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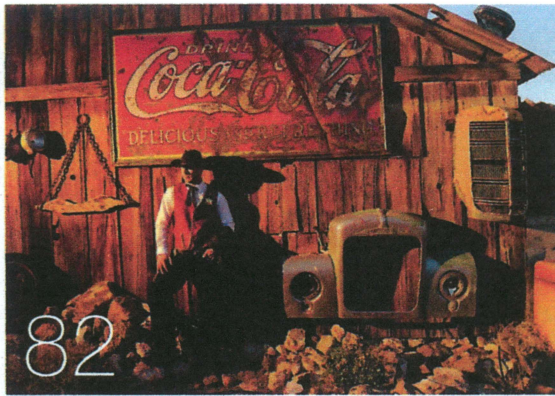
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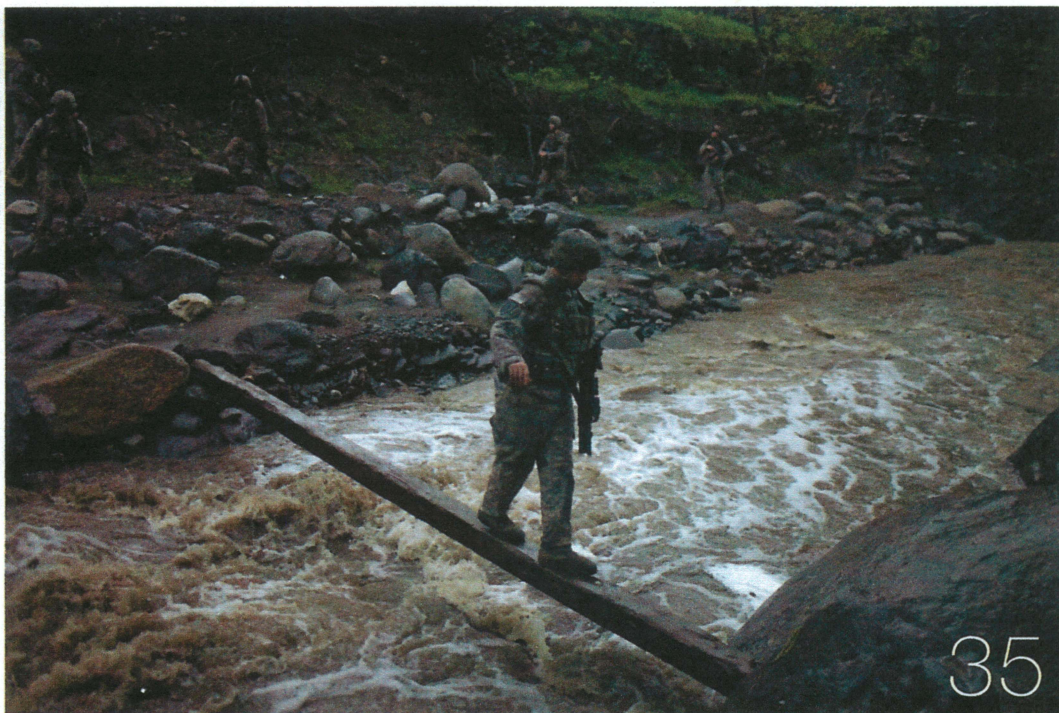


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THE LAW

AN ORPHAN WORKS LAW MIGHT NOT BE AS BAD AS YOU THINK. BY MICHELLE BOGRE

Do a Google search for “orphan works” and you’ll get nearly half a million hits. Yet most photographers don’t know the meaning of this strange phrase, nor that it has important legal implications. In fact, it’s the focus of a raging battle over copyright.

An orphan work is a document, artwork, photograph, or other creation that is protected by copyright law against unauthorized use but whose owner is either unknown or cannot be found—making it virtually impossible for someone to get permission to use the work. As the law currently stands, anyone who uses a copyrighted work without the owner’s permission, including an orphan work, can be held fully liable for infringement, even if he or she made every effort to locate the copyright holder. Such statutory damages can range from \$750 to \$150,000 if the copyrighted work was registered with the U.S. Copyright Office before the infringement or within 30 days of its creation and/or publication. (If the work wasn’t registered, the infringer is only liable for “actual damages,” such as the amount the photographer might have realized from selling his image. Actual damages are usually far smaller than statutory damages.)

Proposed congressional legislation that will more than likely become law limits this liability. It says that if someone who wants to use an orphan work conducts a “qualifying search”—defined as a reasonable and “diligent” search using every available source and technology, including printed material and electronic databases—that person is protected from statutory damages. If the copyright holder eventually appears, the infringer

has to pay the owner only an amount that a “willing buyer and willing seller” would have agreed on before the infringement.

Many photographers and artists are up in arms about a possible orphan works law. Alarmist headlines and subject lines litter the Internet, compelling people to sign petitions, forward e-mails, and urge friends and colleagues to oppose orphan works legislation. Unfortunately most of these missives contain misleading, inaccurate, and, in some cases, false information. Among the misinformation are variations of a few claims: that orphan works legislation will “rob” photographers of copyright; that it will allow users to

pay “whatever they consider reasonable”; that it allows users to “escape all legal liability by claiming they didn’t know who they were stealing from.”

The legislation as currently written isn’t perfect, but it’s not the disaster that many portray it to be. And it is inevitable that an orphan works bill will be passed by Congress because it addresses the pervasive difficulties faced by publishers, libraries, museums, universities, and filmmakers who want to use an orphan work but can’t or don’t because of the risk and liability of statutory damages if the copyright owner does appear. “We’ve never thought that an orphan works law would be Armageddon for photographers,” says Eugene Mopsik, executive director of the American Society

of Media Photographers. “If there is room for reasonable compensation once the artist is located, we can live with that.”

If user/infringers have not conducted a diligent search or do not negotiate a reasonable fee in good faith, they lose the protection of the proposed legislation and will be liable for statutory or actual damages. So practically speaking, those artists who have not registered their work in a timely fashion would be no worse off, and in some cases they would be better off, because the user has a legal obligation to try to find them before using the work. “The idea that you have to look for someone is a new concept that will benefit photographers who haven’t registered their work,” says Nancy Wolff, noted copyright lawyer and author of *The Professional Photographer’s Legal Handbook* (Allworth Press). However, the photographer who has registered an orphan work in a timely fashion will lose the right to sue for statutory damages. That could mean a potential loss of revenue.

This proposed legislation does a good job of balancing the needs of copyright owners with the very real need to limit liability for some uses of orphan works. Both House and Senate versions require that the copyright office certify two databases that can be searchable by image.

When orphan works legislation passes, it will encourage many productive uses that aren’t possible now. Maybe the curators at the Holocaust Museum finally will be able to use the millions of pages of archival documents, photographs, oral histories, and reels of film that, as they have stated before Congress, now just sit in their archives because they can’t afford the liability of damages under the existing law.