

## **INTRODUCTION**

Many years ago I made a submission to Justice Whitford's Copyright Committee. I argued then for photography to be treated the same as all other arts, something which I was pleased to see in his 1988 Act. Now I am writing to ask for photography to be treated as a special case.

I am a professional photographer and work in a business called 'Stock Photography' which provides photographs for a wide range of uses from travel brochures to text books, from books to advertising and to all sectors of industry. As an industry stock photography is relatively small, about 1 billion Euro across the EU per annum. The UK is especially well equipped with talented photographers whose work also sells well in the USA and other countries. Of course copyright also affect other forms of photography which also need protecting.

## **PHOTOGRAPHY IS DIFFERENT**

Much attention is paid to piracy and theft of computer software, DVD films and music CDs. These are products which stand alone in the marketplace. Photographs, on the other hand, are most often used in 'composite' works which combine many separate pieces of copyright material. Magazines, newspapers, brochures, books and calendars are examples of composite works including photographs from many sources.

Photographs are rarely products in themselves. Photographs are produced by individuals often working alone.

Modern technology has given us the benefits of digital photography and the digital file. Unlike other creative works photographs are often reproduced in books, magazines and websites without attribution. The digital files themselves can have ownership data attached but many software procedures remove this data.

## **PUNITIVE SANCTIONS**

Copyright in photographs is often breached because the infringers know that there is no punitive sanction that can be used against them. In the past dozen years I have had my copyright breached several times. In two cases I was able to extract a less than adequate fee. In another two cases I spent the best part of £1,000 each time, and many hours of effort, just preventing further publication with no financial redress. In the final cases I have walked away because the fight is just not worth the hassle.

What photographers need is a change in the law to allow automatic statutory and punitive damages to let the creators of photographs get justice against copyright thieves. The amount should be set high enough to make newspapers and other publishers take a more serious approach to copyright.

The internet has made copyright theft much more common. Sometimes one

image is stolen by many different people as it is passed around the web. A photographer friend who spoke recently at a meeting in London had recorded 440 instances of the theft of one photograph. As well as high statutory and punitive damages I would also suggest a quick and easy remedy through the small claims court for smaller amounts.

## **EUROPE WIDE ENFORCEMENT**

We are now part of the EU which makes cross border pursuit of infringers difficult and costly. We need some kind of easy litigation for copyright theft across Europe. For photographers who are very small businesses indeed this needs to be affordable.

Yours sincerely

Bob Croxford

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Dear Sirs

Orphan Works and the digital photography age.

There are moves in the USA to make it easier for anyone to use copyright material after a 'reasonable' attempt is made to find the copyright owner. These moves are prompted by University Academics whose creative work, if any, is funded by sinecures and foundations. Although the examples they cite all seem very reasonable the proposals go to the very bedrock of the value of Intellectual Property. The proposals take no account of the need for creative authors to profit from their work.

I am writing as a photographer whose copyrights are particularly at risk. Unlike the authors of books or magazine articles, photographs are often used in magazines, newspapers and books without a credit naming the photographer. An image I supply to a tourist brochure could become an 'orphan' the day it is published under the US proposals. The people behind the Bill are suggesting that a 'reasonable' attempt should be no more than 36 hours of searching. Hardly enough time for a letter to come from the US to Europe and back!

Photographs are at particular risk because, as digital files, they can be moved around and used without the photographer's name or contact details being visible.

They also suggest that any breach of copyright which ensues should be settled by a payment of a fee equal to the amount that they have paid to others in the same project. This means that if they illustrate their project with an image bought from their boyfriend for \$10 that would be the fee that they should pay a professional photographer who discovers their use of an image after the event.

There are many reasons why a professional photographer will require equitable fees for his work which this act is designed to almost 'steal'. There are also other reasons why photographers might wish to restrict the publication of their images. They might object to the political use the picture is put to. People in the picture, whether models or people in the street, might object to the use and sue the photographer for damages if the use is objectionable.

The very idea that a photographer's copyright should be available to anyone in the USA without proper recompense is abhorrent. It puts us back to the days when Charles Dickens' and Anthony Trollope's books were published in the USA with no royalty paid whatsoever. This was an aberration that the US Congress only put right when an American author, Mark Twain, started selling books in the UK.

My view is that these proposals run counter to the Berne Convention on Copyrights and should be opposed by the British Government and the European Union.

Please pass my concerns to the appropriate bodies.

Reference can be found here <http://www.copyright.gov/orphan/>. What is not in the document is the continuing submissions from opponents of copyright protection.

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## **ORPHAN WORKS**

**Two appendices follow at end from the Stock Artists Alliance, an international group of stock photographers.**

I am a professional photographer and work in a business called 'Stock photography' which provides photographs for a wide range of uses from travel brochures to text books, from books to advertising and to all sectors of business. As an industry stock photography is relatively small, about 1 billion Euro across the EU per annum. The UK is especially well equipped with talented photographers whose work also sells well in the USA and other countries. Of course copyright also affect other forms of photography which also need protecting.

Once upon a time all photographs were black and white prints. To establish

ownership they had an indelible rubber stamp on the back. Then came colour and for technical reasons publications required the original transparency or slide to make a unique set of 'one use' separations. Original transparencies were easy to keep track of.

Now we have the digital image file which can be duplicated many times. A rubber stamp is no longer of any use. Although there is a protocol, called IPTC data, for adding caption and authorship data to digital files these can easily be stripped out and often are as a matter of course when digital files are transmitted electronically. This means that photographs become 'Orphans' very easily and sometimes within seconds of leaving the photographers computer for delivery to a client.

A theory has been put forward by some non-creative academic lawyers that culture is best served by relaxing copyright protection and shortening the copyright term. A few years ago the exact opposite was proposed. Germany were in the vanguard of the copyright extension from 50 years after death to 70 years because they reasoned this would help the viability of 'back-catalogue' publishing. Many publishers rely on their old titles to provide an income stream to enable them to take risks on new work. The Germans spent a considerable time debating this proposal and it found favour around the world. The misguided academics in the USA think it is something to do with Walt Disney.

## **ORPHAN WORKS PROPOSALS IN THE USA**

There is a move by the USA Copyright Office to make it legal to use 'Orphan Works' under very liberal terms. I and many other visual artists believe this will have a disastrous effect on our business. The same campaigners are trying to introduce similar provision in Europe. They are also campaigning for shorter copyright terms. Their motives are misguided and their reasoning uses words incorrectly. They are also ignorant about the way in which photographs are distributed and used.

The Orphan Rights proposals will allow American picture users to effectively 'steal' my work.

Firstly I will challenge the basic assumptions of the changes proposed by the USA Copyright Office..

### ***E. Conclusions and Recommendations***

***Section VI of the Report contains the US Copyright Office's conclusions and recommendations. 9 Our conclusions are:***

- ***The orphan works problem is real.***

I would doubt this very much. I have written and published seven books which contain anthologies of many writers. Some writers were fairly obscure and took some finding. Although it took effort to track down all copyright owners I

do not think that even six weeks is too short a time. For the promoters of this Bill to suggest 36 hours is reasonable is frankly ridiculous. The late John Fowles, when still alive, would answer post only when he had time and help which was about in six week intervals.

Recently I was held up finding an author who last had books published only two years ago and even did a signing in a local bookshop. Neither publishers nor his ex-agent knew his current address. This was not an obscure writer but a prize winning author. Just before my publishing deadline he returned from a six month holiday in Spain.

You would think I was in favour of making it easier to publish work under these circumstances. Far from it. I don't see why a photographer, or writer, should have his/her work stolen just because he/she decides to go on holiday or a year long round-the-world trip.

We are told by the propagators of this bill that our culture is suffering. With about 240,000 books published in the English language each year I would have thought we have enough already. Many thousands of these are history and other academic books which have no problems coping with the current law.

***• The orphan works problem is elusive to quantify and describe comprehensively.***

One of the reasons is that the promoters of the Orphan Works proposals are being deliberately obscure about their motives. They are using language which does not describe the truth of the situation. One phrase they use is 'Derivative Works' which would normally be described as 'Plagiarism' or 'Copying'. Putting themselves in the role of 'creators' of 'derivative works' puts a gloss on their arguments. The word 'creators' should correctly be used only for those doing 'original' work, not for those who want to copy easily accessed 'orphans'.

***• Some orphan works situations may be addressed by existing copyright law, but many are not.***

Current UK law copes with the problem very easily without putting all rights at risk.

***• Legislation is necessary to provide a meaningful solution to the orphan works problem as we know it today.***

Maybe a very small change on the UK model but the BIG problem with the proposed changes is that it will not be confined to academics in museums.

## **MY ORPHAN WORKS PROPOSALS**

If there are clear research and study reasons to use Orphans this should be allowed under existing or amended Fair Use. This should clearly NOT be for

use in any commercial context. With potentially interesting material libraries and museums should be encouraged to catalogue or store this under a range of options to satisfy the creator of the work. My local research library does this to a certain extent already. With modest investment in digital technology they could extend this to create a database of creators alongside the creators' intentions for their work after death.

## **RIGHTS MANAGEMENT**

More importantly, in the case of photography, the Government should consider helping to fund an online rights database for creative work. This could be split into different sections for different creative sectors. D.A.C.S. is an example of what this should not be. D.A.C.S. manages to consume 25% of its budget on its own administration. An online database could be run on a small fraction of D.A.C.S. expensive solution.

Apart from the eventual financial benefits of an online rights database this would also eventually become a valuable research resource itself.

Yours sincerely

Bob Croxford

## **APPENDIX ONE**

### **Professional creative community concerns**

The professional creative community is abuzz with concern over the speed with which “Orphan Works” legislation is moving ahead, and the disturbing implications for us all if the bill passes as proposed by the USA Copyright Office.

Following is some of the commentary from the trade organizations that represent the interests of stock photographers and distributors, illustrators, photojournalists, editorial and advertising shooters, along with respected journalists...

*"The solution proposed by the Copyright Office to the problem of museums and libraries use of archival materials, is too far-reaching and has too many unintended consequences. It would make it impossible for photographers to get a fair return if an image is*

orphaned'.

*"We urge the user community and the House Subcommittee to work with us to amend the proposal to maintain effective copyright protection for creators."*

- David Sanger, President, [Stock Artists Alliance \(SAA\)](#)

*"The entire stock photography industry depends on a robust copyright licensing and enforcement regime. Loosen the restrictions and unauthorized use will skyrocket."*

- Jim Pickerell, [Selling Stock](#)

*"For artists, this legislation would be a major revision of copyright law. In effect, a repeal of the 1976 Act. The Orphan Works Report calls for a 10 year "sunset provision," which means that the legislation will be subject to reevaluation in 10 years. But if your copyrights have been laundered into the public domain during that decade, they'll be lost to you for good as surely as the income that will be lost with them."*

- Brad Holland, [Illustrators' Partnership of America \(IPA\)](#)

*"It will practically make photographs public domain."*

- Nancy Wolff, General Counsel, [Picture Archive Council of America \(PACA\)](#), as reported by [PDNonline](#)

*"The proposed legislation allows the user of an image to declare it an "Orphan Work" too easily. It sets the bar too low, putting no clear burden on the user to determine the author of a work which carries no authorship information. For example, a web-designer who finds a photo from an old print advertisement for a company now out of business can claim to have tried to contact the company to no avail and declare the work "orphaned."*

- Chris Ferrone, [About the Image](#)

*"This proposal is a disaster for visual creators. It is heavily slanted in*

*favor of users. If this statute is enacted as it, we can pretty much kiss our careers goodbye. "*

- Lisa Shaftel, National Advocacy Committee Chair [Graphic Arts Guild \(GAG\)](#)

*"In my opinion, if that language is enacted in its current form, it will be the worst thing that has happened to independent photographers and other independent visual artists since Work Made for Hire contracts."*

- Victor Perlman, General Counsel and Managing Director [American Society of Media Photographers \(ASMP\)](#)

*"Proposals in the Orphan Works report would make it easier for people to use your images without your permission, and make it harder for you to collect the money you're owed when they do. This should concern photojournalists, because many published images are copied and recopied without permission. If credits are removed in this process, making it difficult to identify the copyright holder, the image could be considered 'orphaned.'"*

- Alicia Wagner Calzada, President [National Press Photographers Association \(NPPA\)](#)

*"While well-intentioned, the Copyright Office's proposal would strip thousands of photographers and other visual artists of their rights. Unless major modifications are made, legislation based on this proposal would be disastrous."*

- David Trust, CEO [Professional Photographers of America \(PPA\)](#)

*"While this proposal could cause serious problems and financial loss for creators of all kinds of original works, it could be especially devastating for commercial photographers and illustrators whose work is often published without attribution. Worse yet, intentional infringement -- not uncommon in this digital age -- could easily result in many works being declared "orphans" under this proposed*

*legislation. Illegal infringers rarely provide attribution."*

- Ron Rovtar, [The Stock Asylum](#)

*"Given the infrequent use of photo credits beyond the editorial print world -- advertising, corporate publications, and much of the internet make use of photographs sans credit -- photographers face the very real threat of having their published photographs eventually counted as Orphan Works."*

- Shawn G. Henry, VP, [Editorial Photographers \(EP\)](#)

## APPENDIX TWO

### The Next Generation: Stock "Orphans" for Commercial Use?

In the world of *Oliver Twist*, orphans had no rights and were subject to all manner of abuses. If the proposed "Orphan Works" changes become law, the same may be true for a new generation of "orphan" images, especially stock images created explicitly for commercial uses.

It started with a laudable objective: to make it easier for non-profit educational institutions to use culturally valuable material whose authors are obscure or unknown without fear of liability for copyright infringement. The original request by Congress to the US Copyright Office asked for "*an inquiry surrounding the use of older copyrighted works whose owner could not be located*" and was aimed at "*libraries and archives*" [letter Hon. Lamar Smith, Jan 7, 2005]

Yet the proposal that the Copyright Office delivered back to Congress a year later went considerably beyond this limited scope by including *all commercial works*, old and recent, including images found on the internet and un-attributed images found in contemporary magazines and advertising. Furthermore, there's no distinction made between the

non-profit educational users for whom the bill was intended and *commercial users*.

Consider the workflow of the typical stock image user – an art director, designer or corporate art buyer - downloading hundreds or thousands of images every year from stock distributor web sites like [Getty Images](#) and [Corbis](#) for comps, reference or future use. Any stock user knows that simply downloading an image one day can easily lead to the creation of an “orphan” the next day. Add to this those who are sourcing images from printed material or the internet that are un-attributed.

These creative professionals know that any contemporary image that they'd like to use in their brochures, ads, promotion and web site designs *does have an owner* and that the source is likely a stock distributor web site or an individual artist.

Identifying the image source can be difficult however - despite the best efforts of the copyright owner - since creator/contact information is often lost as digital image files are saved, resaved or processed into derivative form. There's also no technological means to ensure that information moves along with the images (such as a "lock" on the metadata), so the chances of losing identification of the image increases as it passes from creator to distributor to initial user to company archive and beyond.

For these reasons, copyright owners are already challenged to manage the rights and uses of their digital stock images. We must rely on licensees to maintain proper identification of the image files in their possession so that they can meet their obligation to properly license images prior to use, or re-use. This is a challenge for them as well, as their collections of digital assets grow, and wholly dependent on their ability and commitment to maintaining an effective digital asset management (DAM) system.

Today, we are assisted by the force of Copyright Law to motivate and obligate these users to properly license our images in advance of use. Relaxing that obligation - as the current "Orphan Works" proposal would do - essentially *de-motivates* users by providing them the option for permissible unlicensed use of "orphans."

Worse yet, it would in effect *invite* image theft. We are keenly aware that intentional infringement of stock images on the internet is already a serious problem, one that SAA has been investigating using [PicScout](#) advanced image recognition technology. [Our report of the [2005 SAA/PicScout Study](#) will be released shortly.] It is ironic that as the stock industry is just gearing up to effectively address the issue of unauthorized uses, this "Orphan Works" legislation could undermine it by offering a loophole that will no doubt result in increased theft.

"Orphan Works" legislation was conceived to assist the museums, libraries and universities who seek to make our cultural heritage available to the public, without any purpose of commercial advantage. We see a world of difference between addressing the need of a library to digitize an older archived work for scholarly purposes, and that of a business who makes use of a contemporary image to promote their product or service. Yet the current language of the "Orphan Works" proposal makes no distinction between them.

Why should commercial users who seek to profit from the use of imagery from contemporary photographers be entitled to do so without proper license under any circumstances? How does this serve the purpose and spirit for which this "Orphan Works" proposal was made?

Betsy Reid, SAA Executive Director