to address orphan works should be narrowly construed to address legitimate orphan works issues and should not open the door for extensive copyright revisions that materially affect the balance under the Copyright Act, and in particular the exclusive rights of authors that are intended to create incentives for new works.**

- PACA is concerned that many of the comments filed by non-authors, in particular large corporations that profit from using others materials, as well as and libraries and archives, see orphan works as an opportunity to dilute the exclusive rights afforded authors, and increase the public domain by making it more difficult for authors to enjoy copyright and enforce their rights.
- PACA opposes orphan works legislation that would be used to reduce the copyright term afforded to authors under the Copyright Act.
- PACA opposes orphan works legislation that would impose formalities other than voluntary actions by authors. PACA opposes any requirement to register work or reregister work after period of time in order to enjoy the benefits of copyright or to have works deemed “orphaned” if they are not part of an official registry.
- PACA opposes orphan works legislation to be used instead of reforming Section 108, the exception for libraries and archives.
- There should be no exemption for nonprofits or libraries and archives from any requirement to engage in a meaningful diligent search for the owner of a work that is likely to be in-copyright in order to take advantage of any limitation on remedies.
- Orphan works legislation should not be used as a replacement for any reformation of Section 121. Any expansion of section 121 should be done through legislation where Congress can balance the interests of all rights holders, and ensure that the incentives granted to authors are not harmed.
- Orphan works legislation should not be used as a means to reduce an author’s right to seek statutory damages if the work has been registered, and should not serve as the basis for



restructuring statutory damages in general. In addition, statutory damages should not be conditioned upon a requirement that an author must maintain current contact information with the Copyright Office records. This would unduly burden individual copyright owners.

- PACA objects to comments that would suggest that our copyright system should be opt-out instead of opt-in as that would disproportionately harm individual copyright owners, particularly visual artists who create many independent revalued works, and those entities that license works on their behalf.
- PACA objects to the term “information” to describe works of creative authorship, such as images, film clips illustrations, music and other content that can be distributed digitally and to imply that such works should be freely available. Our copyright ecosystem must support creative professionals and those companies that represent and support them. A copyright system that eliminates the incentives for individual authors to create, will affect the ability of authors to create new professional works.
- PACA objects to responses from some that the requirement that only images that contain water marking, or other identifying material in the metadata be protected. Because water marking and metadata may easily be stripped from digital images, without the consent of the copyright owner and/or its representative, it would be unreasonable to tie remedies and copyright protection to the use of required meta-data or a water marking system for digital images.

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 blue ink, reading 'Nancy E. Wolff', is positioned above the typed name.

Nancy E. Wolff  
Counsel for  
Picture Archive Counsel of America, Inc.