

## ***Orphan Works Study:***

### ***Submission by the Art Copyright Coalition***

The Art Copyright Coalition (ACC) is an organization comprised of art publishers and licensing agents. Between them, they represent hundreds of artists and protect the integrity of hundreds of thousands of artworks. The ACC is committed to taking every possible action to protect the arts and creativity, including to eradicate the cancer of copyright infringement.

The organization was founded approximately 10 years ago by a group of art publishers from North America, the UK and Europe. Its goal is to be a voice for the visual arts community by partnering industry leaders in a worldwide effort to combat copyright infringement and counterfeiting in the arts.

As a group, the ACC takes action against infringers, raises public awareness, polices trade shows, educates retailers and consumers on copyright infringement and advocates on behalf of its members and the visual arts community at large. It is a constant struggle as the members of the ACC are routinely finding their artists' artwork being illegally copied both as wall art (posters, prints and hangings) and on consumer products. They find illegal copies of their works being sold by big box retailers, galleries, gift and frame shops, in the halls and lobbies of hotels and office buildings. On an almost daily basis they come upon their artworks embodied in an endless variety of commercial goods ranging from housewares to luggage to clothing to textiles to containers and labels, to mirrors to linens, in publications and of course on

wall art. In short, counterfeiters are incorporating thousands of ACC member artists' artworks in and on a wide and vast array of products.

The ACC is and has been extremely concerned that proposed Orphan Works legislation and remedies will make a currently intolerable situation much worse. To be clear, as to its position on Orphan Works, the ACC and its member artists recognize that Orphan Works cause legitimate problems for nonprofit cultural institutions. Specifically where libraries, educational establishments, publicly accessible museums, archives, and charitable institutions are unable to make available and reproduce true Orphan Works in order to fulfill their public interest missions, notably preservation, restoration, the provision of cultural and educational access to works contained in their collections, and to further their tax exempt purposes.

These are appropriate goals and have been recently addressed by the *Directive of the European Parliament and of the Council*. The ACC believes this is an appropriate response to the legitimate problems caused by Orphan Works and it is a commendable and useful approach that satisfies a legitimate public need. On the other hand, what serves no public policy and is not useful are "solutions" that facilitate counterfeiting.

A cornerstone of all proposals is that a "diligent search be undertaken" before a work can be considered "Orphaned." A classic image search typically searches text surrounding an image and is basically useless in regard to a meaningful image search for an artwork with an unknown author. Even using some of the new tools, one can only search a very limited part of the internet. From a practical real life point of view, even with advances made within the last few years in

image searching, it is impossible to use these tools to track down most copyright protected artworks. Also, many images are simply not posted on the internet or they are behind password protected websites that current search tools cannot access.

As noted in other comments, it is extremely simple to remove copyright notices from artworks and other like materials which identify the creative artist. After a simple snip of a scissors or cut command a copyright protected work instantly becomes an "Orphaned Work."

If we view what is happening in the real world, this removal of copyright identifiers happens every day by counterfeiters (they are not at all concerned if their actions violate the DMCA). From a practical perspective, that is what would actually occur. A counterfeiter in China removes the identifying material or "finds" material with no author name on it. They then undertake a "diligent search." A search they can document, where they will claim they entered "Red Flower " into a search engine and the image did not show in the results, or they put it into Tin Eye or Google Images search (or other comparable images search software) and nothing was found (see attached examples). Now we have a work which under many of the comments and proposed legislation would be deemed a statutorily protected Orphaned Work where the counterfeiter can use it with impunity, with no risk of any financial risk. The products containing the Orphan Work or in real terms a now protected counterfeit enter the U.S. market where they find their way into a hotel room or on a product in a Big Box store. What remedies would then be available to the artists? Expensive litigation to show that in China a real diligent search was not actually conducted. Not a realistic expectation. To accept a "reasonable royalty" after the fact

if the copyright owner can in fact catch the infringer and show the art work is not in fact "orphaned". The expense of that exercise will outweigh any financial recoupment. Without attorney fees and statutory damages, there is no effective remedy for a visual artist if commercial use of Orphaned Works is permitted. A counterfeiter knowing their exposure, if caught, will be the royalty they would normally have to pay, now has every incentive to increase their counterfeiting activities without fear of any real risk. Where is the public benefit, the valid public policy concern being addressed by such a scenario?

The previous Senate Bill S2913 could have basically been called the "Counterfeiters Relief Act." It would have opened up the flood gates for counterfeit artworks to come in under the guise of being Orphan Works with the copyright owners being stripped of any meaningful remedy and without attorney's fees, statutory damages and the like. It would simply be open season on artists.

In HR5889 Section 514(d) EXCLUSIONS FOR FIXATION IN OR ON USEFUL ARTICLES, an attempt to address this problem was made where it stated, "The limitation on monetary injunctive relief under this section should not be available to an infringer for infringements resulting from fixation of a work in or on useful articles that is offered for sale or the distribution to the public."

The section is a beginning but needs to be modified in order to make it clear that the use of art works on useful articles that are excluded from the Orphan Work safe harbor would also include

all forms of wall art specifically paintings, posters, and prints and also non-scholarly, merely decorative, use in publications.

While the ACC endorses the EU model and believes there is virtue in a consistent approach between our laws and those in the EU if that is not to be then we believe creating an exclusion from Orphan Work protection for art works, graphics, illustrations and photographs found on useful articles that include consumer goods, wall art and decorative use in publications would remove the ability of counterfeiters to hide behind an Orphan Works safe harbor. Nothing in this type of exclusion would prevent or hinder cultural, archival, historic use and scholarly research after the undertaking of a meaningful search from using true Orphan Works.

Finally, suggestions of reintroducing formalities and registration procedure are burdensome, unlikely to be helpful and wrongly shift the burden and expense onto the copyright owner instead of the prospective user.

There are literally millions of images available for licensing from artists and photographers whose livelihood is dependent upon licensing their creative work. Those who wish to use art works in commercial products should obtain licenses for this incredibly rich reservoir of available artworks and not seek to obtain a free ride on the backs of working artists under the guise of Orphan Works. The Orphan Work “problem” should not be used to empower counterfeiters and impoverish the creative class.

# Examples of Failed “Diligent” Searches



Original

**TinEye**  
Reverse Image Search

0 Results

Searched over **5.158 billion** images.

for file: H:\Clients\ACCOV Vase.jpg

- These results expire in **72 hours**. [View?](#)
- TinEye is [free](#) to use for non-commercial purposes.

**Wondering why TinEye couldn't find your image?**

- TinEye is constantly crawling the web and updating our image database [regularly](#). If we missed your image, it is simply because we have not yet crawled the website or page where it appears. But be sure to keep checking back! We add tens of millions of new images to TinEye every month, and our index is on the [go](#).
- TinEye looks for the specific image you uploaded, not the content of the image. TinEye does not identify [people](#) or [objects](#) in an image.
- To receive notification when we update our index, please subscribe to our [Updates RSS feed](#). Alternatively you can follow us on [Twitter](#) or become a fan on [Facebook](#).

**Yard Sign**  
Yard Sign Manufacture Order online daily!

Search



Counterfeit



Original

The screenshot shows the TinEye website interface. At the top, there is a navigation menu with 'TinEye', 'About', 'Products', 'Solutions', and 'Labs'. Below the menu is a search bar with the text 'Upload a new image' and 'or enter new image address'. The main content area features the TinEye logo and a blue robot character. A search result is displayed for the file 'Clients\ACCORD Lions.jpg', showing a small thumbnail of the tiger image. Below the thumbnail, it says '0 Results' and 'Searched over 5.58 billion images.' There are two bullet points: 'These results expire in 72 hours' and 'TinEye is legal to use for non-commercial purposes.' A section titled 'Wondering why TinEye couldn't find your image?' contains several bullet points explaining reasons like database updates, image location, and content detection. On the right side, there are social media icons for Twitter, Facebook, and LinkedIn.

No Results



Counterfeit





Original



No results



Counterfeit

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