

Testimony of

Mr. Victor Perlman

April 6, 2006

SUBCOMMITTEE ON INTELLECTUAL PROPERTY
COMMITTEE ON THE JUDICIARY
U.S. SENATE

HEARING ON "ORPHAN WORKS:
PROPOSALS FOR A LEGISLATIVE SOLUTION"

APRIL 6, 2006

EXECUTIVE SUMMARY AND PREPARED STATEMENT
OF
VICTOR S. PERLMAN,
GENERAL COUNSEL AND MANAGING DIRECTOR,
AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS

AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, INC.
150 NORTH SECOND STREET
PHILADELPHIA, PA 19106

215-451-ASMP EXT. 1207
FAX: 215-451-0880
perlman@asmp.org
<http://www.asmp.org>

PREPARED STATEMENT OF VICTOR S. PERLMAN
EXECUTIVE SUMMARY

ASMP's testimony today is made on behalf, not of just ASMP and its members, but of virtually every major trade association in the United States that represents the interests of freelance photographers, as well as several major organizations representing freelance commercial artists and illustrators.

1. ASMP believes that the Orphan Works problem is a legitimate one that needs to be addressed. However, for professional photographers and illustrators, the Copyright Office's proposal would have the effect of both retroactively and prospectively invalidating copyright protection for the majority of published images.

2. The Copyright Office's proposal would "orphan" not just abandoned works, but probably a majority of published photos and illustrations. Visual artworks are generally published without identification of the creator and copyright owner. There is virtually no attribution provided for visual images published on the web; in fact, an estimated 90% of photo uses on web are unauthorized. In the print world, there are no photo credits given by clients for most published images. These trade practices are counter to the desires of photographers and illustrators and beyond their control.

3. There is a fundamental and erroneous assumption on which the Copyright Office's proposal is based: "....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. There is no way to search the Copyright Office's records for an image unless the

searcher already knows the name of the creator or copyright owner, and that information is generally unavailable for the images that are potential Orphan Works.

4. The proposal would effectively resurrect the pre-Berne notice requirement; however, as a practical matter, trade practices do not permit copyright notices for most published images. The proposal also would probably violate U.S. obligations under Berne by imposing formalities to obtain protection.

5. The de facto result of the proposal would deprive visual artists of any real protection of their copyrights. Worse, it would lead to creation of on-line companies that search the web for unattributed photos, archive them and provide access to them for a fee, without fear of liability. Those companies will profit while the photographers and illustrators receive nothing.

6. Visual artists are already deprived of practical access to the courts for enforcement of their rights because of the huge disparity between the costs of litigation and the potential recoveries. The "reasonable license fee" cap on recovery in the Copyright Office's proposal would limit relief to the point where no photographer or illustrator could afford to compel payment from a user.

7. The proposal would not provide the user community with the certainty it is seeking. Instead, it would provide just another layer of facts and law that would have to be pled, argued, discovered and proved in infringement actions. This should not be viewed as Orphan Works legislation --- rather, it should be titled the "Copyright Lawyer's Relief Act of 2006."

8. ASMP's Proposed Solutions: Do not start with the Copyright Office's proposal as the model. Rather, start with a model that would require users to pay a reasonable licensing fee into a depository, to be held in escrow for copyright owners who come forward, with undistributed payments used to fund the operations of the depository.

If, despite its basic flaws, the Copyright Office's proposal is used as the starting point for developing legislation, at a minimum the changes that the Senate should make are:

1. Exclude photographs, illustrations and other works of visual artworks from the coverage of Orphan Works legislation; OR

2. Limit applicability of Orphan Works treatment of visual artworks to non-commercial uses by non-profit museums, libraries and individuals; AND

a. Follow the Copyright Office's recommendations to create an alternative dispute resolution system to collect royalties, such as an administrative law court, a small claims court or other ADR structure; AND

b. Allow recovery of attorneys' fees where a user acts in bad faith or refuses to negotiate in good faith and/or pay the royalty; AND

c. Delay the effective date of any legislation on this subject by at least two years from the date of enactment in order to allow the creation and population of searchable databases by which more creators and copyright owners of visual artworks can be identified and located.

PREPARED STATEMENT OF VICTOR S. PERLMAN

Mr. Chairman, Ranking Member Leahy, and distinguished members of the Subcommittee, thank you for the opportunity to present our views on the Orphan Works problem and solutions.

The American Society of Media Photographers' mission is to protect and promote the interests of professional photographers who make photographs primarily for publication. ASMP is the oldest and largest trade association of its kind in the world. ASMP's testimony today is made on behalf, not of just ASMP and its members, but of virtually

every major trade association in the United States that represents the interests of freelance photographers, as well as several major organizations representing freelance commercial artists and illustrators.

ASMP believes that the Orphan Works problem is a legitimate one that needs to be addressed. However, the proposal put forth by the U.S. Copyright Office would simply replace that problem with an even bigger one. For professional photographers and illustrators, the Copyright Office's proposal would be a disaster of biblical proportions. It would have the practical effect of both retroactively and prospectively invalidating copyright protection for the majority of published images. It would then compound that felony by leaving no practical way to obtain even the minimal relief granted by the proposal.

The phrase "Orphan Works" is insidiously misleading. It connotes a few, neglected items that have been abandoned in some fashion. In fact, however, the proposal would probably affect a majority of all published photos and illustrations. In order to be located, a copyright owner must first be identified, and most published images simply are not published with any identifying information. In the digital world, for example, there is virtually no photo credit or other attribution provided for visual images published at client or third-party sites on the web; worse, industry service providers estimate that 90% of the photographs on the web are unauthorized uses. In the print world, there are no photo credits given by clients for most published images; the only exception is for editorial uses, and even that is happening less and less.

These trade practices are counter to the desires of photographers and illustrators, are usually counter to their contracts with their clients, and are beyond their control. Freelance photographers and illustrators want very much and try very hard to be found: that is how they earn their livings. If clients and prospects cannot find them, they do not work.

The Copyright Office's proposal is based, at least in part, on a fallacious assumption: page 115, the Copyright Office Report on Orphan Works states, "... if a work is registered it is unlikely that the copyright owner is unlocatable through a diligent search." This statement is simply false when applied to published visual images. There is no way to search the Copyright Office's records for an image unless the searcher already knows the name of the creator or copyright owner, and that information is generally unknown for the images that are potentially covered by the proposal. The Copyright Office's search capability is limited to text searches for very limited fields. Recently, it has become technologically possible to digitize the Copyright Office's inventory and utilize image recognition software to allow someone to search by image, not just by text. However, doing so would come with a price tag that the Copyright Office is unwilling to recommend to Congress. In effect, the Copyright Office's proposal would impose all of the costs on the copyright owners in general and the photographers and illustrators in particular, instead of on the beneficiaries of the legislation: the user community and/or the public at large.

In practice, the proposal would effectively resurrect the pre-Berne notice requirement, since a credit line would have to be attached to the image as the entry level step to avoiding Orphan Works status; however, the realities of the publication business do not permit copyright notices for most published images. The proposal also probably violates U.S. obligations under the Berne Convention by imposing formalities to obtain protection, in the view of several of the country's leading copyright scholars.

The de facto result of the proposal would deprive visual artists who have done everything possible to protect themselves, including registration of all of their works at the Copyright Office, of any real protection of their copyrights. Even worse, it will lead to the creation of on-line companies that search the web for unattributed photos, archive them, and provide access to them for a fee, without fear of liability. Those companies will profit while the photographers and illustrators receive nothing. Profit-seekers have already registered URL's based on variations of the phrase "orphan works" in anticipation of creating precisely such parasitic uses of an Orphan Works amendment to the Copyright Act.

The Copyright Office has long recognized that visual artists are already deprived of practical access to the courts for enforcement of their rights because of the huge disparity between the costs of litigation and the potential recoveries. Copyright infringement litigation, in ASMP's experience, typically costs the plaintiff legal fees of at least five, and often six, figures to take a case through to final judgment in the applicable U.S. District Court. The "reasonable license fee" cap on potential recoveries as provided in the Copyright Office's proposal would limit relief to the point where nobody could afford to seek payment.

As stated at the beginning, the problem of not being able to locate copyright owners is a real one that needs to be addressed. However, the Copyright Office's proposal is seriously flawed. If the Senate wishes to address this problem, we urge you not to start with the Copyright Office's proposal as the model. Rather, we ask that you start with a model that would require users to pay a reasonable licensing fee into a depository prior to use of any work whose owner cannot be located, to be held in escrow for copyright owners who come forward, with undistributable payments to be used to fund the operations of the depository and for educating the public about copyright.

If, however, the Senate wishes to use the Copyright Office's proposal as the starting point for developing legislation despite its basic flaws, we urge you to make the following changes, at a minimum:

1. Exclude photographs, illustrations and other visual artworks from the coverage of Orphan Works legislation; OR
2. Limit applicability of Orphan Works treatment of visual artworks to non-commercial uses by non-profit museums, libraries and individuals; AND
 - a. Follow the Copyright Office's recommendations to create a system to establish and collect royalties like a small claims court, administrative law court, or other similar structure (P. 114); AND
 - b. Allow recovery of attorneys' fees where a user acts in bad faith or refuses to negotiate in good faith and/or pay the reasonable royalty.
 - c. Delay the effective date of any legislation on this subject by at least two years from the date of enactment in order to allow the creation and population of searchable databases by which more creators and copyright owners of visual artworks can be identified and located.

Finally, it is our belief that the practical effect of the Copyright Office's proposed legislation will not be to benefit any potential users of Orphan Works or the public at large. Rather, we believe that this legislation, if enacted, should be retitled as the Copyright Lawyer's Relief Act of 2006. It will lead only to the addition of complex issues that will have to be pled, argued, discovered and litigated in virtually every copyright case following the effective date.

Thank you for your time and consideration.

Respectfully submitted,

Victor S. Perlman