

ILLUSTRATORS' PARTNERSHIP

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RE: Notice of Inquiry, Copyright Office, Library of Congress
Orphan Works and Mass Digitization (77 FR 64555)

Comments of the Illustrators' Partnership of America

In its October 22, 2012 Notice of Inquiry, the Copyright Office has asked for comments from interested parties regarding "what has changed in the legal and business environments during the past four years that might be relevant to a resolution of the [orphan works] problem and what additional legislative, regulatory, or voluntary solutions deserve deliberation at this time."

As rightsholders, we welcome and appreciate the opportunity to comment. In the past, we have not opposed orphan works legislation in principle; but we have opposed legislation drafted so broadly that it would have permitted the widespread orphaning and infringement of copyright-protected art. In 2008, the Illustrators' Partnership was joined by 84 other creators' organizations in opposing that legislation; 167,000 letters were sent to members of Congress from our website. The artists behind those letters earn their living by licensing the work they create. That fact has not changed in the last four years. Therefore before addressing some of the factors that *have* changed, we think it's important to examine some that have *not*. In Part I we'll summarize several key factors that have remained constant:

1. The High Cost of Compliance The great expense (in both time and money) of digitizing and cataloging tens of thousands of copyrighted works in order to register them with commercial registries would make compliance impossible for all but the richest artists and would therefore make their ability to protect their rights a function of their ability to pay.

2. No Credible Evidence of "Market Failure" There has still been no credible evidence of a "market failure" in commercial markets to justify the expansive scope of legislation recommended by the 2006 *Report on Orphan Works* and drafted by the 109th and 110th Congresses.

3. Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works imposes specific constraints on the possible limitations and exceptions a Member Country may make to an author's exclusive right of copyright; and we submit that the orphan works bills previously drafted by Congress would violate all three steps of its "three-step test."

4. Artists' Negative Experience with existing Commercial Databases The reluctance of artists to submit their work to unnamed for-profit databases "to be created in the private sector" is not grounded in abstract fears or reservations, but is based on actual business practices and negative experience with existing commercial databases.

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In Part II we'll comment briefly on how the following developments will affect visual artists:

1. The US Small Business Administration Roundtable: "How Will the Orphan Works Bill Economically Impact Small Entities?" Although conducted in August 2008, this panel was the first, and to our knowledge, only forum ever conducted by a US government agency to assess the impact of previous orphan works legislation on creators and other small businesses. The papers submitted to that forum, which have never been previously considered, will be attached as Appendix A.

2. Orphan Works Developments in the European Union On October 25, 2012 the European Parliament and the Council of the European Union passed Directive 2012/28/EU on certain permitted uses of orphan works. This legislation is laudable and notable in many respects, one feature of which is its recognition that visual art presents unique problems for any orphan works regime, and has therefore exempted stand-alone visual art until such time as a just long-term solution can be formulated. The full text of the Directive will be attached as Appendix B.

3. Suggested Amendments In an effort to amend previous legislation, the Illustrators' Partnership, Artists Rights Society and Advertising Photographers of America proposed amendments drafted by attorney Bruce Lehman, former Commissioner of the US Office of Patents and Trademarks, that would have granted libraries and museums the latitude they need to digitize and preserve their archives in the digital age, but would do so without opening the doors to the unjust commercial infringement of art by working artists, as the legislation drafted by the 109th and 110th Congresses would have done. We offer these amendments and Mr. Lehman's commentary on them as a guide to any future legislation.

4. Copyright Small Claims Court In theory, the concept of a short order court of law to settle copyright disputes would no doubt appeal to many artists. But creating a new form of legalized infringements, as past orphan works bills would have done, and offering a small claims court as a solution to the wave of infringements that will result is not a workable approach.

5. Court Rejects Google Book Search Settlement Like the Orphan Works Acts of 2008, the failure of the 2008 Google Book Rights Settlement has highlighted the age-old problem of separating individual rights from the collective.

I. What Things Have Not Changed

1. The High Cost of Compliance

The high cost of digitizing and registering works of art is a matter of fact. The costs (in both time and money) necessary to prepare work for archiving have not changed in the last four years and will not change for the better in the foreseeable future. We think it is impossible to overstate the importance of this factor. Indeed, we think the practical inability of artists to comply with the kind of orphan works legislation previously drafted by Congress outweighs decisively any possible arguments for its passage.

Yet because the previous legislation was drafted behind closed doors without any responsible input from the working artists it would affect, this fundamental matter of expense appears never to have been taken into account. To understand why it is – or should be – the decisive factor in any orphan works legislation affecting visual artists, we need to break it down to its component parts.

The High Cost of Registration The high cost of registering works of visual art was the most important theme to emerge from the 2008 Roundtable on Orphan Works conducted by the US Small Business Administration (SBA). While nearly all artists and photographers stressed it – and while the exact figures vary according to an artist's age, productivity and the genre in which he or she works – the precise figures supplied by White House photographer John Harrington should suffice to make the point:

"Consider that I have submitted several-hundred-thousand of my images to the Copyright office for my registrations that date back to 1989, and I did so and paid fees for each registration, exactly because I wanted to protect my images. For example, in 2006, I registered 58,731 images, and in 2007, 71,919 images. If a [for-profit] registry charged \$0.50 per image to submit and process, I would have to pay \$29,365.50 to protect my 2006 images, and \$35,959.50 to protect my 2007 images, *for just those years*. For the remaining 16 years of [past] registrations, those costs would increase at least ten-fold. Even if the cost were to drop to \$0.01, just those two years [2006/2007] would incur a cost of \$6,532.50." (Emphasis added)¹

And the proposed legislation would have required him to register his entire life's work – past, present and future – with at least two registries.

Most graphic artists would have fewer images than photographers, but still the cost of digitizing and registering any artist's body of images– particularly those of older artists with decades of past work – could easily run into the high tens of thousands of dollars.

The Time is Money Factor In order to prepare any work of art for registration, artists would first have to carve time out of our ordinary work schedules to locate, sort, photograph and/or scan, color correct, Photoshop, format, document, keyword and catalog thousands or tens of thousands of images. Based on experience, this function alone could consume as much as several hours per image, while the prospect of producing metadata for each picture would prove impossible for all but the most fastidious record-keepers among us. Moreover, most of us cannot afford to devote ordinary work time to such a massive volume of non-income producing work. The task of preparing every drawing, painting, photograph or sketch we've ever created would have to be done in our "spare time." This could take months; for many of us, years or even decades. The only alternative would be to hire and train staff exclusively for this non-income producing purpose; or to have it done at considerable expense by outside suppliers – and even that could take years.

A 2008 survey conducted by our colleagues at the Advertising Photographers of America produced varied responses but similar conclusions. Here are just some:

"It would cost about \$2 each to digitize the images (just for a rough, record image of each), about \$40,560. Furthermore, it would take an enormous amount of time to sort and prepare the images for digitizing, then to re-stock them would be even more time... Let's say that I could get someone competent for \$10 per hour-- that would be \$104,000, but lets not forget FICA, health insurance, etc-- make it about \$150,000...Total scanning, personnel, overhead= \$262,560" –MK (New York)

"I spend about an hour retouching artifacts [in digital scans] at 100% of 60Mb files, another half-hour adjusting contrast, color, gamut, other technical standards; then a half hour writing caption & search keywording. So call it 2 hours per image. Were I to pay a service provider for equivalent scans, it would probably be between \$25.00 & \$50.00 each image." –WJW (California)

"I've been with Corbis for many years and I believe they estimated years ago that the cost to properly digitize a single image would run around \$70. Scan, spot, optimize color, add metadata, etc. I do not have a full time person to do this and would not have time to do this myself. I'd have to shut down my business and do nothing else for years even if I just selected and worked on the best images." –RB (North Carolina)

The job of digitizing/preparing all of my images is simply not practical from a small business perspective. I would estimate that it would take approximately 2 years to digitize/prepare the

¹ John Harrington. "Testimony Concerning How the Proposed Orphan Works Bill Will Economically Impact Photographers," US Small Business Administration Roundtable, August 8, 2008. Appendix A, Part 3, Document 36.

entire collection. If I were to hire an entry level employee strictly dedicated to this project it would easily cost me \$40,000 a year of solid work...This totals, at minimum, \$80,000 for the two year period alone and does NOT include my time for the cost of hiring, training, overseeing, catalogue decisions, etc..." –GF (South Carolina)

"[T]o convert all valuable images to a digital form, and keyword them, I'd estimate at least 2 years of work, at a cost ranging from \$50K to almost \$750K (for an outside service)... The most significant cost would be the personal database and keywording, before the images can be released to the registries and the public - this could easily cost \$25K by itself! Uploading would also include registration and review of the accepted submissions, for accuracy - many, many hours - if done by an employee, it could cost up to \$5K." –GS (California)

"Just to bring myself current & register all my professional existing as of today, \$912,905.98- almost a million dollars, conservatively." – RR (New York)

"It took a year to organize a modest set of portfolios for Digital Railroad. My entire set of images would take years to scan, spot and organize at an astronomical, prohibitive cost." –JD (California) ²

This valuable survey contains many more examples than can be summarized here. Still, even these excerpts should demonstrate that artists have not opposed past orphan works bills for light or arbitrary reasons. Whether the expense of preparation and registration would cost each of us hundreds of thousands of dollars, or just tens of thousands, the expense would make compliance impossible for all but the richest among us. As our colleague Constance Evans, who as APA's Executive National Director, conducted the survey, has written: just trying to comply "would bankrupt most artists." And Creative Consultant Debra Weis concurred in her separate paper submitted to the SBA: "The high cost of complying with the proposed Orphan Works legislation is likely to put many artists and photographers out of business." ³

The Red Tape Factor Even if visual artists could bear the initial burden and expense of preparing images, collecting metadata for each image and filling out thousands or tens of thousands of registration forms, it would be only the beginning of a lifetime of time-consuming and never-ending record-keeping for each of us. The most insidious burden of all would be to track and renew these tens (or even hundreds) of thousands of staggered registrations over a period of decades for the rest of our lives. And since errors in paperwork and/or missed deadlines would inevitably occur and invalidate countless registrations, billions of copyrighted works created by hard-working artists would be destined to fall through the cracks and into the public domain. This would happen not because we had abandoned our copyrights (which would be the legal presumption), but merely because the law had swamped us with an impossible burden of paperwork.

Conclusion: If copyright legislation were to require graphic artists to register their life's work with commercial registries or see every unregistered work defined, for legal purposes, as an orphan, it would be virtually impossible for all but the richest or least prolific among us to comply. And to make compliance dependent on personal wealth would, by creating *de facto* orphans *arbitrarily*, seem to violate the Takings Clause of the Fifth Amendment to the US Constitution. That amendment states that no person shall be "deprived of life, liberty, or property, without due process of law; *nor shall private property be taken for public use, without just compensation.*" ⁴ (Italics added) Under copyright law, no author can be

² Statement of Constance Evans, National Executive Director, Advertising Photographers of America. SBA Roundtable, August 8, 2008. An addendum includes responses from working photographers: "ECONOMIC IMPACT OF THE ORPHAN WORKS BILL ON PHOTOGRAPHERS: THE COST OF COMPLIANCE" Appendix A, Part 3, Document 34.

³ Debra Weiss. "Orphan Works: The High Cost of Compliance," Statement to the SBA Roundtable, August 8, 2008. Appendix A, Part 3, Document 37a.

⁴ Fifth Amendment – US Constitution: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." <http://constitution.findlaw.com/amendment5/amendment.html>

compelled to publish his or her work. So by what right of eminent domain can Congress give members of the public the blanket right to take our unregistered work and publish it without our knowledge, consent or payment?

2. No Credible Evidence of “Market Failure”

The demand that rightsholders assume an impossible burden of compliance with orphaned work legislation is derived from recommendations made by the US Copyright Office in its 2006 *Report on Orphan Works*. That report concluded that there was a “market failure” in *commercial markets* so serious that custody of the nation’s copyright wealth should be transferred from the control of individual authors to giant commercial databases to be created in the private sector. Officially, this was expressed benignly on page 106 of the Copyright Office Report:

“[W]e believe that registries are critically important, *if not indispensable*, to addressing the orphan works problem, as we explain above. It is our view that such registries are better developed *in the private sector*...” (Italics added.)⁵

But subsequently, in defending their proposal from unexpected opposition, the Report’s principal author began stating the case for registration in more coercive terms. Speaking at “Orphan Works: A Search for Solutions,” hosted by the Progress and Freedom Foundation, March 31, 2006, Jule Sigall, the Copyright Office’s Associate Register for Policy & International Affairs, explained why they had proposed stripping artists of the automatic protection afforded under current copyright law. He said it was necessary to “push” us into handing our work over to the private registries the bill would create. Artists, he said, are like cats who can’t be herded, and:

“*You can’t herd cats, but you can move their food*...It’s really what kind of incentives, what kind of pressure and how you put on the right pressure.” (Italics added.)⁶

He justified such coercive measures by blaming visual artists for having failed to create such registries themselves:

“I use this line a lot, photographers and illustrators like to say, ‘We haven’t collectivized.’ This is a problem, generally, for their marketplace. *It’s hard to have a marketplace where buyers can’t find sellers*.” (Italics added.)⁷

Yet the *Orphan Works Study* on which these recommendations were allegedly based inquired into the specific subject of orphaned work, that is, work whose authors have died or abandoned their copyrights. The study did not inquire into the workings of commercial markets and there is no evidence in the report that clients working in the commercial sector are unable to find the living authors they wish to work with: no evidence whatsoever. The Illustrators’ Partnership has stressed this fact from the beginning, but we have not been alone. As the Association of Independent Music Publishers and the California Copyright Conference noted in a joint paper published July 15, 2008.

“The Copyright Office requested orphan works legislation without having conducted a needs assessment study, an independent audit of its registration and copyright history records, an economic impact analysis, or an evaluation of how the public, society and authors would be

⁵ *Report on Orphan Works*, A Report of the Register of Copyrights, January 2006 United States Copyright Office, Page 106 <http://www.copyright.gov/orphan/orphan-report.pdf>

⁶ Jule L. Sigall, “*Orphan Works: A Search for Solutions*,” hosted by the Progress and Freedom Foundation, March 31, 2006. <http://www.archive.org/details/PffSeminar-OrphanWorksASearchForSolutions>

⁷ *ibid.*

affected by reduced quantity and quality of art, film, television, music, video games and other copyrighted works in the future.”⁸

A “Paucity of Data” In testimony before Congress regarding the Orphan Works Act of 2008, the Copyright Office reported “an overwhelming response” to its “year-long [Orphan Works] study,” stating that it “documents the nature of the orphan works problem, as synthesized from the more than 850 written comments we received.”⁹ In a nation of more than 300 million people, 850 comments might not seem like an “overwhelming response.” Yet on pages 17-21 of the *Report on Orphan Works*, we learn that the relevant number is actually even far less: more than 600 of those “written comments” had to be disregarded because they failed to reflect “an orphan works situation.”¹⁰

To be precise, the Copyright Office reported only 721 initial comments and 146 reply comments, for a total of 867. Of those, the authors of the Report acknowledged that only “24% of all comments provided enough information about a specific situation for us to conclude that it presented an orphan works situation.”¹¹ Twenty four percent of 867 letters equals 215. This means that even by counting “reply comments,” there were no more than 215 letters to the Orphan Works Study that could even “be construed” by the Copyright Office as relevant to the subject.

As David Rhodes, President of New York’s School of Visual Arts, has written:

“The Copyright Office’s own study indicated that the majority of comments it received were not about ‘Orphan Works’, but about works whose owner could be identified but who either did not answer requests for permission or whose license requirements were too expensive.”¹²

This means that the entire case for a massive forced transfer of intellectual property from individuals to corporate databases has been predicated on no more than 215 anecdotal letters. To put this number into perspective, Rhodes compares it to the number of letters received by the government in other studies:

“When the Federal Communications Commission tried to change ownership rules to allow further media conglomeration, a serious problem, it received millions of negative comments. More recently when the Federal Reserve asked for comments on abusive credit card practices they received 56,000 comments. Obviously, people believe that these are serious issues.”¹³

Therefore, based on the Copyright Office’s own data, Rhodes concludes: “Most people simply do not believe that ‘Orphan Works’ are a serious issue.”¹⁴

In a written statement submitted to the US Small Business Administration August 8, 2008, Rhodes concurred with the Illustrators’ Partnership, the Association of Independent Music Publishers and the California Copyright Conference that the Copyright Office’s Orphan Works Report” provides little or no evidence that there is in fact a problem”:

“There is no systematic review of the various markets to see if they are in fact dysfunctional. All of the supposed examples of the harm caused by orphan works are clearly anecdotal and in a country

⁸ Association of Independent Music Publishers (AIMP) and California Copyright Conference (CCC) *Joint Position Paper on Orphan Works Legislation*, July 15, 2008, Page 2. [http://www.aimp.org/UserFiles/File/AIMP-CCC_Orphan_Works_Position_Paper\(1\).pdf](http://www.aimp.org/UserFiles/File/AIMP-CCC_Orphan_Works_Position_Paper(1).pdf)

⁹ Register’s testimony on the “Orphan Works Problem and Proposed Legislation” before the Subcommittee on Courts, the Internet, and Intellectual Property; Committee on the Judiciary; United States House of Representatives, March 13, 2008. <http://www.copyright.gov/video/testimony-3-13-08.html>

¹⁰ *Report on Orphan Works, A Report of the Register of Copyrights*, January 2006 United States Copyright Office <http://www.copyright.gov/orphan/orphan-report.pdf> (Note: download is 133 pages.)

¹¹ *ibid.*

¹² David Rhodes, President, School of Visual Arts. “Orphan Works Statement,” SBA Roundtable. Appendix A, Part 1, Document 12.

¹³ *Ibid.*

¹⁴ *ibid.*

of 300,000,000 fall far short of the threshold for serious consideration. The Copyright Office's own paucity of data should lead one to conclude that 'Orphan Works' are not a problem at all." ¹⁵

Nothing in the last four years has happened to justify changing that conclusion.

"The Legislative Blueprint" The essential language of the Orphan Works legislation was written at least a year *before* the release of the 2006 Copyright Office Report. It was drafted, allegedly by law students, as a classroom project at the Glushko-Samuelson Intellectual Property Law Clinic under the guidance of its Director, Peter Jaszi and was submitted to the Copyright Office March 24, 2005. In a few simple words, the Glushko-Samuelson *Copyright Clearance Initiative* (CCI) spelled out the "limitation on remedies" for infringement that was to become the operative feature of the Copyright Office recommendations released nearly one year later.

But if eight law students conceived the "legislative blueprint" *before* the Copyright Office commenced its study, what kind of research did they or the Law Clinic undertake to inform its proposals? Here, in their own words, is how the authors of the plan described it:

"On April 11, 2003, the Clinic held a symposium with scholars, academics and other interested parties to discuss this [orphan works] issue. Since then, the work of CCI has focused its efforts on devising the blueprint for a legislative solution to the 'orphan works' problem (hereafter the CCI proposal) and has been in close contact with various non-profit organizations, intellectual practitioners and academics..." ¹⁶

A footnote on page 2 identifies the eight "clinic students" who allegedly conceived the plan. Yet there's nothing that explains how eight law students had gained any knowledge of the dynamic \$187 billion¹⁷ dollar commercial licensing markets their recommendations would affect. Nor does it explain how a "one day symposium" attended by "non-profit organizations, intellectual practitioners and academics" could shed any serious light on the matter. In spite of that, the Glushko-Samuelson proposal was adopted by the Copyright Office and passed on to Congress with only slight modifications: where the law students had proposed capping orphan works infringement fees at \$100, the Copyright Office report changed that to the ambiguous and undefined "reasonable fee," suggesting that this could be decided by lawsuits after infringements had occurred.

Conclusion: Because a.) the "legislative blueprint" for orphan works legislation was drafted before and not as a result of the Copyright Office's Orphan Works Study; and because b.) that study provided no data whatsoever to justify the claim of a market failure in commercial markets, we must conclude in the strongest terms that there are no grounds whatsoever for imposing the kind of sweeping proposals for "copyright reform" as drafted by Congress in its 2006 and 2008 Orphan Works Acts.

Instead we wish to stand by our testimony as presented to the Senate Subcommittee on Intellectual Property, April 6, 2006:

"We believe the orphan works problem can be and should be solved with carefully crafted, specific limited exemptions. An exemption could be tailored to solve family photo restoration and reproduction issues without otherwise gutting artists' and photographers' copyrights. Usage for genealogy research is probably already covered by fair use, but could rate an exemption if necessary. Limited exemptions could be designed for documentary filmmakers. Libraries and

¹⁵ *ibid.*

¹⁶ Glushko-Samuelson Intellectual Property Law Clinic. Response to Notice of Inquiry on the Issue of "Orphan Works," submitted to the United States Copyright Office, Library of Congress, March 24, 2005, Page 2. <http://www.copyright.gov/orphan/comments/OW0595-Glushko-Samuelson.pdf>

¹⁷ Cheryl Phelps "Orphan Works Statement," SBA Roundtable. Appendix A, Part 1, Document 20.

archives already have generous exemptions for their missions. And if their missions are changing, they should abide by commercial usage of copyrights, instead of forcing authors to subsidize their for-profit ventures.”¹⁸

3. Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works

“Certain Special Cases” The assertion of market failure, though entirely unsupported by evidence, took on the authority of fact, however, when presented to Congress with the imprimatur of the *Report on Orphan Works*. By the time Howard Berman, Chairman of the House Judiciary Subcommittee on Courts, the Internet and Intellectual Property, opened the single hearing on the Orphan Works Act of 2008, he simply cited the Report’s premise to acknowledge that the proposed legislation was not really what it purported to be:

“[W]e should correct a misnomer” [he began]. “The works we’re talking about are not orphans...The more accurate description... is probably an unlocatable copyright owner...this situation better describes the orphan works construct, which is to correct the *market failure* when a potential user can’t find the copyright owner. But for the sake of ease we’ll keep talking about them as if they’re orphans.” (Italics added.)¹⁹

Yet Article 9.2 of the Berne International Copyright Convention clearly poses a “three-step test” to define the possible limitations and exceptions a member country may impose on an author’s exclusive rights: “Member [countries] shall confine limitations and exceptions to exclusive rights to:

- a.) certain special cases;
- b.) provided that such reproduction does not conflict with a normal exploitation of the work; and
- c.) does not unreasonably prejudice the legitimate interests of the author.”²⁰

Clearly, by redefining an orphaned work as *any* work by *any* author that *anybody* finds sufficiently hard to find, the orphan works bills drafted by Congress in 2006 and 2008 would *not* have limited exceptions to “certain special cases.” Since *everybody* can be hard for *somebody* to find, this new definition alone would potentially void every rightsholder’s exclusive right to his or her intellectual property. It would create the public’s right to use an individual’s private property as a new default premise in US copyright law and that would explicitly violate Step 1 of the international copyright agreements to which the United States is a signatory.

A Prohibition on Prejudicial Exceptions to an Author’s Exclusive Right Step 1 of the Berne three-step test would not have been the only casualty of previous orphan works legislation. Steps 2 and 3 would also have fallen prey to its broad provisions. Rightsholders have not been alone in making that point. On August 30, 2008, just days before the 110th Congress reconvened for its final legislative drive to pass the

¹⁸ Statement of Brad Holland, Founding Board Member, Illustrators’ Partnership of America. Subcommittee on Intellectual Property. Committee on the Judiciary; U.S. Senate Hearing on “Orphan Works: Proposals for a Legislative Solution,” April 6, 2006. http://www.judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da1127a4b&wit_id=e655f9e2809e5476862f735da1127a4b-1-4

¹⁹ Rep. Howard Berman (D-CA), Chairman, Subcommittee on Courts, the Internet, and Intellectual Property; Committee on the Judiciary; United States House of Representatives, Opening Statement: “Orphan Works Problem and Proposed Legislation,” March 13, 2008 <http://www.copyright.gov/docs/regstat031308.html> Video Testimony of Chairman Berman’s opening comments (requires RealAudio plug-in): <http://www.copyright.gov/video/testimony-3-13-08.html>

²⁰ Berne Convention for the Protection of Literary and Artistic Works. Article 9 (2) “It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.” http://www.wipo.int/treaties/en/ip/berne/tridocs_wo001.html#P140_25350

Orphan Works Act, prominent legal scholar Jane Ginsburg of the Columbia Law School published *Recent Developments in US Copyright Law: Part I – “Orphan” Works*.

In her paper, Professor Ginsburg raised many critical questions about the merits of the legislation. Among these, she specifically noted that certain provisions of the proposed bill might violate Article 9.2, adding that the preclusion of injunctive relief with respect to derivative works would appear to force authors to tolerate “even derivative uses they find offensive or that distort their works.” She added that this “has economic consequences as well,” depriving the author of the right “to grant exclusive derivative work rights to a third party. The bill thus potentially devalues the derivative work right.”²¹

A law that “devalues” an author’s work or “distorts” an author’s intent would necessarily “conflict with a normal exploitation” of that work (step 2) and would “unreasonably prejudice the legitimate interests of the rightsholder” (step 3). This means that taken together with a failure to limit orphan works infringements “to certain special cases,” we must conclude that the legislation previously drafted by Congress would explicitly violate all three steps of the Berne three-step test.

Conclusion The three-step test was formulated as far back as 1886 to guide individuals in striking a delicate balance between the private and public interest uses of copyrighted material. While its wording is subject to legal analysis and debate, its use as a tool acquires precise meaning only in the marketplace. As Professors Ginsburg and Paul Goldstein wrote in their reply comments to the Orphan Works study in 2005, compliance with international copyright agreements “is required by more than punctilio.”

“[T]hese rules embody an international consensus of national norms that in turn rest on long experience with balancing the rights of authors and their various beneficiaries, and the public. Thus, in urging compliance with these technical-appearing rules, we are also urging compliance with longstanding practices that have passed the test of time.” (Emphasis added)²²

It is only because of our experience with these longstanding practices that we have opposed legislation crafted by law students and attorneys with no background in the marketplace we serve.

4. Artists’ Negative Experience with Existing Commercial Databases

For legal practitioners, the issue of copyright may be a matter of abstract law. But for working artists, it’s our livelihood. Therefore it’s striking that the case for previous orphan works legislation has been made by legal scholars and that the “legislative blueprint” was drafted allegedly by law students with no input from those of us who have had direct experience with the kind of commercial databases their legislation would have “pressured” us to subsidize.

For working artists, the prospect of copyright registries run in the private sector is no abstraction. The question of how these giant image banks would make money leads to the conclusion that they would do business the way existing image banks do now: that is, they would charge fees to rightsholders for registering and maintaining work; and/or they would charge infringers fees for clearing rights to use that work. But in fact, it is the business practices of these *existing* image banks that has caused us such concern.

The Bait and Switch Factor Even if the orphan works databases proposed by the Copyright Office were to offer free registration to illustrators, there is no way to prevent them, once they’ve achieved a

²¹ Jane Ginsburg, “Recent Developments in US Copyright Law: Part I – ‘Orphan’ Works,” August 30, 2008, Page 10. http://lsr.nellco.org/cgi/viewcontent.cgi?article=1044&context=columbia_plli

²² Jane Ginsburg and Paul Goldstein, “Reply Comments on ‘Orphan Works’ Inquiry,” May 5, 2005, Page 1. <http://www.copyright.gov/orphan/comments/reply/OWR0107-Ginsburg-Goldstein.pdf>

sufficient volume of images, to impose onerous fees on rightsholders for maintenance, handling, registration renewals, rights clearance or other unwanted “services.” Over time, they could also impose unwelcome new terms and conditions, either on their own initiative or as the result of mergers and acquisitions.

As ordinary citizens, we’ve all seen this strategy employed by banks, credit card companies and other institutions that initially offer inviting terms and free or cheap service to sign up; then later impose new conditions and fees. But as graphic artists, we’ve seen particular examples of this insidious strategy in the business practices of corporate image banks such as Getty and Corbis. These *stockhouses* initially represented themselves to artists and photographers as “agencies” through which visual artists could make their work available to *new* clients. Instead, once flush with images, they revealed themselves to be aggressive competitors, using the very work they had been entrusted with to compete with artists and photographers for their own clients.

In 1997, Henry Scanlon, one of the founders of the stock imagery business, gave an interview to *Photo District News* in which he acknowledged that image banks had already “decimated” the ranks of assignment photographers, and by adopting royalty-free strategies, would soon be putting even more of them out of business.”[T]hey should be going to night school,” he said, “to seek an alternative career... The party’s over – or soon to be.”²³

The Negative Business Practice Factor Although stockhouses deny engaging in business practices harmful to artists, many illustrators and photographers who entrusted them with work have testified to the contrary. We’ll note just two examples, both cited in the 2006 article “First Things About Secondary Rights,” published in the *Columbia Journal of Law & the Arts*.

The first is from a photographer whose prior contracts with two artist-friendly “agencies” had been purchased by the image bank Getty:

“I feel that Getty destroyed my two very good stock agencies: Tony Stone and FPG. They lowered the percentage on my Stone sales 20% and attempted to ramrod a very obtuse and bad contract down the throats of their current stock photographers. They are in the process of flooding their files with images where they get 90% commission from funded productions. In effect competing with their existing group of contributors that get a higher percentage. You are more and more likely to only see the credit of “Getty Images” [on images delivered to clients] rather than “The [name of the] photographer/Getty Images.” Their news and sports division are mostly work for hire, and the stock division is moving in that direction. I can’t recommend Getty to any photographer that cares about continuing to make a living as a photographer.”²⁴

In the illustration field, a similar opinion was expressed by an artist who had entrusted his copyrighted illustrations to the stockhouse Images.com, then found, like many others, that the company had entered into unspecified “distribution agreements” with Corbis. Later, they learned that the company had initiated “a new policy” of not supplying artists with the identity of the clients their work had been licensed to and had dumped copyrighted work from its “Spots on the Spot” collection into the royalty-free market:

“I would not have believed that the powers-that-be at Images.com would allow illustrations submitted to them . . . as ‘rights-protected’ stock illustrations to now become available as royalty-

²³ *Photo District News*, “Future Shock: Comstock goes clip Henry Scanlon explains why,” September, 1997. <http://connection.ebscohost.com/c/interviews/9712123082/future-shock-comstock-goes-clip-henry-scanlon-explains-why> The full copyrighted interview, conducted June 11, 1997, is available at Selling Stock: <http://www.selling-stock.com/Article/royalty-free-at-comstock>

²⁴ Posting of Mark Harmel to http://www.illustratorpartnership.org/04_forums/index.php (Aug. 6, 2003, 08:50 CST). Quoted in Brad Holland, “First Things About Secondary Rights,” the *Columbia Journal of Law and the Arts*, Columbia University School of Law, Page 301; Vol. 29, No 3. Spring 2006. Available as pdf at Social Science Research Network: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1909039

free clip art. Clip art that is controlled by unknown corporate employees who have no relationship with—or understanding of—the artists whose work they will now market and represent.

"I am also vehemently opposed to the fact that the copyright credit will list Corbis and Images.com and intentionally omit the artist's name. This is an incredible insight into the corporate mentality of these two companies, showing a deep lack of respect for the illustrator as creator and artist.

"I am deeply disappointed and embarrassed. I also feel betrayed, particularly because I was the founder of Spots on the Spot. Now that collection is virtually the opposite of what I envisioned it to be. In its new incarnation, I would never allow myself or any artist who contacted me for advice to be part of such a travesty to the rights of artists and creators." (Emphasis added) ²⁵

Selling Art as "a Disposable Commodity" The principals of Images.com did not deny the charge by artists that their new policies amounted to breach of contract and copyright infringement. In a public statement to their members, they merely acknowledged that "not all of you" will agree with these "new strategies," but wrote that the strategies were "necessary" because "the new generation of art buyers sees imagery as a disposable commodity." As the chief reason for this change, they blamed "a tendency for buyers to purchase particular *images* rather than to seek out the work of particular *artists*." ²⁶

Yet this unfortunate "tendency" occurred after, and in concert with, the business practices introduced to the illustration field by corporate image banks. It was arguably the *result* of those practices, not the cause. By dumping copyrighted work into the royalty-free market, these "agencies" intentionally created orphans out of work entrusted to them for rights protection. Moreover, by removing artists' names from other copyrighted works and crediting the art only to "images.com/Corbis," the stockhouse ensured that clients would become reliant on the stockhouse, not on artists, for future work: prospective buyers could hardly "seek out the work of particular artists" if they didn't know the names of the artists whose work they were licensing.

Conclusion In 1998, these and other practices by stockhouses, led nearly 350 top illustrators to publish a statement as a double page advertisement in that summer's *Communication Arts Illustration Annual*.²⁷ Drafted and paid for by the artists who would later form the Illustrators' Partnership, it said in part:

"Stockhouses are flooding art buyers with tens of thousands of pictures at discounted prices. We believe this erodes the quality of illustration and its value in the marketplace...We need to remember stock houses are our competitors. They are not our agents...they will keep selling illustrations cheap as long as [artists] keep giving them pictures free.

"Some of us deplore the discount illustration business in any form. Some of us have sold stock on our own for years. But we all agree that if we were to put work in stock, we would place it with an artist-controlled, direct stock service.

"These outlets allow artists to control their own rights, negotiate their own sales, and keep their own fees. Most importantly, they allow artists to keep their own clients." ²⁷

This statement of principle was the first step in an ongoing effort by artists to develop competitive strategies in the marketplace. As the British Association of Illustrators noted in a 2004 article, "What is Stock Illustration?":

²⁵ Dave Cutler, "How I Feel About the Images.com/Corbis Deal," http://www.illustratorpartnership.org/01_topics/article.php?searchterm=00117 (last visited Feb. 28, 2006) (on file with author). Quoted in Brad Holland, "First Things About Secondary Rights," the *Columbia Journal of Law and the Arts*, Page 303.

²⁶ Posting of Images.com "To Our Contributors," to http://www.illustratorpartnership.org/01_topics/article.php?searchterm=00209 (Mar. 7, 2003, 14:39 CST). Quoted in Brad Holland, "First Things About Secondary Rights," the *Columbia Journal of Law and the Arts*, Page 304.

²⁷ "Stock Maybe, Stockhouse No," Statement by 330+ visual artists, available at the Illustrators' Partnership of America: http://www.illustratorpartnership.org/01_topics/article.php?searchterm=00059

"The first warning call about the negative effects of stock companies was made by prominent U.S. illustrator Brad Holland in a piece called 'The Stockman Cometh' written for *Communication Arts Magazine* in 1998. Since that time the 'stock issue' has been extensively covered on both sides of the Atlantic in seminars, print, and web discourse. As a result more 'creator-friendly' alternatives [to stock companies] have emerged and illustrators generally are far more aware of the issue."²⁸

These developments, which occurred years before the introduction of orphan works legislation, document that many, if not most, in the illustration community had already made the rational business decision not to entrust their work to for-profit databases. This decision was not based on fear or uncertainty or disdain for the public uses of our work, but on the conclusion drawn from hard experience that to do so would be to supply ruthless corporate competitors with the commercial inventory they would use to undermine our own individual businesses.

Having made the decision not to entrust our work to these databases when it was a voluntary option, we cannot be expected to acquiesce in the passage of legislation that would penalize us for not doing so now. As David Rhodes of the School of Visual Arts stated to the US Small Business Administration, any law that requires small business owners to subsidize the business models of corporate competitors would amount to little more than a reverse distribution of wealth:

"[S]ince the expense of registering works will be borne by the creative community the expense of copyright protection will be socialized while the profit of creative endeavors will be privatized."²⁹

And he noted that passage of such legislation would reverse the intent of copyright law by acting as a disincentive to individual creators:

"Copyright protection may have impeded the creation of ever-larger image banks, but that is not a problem – that is the purpose of Copyright. In short there is no problem that this legislation will fix. Therefore, prudence dictates that nothing be done."³⁰

"The 'best practices' that are adopted for databases of works [should] be established by those who know those works the best," attorney Bruce Lehman wrote in 2008. That would be "the class of authors that has created them. Especially in the case of the visual arts, it is the artists themselves who best understand how to create a workable database. In any event infringers should not be in the position of creating the system that immunizes them from liability for their violation of the copyright law. To do otherwise would be putting the fox in charge of the chicken coop."³¹

"The steps taken by illustrators over the past few years to address similar changes in their marketplace demonstrate that the incentives of the marketplace should be allowed to work without government intervention such as the Orphan Works Act, a bill that will permanently weaken the rights to the work these stakeholders create." –Terrence Brown, Executive Director, American Society of Illustrators Partnership³²

In our opinion, nothing has happened in the last four years to change the wisdom of these assessments.

²⁸ Association Of Illustrators, "What is Stock Illustration?" September 7, 2004. <http://web.archive.org/web/20050224091926/http://www.theaoi.com/Mambo/index.php?option=content&task=view&id=314&Itemid=28>
"The Stockman Cometh," by Brad Holland, was published in *Communication Arts*, September 1998. It is available at The Illustrators' Partnership of America: http://illustratorspartnership.org/01_topics/article.php?searchterm=00205

²⁹ David Rhodes, SBA Roundtable. Appendix A, Part 1, Document 12.

³⁰ *ibid.*

³¹ Amendment 7: "Best Practices." Suggested Amendments to H.R.5889, The Orphan Works Act of 2008. Submitted June 20, 2008 on behalf of The Illustrators' Partnership of America, Artists Rights Society and Advertising Photographers of America to the Committee on the Judiciary, U.S. House of Representatives. SBA Roundtable. Appendix A, Part 5, Document 2a.

³² Terrence Brown, "Orphan Works," August 8, 2008, SBA Roundtable. Appendix A, Part 1, Document 7. Also quoted in "We Are Our Work," Illustrators' Partnership Orphan Works Blog. <http://ipaorphanworks.blogspot.com/2008/10/orphan-works-we-are-our-work.html>

II What Has Changed

1. The US Small Business Administration Roundtable

The first, indeed the only, effort by a government agency to assess the economic impact that previous Orphan Works bills would have on working artists and small businesses came August 8, 2008 when the Office of Advocacy of the US Small Business Administration (SBA) conducted an Orphan Works Roundtable at the Salmagundi Club in New York City. The participants included artists, writers, photographers, songwriters, musicians, performers, art licensors, art educators and collateral small business owners. All the participants stressed that the Orphan Works Act would harm small businesses in several major ways:

- By acting as a compulsory license on business transactions that properly should be conducted as voluntary agreements.
- By driving many of those unsanctioned transactions into overburdened courts.
- By acting as an unfunded mandate requiring small business owners to bear a cost in time and money that would make compliance virtually impossible.
- By forcing small business owners to subsidize the business models of potential corporate competitors.

Brenda Pinnick, Owner and President of Brenda Pinnick Designs, Inc. summed up the injustice of any legislation that would “pressure” small business owners to “share” their privileged business information with potential corporate rivals:

“If our government approached any other type of business and told them they could no longer own what makes their business valuable, that their intellectual property including sourcing information, trade secrets, collected knowledge of their industry and so on was now no longer theirs to own and use to prosper . . . imagine the outrage.”³³

The individuals who participated in this roundtable represented hundreds of years of professional experience in all aspects of the creative arts. Those attending submitted written statements, as did others who could not attend. Although these statements were collected by the Illustrators' Partnership and submitted to the SBA that September, they have never been considered by the Copyright Office nor by Congress in drafting legislation. Therefore we think it is imperative to place these comments – and the perspective they offer – on the record.

A selection of excerpts from the comments can be found at the Illustrators' Partnership Orphan Works Blog <http://ipaorphanworks.blogspot.com/2008/10/orphan-works-we-are-our-work.html> The full comments are attached as Appendix A.

2. Recent Orphan Works Developments in the European Union

On October 25, 2012 the European Parliament and the Council of the European Union passed **Directive 2012/28/EU** on certain permitted uses of orphan works. It is due to be implemented into the national law of member states by October 2014.

This legislation is laudable and notable in many respects. Of particular interest to us is its recognition that visual art presents unique problems for any orphan works regime, and as a consequence, stand-alone visual art has been exempted from the present law.

³³ Brenda Pinnick, Letter to Tom Sullivan, Director of the Office of Advocacy, Office of Advocacy, US Small Business Administration, August 6, 2008, SBA Roundtable. Appendix A, Part 1, Document 22b. Also quoted in “We Are Our Work,” Illustrators' Partnership Orphan Works Blog. <http://ipaorphanworks.blogspot.com/2008/10/orphan-works-we-are-our-work.html>

- The EU legislation is limited to orphan works use by public cultural institutions alone,
- specifically for the purpose of the digitization, indexation, restoration, and preservation to fulfill their public interest missions to make their collections available to the public in online libraries.
- It applies to books, journals, newspapers, magazines or other writings, cinematographic or audiovisual works and phonograms.
- Stand-alone visual works such as illustrations and photographs are exempted. However, the Directive contains a "review clause" to consider including these within the scope of the Directive in the future.
- When there are several rightholders in a given work, and at least one has been identified and located, the work will not be considered an orphan work.
- Rightholders are entitled to stop the use of their work.
- Rightholders are entitled to receive fair compensation.
- Remedies for copyright infringement remain available if a work has wrongly been relegated to orphan status by a non-diligent search.
- Public cultural institutions can enter into contracts with private commercial partners for digitization, but cannot grant the commercial partner any rights to use or control the use of the orphan works.
- Public cultural institutions are permitted to generate revenue by using orphan works, provided that it is for the exclusive purpose of covering their costs of digitizing content.
- Records of diligent searches must be maintained and provided to national copyright authorities [Article 3(5)] and also recorded in a single publicly accessible EU online database. [Article 3(6)]
- In no way can the orphan works exception supersede or obviate other existing legal provisions including licensing contracts, privacy rights, trade secrets, confidentiality, etc. [Article 7]

The Directive targets the specific problem of the legal determination of orphan work status, to create a legal framework for the digitization and dissemination by cultural institutions of works in their collections that are under copyright without identifiable or locatable rightholders. It is without prejudice to specific solutions being developed in Member States to address larger mass digitization issues of "out-of-commerce" works.

The Directive is attached in its entirety here, as Appendix B.

3. Proposed Amendments to Create a True Orphan Works Act

On June 20, 2008, the Illustrators' Partnership, Artists Rights Society and Advertising Photographers of America proposed amendments to the proposed orphan works legislation then being considered in both houses of Congress. The amendments were drafted by attorney Bruce Lehman, former Commissioner of the US Office of Patents and Trademarks, a specialist in intellectual property law for over 40 years, whose

background has included acting as congressional committee counsel in the enactment of the 1976 Copyright Act and later as the Executive Branch officer with responsibility for Administration policy leading to the 1996 WIPO Copyright and Phonograms Treaties and the 1998 Digital Millennium Copyright Act.

The amendments would have granted libraries and museums the latitude they need to digitize and preserve their archives in the digital age. But they would have done so without violating artists' rights, without creating uncertainty in commercial markets and without opening the doors to the unjust commercial infringement of art by working artists. Although differing in particulars for both the House and Senate bills, these amendments would:

- Limit the scope of use of Orphan Works and the qualifying users of orphan works to “certain special cases, which do not conflict with a normal exploitation of the work, and do not unreasonably prejudice the legitimate interests of the rights holder;” thereby preserving contemporary commercial markets and the exclusive rights of contemporary creators who are alive, in business, and managing their copyrights.
- Extend to illustrators and other visual artists the same protection afforded to textile designers, including works of art that are included in another, larger work – and free standing works, such as works of fine art that often are included in collective works following their creation.
- Require the Copyright Office to create a publicly searchable electronic database of works of visual art that can serve as a basis for conducting searches involving such works.
- Exempt works by foreign authors.
- Guarantee that the law does not violate US Treaty obligations with respect to Article 5 (2) of the Berne Convention on Literary and Artistic Works, which provides that “the exercise of their (authors’) rights shall not be subject to any formality.”
- Guarantee that the law should not violate US treaty obligations under Article 13 of the TRIPS Agreement relating to Limitations and Exceptions.
- Should not take effect until the Small Business Administration has certified in a joint communication to the President of the Senate and Speaker of the House of Representatives that individuals and small businesses will effectively be able to prevent, through their own due diligence and at reasonable cost, their works from becoming orphaned by complying with the provisions of the legislation.
- Provide that the “best practices” adopted for databases of works be established by those who know those works the best: the class of authors that has created them.
- Remove nonprofit educational institutions from safe harbor infringement protection in order to prevent the special harm that will be exerted by infringement on medical education and the advancement of science.
- Expand the scope of the useful objects exclusion and prohibit the aggregation of orphan works for purposes of sale or distribution. The real need for use of orphan works for cultural heritage and preservation purposes does not in any way justify the commercial exploitation of orphan works.
- Guarantee that the infringer’s copyright protection in a derivative work based in whole or in part on an infringed work shall not entitle the infringer to remedies in the event that the owner of the copyright in the infringed work infringes on such derivative work in the normal course of exploiting the owner’s own copyright.

We offer these amendments and Mr. Lehman's accompanying commentary as a guide to any future legislation. They are available here in Appendix A, Part 5, Documents 2a and 2b.

4. A Copyright Small Claims Court

On March 29, 2006, the Subcommittee on Courts, the Internet, and Intellectual Property, Committee on the Judiciary, US House of Representatives, conducted "Oversight Hearings on Remedies for Small Copyright Claims." The hearing followed suggestions by the Copyright Office that a copyright small claims court would address the "concerns of individual authors" regarding the wave of infringements that were expected to follow passage of orphan works legislation:

"We believe that consideration of new procedures to address this situation [orphan works lawsuits] such as establishment of a 'small claims' or other inexpensive dispute resolution procedure, would be an important issue for further study by Congress."³⁴

The Illustrators' Partnership testified before the 2006 hearing and took the position that we are business people; therefore:

- a. we make our livings through voluntary business transactions, not lawsuits;
- b. any legislation that drives business decisions into the courts is bad for business and bad for the courts.

Last year the Copyright Office again raised the issue of a small claims court and again asked for comments by interested parties. On January 17, 2012 we responded. Those comments, which include our 2006 testimony to the House subcommittee, are attached here as Appendix C.

There are many objections we could raise to the reliance on a copyright small claims court to litigate orphan works infringements of our work. But for purposes of summarizing them here, we'll take just two of the most decisive:

Jurisdiction: Copyright law is a federal law; small claims courts would be administered on a local level. Local judges cannot be expected to be familiar with the complexities of international copyright law and copyright-related treaties. Therefore trying to administer federal law on a local level is bound to lead to inconsistent and unjust rulings from one jurisdiction to another. Hundreds of thousands of local rulings would inevitably create contradictory precedents, requiring constant and lengthy appellate litigation to prevent federal copyright law from becoming incoherent.

Discovery: Small claims litigation would deprive plaintiffs of discovery, expert witnesses and other tools necessary to discover hidden facts or test false claims and doctored evidence. The relevant facts of any infringement are rarely self-evident. So unless an infringer has a Perry Mason Moment and confesses his offense, a typical small claims lawsuit would probably resemble a few minutes in the court of Judge Judy.

Any efforts to work around these fundamental objections are likely to lead only to further complications. For example, limiting the scope of each small claim decision to that particular case would only deprive the victims of bad rulings of any further due process.

But the greater danger would come if orphan works legislation were to require all creators to register their life's work with commercial registries. In that case, the reliance on a copyright small claims regime would come with insidious risks:

In 2008, 85 creators organizations came together to oppose the proposed legislation. Only one graphic arts organization supported it. And we now know that that group lobbied the House subcommittee for the creation of a registry where infringers could register their right to infringe artists' work.

³⁴ *Report on Orphan Works*, Page 11.

We fear that if such legislation is adopted, a small claims court would ultimately choose to resolve lawsuits not on the basis of authorship, but on the red tape of registration. This, of course, is exactly what Congress has already done with US patent law. The new America Invents Act would determine patent ownership based not on who invented something, but on who was "first-to-file."³⁵

Our concern is that under an Orphan Works regime, a similar standard would inevitably be adopted as the only workable default basis for settling copyright disputes in a small claims court.

Basing the ownership of intellectual property on the evidence of registration would eliminate the problem of inconsistent rulings: because local judges could simply decide all cases based on the priority of filing. And it would make the discovery of facts irrelevant since, for court purposes, ownership of the intellectual property at issue would be decided by registration, not authorship.

This kind of default resolution would, of course, streamline litigation. But it would place a heavy thumb on the infringers' side of the scales: because *artists would have to register everything they've ever done; infringers would have to register only the works they want to infringe.*

Finally – at a time when our country is facing an ever-growing debt crisis – there's the issue of cost. As we testified to Congress in 2006:

"Creating a new form of legalized infringement without statutory remedies - even for registered copyrights – and offering a small claims court as a solution to the wave of infringements that will result – is not a workable approach. It will only serve to legitimize the taking of our copyrights. For these and other reasons, we would respectfully ask this committee to consider the negative effects that Orphan Works legislation will have on free market transactions. The attempt to lessen the damage by adding the burden of a small claims court to our overloaded federal judiciary is simply not a viable approach."

Nor would it be an economic one.

5. Court Rejects Google Book Settlement

On March 23, 2011, U.S. Circuit Judge Denny Chin rejected the Book Rights Registry settlement between Google and the US Authors Guild. The multimillion commercial agreement would have rewarded both parties for the largest mass infringement of authors' copyrights in history. Instead, the judge ruled it a business deal "too far."

"**A Reversal of Copyright Law**" is what we called this agreement in our warning to illustrators September 29, 2009. Like the visual arts "databases" we opposed during the Orphan Works debate, we wrote:

"[T]his agreement would allow both Google and a yet-to-be-created Book Rights Registry to commercially profit from an author's work whenever they say they can't locate the author.

"Both schemes would force authors to opt out of commercial operations that infringe their work or to 'protect' their work by opting-in to privately owned databases run by infringers. This Hobson's Choice for authors reverses the principle of copyright law."

Judge Chin held this to be the case. "A copyright owner's right to exclude others from using his property is fundamental and beyond dispute," he ruled. "[I]t is incongruous with the purpose of the copyright laws to place the onus on copyright owners to come forward to protect their rights when Google copied their works without first seeking their permission."

³⁵ For one Congressman's take on the America Invents Act, see "H.R.1249 American [sic] Invents Act Hurts American Innovators," by Representative Dana Rohrabacher (R-CA) <http://rohrabacher.house.gov/hr-1249-american-invents-act-hurts-american-innovators>

The judge also noted objections to the “Adequacy of Class Representation.” In short, this holds that neither Google, nor any organizations claiming to represent authors, nor the university libraries that gave Google “permission” to digitize their holdings, own the copyrights to the works this agreement would have allowed them to exploit.

Therefore, they have no standing to broker deals based on claims that they represent the “class” of authors. The judge held this to be the case even where organizations asserted the right to “expropriate” “orphaned” royalties belonging to rightsholders. Noting: “After ten years, unclaimed funds may be distributed to literary-based charities,” the judge concluded:

“[A]t a minimum a fair question exists as to whether this Court or the Registry or the Fiduciary would be expropriating copyright interests belonging to authors who have not voluntarily transferred them. As Professor Nimmer has written: ‘By its terms Section 201(e) is not limited to acts by governmental bodies and officials. It includes acts of seizure, etc., by any ‘organization’ as well.’ 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* §10.04 (Rev. Ed. 2010) (footnote omitted).” [Page 31 of the judge’s ruling, emphasis added.]

In rejecting the settlement, Judge Chin also echoed the US Justice Department’s antitrust objections: The deal, he wrote, “would give Google a significant advantage over competitors, rewarding it for engaging in wholesale copying of copyrighted works without permission...” He suggested the settlement might win approval if it were revised to cover only those who opt into the agreement.

Copyright is an Individual, not a Collective Right The Google Book Rights Settlement and the previous Orphan Works Acts have highlighted the age-old problem of separating individual rights from the collective. The ability of large Internet interests to build empires by aggregating the work of individuals and licensing that work as a “service” to the public has created a tempting business model for opportunists eager to cash in and clothe their self-interest in the language of public interest. The land rush for creators’ rights as a collective right is on.

Yet it is no more deserving of Congressional imprimatur than of judicial activism.

III Conclusion

We began this paper with a lengthy exposition of the defects we perceived in the orphan works bills previously considered by Congress. We hope that by doing so we’ve shed some light on our reasons for opposing that legislation, and we hope that future bills will not take such liberties with the fundamental premise of copyright law.

To enact copyright legislation that imposes an impossible burden of compliance on visual artists would inevitably and unjustly compromise the rights to art we ourselves have created. It would foster a business model run by middlemen whose precedents abound in examples of abuse and the unwarranted acquisition of rights by opportunists whose only contribution to the creative process was summed up by the owners of an image bank who said their clients now consider art to be a “disposable commodity.”

How can the public interest be served by a business model that leads to conclusions such as that?

With all due respect, we believe that the genesis of this legislative overreach lies in the Copyright Office’s own *Report on Orphan Works*. It can be summed up in the few words with which the authors of that report summarized their contribution:

“If our recommendation resolves *users’ concerns* in a satisfactory way, it will likely be a comprehensive solution to the orphan works situation.” (Italics added) ³⁶

³⁶ *Report on Orphan Works*, Page 14.

But how can any “solution” be “comprehensive” if it fails to consider the “concerns” of the individuals whose private property is the subject of the transaction? Apply that logic to any other business deal and it fails to pass the test of common sense.

The copyright provision in the US Constitution does not mention “users.” Therefore any copyright legislation that “resolves users’ concerns” at the expense of authors’ legitimate rights would not only violate Article 9.2 of the Berne Convention; it would invert the premise of copyright law.

Chairman Berman implicitly acknowledged this fact when he held his subcommittee’s single hour-long hearing on the Orphan Works Act of 2008. By admitting that the bill in question was not really drafted to apply to orphaned work, but would instead re-define an orphan as any work by any author that anybody found sufficiently hard to find, the Chairman effectively conceded that if enacted, the bill would create a new default position in copyright law.

Under this new default premise, the public’s right to use an individual’s work would be the new normal and it would be every individual’s obligation to make his or her intellectual property available for use or risk having it defined, for legal purposes, as an orphan.

Despite the radical nature of this premise, it was presented to lawmakers as a minor adjustment to copyright law. It is not. The legislation we have seen so far has been a thinly disguised attempt to rewrite the laws affecting private property. It would affect the most personal form of private property that exists: the work that citizens create themselves, the work we use to make a living or to express our short time on Earth. Previous bills have been drafted so broadly that their implementation would affect any form of creative expression – from professional artwork to family photos, home videos, songs and lyrics – or anything that anyone has ever placed on the Internet.

From the beginning, the bill’s authors have said its purpose was to benefit libraries and museums by giving them the tools to preserve their collections of old and older work. But if so, why were the doors thrown open for commercial infringement of art by working artists? Some other agenda must be at work behind the pell-mell drive for mass digitization.

The drafters of previous orphan works bills have cited the *Report on Orphan Works* to justify their claim of a market failure so serious that it can only be fixed by the transfer of the nation’s copyright wealth from individuals to corporate image banks. Yet we know that their recommendations were based on no more than 215 anecdotal letters. This hardly qualifies as grounds for standing international copyright law on its head. Moreover, we know that the legislative blueprint for the legislation we’ve seen was drafted before and not after those letters were even solicited.

For artists, the most troubling part of this has been our near-total exclusion from the legislative process. All the bills we’ve seen so far were drafted behind closed doors, in negotiations with lobbyists for organizations that have unanimously asserted attorney-client privilege to prevent artists from discovering whatever terms, conditions or *quids pro quo* were transacted in return for their support of the legislation. Since lobbyists acting in good faith do not assert attorney client privilege to keep such information from their clients, we must assume that past bills were drafted without any good faith representation of artists’ true interests.

To counter the protests with which this legislation has been met, certain lobbyists have tried to dress up the bills with complicated provisions, calling them “speed bumps” for infringers. For example, the 2008 House bill required an infringer to perform a “qualifying search” – where a qualifying search was defined as one that is “reasonable” and “diligent,” but reasonable diligence was left to be defined by future lawsuits. To apply this kind of law across the vast landscape of creative art can only foment needless uncertainty in commercial markets. Legislation that seeks to replace voluntary business transactions with lawsuits, then proposes to create a new system of courts to deal with the litigation is legislation only Rube Goldberg could love.

Certain groups claiming to speak for artists have also lobbied for a privately owned archive to be sanctioned by the Copyright Office, where infringers could file their Notices of Intent to infringe works of art. Yet a for-profit registry for infringers will inevitably seek to profit by promoting infringements. Their so-called "Dark Archive" will not protect the property of rights holders. It will merely provide protection for infringers while allowing the archive to cut itself in on the \$187 billion licensing industry currently being served by artists themselves.

To understand the special interest some corporations have in this legislation, we have to go to the heart of the matter. By defining millions of copyrighted works as orphans on the premise that some *might* be, previous bills would allow Internet content providers to build financial empires by harvesting the work of others, providing their databases with content they could never create themselves nor acquire from authors without having to pay for it.

Yet databases don't create art. Individuals do. And in light of the meltdown on Wall Street four years ago, we do not think it's wise for Congress to concentrate our nation's copyright wealth in the hands of a few corporate databases. The contents of these databases would be more valuable than secure banking information – which means it would be our assets at risk in the event of their failure, mismanagement or corruption.

Instead, we hope to see the orphan works issue resolved with a minimum of disruption to existing copyright law. We acknowledge that libraries and museums have a special interest in orphaned works for purposes of preservation and education. But we wonder if those functions are not already permitted under the existing copyright law. As the drafters of the 1976 Copyright Act made clear:

"[I]t is important to realize that the [1976] bill would not restrain scholars from using any work as source material or from making "fair use" of it; the restrictions would extend only to the unauthorized reproduction or distribution of copies of the work, its public performance, or some other use that would actually infringe the copyright owner's exclusive rights." (Emphasis added) ³⁷

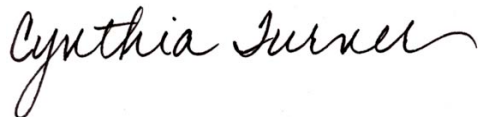
To our reading, this suggests that the cultural heritage sector already has the latitude it needs to fulfill its mission, even in the digital age. However, if additional modification is necessary, we hope these changes can be arrived at by working with members of the creative community who are familiar with how copyright law intersects with standard business practice.

This kind of proactive solution should win widespread praise from the creative community, while preserving the sanctity of existing copyright-related contracts. It would protect the small businesses that are the heart and soul of the creative community and would continue to act as an on-going incentive to further the creation of new work.

Respectfully submitted,



Brad Holland
Director, Illustrators' Partnership of America



Cynthia Turner
Director, Illustrators' Partnership of America

³⁷ H.R. Rep. No. 94-1476, at 136 (1976)
<http://www.copyright.gov/circs/circ1a.html>

Appendix A

The US Small Business Administration Roundtable:

“How Will the Orphan Works Bill
Economically Impact Small Entities?”

THE ORPHAN WORKS ROUNDTABLE

Conducted by the Small Business Administration

August 8, 2008, Salmagundi Club, 47th Avenue, New York, NY 10003

How Will the Orphan Works Bill Economically Impact Small Entities?

Part 1: Illustrators, Fine Artists, Art Licensors,
Art educators, Copyright Attorneys



ADVERTISING
PHOTOGRAPHERS
OF AMERICA

view archived webcast: <http://videos.cmitnyc.com/asip.html>



Visual Artists

Part 1: Illustrators, Fine Artists, Art Licensors, Art Educators, Copyright Attorneys

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<i>A Hobson's Choice</i>	Brad Holland, Artist, Introductory Statement
<i>How Registries Can Orphan Copyrighted Work</i>	Brad Holland and Cynthia Turner for the Illustrators' Partnership
<i>Response to Queries by House Judiciary Committee</i>	Brad Holland for the Illustrators' Partnership
<i>Creator Groups Opposed to the Orphan Works Bills</i>	over 60 Organizations and 250,00 creators worldwide
<i>Warning to the Public</i>	Brad Holland and Cynthia Turner for the Illustrators' Partnership
<i>Responses to Public Knowledge</i>	Brad Holland, for the Board of the Illustrators' Partnership
<i>Orphan Rights</i>	Terrence Brown, Director, American Society of Illustrators Partnership
<i>Orphan Works Legislation – a Bad Deal for Artists</i>	Bruce Lehman, Esq.
<i>The Orphan Works Act: A View From the Trenches</i>	Tammy L. Browning-Smith, J.D., LL.M
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<i>Statement of Kathleen Bitetti</i>	Executive Director, Artists Foundation
<i>Statement of Frank Costantino</i>	CoFounder, American Association of Architectural Illustrators
<i>Statement of David Rhodes</i>	President School of Visual Arts, New York
<i>Letter from Neal Adams</i>	on behalf of Superman's Creators, Jerry Siegel and Joe Schuster
<i>The Orphan Works Bills: A Call to Get It Right</i>	C.F. Payne, Illustrator Chair, Illustration Department, Columbus College of Art and Design
<i>Orphan Works Act – Unintended Effects</i>	Molly Crabapple, Illustrator and Internet Entrepreneur
<i>Letter from Jim Perkins</i>	Medical Illustrator, Associate Professor & Assistant Director Medical Illustration Program, College of Imaging Arts and Sciences, Rochester Institute of Technology
<i>Statement of Dena Matthews</i>	Medical Animator
<i>Statement of the Association of Medical Illustrators (AMI) and the Guild of Natural Science Illustrators (GNSI)</i>	
<i>How Camel Cigarettes Orphaned My Work</i>	Michiko Stehrenberger, Illustrator
<i>Statement of Cheryl Phelps</i>	Illustrator, Designer, Art Licensor and Adjunct Professor
<i>Orphan Works Unmasked</i>	Andrea Mistretta, Art Licensor
<i>Statement of Gail Green</i>	Art Licensing & Design
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<i>Statement of Kathy Andrews Fincher</i>	Inspirational Artist and Art Licensor
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<i>Open Letter from Harry Murray to Marybeth Peters, Register of Copyrights</i>	Internet Entrepreneur

INTRODUCTION

An SBA Roundtable: *How Will the Orphan Works Bill Economically Impact Small Entities?*

On August 8, 2008 the Office of Advocacy of the U.S. Small Business Administration conducted an Orphan Works Roundtable in New York City. This was the first effort to assess the economic impact of the Orphan Works Acts H.R. 5889 and S. 2913 on creators and small businesses.

Seventeen distinguished panelists spoke, all freelance working artists and stakeholders who will be directly impacted by this proposed legislation. Although panelists generally agreed that they would support a true orphan works bill, all expressed concern that the current legislation has been written so broadly it would permit widespread infringement of copyrighted works, impose an impossible cost of compliance on creators, devalue their work and create uncertainty in their commercial markets.

Orphan Works legislation is based on proposals initiated by the US Copyright Office, as presented in their *2006 Report on Orphan Works*. However the Copyright Office studied the specific subject of “orphaned” work, not the workings of commercial markets, which this bill would affect. Small business owners fear the unintended consequences of legislation that will affect markets in which no needs assessment studies or market impact surveys have ever been conducted. This concern is summarized in an enclosed position paper published jointly by the Association of Independent Music Publishers & the California Copyright Conference:

“In the process of ‘helping’ appropriate other people's personal property, the legislation promotes the incremental dismantling of one of our nation's primary economic growth engines. The Internet, computer and consumer electronics industries utilize vast amounts of copyrighted works to attract customers to their websites, from which they derive enormous profits from advertising and subscription fees. These industries have long sought to eliminate copyright protections and to avoid paying for the content they use to lure consumers.”

http://www.brandaideblog.com/pdf/Position_Statement.pdf

The enclosed papers address these and other related issues from various perspectives, but all urge lawmakers to rethink this legislation and its long term ramifications. As attorney Bruce Lehman, former Commissioner of the US Patent Office, writes in “Orphan Works Legislation – a Bad Deal for Artists,” these bills “reverse a 30 year history of taking bureaucracy out of the copyright system and impose new burdens and expenses on those least able to comply. And, while the Copyright Office proposal immediately and unfairly prejudices the little guys in the creative economy, it sets a long term precedent that eventually could come back to haunt even those with deep pockets to defend themselves like Hollywood and Silicon Valley.”

The small business community of creative artists asks that this legislation be reconsidered through a process of open and informed public debate.

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Legislative Update & Overview

*Statement by Cynthia Turner, delivered at the Small Business Administration Roundtable:
“How Will the Orphan Works Bills Economically Impact Small Entities?” Conducted
August 8, 2008 at the Salmagundi Club, New York City.*

Director Tom Sullivan and Assistant Chief Counsel Cheryl Johns,
Small Business Administration;
New York Congressional Staff; U.S. House and Senate Staff;
Representatives of the U.S. Copyright Office;
The World Intellectual Property Organization and Representatives of the European Union,

Thank you for granting the opportunity to small businesses to express their critical concerns about the Orphan Works legislation pending before Congress. It is especially important for your office to alert the policy making community to the problems of the current legislation because – probably more than in the case of any other profession – *all* artists are small businesses. This is true even of the most important and successful members of our profession.

You will hear from nineteen distinguished panelists, all from the creative community, who represent the copyright interests of illustrators, photographers, fine artists, art licensors, writers, musicians, and the collateral businesses that serve and are dependent on creators.

We all respect the creators who have come before us, and creators and the public are enriched and inspired by access to old and historical works. We all support orphan works legislation that remains true to its original intent, which is to find a way to increase public access to our shared cultural heritage by permitting the creative works of unknown or unlocatable authors that reside in the collections of accredited archives, libraries, and museums, to be placed online, on display, and in publication, while ensuring that those creators and other copyright owners will be properly compensated and credited if later identified.

That is not what we are here to discuss. What we wish to call attention to is the disastrous effect that the current legislation, as drafted, will have upon creators. These bills, if enacted, would lead to the aggregation of the world’s artists’ works into a handful of immense databases. It is hard to estimate how many images would be in such databases. Some people put the number at 3 trillion or more. Whatever the size, it would be far bigger than Google is now. This content would be more valuable than the assets in a banking system. That’s a tantalizing prospect for commercial interests.

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I don't believe we have ever lived in a time where more people were surrounded by more creativity. The passing of works from hand-to-hand, or hand-to-millions, through the internet has resulted in the exposure of millions of people to millions of works they might never have experienced. This is a wonderful thing. But, it has also brought unprecedented pressures to bear upon artists. The technology of easy access endangers passive copyright protection, respect for other's self-created private property, and legal remedies against those who would infringe the rights to those creative works without permission.

Currently, copyright is automatic at the moment an idea is fixed in a tangible expression. Article 5 (2) of The Berne Convention guarantees these rights by providing that copyright protection shall not be subject to any formality. This has been incorporated into the agreement on Trade-Related Aspects of Intellectual Property Rights (known as the TRIPs Agreement), the WIPO Copyright Treaty, the EU Copyright Directive and the WIPO Performances and Phonograms Treaty.

The 3-step Test of TRIPs defines certain exceptions to a creator's exclusive rights, but only if limited "to certain special cases, which do not conflict with a normal exploitation of the work, and do not unreasonably prejudice the legitimate interests of the rights holder."

We believe the Orphan Works legislation will violate that 3-step test by permitting all manner of exceptions to any work defined as an orphan, and by defining an orphan as any work that lacks identifying information. Visual works will be especially vulnerable to abuse under this law because images are frequently published without identifying information, signatures may be illegible and information can be cropped or removed by others.

There is much that one cannot know about an unmarked image and it is frequently impossible to trace an unmarked image back to its creator. One cannot determine the age of the image, the nationality of the creator, the rights currently under license, or the agreements, contracts and releases surrounding the rights. In fact, confidentiality and non-disclosure is trade practice in some art licensing.

This network of contracts and agreements, the very fabric of the business of copyright that surrounds the marketing of images, has been overlooked by this legislation. This threatens the entire commerce of visual art licensing.

The House version of this bill contains an artists' palliative: a so-called Dark Archive where infringers are expected to file a Notice of Intent to Infringe. However, this offers no protection to artists. The Notice can be revealed to the artist only if she discovers her work has been infringed and files a legal action in federal court. While not protecting artists from infringement, the "Notice of Use" archive will in fact serve to protect infringers by letting them prove in court that they followed the perfunctory rules permitting them to infringe. The justification for this Dark Archive is twofold: to encourage use of orphaned work, and to protect infringers from alleged "harassment" by artists looking to see if their work has been infringed.

Currently there is discussion of making the Dark Archive accessible to the public. This will only impose an impossible burden of diligence upon creators. Artists would be required regularly to monitor a "lost and found" containing millions of text descriptions of works to see if some description sounds like one of their hundreds or thousands of works they may have created. This would be an impossible task. The same would be true if the Open Archive were to contain images. Rights holders should not have to waste hours every day combing through archives of texts or pictures simply so that others can have the freedom to infringe their work.

It is also important to understand that the bill's limited, so-called protections for artists for after-the-fact remuneration for infringement are entirely based on hiring lawyers and bringing a lawsuit in federal court. And the defendant infringer in such a suit will normally be a very large company such as Google with unlimited financial and legal resources. Furthermore, even if you can afford a lawyer, the actual and statutory damages provided in the Copyright Act are eliminated under the bill. This means that in all but the most exceptional of cases the costs of bringing the suit would far exceed the damage award.

Of course, this totally violates the three step test of TRIPS I have referred to earlier. The elimination of the right to actual and statutory damages takes away the primary mechanism that protects all copyright holders from theft of their works today -- and that is the knowledge by infringers that there will be a significant monetary risk to engaging in infringement. Under this bill that risk is reduced to the potential for a slap on the hand -- not much of a deterrent to infringement by a large, well financed corporation eager to make unauthorized expropriation of any work of art they chose to deem an "orphan".

We believe proper Orphan Works legislation could be accomplished by a precise expansion of USC, Title 17, § 108: Limitations on exclusive rights: Reproduction by libraries and archives. Unlike the present bill's all-encompassing creation of a new § 514: Limitation on Remedies (which covers all works for any use), this approach would not lead to the widespread violation of exclusive rights. We believe similar orphan works situations - family photo restoration and duplication, personal genealogy usage of orphan works, and orphan works rights clearance for documentary filmmakers - can all be resolved in a similar manner, by carefully and precisely expanding Fair Use: USC, Title 17, § 107: Limitations on exclusive rights.

The Orphan Works bills were introduced simultaneously in the House and the Senate on April 24, 2008. The Senate bill, S. 2913 The Shawn Bentley Orphan Works Act was reported out of the Committee on the Judiciary unanimously on May 15th, by Senator Leahy with an amendment in the nature of a substitute. There has not been one hearing in the Senate. The bill was hotlined for unanimous consent on June 5th (when artist advocates of the illustration, photography and art licensing community were on the Hill raising awareness of the flawed bill.) It was hotlined again, last Wednesday, July 30, within two hours of the announcement of this SBA Roundtable. Thousands of artists called their Senators. Multiple holds were placed on the bill, albeit temporarily.

The House bill, H.R. 5889, was referred to the House Committee on the Judiciary, and thence to the Subcommittee on Courts, the Internet, and Intellectual Property. On May 7th the Subcommittee held a Mark-up session and the bill was unanimously forwarded by the

subcommittee to the Full committee (amended) by voice vote where it awaits another Mark-up. One hearing was held in the House on March 13, before the bill was introduced and its text was not yet released.

We hope that Congress will see the wisdom of reconsidering this legislation. We hope lawmakers will work to preserve copyright's mission to serve the public interest by promoting cultural heritage and preservation **by protecting the work of creators**. We neglect, at society's peril, maintaining an environment that is sufficient to encourage and foster current artists – and new artists – to self-sustain (and even thrive) by their creative work.

Cynthia Turner is a certified medical illustrator and a Fellow of the Association of Medical Illustrators (AMI). She is a Board member of the Illustrators' Partnership of America, a member of the Society of Illustrators, and a Founder and Co-chair of the American Society of Illustrators' Partnership.

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Orphan Works: A Hobson's Choice for Artists

Opening statement by Brad Holland, delivered at the Small Business Administration Roundtable: "How Will the Orphan Works Bills Economically Impact Small Entities?" Conducted August 8, 2008 at the Salmagundi Club, New York City.

Visual artists oppose the Orphan Works Act because it would impose a radically new business model on the licensing of copyrighted work. It would force artists either to entrust their entire life's work to privately owned commercial databases or see it exposed to widespread infringement.

This Hobson's Choice would harm artists and collateral small businesses. It would let giant image banks access our commercial inventory and metadata – and enter our commercial markets as clearinghouses to compete with us for our own clients.

I can think of no other field where small business owners can be pressured to supply potential competitors with their content, business data and client contact information. Databases don't create art. Individuals do. Yet this bill's provisions have been drafted so broadly it will orphan the work of working artists. Its consequences will be far-reaching, long lasting, perhaps irreversible and will strike at the heart of art itself.

The bill's sponsors say it's merely a small adjustment to copyright law. In fact, its logic *reverses* copyright law. It presumes that the public is entitled to use your work as a *primary right* and that it's your obligation to make your work available. If this bill passes, in the United States, copyright will no longer be the exclusive right of the copyright holder.

This exclusive right matters to artists for three reasons:

- **Creative control:** No one can change your work without your permission;
- **Ownership:** No one can *use* your work without your permission;
- **Value:** In the marketplace, your ability to sell exclusive rights to a client *triples the value of your work*.

The Orphan Works Act would void that exclusive right:

- It would permit anyone who can't find you (or who removes your name from your work and says he can't) to infringe your work.
- And since you can be infringed without your knowledge anytime, anywhere in the world,

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- You could never again guarantee a client that your work has not been – or won't be – infringed.
- Therefore you could never again guarantee a client the exclusive right to license your work.

That means that from the moment this bill takes effect, every artist's commercial inventory would be devalued by 2/3.

The databases this bill would create will be for-profit enterprises. That means to make money, they'll have to do a lively business identifying orphans for infringers. That means making the databases infringer-friendly. It means *promoting* infringement. As clients come to rely on these registries as one-stop shopping centers for rights clearance, any works not found in the registries could be infringed as orphans.

The cost of digitizing and registering thousands - or tens of thousands - of individual images will make compliance impossible for most artists. This will cause countless copyrighted works to fall through the cracks and into the public domain. This mass orphaning will be a gold mine for opportunists:

- Some will provide access to orphans as royalty-free work and take their profits in advertising revenue.
- Others will harvest orphans and market them as clip art.
- Others will harvest orphans, alter them slightly to make "derivative works" and register the derivatives as their own copyrighted product.

This will unjustly alter the nature of competition in commercial markets. How many artists - who must create the work they sell - will be able to compete with large internet databases that can provide clients with free or cheap access to the work of others?

This legislation is based on recommendations by the Copyright Office. Yet the Copyright Office studied *the specific subject of orphaned work*, that is - older work whose authors have died or abandoned their copyrights. This bill would affect commercial markets - *a subject the Copyright Office never studied.*

This bill's sponsors have finally acknowledged that it's not actually an orphan works bill. Instead they've re-defined an orphaned work as any work whose author is simply hard to find. Yet this is an irresponsibly broad definition. A professional artist may be accessible to hundreds of clients, but still be inaccessible to millions of other people. Basing a law on this questionable premise is *not* solving an orphaned work problem. It's legalizing the theft of private property.

The majority of visual artists are self-employed. We work alone without marketing, administrative and financial support. We receive no salaries, do our own marketing and have no administrative support. We have no safety net. Yet we supply much of the visual material that makes up our popular culture. We have every incentive to see that our work is accessible. But it's our right to control its use and it's our prerogative to protect it from exploitation.

We're here today to speak as small business owners. Yet for most of us, art is something more than a business.

Artists become artists because we want to practice alchemy - to turn the lead of experience into something that doesn't tarnish or rust. At the heart of creativity is independence. We're here today to defend our independence.

We didn't ask for this law to be drafted. It's not pleasant to have to be here to oppose it. Most of us would rather be home painting, writing, composing, making music, taking pictures. But if opposing this bill is the cost of our independence, then it's a price we have to pay, because independence is the price we owe to our craft.

– © 2008 Brad Holland

Brad Holland's work has appeared in Time, Vanity Fair, The New Yorker, Playboy and the New York Times, among others. He is a member of the Society of Illustrators Hall of Fame, the Alliance Graphique Internationale and co-founder of the Illustrators' Partnership of America. In 2006 he testified against the Orphan Works Act in both Houses of Congress.

How Registries Can Orphan Copyrighted Works



When the Copyright Office released their Orphan Works proposals in 2006, they made privately-owned commercial registries the key to their legislative scheme: Officially, this was expressed benignly on page 106 of *their Report on Orphan Works*:

“[W]e believe that registries are critically important, *if not indispensable*, to addressing the orphan works problem...It is our view that such registries are better developed *in the private sector*...” <http://www.copyright.gov/orphan/orphan-report.pdf>

But subsequently, the Report’s “principal author” stated the case in more coercive terms. Speaking at “*Orphan Works: A Search for Solutions*,” hosted by the Progress and Freedom Foundation, March 31, 2006, Jule Sigall, Associate Register for Policy & International Affairs, U.S. Copyright Office, condemned visual artists for having failed to “collectivize.” Comparing artists to cats who can’t be herded, he said:

“*You can’t herd cats, but you can move their food*... It’s really what kind of incentives, what kind of pressure and how you put on the right pressure.” <http://www.pff.org/events/pastevents/033106orphanworks.asp>

At the time, the bill’s advocates said pressuring artists to commit their work to competitive commercial registries would *not* cause problems for artists. They were wrong. Now they concede the problems, but say technology is the solution. Wrong again.

PicScout is one of the companies developing technologies for locating visual art. On March 13, a PicScout representative testified before the House Subcommittee on the Courts, the Internet and Intellectual Property:

“Our technology can match images, or partial information of an image – such as a single face of one person in a crowd, with 99% success...Over the years, we have established relationships with our partners and now track the use of millions of digital files stored in our huge centralized database.” <http://judiciary.house.gov/media/pdfs/Gura080313.pdf>

PicScout is just one of several firms that hope to benefit from the Orphan Works Acts. They envision future registries in which registered pictures will not be available for review or browsing. Instead a searcher would feed in a desired image and if there’s a match, get back only the artist’s name and contact information – or be told there’s “no match.”

So far, so good – *for all the pictures in the registry*. But “no match” - there’s the rub.

You can't find work that's not in the registry. Let's say you haven't registered a particular image in the system. *In that case, the best technology in the world won't find it there.* So unless every picture you've ever done is registered, the searcher's failure to find a match would actually orphan work that's still copyrighted to you.

But let's say you *comply* with this coercive bill. You register tens – or hundreds - of thousands of your works with one or more commercial registries. Are these works now safe from infringement? No, they can still be orphaned. Here's how:

It's unlikely that PicScout or any other image recognition technology can ever operate on a mass scale with anything like 99% accuracy. But for the sake of discussion, let's take even this best-case claim and analyze it.

PicScout's boast of "99% success" concedes a margin of error of *at least* 1%. Sounds small, but consider:

- Google has already said they intend to use millions of orphaned works. Other businesses will use millions more.
- One percent of every million searches means 10,000 *registered* images "accidentally" orphaned.
- Multiply 10,000 accidental orphans by millions of millions of searches and you have an astronomical number.
- *These are images that will be orphaned even though the artists spent the time and money to register them.*
- Will these artists be able to sue for infringement? Perhaps, but at their own risk, because
- The infringers' use of registries might be considered proof of a "good faith" "reasonably diligent search."

And there's another problem:

- It's statistically impossible for each million searches to orphan the same 10,000 images each time. Therefore:
- *Every image anyone registers will be permanently vulnerable to an infinite number of orphaning opportunities;* which means:
- An image may turn up as a "match" in one registry — while being orphaned in another.
- Have fun in court.

Further, we have a number of unanswered questions about how these commercial registries would work, such as:

- Who is to be trusted with this [these] valuable database(s)?
- Why should any professional creator be forced to entrust his or her entire creative inventory to the control of other commercial entities?
- What happens when a registry is hacked?
- What happens when it's acquired?
- The contents of these image registries will be more valuable than secure banking information. What happens when the terms of service are changed?

- What happens when registration or maintenance fees become prohibitive?
- What if individual artists can't afford to maintain their immense bodies of work in competing registries?

Finally, we're concerned that, even if artists do comply with these coercive measures, they might still find their work orphaned. Let's say an artist registers tens of thousands of images with one or more commercial registries. A user searches for one of his images and makes a match. The user contacts the artist and asks to use the art for a silly or distasteful ad. Or he asks to use the art for free. Most artists already see such inquiries and we know there aren't enough hours in the day to deal with them. Yet under this law, we would be obligated to respond to every irresponsible request! All this uncertainty would drive ordinary business transactions into the courts where uncertainties would multiply: judges unfamiliar with commercial markets would routinely have to render decisions regarding countless disputes in fields in which they lacked expertise.

The imposition of coerced registration in the U.S. could force foreign rights holders to pay to register their work with U.S. registries, inviting foreign governments and business to retaliate against American rights holders in unpredictable ways.

Also, many of the images to be affected by these proposals will be works created since 1976, when the current copyright act was passed. That law promised artists that their art would be protected even if it was not marked and registered. Yet if the Copyright Office proposals become law, any unmarked picture created in compliance with the 1976 law will become an instant potential orphan. Countless rights holders will be penalized for not having done over the last 30 years what the law never required them to do.

There are many reasons why international law forbids coerced registration as a condition of protecting copyrights. These are just some.

– Brad Holland and Cynthia Turner for the Illustrators' Partnership

The Orphan Works Act: Responses to the House Judiciary Committee



The following statements about the Orphan Works Act were sent from the House Judiciary Committee to a Congressman who asked for responses from visual artists. I've subdivided some of the statements in order to reply to them point-by-point.

Statement 1a: An infringement today will continue to be one after enactment of orphan works legislation. Critics of orphan works measures frequently seem to miss this point, often wrongly suggesting that an orphan works law will legitimize infringing acts.

Response: No one is missing the point. Under this bill, infringements may continue to be infringements, but millions will be infringements *in name only*. That's because these bills would remove any effective remedy for the infringement whenever the infringer can *successfully* assert an orphan works defense. The defense need not be valid, only successful. That means we'll see millions of so-called "good faith" infringements, among which bad actors will be able to hide like needles in a haystack.

What bad actor, if caught, will have a Perry Mason Moment and admit he's guilty of willful infringement? Not if he can assert an orphan works defense and dare the artist to sue. And under this bill, any artist who sues will have to be sure of winning, because without the possibility of statutory damages and attorneys' fees, it'll be too expensive to lose. Since lawyers will be unwilling to accept such cases on contingency (because there's no guarantee the infringer will have to pay), this law will effectively deprive rights holders of legal counsel, expert witnesses, court costs, etc. - the very tools they'd need to legally prove bad faith.

Statement 1b: Orphan works proposals are tailored to address the remedies that will be available under certain prescribed circumstances. In an instance where a good faith user has performed and documented a qualifying search and satisfied each of the other statutory conditions (i.e. filed a notice of use with the Copyright Office, placed an orphan notice on their use, etc.) the user will ordinarily be subject to the payment of reasonable compensation to the owner of the orphaned work if that owner is later identified.

Response: Note the key phrase: "*if* that owner is later identified." Infringements can occur anytime, anywhere in the world, so most will never be discovered by rights holders. This undermines the case for "reasonable compensation," because compensation can't be reasonable if it's never paid.

Statement 1c: Reasonable compensation is intended to reflect the amount a willing buyer and willing seller would have negotiated for a licensed use prior to the infringement. Contrary to popular criticism, [reasonable compensation] is not an amount that must be accepted by an owner that is dictated by the user after infringement.

Response: Several points :

- Since orphan works transactions will occur only *after* infringement, the copyright owner will have no leverage to bargain for more than the infringer is willing or able to pay.
- Unless the owner accepts the infringer's offer, he'll have to go to federal court.
- If the court accepts the infringer's claim that the infringer made a reasonably diligent effort to find the owner,
- Then it becomes the owner's burden to prove the market value of his work; but
- To prove this, the owner will have to prepare a legal case with expert witnesses;
- These are expenses the owner will not be able to recover from the infringer.
- Filing fees, legal expenses and court costs could well exceed the so-called "reasonable fee."
- And now the Catch 22:
- There'd be no limit to the amount of damages and legal fees the infringer could get from the owner in a countersuit.

Statement 1d: [Reasonable compensation] is intended to approximate the results of a market-place negotiation. In many cases, reasonable compensation will approximate the amount a copyright owner would have received as actual damages. The amount may also approximate the amount of statutory damages that would have been awarded by a court.

Response: Regardless of whatever the bill is "intended" to do, these intentions are unlikely to translate so cleanly into the rough and tumble of the marketplace. In real life, it's safe to assume that serial infringers of orphan works will establish low "reasonable" fees, which will effectively become the legal standard for "reasonable compensation" in lawsuits regarding orphan work uses. Artists might never agree to these low fees if contacted "prior to infringement," but they'd have no choice but to accept them if "offered" after the fact.

Statement 1e: The House bill requires that the user of an orphan work engaged in a qualified search to identify the owner prior to and proximate to the use; that the search was properly documented; that a notice of use was filed with the Copyright Office; that detailed best practices to be promulgated by the Copyright Office for conducting such a search were followed; or that an orphan works symbol was placed on the infringing use.

Response: These provisions are of no use to a rights holder unless he goes to court. And as business people, we make our livings from voluntary business transactions, not expensive lawsuits with all the uncertainty that comes with them.

In fact, uncertainty in commercial markets will be this bill's chief legacy. The language of the drafts defines an infringer's "qualifying search" as one that is reasonably diligent. But reasonable diligence is never defined. The Copyright Office has said that these ambiguous terms will be left to the courts to define on a case-by-case basis. But since any work might become an orphan in one legal proceeding and not in another, it'll take a decade of expensive lawsuits and appeals to learn how the law will ultimately define these vague terms. Since artists are unlikely to have the resources for litigation, infringers may generally win by default. Why should copyright owners have to go to court on a regular basis to contest the diligence of an infringer's search or to prove the value of their own property for uses they never authorized?

Statement 1f: As an explicit measure to discourage malicious actors who might seek to exploit the orphan works limitation in furtherance of commercial piracy, the House bill was expressly amended to prohibit the limitation from being used in connection with the production of useful articles (i.e. coffee mugs, wallpaper, rugs, clothing, etc.). So the [use of art on a] coffee mug [for] example is expressly prohibited by the House bill even in a circumstance where the user theoretically sought to meet the aforementioned statutory pre-conditions.

Response: Commercial piracy is not limited to rip-offs of art on "useful articles." *If the bill's drafters have exempted designs for coffee mugs, wallpaper, rugs and clothing, then they've conceded that the bill will lead to the piracy of visual art. Having acknowledged that, why would they permit other forms of art to be pirated?* Are designs on coffee mugs more deserving of protection than medical illustrations, editorial cartoons, news photos, book illustrations, advertising art, fine art?

Statement 2a: There is no present requirement for an author to register their work or place a copyright notice on it to qualify for the protection of U.S. copyright law. It is false that registration will become mandatory after the enactment of orphan works legislation. There is nothing in either the House or Senate versions of the bills that will require copyright owners to register their works or place copyright notices on them to enjoy copyright protection.

Response: That's because Congress *cannot* "require" artists to register their work without openly violating the Berne Convention, NAFTA, TRIPS, WIPO and WTO treaties. Yet in reality, the effect of this legislation will be the same as compulsory registration: artists who don't register their work will find it vulnerable to orphan infringement. Or to put it another way: the bill would not *impose* registration on rights holders; it will just endanger the work of those who don't impose registration on themselves.

Statement 2b: As previously noted, a "user" of an orphan work will be required by the House bill to, *inter alia*, file a "notice of use" with the Copyright Office prior to use and required to place an orphan works symbol, which will be prescribed by the Copyright Office, on their work.

Response: As currently written, the "notice of use" is a dark archive. That means if someone infringes your work and has filed a Notice of Use, you wouldn't know about it unless:

- you discover you've been infringed;
- you sue the infringer in federal court;
- the infringer asserts an Orphan Works defense.
- Only then can you file a request to see if your work is in the archive.
- In other words, the notice of use is of no probative value to the rights holder at all, unless by luck, he finds that he's been infringed and has to go to court.

As for the orphan works symbol to be "prescribed by the Copyright Office" and placed on all so-called orphaned work: it will act as a "come-and-get-it notice," signaling to new infringers that a copyrighted work has already been orphaned by previous infringers and is therefore free for further exploitation.

Statement 3: Orphan Works critics claim that copyright protection will no longer exist at the moment of creation under an orphan works structure, that new requirements will be imposed. No new *statutory* requirements are imposed on copyright owners to establish protection or ownership nor is the manner for determining ownership altered by the House bill. (Italics added)

Response: Note the modifier "*statutory*." To repeat, we understand that the Copyright Office cannot propose *statutory* registration requirements. That would explicitly violate international copyright law and copyright-related treaties. Instead, the Copyright Office has proposed that Congress "limit" the remedies for Infringement: this pulls the teeth out of copyright law because:

- Remedies for infringement are the only means rights holders have to protect their work from thieves.
- There is no Copyright Bureau of Investigation; no Copyright Police Force.
- Rights holders have to police their own copyrights, and
- Penalties for infringement are the only weapon the law gives us.
- Remove those penalties and you remove uncertainty in the minds of bad actors.
- Under current law, if an infringer wants to rip off your work, he can guess that a.) you may never find out about it; and b.) it may not be registered.
- He may guess correctly but – *he can't be sure*.
- This uncertainty is the key safeguard against infringement, because
- If the bad actor guesses wrong, he'll be liable under current law for statutory damages of up to \$150,000 per infringement, plus attorneys fees.
- This is a powerful incentive for a thief not to risk stealing work. So

- In the real world, uncertainty in the mind of a bad actor is the only weapon we have to protect our copyrights.
 - Remove that uncertainty and you remove the only realistic safeguard the law provides.
-

Statement 4a: [Critics charge that c]opyright owners will be statutorily required to "register" their works with private databases that have yet to be created to protect their exclusive rights in an orphan works environment. There is no such requirement in the House bill.

Response: For the third time: we acknowledge that international agreements with our foreign trading partners prohibit Congress from "*statutorily*" requiring registration. But the proposal for commercial registries (now referred to in the bill as "databases") has been there from the beginning. See page 106 of the Copyright Office's 2006 *Report on Orphan Works*:

"[W]e believe that registries are critically important, *if not indispensable*, to addressing the orphan works problem...It is our view that such registries are better developed *in the private sector*..." <http://www.copyright.gov/orphan/orphan-report.pdf>

And on January 29 2007, twenty visual arts groups met in Washington D.C. with attorneys from the Copyright Office. The attorneys stated that the Copyright Office would *not* create these "indispensable" registries because it would be "too expensive." So I asked the *Associate Register for Policy & International Affairs*:

Holland: If a user can't find a registered work at the Copyright Office, hasn't the Copyright Office facilitated the creation of an orphaned work?

Carson: Copyright owners will have to register their images with *private registries*.

Holland: But what if I exercise my exclusive right of copyright and choose not to register?

Carson: *If you want to go ahead and create an orphan work, be my guest!*

– *From my notes of the meeting*

Statement 4b: One of the ends of orphan works legislation is to facilitate the ability of copyright owners to receive greater compensation for the use of their works.

Response: If this were true, we would not be spending our own time and money opposing this bill. But in fact over 60 creators organizations do oppose it:

<http://capwiz.com/illustratorpartnership/home/>

These groups represent hundreds of thousands of illustrators, photographers, fine artists, writers, songwriters, performers and countless small businesses that serve and are dependent on the creative community.

Statement 4c: To facilitate [licensing] transactions, it is desirable and necessary for prospective users to have the means of identifying the owner of the work as well as the ability to contact them to seek to negotiate a license.

Response: Absolutely true, but it's incorrect to assume this bill is necessary for that purpose. As successful business people, we don't need government to legislate a quasi-compulsory license to replace our voluntary business transactions. We know how to make ourselves available to clients and we know how to negotiate licenses.

According to the Licensing Industry Merchandising Association, licensing is now a \$187 billion dollar industry. Creators are responsible for a robust sector of the U.S. economy. We employ and support agents, directories, source books, web sites, archives, internet portals and other advertising venues to make ourselves available to users. Not only we, but all these hundreds of thousands of small businesses will be harmed, not helped, by a bill that removes effective protections for the work we create and trade in.

Statement 4d: The more owners voluntarily contribute to the creation of a meaningful and accessible public record of their works, which includes licensing information, the better for all parties. This includes the owner, potential users who are searching for them and the general public who will benefit from new uses of creative works.

Response: *Again, why should any business owner be required to give his licensing information to outside business interests?* Consider the potential for unauthorized use or abuse! Moreover, many artists, such medical illustrators, frequently enter into confidentially agreements with their clients, agreeing to protect their clients' trade secrets, patient or victim information and medical litigation materials from exploitation. These agreements would preclude them from displaying their work and client information in a public record.

Statement 4e: While the law will not, in any way, require owners to register their works or copyright information with any private entity, the fact is that the easier it is for an owner to be identified and located, the less likely it is that a user will be able to prevail in the assertion of a claim that the work was an orphan and that the owner could not be identified and/or located.

Response: For the fourth time: to say that the law will not "require" registration is misleading. The problem with "voluntary" registries is that *you can't find a picture in a registry if it's not there*. That means that any picture – published or unpublished, professional or personal – that hasn't been registered in one of these commercial databases could be declared an orphan for legal purposes, even if the artist is alive, easily accessible to clients and prudently managing his copyrights.

Registries would merely benefit two classes: a.) infringers – who could use a non-productive search to declare unfound works as orphans; and b.) owners of registries, who could cut themselves in on the multi-billion dollar licensing industry, currently functioning well without them.

Statement 4f: [But] *if the owner can be easily found*, then the orphan works limitation will in no way restrict the range of damages that are available to them in an instance of infringement. (Italics added.)

Response: Several points:

- The presumption that owners of contemporary work can't be "easily found" is false. An owner may be hard to find if he's died or abandoned his copyrights – that would be a true orphaned work. But this bill re-defines an orphan as *any* work by *any* author that *any* potential user *ever* finds hard to find. Sooner or later that could be every work by every author. This bill will define millions of works as orphans on the premise that *some* of them may be.
 - Why must an owner be "easily found" by any parties other than those whom the owner chooses to do business with? Is there a national emergency in visual images that requires legislation to regulate this sector of the free market?
 - There is no need for government intervention here. We are professionals. We're alive, working and managing our copyrights. We can be located. Our clients locate us all the time. But that doesn't mean that anyone anywhere can find us. And frankly, why should it? What if 1000 people can find me but one person can't? Why should that person get a free pass to use my intellectual property? Won't that give infringers an incentive not to find rights holders? Basing a law on this questionable premise is *not* solving an orphaned work problem. It's legalizing the taking of private property.
 - The argument that artists can always resolve orphan works disputes in court is a measure of the bill's most serious defect: Any law that drives business decisions into the courts is bad for business and bad for the courts.
 - We believe our work benefits the public by being published through the channels where we wish to publish it. The current copyright law works by giving us the incentive to keep doing this. But authors' rights are exclusive. Public interest cannot compel any creator to publish his work. So by what right of eminent domain can government give members of the public the right to publish his work for him? We're only asking Congress to protect this basic property right.
-

Statement 5: [Critics charge that] orphan works bill will change the laws that relate to the group registration of photographs and the registration of other types of collected works. Among other things, [they say] the expense to register will increase exponentially since works will all need to be registered individually. Nothing in the bills requires or supports this allegation.

It is true that there are already intrinsic and systematic limitations on the ability to search for individual works that are registered as part of a "group" or "collection." Today, there is no meaningful public record of individual works that an owner chooses to register in this fashion. This situation results, in part, from the persistent desire of copyright owners to limit the expense of registration. But the decision to register works individually or collectively is today an independent decision that is exercised by owners who presumably conduct a cost-benefit analysis of the value of individual registration. Nothing in the House bill mandates changes here nor fundamentally alters this cost-benefit analysis calculation. That said, the Congress may, independent of whether or not an orphan works bill is enacted, want to consider potential improvements in the copyright registration process in an oversight or legislative capacity but the timing for doing so as well as any decision to do so is speculative.

Response: At the recent SBA Roundtable (see below), one photographer said he had already registered over half a million images with the Copyright Office. Yet under this bill, he'd have to "voluntarily" re-register every single one of those images again, this time with privately-owned databases. How many databases? Who knows? And when a database fails, would he have to re-register his work again and again?

Under this bill, every rights holder will face this issue because:

- The number of works created by the average visual artist far exceeds the volume of the most prolific creators of literary, musical and cinematographic works;
- The cost and time-consumption to individual artists of registering tens of thousands (or with photographers, hundreds of thousands) of visual works, at even a low fee, would be prohibitive; therefore:
 - Under this law, every artist would see thousands of his creations potentially orphaned from the moment of creation.
 - No registry would be meaningful until billions of pre-existing works (both published and unpublished) from artists (both living and dead) have been digitized, color corrected, keyworded and registered; but
 - Few, if any, living artists could afford the time and expense of digitizing and registering a backlog of tens (or hundreds) of thousands of their own works; therefore:
 - Countless working artists would find countless existing works vulnerable to infringement from the moment this bill takes effect.

Statement 6: Much of the confusion about the potential impact of orphan works legislation appears to derive from a misperception about the eligibility and availability of statutory damages to owners in infringement actions. Statutory damages are not ordinarily available to copyright owners. They are available to only those copyright owners who have registered the particular work that is infringed with the Copyright Office prior to the infringement or within three months of publication. When available, statutory damage awards generally range from \$750 to \$30,000. Where the infringement is proven by the owner to have been willful, the court, in its discretion, may increase the statutory damage award up to \$150,000.

Response: The issue of statutory damages is a real one and we've already addressed it. But debating it apart from its impact on business misses the point. Artists rarely go to court and

would prefer never to have to. *We oppose the Orphan Works Act for fundamental reasons: it's a bill too far!*

In drafting this legislation, the Subcommittee has relied on the *2006 Report on Orphan Works* issued by the Copyright Office. But the Copyright Office studied *the specific subject of orphaned work*. Their study did not inquire about the workings of commercial markets and *there is no evidence in their report that a market failure in commercial markets exists*. This fact was summarized in a joint position paper published July 15, 2008 by the Association of Independent Music Publishers & the California Copyright Conference:

“In 2004, The Copyright Office initiated a theory, with the enthusiastic support of the anti-copyright lobby, that the public was being harmed because it did not have enough current contact information for authors and owners. *The Copyright Office then requested orphan works legislation without having conducted a needs assessment study, an independent audit of its registration and copyright history records, an economic impact analysis, or an evaluation of how the public, society and authors would be affected by reduced quantity and quality of art, film, television, music, video games and other copyrighted works in the future.*”

http://www.brandaideblog.com/pdf/Position_Statement.pdf

Because the Copyright Office never presented evidence to justify their proposed changes to commercial markets, hundreds of thousands of creators respectfully ask that this bill be withheld until it can be re-written as a true orphan works bill. Three groups: The Illustrators' Partnership of America, the Artists Rights Society and the Advertising Photographers of America have jointly submitted amendments that would do that. These amendments can be accessed here:

<http://ipaorphanworks.blogspot.com/2008/07/hr-5889-amendments.html>

Brad Holland
Co-founder, Illustrators' Partnership
9.1.08

Creator Groups Opposed to the Orphan Works Bills



August 4, 2008 The organizations listed below, **representing over 250,000 creators worldwide**, oppose H.R. 5889, The Orphan Works Act of 2008 and S. 2913, The Shawn Bentley Orphan Works Act of 2008 because each bill permits, and even encourages, wide-scale infringements while depriving creators of protections currently available under the 1976 U.S. Copyright Act, the Berne Convention for the Protection of Literary and Artistic Works, and the international TRIPs Agreement.

On June 27th, 2008, the **International Council of Creators of Graphic, Plastic, and Photographic Arts (CIAGP)** adopted the following resolution:

“Resolved that the artists rights societies of 31 countries, members of CIAGP, under the aegis of the International Confederation of Societies of Authors and Composers (CISAC), hereby expresses its condemnation of any effort by the United States Congress to legitimize and endorse an ‘orphan works’ regime, which would function to the great detriment of the creators of these works, and deprive them of their artists' rights.”

The resolution was unanimously adopted during the international conference of CISAC. It was proposed by Dr. Ted Feder of the U.S., President of the Artists Rights Society.

CIAGP is the visual arts division of **CISAC**. CIAGP collectively acts for over 100,000 artists, photographers and illustrators through artists' rights societies in 31 countries. CISAC works towards increased recognition and protection of creators' rights. Founded in 1926, CISAC is a non-profit organization headquartered in Paris.

Visual Artists

American Society of Illustrators Partnership

- The Illustrators Partnership of America
- The Society of Illustrators New York
- The American Society of Architectural Illustrators
- The Association of Medical Illustrators
- The Guild of Natural Science Illustrators
- The American Society of Aviation Artists
- The Illustrators Club of Washington DC, Maryland and Virginia
- The Pittsburgh Society of Illustrators
- The National Cartoonists Society
- The San Francisco Society of Illustrators
- The Society of Illustrators of Los Angeles
- The Society of Illustrators of San Diego

Artists Rights Society of New York *representing 40,000 fine artists worldwide*

Advertising Photographers of America

Artists Foundation

Appalachian Pastel Society

Art of Licensing Listserve

Association of American Editorial Cartoonists

Atlanta Artists Center

Atlanta Photography Group

Atlanta Photographic Society
California Copyright Conference
Colorado Alliance of Illustrators
Creators' Rights Alliance
Editorial Photographers of America
Maine Illustrators Collective
National Association of Independent Artists
Editorial Photographers of America
National Needle Arts Association
National Press Photographers Association
New Jersey Creatives Network
Oil Pastel Society
Palm Beach County Art Society
Philadelphia/Tri State Artists Equity Association, Inc.
Professional Women Photographers, Inc.
Society of Decorative Painters
Society of Digital Artists
Society of Childrens Book Writers and Illustrators
Society of Photographers and Artists Representatives
South Cobb Arts Alliance
Southeastern Pastel Society
Stock Artists Alliance
Studio Art Quilt Association
Tannery Row Artist Colony
United States Digital Imaging Group
Volunteer Lawyers for the Arts of Massachusetts
Wellington Art Society
Women in Focus

International Associations

International Council of Creators of Graphic, Plastic and Photographic Arts
– *artists' rights societies of 31 countries, representing over 100,000 visual artists*
Association of Illustrators (UK)
Association of Photographers (UK)
Association de Illustrateurs et Illustratrices du Quebec
Association Européennes des Illustrateurs Médicaux et Scientifiques
Association of Dutch Designers
Canadian Association of Photographers and Illustrators in Communication
Cyberscribes-- an International Assembly of Lettering Artists
FreeLens (France)
Union des Photographes Créateurs (France)
International Quilt Association
Pro-Imaging.org
Rassemblement des Artistes en Arts Visuels
Australian Cartoonists' Association

Writers

National Writers Union

Music

National Association of Record Industry Professionals (NARIP)
American Association of Independent Music (A2IM)
Los Angeles Music Network (LAMN)
Association of Independent Music Publishers (AIMP)

The Orphan Works Act: Warning to the Public



Most people don't understand current copyright law and under current law, they don't have to – the law itself protects them from not understanding it: anything you create is considered your private property – and your right to grant usage is an *exclusive right*.

But Congress is considering a new amendment, under which copyright will no longer be the exclusive right of the rights holder. The Orphan Works Bill would expose *any citizen's* visual images to infringement, including infringement for commercial purposes or distasteful uses. This would require all citizens to understand that they must now take *active steps to register their work with privately-owned commercial registries* – not to actually protect their work (because registries won't protect it) – but merely to preserve their right to sue an infringer in federal court (in case they ever find out they've been infringed).

Under the Orphan Works Act, ignorance of copyright law will be no excuse against an infringer who has done a "reasonably diligent search" for a photo he found on a blog, photo sharing site, Facebook page, or other source. Therefore if the bill is passed, Congress should direct the Copyright Office to commence an awareness campaign to be conducted in all media, explaining to all citizens the new terms of copyright obligations. Public warnings should state at least the following:

“Due to a change in U.S. copyright law, citizens should now be aware that any creative expression they put into tangible form – from professional artwork to family photos – will be subject to infringement, including infringement for commercial uses, by anyone in the United States who is unable to locate them by what the infringer determines – and a court agrees – to be a qualifying search – where a qualifying search is defined as one that is reasonable and diligent and reasonable diligence has been left for the courts to define.

“To preserve your right to sue infringers in federal court, you are advised to take active steps to assert authorship of every single work you create.

“These steps should include inserting metadata in each work, marking each work with a copyright symbol and contact information and registering each work with privately-owned commercial databases where potential users, competitors and infringers can search for it. Works not found in these databases may be vulnerable to infringement.

“Ignorance of copyright law will be no excuse against use of your work by any infringer who has done a reasonably diligent search according to guidelines established by Congress, the courts or other yet-to-be-designated third parties.”

This should be the minimum warning information and it should be issued to the public on an on-going basis to alert successive generations to the legal obligations they will now have to observe as the price of creating any kind of tangible expression. Congress should also direct the Copyright Office to establish and maintain local law clinics where creators and other citizens can seek free clarification about their obligations under Orphan Works law.

– Brad Holland and Cynthia Turner, for the Board of the Illustrators' Partnership

Orphan Works: Responses to Public Knowledge



*Public Knowledge has been a persistent advocate of the current Orphan Works legislation. On May 29, 2008 the group's President and Co-Founder made numerous public comments about the opposition of visual artists to the current bills. <http://www.publicknowledge.org/node/1594> **

Public Knowledge: Nothing in the orphan works bills eliminates automatic copyright protection or requires registration. Indeed, if it did so, that would violate the Berne Convention, which is an international agreement that eliminates “formalities” such as registration.

Response: The bills *do* violate Berne and other copyright-related treaties, specifically:

- Article 9.2 Berne http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P140_25350
- Article 13 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) http://www.wto.org/english/docs_e/legal_e/27-trips_04_e.htm

Both agreements guarantee an author's exclusive right of copyright, but acknowledge certain exceptions, as defined by the TRIPS Three-Step Test:

“Member [countries] shall confine limitations and exceptions to exclusive rights to:

- (1) certain special cases
- (2) which do not conflict with a normal exploitation of the work
- (3) and do not unreasonably prejudice the legitimate interests of the rights holder.”

The Orphan Works bills specifically violate all three of these steps:

- *They would not confine exceptions to certain special cases.*
- Instead, they'd permit *any* user to infringe *any* work for *any* purpose by *any* artist that *any* user finds sufficiently hard to find.
- That would create an entire class of “single-party transactions” in which only the user may ever be aware of the usage.
- And that means rights holders would never again be certain they have exclusive rights to *any* of their works; which means
- They could never again transfer exclusive rights to clients with certainty, because
- neither they nor their clients would ever know if, where and when any of their works have been – or will be – infringed and
- thereby devalued in the marketplace.

Public Knowledge: Whether their works are registered or not, copyright holders would still be compensated *if* they found that somebody who conducted a diligent search used their works. (Italics added)

Response: The “if” in this statement is a big “if” because:

- Infringements can occur anytime anywhere in the world; therefore
- Discovery of infringements would depend on luck; but
- Even if you *did* discover an infringement, you’d still have to
- Locate the infringer and get him to respond; and
- While the infringer would only have to make a “*reasonably* diligent search” to find *you*,
- You would have to make an *absolutely successful* search to find *him*.
- Then, if you were able to track him down and get him to respond, you’d have to
- Settle for whatever he was willing or able to pay you; or
- Take him to Federal Court.

The whole idea of legalizing the misuse of someone’s private property and making the owners go to court to get paid should be a red flag to anyone considering this bill. And the complicated protocols of determining if an infringer has performed a “qualifying search” (where qualifying is defined as being reasonable and diligent - but reasonable diligence is *never* defined), is bound to lead to ambiguity in the courtroom and uncertainty in the marketplace.

Public Knowledge: The orphan works legislation does not make a copyright holder more vulnerable to bad actors, nor would it make infringement any easier for bad actors. A thief is a thief, and he would be highly unlikely to be able to craft a successful but phony diligent search. If a court finds the thief to be acting in bad faith, then the copyright holder would be entitled to the full panoply of damages under copyright law. (*Italics added*)

Response: *Note that these assurances always rely on the word “if.”* Under the Orphan Work bill, detection of infringement will depend on luck. Therefore bad actors could reasonably gamble that their thefts may never be detected, the work they steal won’t be registered, the owners of the stolen work will never find them and – *if* once in a while they *do* get caught – they won’t have to “craft a phony diligent search.” They can simply say the work had no name on it when they found it and dare the owner to sue. From that point on, the risk will belong to the rights holder. Why?

Because under current law, all infringements are illegal. But under this amendment, millions would be “permitted” as orphan works infringements. Since any successful legal action against a bad actor will depend on the owner’s certainty that he can legally prove bad faith in court, any litigation would be an expensive gamble. Moreover, should the owner be outspent, outlawyered or outmaneuvered, years of costly legal bills might yield nothing more than a finding that “some person or persons unknown” had removed the owner’s name or contact information from the work. *And since this bill would hold infringers innocent of bad faith until proven guilty*, the presumption of innocence would favor bad actors.

Public Knowledge: The bill provides for the creation of marketplace-based visual registries that would make it easier for users to find the owners of visual art. And let me emphasize that having users find owners is the real goal of this legislation.

Response: *Nothing better expresses the looking glass logic of this bill than the claim that millions of commercial copyrights must be exposed to infringement in order for users to find owners in the marketplace. A trip to the corner newsstand will refute that argument.*

Take just one look at magazines such as *Vanity Fair*, the *New Yorker*, *Time*, *Vogue*. Or look at newspapers, trade publications, medical journals, ads, annual reports, posters, brochures, catalogues, postcards, greeting cards, surface and fabric design. How can anyone be surrounded by this sea of legally-transferred images and seriously argue that the intellectual property rights of creators must be permanently endangered in order for the users of visual art to find owners? *The Orphan Works proposals would not create new ways for users to find owners. They would merely allow opportunists to co-opt the existing markets of creators.*

Public Knowledge: [W]hile it might be wise for a visual artist to make use of the [privately-owned commercial registries this bill would authorize], nothing requires her to do so. Nor does failure to place a work in a [commercial] visual registry *automatically* orphan a work. A user would still have to do a diligent search to find an owner, and might be able to do so without the help of the [commercial] visual registry. (Italics added)

Response: “While it *might* be wise” for artists and photographers “to make use of” these for-profit registries, how many will be able to afford to? The high cost (in both money and time) of digitizing, color correcting, key wording and registering tens (or hundreds) of thousands of images will make compliance impossible for any small business owner. Yet failure to comply will expose millions of copyrighted images to potential orphan works abuse. As users come to rely on commercial registries for all-purpose rights clearance, any works not found in them might be orphaned for all practical purposes.

Yet the claim that this coercive requirement will not “*automatically* orphan a work” is a red herring. The real issue for artists is the effect this legislation will have in fostering unjust competition favoring large content aggregators over the lone artists who actually create new work.

Commercial registries will exist to make money. And they won’t make money operating as passive databases of names and works. To thrive, they’ll inevitably use the inventories of work they acquire to compete aggressively against artists for clients in existing commercial markets. So by pressuring artists to supply them with work – or by allowing them to sell access to unregistered work as “orphans” - this bill will effectively force artists to subsidize potential competitors by supplying them with the content they’ll need to compete. This runs counter to what any rational business person should be pressured by law to do.

As artists, we don’t need to speculate on this scenario as a likely business model for these registries. All of us are familiar with the business practices used by big “stock agencies” such as Getty and Corbis to take market share away from creators. These companies acquired inventory from artists by promoting themselves as agencies through which artists could make sales to new markets. Instead, they used the images artists entrusted them with to commence an on-going raid on artists’ existing markets, licensing pictures at steeply discounted prices.

Public Knowledge: *[Critics of the Orphan Works bills say t]he legislation will force copyright holders to constantly look for people using their works without their permission. The problem with this argument is that this situation is no different than what copyright holders face today.*

Response: False. The situation would be *vastly* different. Currently, penalties for infringement and the uncertainties of litigation help keep infringement in check. By creating a huge class of penalty-free infringements, this bill will multiply exponentially the number of infringements that owners will never discover; and that means multiplying the number of uses for which the owners will never be paid.

Public Knowledge: The legislation makes going to court a means of last resort, requiring good faith negotiation once the copyright holder finds the user. In addition, the legislation requires the Copyright Office to do a study on the feasibility of a copyright small claims court, which would ease the burden on small copyright holders seeking damages against bad actors.

Response: The feasibility study of a copyright small claims court is a true cart-before-horse provision. *The bill doesn't require the Copyright Office to conduct the study until after the bill has been passed!* Several obvious problems with that:

- If government is going to pass a law driving business decisions into the courts, shouldn't the feasibility of resolving those lawsuits be established before the law is passed to make them necessary?
- Copyright is a federal law and small claims disputes are handled in local jurisdictions. Shouldn't Congress be assured that the jurisdictional issues can be resolved before they pass a law depending on it?
- The determination of feasibility should include: means by which rights holders can reasonably avail themselves of discovery, expert witnesses and other necessary tools to resolve disputes. This should include fees for legal assistance: if government is going to make the private property of some citizens available for others to use without the owners' knowledge or consent, owners should not have to bear unreasonable costs to go to court to prove the value of their own property.
- The feasibility study should be conducted by the Justice Department, not the Copyright Office, whose attorneys have a vested interest in the outcome of their controversial proposals.

Public Knowledge: Opponents of the legislation don't like the fact that good faith users — those who are willing to pay but can't figure out who to pay — might be able to use their works without permission and without the maximum financial punishment. They want to control every use of their works, and whether or not they receive fair payment is beside the point.

Response: This charge is disingenuous or absurd. As practical business people, we don't need government to pass laws to make us accept money for the use of our work! The people promoting this bill are corporation lobbyists or employees of foundations who subsist on grant money. Those of us calling attention to its defects are dependent on our own resources. We're

not spending our time and money for the perverse pleasure of not getting paid. We're doing it because the bills, as written, will conflict with our normal exploitation of our work and unreasonably prejudice our legitimate commercial interests.

Contrary to frequent claims by people who want this legislation for their own reasons, artists do not create work so they can lurk in the shadows, pounce on hapless infringers and bleed them for "the maximum financial punishment." Artists who go to court usually regret the experience, even if they win – and many don't, even in a just cause: legal cases are too often decided by who has the most money to stay in court the longest.

Do most artists want to control how their work is used? Yes, if they're good artists and their work means anything to them. Why should this be otherwise? In how many other fields do we respect people who don't respect themselves or the work they do?

Authors' rights are exclusive. Public interest cannot compel anyone – artists or private citizens - to publish their work. So by what right of eminent domain can government give members of the public the right to publish it for them?

– Brad Holland, for the Board of the Illustrators' Partnership

*For more about the orphan works bill, see the **Illustrators' Partnership Orphan Works Blog**, at <http://ipaorphanworks.blogspot.com>.*



Illustrators' Partnership of America

Society of Illustrators

Association of Medical Illustrators

American Society of Architectural
Illustrators

San Francisco Society of Illustrators

Guild of Natural Science Illustrators

Illustrators Club of Washington DC,
Maryland & Virginia

Pittsburgh Society of Illustrators

Society of Illustrators San Diego

National Cartoonists Society

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ORPHAN RIGHTS

By Terrence Brown

*Statement by Terrence Brown, for the Small Business
Administration Roundtable: "How Will the Orphan Works Bills
Economically Impact Small Entities?" Conducted August 8, 2008
at the Salmagundi Club, New York City.*

For decades, the field of illustration was a model of classical competition in which independent craftsmen competed with one another to do competitive work and charge competitive prices. In general, artists' work was commissioned by clients for specific one-time usage, and priced accordingly. The value of secondary rights was rarely discussed. But with the advent of the digital age, these neglected secondary rights have been recognized as a potential stream of income to contending parties. And as freelancers discover that they must now compete with corporate picture archives, the matter of who controls an artist's secondary rights has become critical.

In the past, if you were a publisher and needed a picture of, say, a partridge in a pear tree, you'd be likely to commission one from an illustrator. Otherwise, you'd have to search through a conventional library to find a picture you wanted, then track down the rightsholder somehow and clear the rights. But now, with a modem and a search engine, you can find hundreds of suitable pictures and clear the rights on-line in a matter of minutes. As a consequence, large picture collections have evolved along two basic lines: First, middlemen have moved into the fields of photography and illustration, acquiring control of a vast body of untapped secondary rights; and second, major publishers have begun to accumulate their own archives of commissioned work by demanding that artists sign away all-rights as a non-negotiable condition of accepting the assignment.

Over the years, many artists resisted the trend toward stock sales in any form and some warned against stockhouse business practices in particular. But because freelancers are scattered across the country and graphic arts organizations did not address the issue, reliable information was slow to develop. When it did, it was a grassroots effort.

Beginning in late 1997, using fax machines, e-mails and a commercial internet chat board, artists began to create an ad-hoc network to share information, publish articles and discuss legal ways to adapt to the challenge of the new commercial environment. As a result, over the last few years, 13 illustrators' organizations have come together as the American Society of Illustrators Partnership to speak with one voice on issues concerning their members' futures.

The combined membership of this new organization includes a critical mass of the most prolific and widely published visual artists in the world. Their pictures illustrate a wide spectrum of general and special-interest publications. The majority of the artists represented are independent contractors – small business owners – who have reserved reproduction rights on a substantial body of their published work. This group constitutes the relevant rights-holder class of the collective rights of the American illustration repertoire of published works. As Executive Director, I am very proud to be a part of this visionary effort.

Illustrators today are in the same position songwriters were in the early 20th century when the musical collecting societies ASCAP – and later BMI – were created. Technology now evolving – similar to the development of radio and television broadcasting with respect to use of music in the 20th century – permits broad secondary use of visual artists' work. It wasn't that long ago that you needed a professional printer to make a good copy of a professional illustration. Now we have copying technologies that have become easier and ubiquitous. In fact, we are in the midst of a seismic shift – comparable to radio in the 1920's - and that is the Internet. The Internet has the capacity to seize images and send them around the world in digital form so they can be produced with original quality.

The music societies have recognized the role of the Internet and now license the use of their works not only to over-the-air broadcasters and cable companies, but to Internet music streaming companies as well. The steps taken by illustrators over the past few years to address similar changes in their marketplace demonstrate that the incentives of the marketplace should be allowed to work without government intervention such as the Orphan Works Act. This legislation, as currently drafted, will permanently weaken the rights to the work these stakeholders create. The promotion of culture requires more than public access to the work of artists. It requires that artists continue to be given an incentive to create.

Terry Brown is the Executive Director of the American Society of Illustrators Partnership and Director Emeritus of the Society of Illustrators. He has lectured at universities and museums nationwide on the History of American Illustration and taught American Culture and the Applied Arts at the School of Visual arts 1995 - 2000. He is currently on the Board of Artists Fellowship, a foundation that supports artists in need and the faculty of The Illustration Academy at Ringling School of Art.

Orphan Works Legislation – a Bad Deal for Artists

Bruce Lehman, Esq.

In recent Congressional testimony the U.S. Register of Copyrights observed that during the last 30 years the United States has made it easier to obtain copyright protection without meeting cumbersome bureaucratic requirements. Indeed, these changes were seen as necessary to harmonize U.S. law with long-standing international standards, thereby, enabling American. movie, publishing, music and software companies to more effectively enforce their rights in a globalized economy. Mindful of the importance of the creative industries to the U.S. economy, Congress – in 1998 – acted to extend the term of copyright by 20 years in keeping with European law. More recently, Congress has responded to the pleas of corporate copyright interests to increase criminal penalties for copyright piracy.

These changes to strengthen copyright have greatly benefited big companies such as those in Hollywood and Silicon Valley. And, we have no quarrel with the right of large corporations to protect themselves in a market full of pirates. But, we find it strange that Congress at the recommendation of the Copyright Office is considering drastic changes in U.S. law that would take away from visual artists the same rights to copyright enforcement enjoyed by big corporate interests.

The Register of Copyrights has recommended that Congress limit remedies for copyright infringement to “reasonable compensation” in cases where the infringer does not know the identity of the author or artist and has not been successful in an attempt to locate them. While at first glance this may sound reasonable, it is a huge change from current law where – when an artist or author finds out that his work has been stolen – he or she is entitled to have the infringement cease and to receive damages up to \$150,000.

The register of Copyright has attached the label “orphan works” to creations such as paintings, drawings and illustrations that have become separated from identifying information, even though that information may have been lost through no fault of the artist. And, she apparently feels that anyone wishing to infringe such works should be given a free ride. Yet, who are the creators of these likely “orphans?” They certainly are not the big Hollywood Studios or Microsoft. It is hard to imagine someone being unable to find the title or producer of a blockbuster film. And how many users of a computer would be unaware of the copyright owner of Microsoft Office ®?

The creator of a so-called orphan work is likely to be an illustrator laboring alone to meet a magazine’s deadline or a painter sending out prints to gallery owners and museum directors begging for a chance to sell or display his or her work.

Proponents of the Copyright Office recommendations point to the fact that – to take advantage of the proposed safe harbor – an infringer would have to have made an unsuccessful attempt to locate the copyright owner. The problem with this is that it unfairly discriminates against works of visual art. Unlike books, songs and films, paintings and illustrations lack universally accepted titles that would allow users to search for information about them by name. And, once a work of visual art is first reproduced, copyright notices and artists signatures are routinely lost. ‘

To prevent their creations from becoming orphaned the Copyright Office has suggested that artists digitize and file them with as-yet-to-be-created private registries, run by profit making companies. These companies would use scanning technology to compare a copy supplied by a user with the artworks that had been placed on file by the artist. And, unlike the current system of registration with the Copyright Office— a government agency— these companies would be able to charge whatever fee they wish. Since the numbers of works created by the average painter or illustrator far exceed the volume of even the most prolific creators of music, books and films, the expense and administrative burden of filing with these registries would be prohibitive.

Even assuming that these registries could work, they reverse a 30 year history of taking bureaucracy out of the copyright system and impose new burdens and expenses on those least able to comply. And, while the Copyright Office proposal immediately and unfairly prejudices the little guys in the creative economy, it sets a long term precedent that eventually could come back to haunt even those with deep pockets to defend themselves like Hollywood and Silicon Valley. It is the deterrent effect of injunctions and large damage awards that keeps copyright infringement and piracy under control in the United States. But, this proposed legislation would limit relief to “reasonable compensation” for the copies made, even after the great expense of suing in a federal court. The typical visual artist would be denied effective justice and bankrupted by this process. However, even deep pocket publishers, film producers, and software developers could find the costs too much to bear when this shift in the burden of copyright enforcement spreads to other uses of copyrighted works.

Congress should reject the current proposals regarding orphan works.

The Orphan Works Act: A View From the Trenches

By Tammy L. Browning-Smith, J.D., LL.M

As an attorney at a law firm that handles copyright issues, I have thoroughly reviewed the Shawn Bentley Orphan Works Act of 2008 (S. 2913). The representation at our firm is diverse, including famous brands, famous artists, manufacturers and those waiting to be discovered. We live copyright law on a daily basis and would see first hand what consequences this Bill would have on both sides of this issue. I personally hold a Juris Doctor and a Master of Laws in Intellectual Property. After a thorough review of the proposed Bill, the following comments are offered from a legal professional who would be “in the trenches” if this legislation were to pass.

Nullification of the Copyright Act of 1976

Artists relied on the provisions of the Copyright Act of 1976 that did not require them to place the copyright notice on their work in order for them to own their copyright.[1] < The additional provisions of this bill do not change the language of §401(a). The Act clearly states that “copyright...subsists from its creation.”[2] The Bill does not state that this language will be changed to “copyright...subsists from its creation provided that you register, use the correct search terms, and can pay for it.” This Bill puts a large requirement on individuals to register and use large amounts of financial resources to protect an artistic work.

Public Notice and Private Databases

Copyright registration continues to be the most accessible intellectual property protection available to the public. The fees are minimal and the forms understandable so that an average person could complete the task with relative ease. The proposed bill changes that premise. The use of private databases creates two very significant problems:

- 1) Private Databases force individuals to become intimately familiar with search terms and remain current on any case law that would direct what constitutes a “qualifying search.” The bill requires the use of search terms that require the average public to become attorneys or highly skilled researchers to know what terms to use so that a work of art can be located.
- 2) The cost for registration for both the US Copyright Office and any private database(s) could be substantial to most artists who create multiple works in a short time frame. As well, if an artist does not feel comfortable filing such documentation due to the burdensome requirements, he or she will need to hire an attorney which will prevent the vast majority of artists from registering copyrights.

The use of search terms and registration with the US Copyright Office and private databases takes some of our country’s greatest treasures and places them in the hands of private individuals. The Federal Government is privatizing part of a constitutional function (the protection of intellectual property). The burden placed on the individual

artist is a far greater crime under this Bill than the potential that a work of art will not be able to be used because the owner is not found. The passage of this Bill would eventually mean there will only be works of the past. It will be almost impossible for the individual artist to survive and protect his or her work while making a living as an artist.

Reasonable Compensation & Relief

The majority of creative individuals do not make large sums of money. The large corporations, libraries, museums, and the like that are attempting to have this bill passed hold the position that national treasures are being lost because the creator cannot be found. This could not be further from the truth. There is a great amount of art available for use and many times the compensation asked is minimal.

The term "Reasonable Compensation"[3] opens the door for a significant amount of litigation. Highly qualified individuals disagree on what "reasonable compensation" would be on any given license. Daily our firm works with licenses and knows the complexity that goes into them. It is impossible to determine the value of a license without having the license actually go to full term. Allowing an infringer to only pay "reasonable compensation" would require an artist to wait for compensation and then would limit his or her abilities to exploit the art, as the art is already in use in public. For example, an infringing use of artwork by an "orphan works user" would prevent the rightful owner from entering into a potentially far more profitable exclusive licensing arrangement with a client of his/her choice.

It is true in the realm of merchandising that you only get "one shot" at the public. The artist's right to fair compensation and further exploitation would be ruined. In this scenario, the artist would only be able to be compensation for the use and not the loss of the art's exploitation value. Even personal injury victims are allowed some type of future or speculative damages, but creators of art would not be permitted such rights.

Litigation is expensive. Many artists are only able to bring such cases forward because of contingency arrangements made with a law firm. This type of litigation has not overburdened the court system nor has it been shown to be abused. This type of litigation permits an injured person his or her day in court. This Bill would remove such an opportunity. Not only would it remove any financial incentive for attorneys and artists to work together, it would also make it almost impossible to bring a case forward because of the heavy financial requirements placed on the artist. The financial (and technical) requirements of this Bill truly assume that an artist is "guilty of failing to comply until proven innocent" instead of the reverse.

Works Based on the Infringed Art

The most appalling and morally outrageous part of this Bill pertains to the registration of new works created from the infringed upon work and the prohibition of the injunctive relief if a work"... integrates the infringed work with a significant amount of the infringer's original expression."[4] The US Courts have never adopted a bright line test in

regards to the changes of an original work in order for the new work not to be an infringer of the old. This bill suggests that there is a rule for changing an existing work and making it a new work, yet it fails to state the exact rule.

Failing to specify a rule creates legal havoc. Not only does it create legal havoc, it causes substantial confusion to the public and requires significant money to be spent in order for a judicial body to determine what is a “significant amount.”

Thieves are not allowed to keep the stolen property, but this Bill would allow infringers to steal work and call it their own. Mistakes happen and innocent infringement occurs. However, an artist loses twice under the proposed bill. An artist loses money and future opportunity when the work is stolen. The artist loses a second time when the infringer is allowed to register the work and then claim it as “new” which creates commercial value. Once again, a criminal can't be tried twice for the same crime, but this Bill permits a victim to lose twice from a crime.

International Implications

The global marketplace will become even more difficult to navigate because of this bill. International Artists' rights will be greatly compromised here in the US. This invites sanctions under the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

Furthermore, if a manufacturer were to rely on the US “Safe Harbor” for orphan works and ship the merchandising containing an infringing work to a Berne Convention country, the manufacturer could face stiff penalties for infringement as the Berne Convention does not recognize such a term as “orphan works” and states that copyright ownership is free from formality. [5] The Berne Convention gives US Citizens the rights to protect their work in other countries, but this bill would mean that US Citizens may not be able to protect his or her own rights in their homeland if “formalities” were not followed.

Everyday Application

This Bill will take the copyright registration and enforcement out of the hands of the individual artists and place them squarely in attorneys' hands. It establishes systems to determine what is fair and what is reasonable in a field where individual facts and situations dictate the outcome, thus making “bright line” rule burdensome and unfair. The windfall for the legal profession will come at the cost of untold artists whose works will be free for the taking. Citizens will no longer be able to register their own copyrights without significant expertise or expense, and in fact this Bill essentially states that copyright registration is not sufficient to protect one's work. This Bill takes a piece of the government out of the citizens' hands and places it in the hands of a select few.

68% of all Americans say that this nation is in a recession.[6] The nation is at war against terrorism. Untold millions of American's are without jobs. The need for this type of Bill

that would take opportunities for the average American to make a living is shocking and beyond comprehension. National Treasures are not going unused, but large corporate interests are trying to get to items that they couldn't use thus far, so that profits can be reaped. It's about the economy and not copyrights. It's time to get back to the problems facing the nation and move forward to creating a fair economy for all.

Tammy L. Browning-Smith, J.D., LL.M
BROWNING-SMITH, P.C.

[1] 17 U.S.C. §401 (a) – the language clearly states "may be placed" but a requirement is not established.

[2] 17 U.S.C. §302 (a)

[3] Page 4, Line 1

[4] Page 11, Line 1

[5] Berne Convention, Article 5 (2)

[6] <http://americanresearchgroup.com/economy/> - April 21, 2008 American Research Group, Inc. Poll



August 8, 2008
Dr. Theodore Feder
President, Artists Rights Society

Small Business Administration Roundtable on U.S. Orphan Works Legislation

Artists Rights Society, an organization that I head, represents some 54,000 visual artists in the U.S. and abroad. Included among this number are some very prominent names, such as Pablo Picasso, Henri Matisse, Marc Chagall, Jackson Pollock, Georgia O'Keeffe and Mark Rothko. These however are exceptions. The vast majority of our members are not well-known, and are indeed small business men and women. It has been estimated that the average income of an artist in the U.S. is under \$25,000 per annum.

All would be very adversely affected by the Orphan Works bill, as it would propel many of their works into the public domain and deprive them of their right to control their own copyrights. The bill allows an infringer to reproduce a creator's work "provided he or she has performed and documented a reasonably diligent good faith search to locate the owner of the copyright." The problem here is that unless the infringer can be brought to court, at great expense to the creator, the sole decider of whether a diligent search has been made is the infringer himself. Alas, all too often, it will be in the interest of the infringer to *fail* to locate the copyright holder.

Should the copyright holder contest the infringer's unauthorized use, the only recourse is for the him or her to go to court where the legislation specifically limits the financial recovery to what a reasonable buyer and a reasonable seller would have agreed to *prior* to the infringement. There is no provision for the copyright holder to *refuse* to license the work to the infringer. Nor is there any mandate for statutory damages to be applied as punishment for an illicit use. Statutory damages which are now in effect can be as high as \$150,000 per infringement, and though rarely applied, the threat of its application tends to reduce the incidence of pirated and infringing uses. The present bill eliminates all such statutory damages.

The costs of bringing a court action by the artist far outweigh any benefits a successful court finding would produce, as the reward for a favourable ruling is so discouragingly low. Attorneys cost hundreds of dollars an hour and court cases drag on notoriously for months if not years nor would an attorney take such a case on a contingency when total damages are limited to several hundred or at most several thousand dollars. In effect, legal costs for a small business person are prohibitive, and the cost benefit analysis is such that artists would be well-advised to refrain from undertaking litigation. This of course means that the infringer is given a free hand to reproduce works at will, at virtually no risk whatever.

The Bill is also a very broad one. It would apply to both domestic and foreign works, both published and unpublished works and to both commercial and non-commercial uses.

The legislation flies in the face of numerous international treaty obligations of the U.S. It violates Article 9(1) of the Berne Convention for the Protection of Literary and Artistic Works which reserves to the author the exclusive rights of authorizing the reproduction of his or her work. Our trading partners abroad would not look favourably on the negation of their copyrights in the U.S., and there is a distinct possibility as there is already talk that a number of E.U. nations would retaliate against U.S. copyrights by stripping them of their protection, much as theirs would be deprived of protection in the U.S. if this bill is passed. This would be an unforeseen and highly regrettable consequence of the Bill's passage, thus further punishing U.S. artists.

There is much talk about establishing commercial registries of works which may then be consulted by the infringer as a part of his or her search. Any work not found on one of these registries will be assumed to be an "orphan work." This brings back the bad old days of U.S. copyright formalities which famously included the need to register a copyright as a condition of its protection. Such a development would violate Berne, Article 5(2) which rejects all such formalities. What artist would have the time, money, and clerical patience to fill out the forms necessary to register his or her work, let alone to spend time and money digitizing them? Visual artists are not like authors of books, even prolific ones, who may produce one book a year. If we include sketches, preparatory studies or drawings, and finished works, an artist may accumulate hundreds of works a year and thousands of works in his or her lifetime.

It would be impossible to register all of these, and even if such an effort was to be undertaken, those works which had not yet been entered in the registry would be orphaned until such time as they were, which might take many years to accomplish, and by which time great damage would be done to these so-called orphans.

It is important to note a would-be infringer already has three existing ways to reproduce a work without obtaining the copyright owner's approval, and that adding an orphan works regime is simply not necessary.

One is the Fair Use provision of the U.S. Copyright Act which allows for reproduction in mostly educational and journalistic cases in non-commercial settings without permission or fee.

The second occurs where an infringer in a commercial context employs a marketplace risk analysis, and decides to reproduce a work hoping the copyright holder does not come forward. If he or she does, the matter may or may not be settled for a fee or other consideration, and if the parties cannot resolve the dispute, normal court procedures are available.

Thirdly, we have seen where publishers have occasionally appended a notice to their books announcing that they have reproduced works without locating the copyright holder, but having made every effort to do so, they would be happy to make amends by inviting the owner to come forward.

All three of these methods are currently employed. They are sufficient unto themselves and certainly help to obviate the need for an orphan works bill.

It is clear that this piece of legislation is part of an anti-copyright offensive waged by those who maintain that copyrights are obstacles to creativity and the free flow of ideas, as if copying, mixing, sampling and appropriation are the essence of the creative process.

Our advocacy has focused on three objectives. In order of importance they are:

1. First and foremost rejection of the bill in its entirety
2. Exclusion of foreign works from the Bill's mandate and
3. The abolition of the registration requirement.

– © 2008 Dr. Theodore Feder

Dr. Theodore Feder, is President and Founder of Artists Rights Society, headquartered in New York. The Artists Rights Society (ARS) is the preeminent copyright, licensing, and monitoring organization for visual artists in the United States.

Founded in 1987, ARS represents the intellectual property rights interests of over 30,000 visual artists and estates of visual artists from around the world (painters, sculptors, photographers, architects and others). ARS represents American artists who become its direct adherents and it also represents foreign artists who are members of affiliated arts organizations abroad. A complete list of ARS' American members can be found at <http://www.arsny.com/represented.html> and includes such names as Milton Avery, Alexander Calder, Sam Francis, Arshille Gorky, Red Grooms, Robert Indiana, Sol LeWitt, Willem de Kooning, Lee Krasner, Barnett Newman, Bruce Nauman, Georgia O'Keeffe, Jackson Pollock, Ad Reinhardt, Susan Rothenberg, Mark Rothko, Richard Serra, Frank Stella, Andy Warhol, Frank Lloyd Wright, and many others.

ARS is also a member of CIAGP of CISAC. As part of this international network of rights organizations, ARS maintains relationships with sister societies abroad. Through reciprocal agreements ARS represents the artist repertoires of its foreign sister societies in the U.S. including the estates of Pablo Picasso, Henri Matisse, Marc Chagall, Joan Miró, Rene Magritte, Wassily Kandinsky and many others. The sister societies in turn represent ARS' American repertory in their territories.

Orphan Works Compliance: An Impossible Burden for Small Businesses
By Alexis Scott, Publisher of *The Workbook* and *workbook.com*

My name is Alexis Scott and I am the publisher of *The Workbook* and *workbook.com*. We are what is defined as an Annual and a Portal. We publish printed and online directories in which visual artists place advertisements to display samples of their work and make their contact information available to clients. We also were once a Stock Agency, through which visual artists licensed work from their inventories to clients for new uses.

About 8 years ago, we rebuilt our website to upgrade it to include the capability of housing hundreds of thousands of images, meta-data, captioning, additional information, etc. While this was a while ago, we also provided scans for our contributors, checked the quality and information provided and built a great, keyword searchable website.

But the cost was overwhelming. To have a website that could handle less than 1 million images and data cost over 3 million dollars to build and host. And that did not include the scanning costs - which for illustrators and older images - ranged from \$5 down to \$.50 (if sent in batch to India). Nor submitting and processing costs. Just the basic storage and search-engine.

The thought of building a searchable site for millions and millions of images before one can use them or claim them as Orphans is way beyond the ability and costs for most companies. There are really only a few in existence now and who knows the time and costs it would take to create or even "mirror" their systems.

So let's say it's somehow built. Now what? Here comes the assumptions - that the artist - photographer, illustrator, songwriter, book or scriptwriter has the time to scan (older works), submit all the various information required with each image and PAY FOR IT. To say it is impossible, both in time and costs, is to be a realist.

One photographer I know has been shooting for over 50 years. He is very prolific and runs a great company. While he has copyrighted his work, if the Orphan Works Bill passes, he would have to start all over again. He has at least 2 million images. He is 72 years old. Not only would it be cost prohibitive, but he would not live long enough to finish providing all the information and pay for it. His legacy, his life's work, his family's inheritance would disappear. And he is just one example.

To put it simply, the concept of creating an inclusive, cost effective database for imagery is impossible. I represented 400,000 images, had 500 portfolios of artists online, verified listings of 50,000 graphic artists, and I know the time and cost for creating databases.

Not possible. Not feasible. Not cost effective. And if there were multiple, smaller databases, not workable.

Just because you cannot find your child one night, does that make him/her an orphan - up for adoption by anyone who does a "reasonable search" for you? Or if a house is empty, does that make it an orphan? Can you just move in if the neighbors say they don't know who owns it? Obviously, the answer to these questions are no. There are laws in place to protect families and homeowners. Now what about artists? Where are the laws to protect their creations? The Orphan Rights Bill would destroy them.

These images are not orphans. These are the lifeblood of the creators, the lifeblood of their family, the lifeblood of an industry that may well disappear if this law passes. I do not know who is behind this bill. I know that there's more to it than creating databases and making images easier to find. Simply said, it is about making money. And definitely not by artists.

Artists Foundation

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August 8th, 2008

Tom Sullivan
Director of the Office of Advocacy
Office of Advocacy
U.S. Small Business Administration
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Washington, D.C. 20416

Dear Director Sullivan,

The Artists Foundation (AF) was founded in 1973 to foster the development of artists in all disciplines and to improve the economic and social position of artists by advocating on public policy issues that affect the artists community. The artists community and the artists advocate community have grave concerns about the current Orphan Works Legislation that has been proposed in both the House (HR 5889) and Senate (S 2913). Although the Foundation and many advocates are in strong support for allowing our cultural allies and partners, the accredited libraries, museums, archives and our documentarians to access true orphaned works of art, the Orphan Works legislation (H.R. 5889 and S. 2913) as they are now written do not protect artists of all disciplines and artists run businesses (including the documentary filmmakers) from their copyright being unfairly infringed. In fact the legislation does just the opposite. If this legislation is passed, it will have damaging consequences for our nation's artists, small business owners, and the creative economy sector that so many states are now trying to cultivate and expand.

I am very pleased that the SBA is conducting roundtables on this matter. As an artists advocate for over 20 years who has been actively working on artists rights, artist health care, artists disaster relief, and artists empowerment issues, I am deeply concerned that the drafters of the legislation clearly did not do the needed research and outreach to the artists advocates, the artists community, the small business community, and the "minority" communities **before** crafting the language of this legislation. None of the 18 Volunteer Lawyers for the Arts were notified of this legislation or consulted (the AF co-founded the Massachusetts Volunteer Lawyers for the Arts). The AF and other key arts policy advocate organizations such as the Craft Emergency Relief Fund, the Americans for the Arts, or the Native American Congress were consulted or even notified by the crafters of the legislation. This is a major and unacceptable oversight.

In this packet I include my more detailed analysis of the impact of the legislation as well as needed background information (AF's talking points, reports, articles, surveys, etc.). I am also submitting several letters from individual artists, small business owners, arts organizations, and international based artists/organizations on their behalf as they could not attend this NYC roundtable.

Thank you again for your time and attention to this matter of Orphan Works. I sincerely look forward to growing not only the AF's connection with the SBA, but also the SBA's connection and needed support of our nation's individual artists, small arts businesses, and the creative economy.

Sincerely,



Kathleen Bitetti
Artist & Executive Director
Direct Line 617-784-4652
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www.artistsfoundation.org
www.healthcareforartists.org
www.artistsunderthedome.org

Artists Foundation's Talking Points

Orphan Works 2008

House H.R. 5889 & Senate S. 2913

The proposed legislation, if it passes as it is now written, will change US copyright law. Such a change, as it is now written, will negatively impact artists of all disciplines (literary, visual, music, etc.), as well as every US citizen. House H.R. 5889 and Senate S. 2913 differ from each other BUT both bills are highly problematic and should not pass as they are now written.

Currently under US copyright- the only legal way to use someone's work (whether one has officially filed for copyright with the US copyright office or not) is to find the copyright owner and negotiate for the use. If you can't find the copyright owner you can NOT legally use the work. If the proposed current legislation passes as it is now written, that will change. Under these proposed pieces of legislation, if the copyright owner or artist cannot be found, anyone will be legally allowed to use or infringe the works (artwork, music, family photos, films, poems, etc.). One does not don't lose their copyright, but their work if deemed orphaned, will be able to be legally infringed upon.

We are deeply concerned that the orphan works legislation will negatively impact the Visual Artists Rights Act of 1990.

The legislation seems to be moving very quickly and we would like to ask for there to be a hold on it/slow it down to allow more input from the artists community and the artists advocate community.

WHAT IS PROBLEMATIC ABOUT THE LEGISLATION AS IT IS NOW WRITTEN (Our top 10):

- 1) The vast majority of artists of any discipline (or US citizen for that matter) do not copyright their work for many reasons- mainly due to it being cost prohibitive and impossible in some cases due to the volume of work they create.
- 2) The legislation is too broad and does not adequately protect from commercial use/infringement-or "infringers" being able to profit from their infringement- this will clearly negatively impact all artists of every discipline and will enable infringement abuse to occur.
- 3) The use of orphaned work needs to be clearly defined and narrowed (personal use that is clearly defined, use for documentarians, use educational use only for accredited libraries, archives and museums) with NO commercial infringement privileges or uses of orphan works for charity or fundraising. (in some cases the "infringer" would be able to save money by using the orphaned work instead of hiring/ commissioning an artist to create an art work)
- 4) The legislation allows for someone (a person or a business) who has done a "search" and can not find the copyright owner to infringe/use the copyright, but the legislation does not clearly spelled out how long and what the search will need to entail.
- 5) The legislation does not require the "infringer" to prove they obtained the orphaned work legally or that "the possessor obtained the legal rights of disposition".

6) The pieces of legislation call for on-line databases or what would be also called registries to be certified by the Copyright office for visual artists for to register their work with. No where in the legislation does it say they are to be free of charge to artists and although the law does not mandate visual artists to register their work with these databases/registries- it is clear that these databases/registries will be a key tool for those to use searching for the copyright owners and a way for them to justify they did a search. WE would prefer no certified data bases, but if there are data bases then one needs to be free with no hidden costs to artists and there needs to be a free program to help artists be able to digitize their work.

7) The amount of damages that can be retrieved by the copyright owner if they "surface" and find their work was deemed and used as an orphan work (when in fact it was not orphaned) are unacceptable (legal fees need to be covered).

8) There needs to be a way for artists and advocates to easily track the requests for infringement and it must be free of charge- It also needs to be mandated by the law and needs to be under the government to ensure transparency and accountability.

9) The legislation does not require or mandate the Copyright office to conduct a national educational outreach campaign to alert the US public of this law change. There also needs to be federal funding allocated to do this needed outreach.

10) Most importantly the very real problem that works will be classified as orphaned works when in fact they are not orphaned.

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516 East Second St. #49 Boston MA, 02127

These talking points can be downloaded for personal use and/or used to help advocate for better legislative language to protect copyright holders/artists. However please note the AF as the source/author.



THE ORPHAN WORKS ROUNDTABLE

CONDUCTED BY THE SMALL BUSINESS ADMINISTRATION

How Will the Orphan Works Bill Economically Impact Small Entities?

Friday, August 8, 2008 10:00 am – 12:00 noon

The Salmagundi Club

47 Fifth Avenue, New York, NY 10003

Small Business Administration Director Tom Sullivan and Assistant Chief Counsel Cheryl Johns; State of New York Congressional Staff, Representatives of the U.S. Copyright Office, World Intellectual Property Organization, and the European Union, good morning. My name is Frank Costantino of Winthrop MA and I am a small business owner, and my profession is architectural illustration. I am also the Co-Founder of the American Society of Architectural Illustrators (ASAI), a based in Arizona. I will not only speak on my own behalf, but also on behalf of our 500 plus member Society of architectural illustration businesses like mine. I appreciate this special opportunity to address you. My comments will provide some background on my own firm, our larger profession, and the methods with which we maintain our small businesses and protect our interests.

From an education in architecture, I have had an architectural illustration practice for over thirty-five years, and have created drawings for renown architectural, design, and development firms throughout the United States, Canada and Europe. I am the recipient of the Hugh Ferriss Memorial Prize – the world's most prestigious award for architectural illustration – as well as other awards from the American Society of Architectural Illustrators. My work has been exhibited both nationally and internationally, most notably at The Art Institute of Chicago, The Urban Center of New York, and The Octagon Museum in Washington, D.C. During my career, selected illustrations have been published in more than forty-five books or catalogues.

I have also designed five post cards for the US Postal Service's Historic Preservation series. Since 1994, I have been listed in annual editions of *Who's Who In America*. Representative pieces of my work for Chicago projects are included in the permanent collection of The Art Institute of Chicago.

I have taught in one position or another for more than 35 years, and currently conduct seminars in illustration to architects at locations around the country, offering courses in architectural watercolor for all levels of experience, with workshops and field sketching programs. I am also a Signature Member of the New England Watercolor Society (NEWS), and a member of the venerable Salmagundi Club of New York. My fine art watercolors have been accepted into national shows, with many of my works in private collections.

I regularly contribute to professional publications or web sources about the business practices of this profession, including essays on the subjects of illustration, copyright, marketing and other topics. I assist, in various capacities, in the many affairs of ASAI, including its highly acclaimed annual exhibitions, *Architecture In Perspective*. From all quarters, I am regarded as one of the world's most respected practitioners in, and vigorous proponents for, the field of architectural illustration.

The American Society of Architectural Illustrators (ASAI) was founded in 1986 as a professional organization to represent the business and artistic interests of architectural illustrators throughout North America, and now includes practitioners worldwide. The Society's principal mandate was and remains the fostering of communication among its members, raising the standards of architectural drawing, and acquainting the broader public with the importance of such drawings as a conceptual and representational tool in architecture.

THE ORPHAN WORKS ROUNDTABLE (cont)



The Society also assists in the advancement of the art and profession in a number of significant ways: as a referral agency for those seeking the services of an illustrator, as a network among the world's practitioners and affiliated organizations, as a clearing-house for ideas and discussions about architectural illustration, and sponsorship of regional and local member activities as well. The central purpose of ASAI remains the improvement of architectural drawings worldwide. The composition of our membership reflects the increasing globalization of the Society. ASAI enjoys strong affiliations with its counterpart groups here in the US, including the New York Society of Renderers (NYSR), New York's Society of Illustrators (SI), among many others. In addition, we sustain connections to international groups in Japan, (the Japanese Architectural Renderers Association, JARA) Korea (Korean Architectural Perspectivists Association, KAPA), England (Society of Architectural Illustrators, SAI) Australia (Australian Association of architectural Illustrators, AAAI), and CGArchitect, based in Canada. ASAI is also a Co-Founding member of the new American Society of Illustrators Partnership (ASIP), which represents thousands of small business artists in many disciplines.

To further attest to its network of collaborators, in 1995, ASAI was recognized for its excellence with an A.I.A. Institute Honor Award by the American Institute of Architects (based in Washington DC), which commended the Society's work in strengthening collaborative associations with communities of architects, designers and other professionals, as well as its programs for educating the general public about architectural drawing. That award is given annually by the AIA to only a few individuals and organizations whose distinguished achievements are seen to benefit the architectural profession. In the words of the selecting jury chairman, the 1995 Gold Medalist Cesar Pelli: "ASAI has done an admirable and successful job of giving respectability to its profession. Its gain and improvement is the gain of the whole architectural profession."

For the past 23 years, the principal means of achieving the Society's goals is *Architecture in Perspective*, an annual international competition, exhibition, and catalogue, which has included work by the most accomplished contemporary architectural illustrators across the globe. During that time, ASAI's catalogues have served as the documented history of contemporary illustration from around the world, while also recording the masterful development of varied and powerful architectural imagery in numerous media. Our exhibitions have appeared in more than one hundred venues - museums, galleries, universities, and architectural firms - providing evidence of a keen continuing interest in architectural representation, and its increasingly broader presence in the world.

The Society also sponsors an annual conference, at which seminars, symposia, workshops, and other activities are provided for the development of members' skills and business learning. For example, ASAI hosted a panel discussion in Washington DC on copyright and reprographic issues, and addressed some of the relevant questions that pertain to our members' artworks. Our current Board and our previous officers advise members on various questions and aspects of our unique profession during the course of a year.

In addition to my own practice, I can personally attest to a similarity of business model with most ASAI members, drawing commissions include a clientele of renown architectural, design, and development firms, such as Cesar Pelli, Moshe Safdie, I.M. Pei & Partners, Robert AM Stern, SOM, Daniel Liebskind, HOK, Colleges and Universities, and many others throughout the US. Our illustration work spans a wide range of projects around the world, including skyscrapers, office buildings, museums, concert halls, stadiums, libraries, and aquariums, as well as smaller commissions for residences, multi-family dwellings, municipal buildings, and historical or research projects.

ASAI maintains a very active and heavily trafficked web site to service its members, our clients, and the public in general. The Society posts general guidelines and forms, gallery pages, copyright information, business articles and excerpts from many sources that are of relevant interest to our members. The Society also links to our individual member's web sites to help sustain their vital business presence. Although there are a number of moderately sized firms in our membership, most practices are a single or few person businesses; but nearly all our members rely heavily on their web sites to promote their work, and maintain their market outreach.

THE ORPHAN WORKS ROUNDTABLE (cont)



In the many years since founding this organization, and even prior to the emergence of the internet, I have never known of an instance when a client was not able to locate an artist for their project. Now with the internet, clients in our community of architecture have no difficulty in locating an illustrator of choice, by searching, browsing and identifying numerous web sources. By virtue of posting their current and past illustrations, ASAI, as well as individual members, are cross linked in so many ways, that not only can our target market of architects and developers locate us easily, other markets become available to us as well.

Of course, the risks to our members, or any artist, in posting unique creative works on the internet, are the potential abuses of infringement, misappropriation, alteration, or theft of their imagery.

Not unlike our counterparts in other disciplines, our work, although primarily for unbuilt projects, is seen regularly and extensively in the public realm. However, with the general pressures of providing illustration services on tight deadlines, most members are dependent on the protections that the current Copyright System provides for this work, since they can be assured that their signature or a copyright symbol on a drawing affords them the full protection of US Copyright Law. ASAI encourages the digital protection of their image files, and the use of copyright measures to protect their work from undue infringement or abuses. We are reliant on the universal and simple understanding of this law to assure such protection. We are reliant on the integrity and implementation of these laws to support our businesses.

In no instance of which I am aware, are the works of our professional and diligent members unprotected or “orphaned”. However, according to my understanding of the intent of this Orphan Works Bill, and that of many of the artists in our Society and other groups, the immediate protections of the Copyright System would be upended, leaving all works (new or otherwise) as “orphaned”, and thereby entitling an infringer – individual, institutional or corporate - to identify and take whatever image is needed, and flaunt with impunity the purposes and penalties of copyright. According to this Orphan Works Bill, our members would be required to expend resources beyond the capacity of their small businesses to identify, notify, pursue, make claim, file suit and take to court any infringing party, with no guarantee of any suitable settlement or recovery of time and legal fees.

The abuser, who in this case would be the alleged criminal, has the benefit of the Orphan Works Bill vague language, whereby the artist, as the infringed party, must prove the intent and degree of the infringer’s abuse. No member of our Society would have the time or financial means to track any unwarranted, illegal activity on the internet, let alone pursue claims against multiple parties that may avail themselves of any artwork. Nor would any illustrator have the resources to register significant collections of current and past works with a proposed system that would offer little or no protection. I have already heard of a few instances where ASAI member’s imagery, their business names, logos, and/or entire web sites have been appropriated by Asian persons or companies! The offending parties have ceased their activity because of due notice by our members, and the understanding of universal copyright law by the offenders.

On my own behalf, and as spokesperson for ASAI, and our Society’s liaison as Vice Chairman of the Board of the American Society of Illustrator’s Partnership, I strongly oppose the enactment of this Orphan Works Bill.

Respectfully Submitted,

Frank M. Costantino, ASAI, SI, JARA, FSAI

President, F.M. Costantino, Inc.

Co-Founder, ASAI

Vice-Chairman, ASIP

Orphan Works Statement
By David Rhodes
President, School of Visual Arts

Director Tom Sullivan and Assistant Chief Counsel Cheryl Johns, Small Business Administration; New York Congressional Staff, Representatives of the U.S. Copyright Office, World Intellectual Property Organization, and the European Union, my name is David Rhodes. I am President of the School of Visual Arts an independent college of art located in New York City. I hope to persuade you on behalf of my students and faculty that the proposed Orphan Works legislation is an attempt to solve a problem that does not exist. Therefore, given that it has unintended consequences that others have discussed in detail, under the theory of do no harm, the legislation should be abandoned.

The copyright office is convinced that orphaned works are a serious problem because they received over 850 responses to their request for comment. Although only 24% of these responses addressed what the office itself thought was the orphaned works problem, they nonetheless conclude "... there is good evidence that the orphaned works problem is real and warrants attention, and none of the commenters made any serious argument questioning that conclusion." In other words, those who believe there is no problem are defined as not serious and dismissed out of hand. As a gauge to serious some other examples are instructive. When the Federal Communications Commission tried to change ownership rules to allow further media conglomeration, a serious problem, it received millions of negative comments. More recently when the Federal Reserve asked for comments on abusive credit card practices they received 56,000 comments. Obviously, people believe that these are serious issues. Most people simply do not believe that "Orphan Works" are a serious issue.

In fact the very notion of "Orphan Works" is a suspect construction. There are really only two kinds of works. Works which I have made and whose copyright I control and works made by others for whose use I must get permission. My failure to receive permission should not orphan the work. Therefore, there are no "Orphan Works". The Copyright Office's own study indicated that the majority of comments it received were not about "Orphan Works", but about works whose owner could be identified but who either did not answer requests for permission or whose license requirements were too expensive.

More importantly, in its report the Copyright Office provides little or no evidence that there is in fact a problem. There is no systematic review of the various markets to see if they are in fact dysfunctional. All of the supposed examples of the harm caused by orphan works are clearly anecdotal and in a country of 300,000,000 fall far short of the threshold for serious consideration. The Copyright Office's own paucity of data should lead one to conclude that "Orphan Works" are not a problem at all. They have not impeded the creation of new works. Passing this legislation, however, would impede the creation of new work because it would permit the extensive use without compensation of existing work rather than encouraging end users to commission new works. This

legislation would encourage a culture of banal repetition. And, since the expense of registering works will be born by the creative community the expense of copyright protection will be socialized while the profit of creative endeavors will be privatized. Copyright protection may have impeded the creation of ever-larger image banks, but that is not a problem - that is the purpose of Copyright. In short there is no problem that this legislation will fix. Therefore, prudence dictates that nothing be done.

David Rhodes
President
School of Visual Arts
8/8/08

David Rhodes has been president of the School of Visual Arts in New York City since 1978. He is an active advocate for all aspects of quality art education. Mr. Rhodes presently serves on the boards of the Association of Colleges and Universities, the New Hampshire Institute of Art, and the School of Visual Arts. Mr. Rhodes is also a Board Trustee for the Association of Regionally Accredited Private Colleges and Universities, the Association of Proprietary Colleges, and the National Association of Visual Arts. He serves as the Vice Chair on the Regents Advisory Counsel on Institutional Accreditation for the University of the State of New York, Commission for Higher Education. He has been a member of the accreditation teams for this nation's arts schools since 1986, including such distinguished visual arts institutions as Rocky Mountain College of Art & Design, Delaware College of Art and Design, Strayer University, Bradley Academy of the Visual Arts, Fashion Institute of Design & Merchandising, Harrington Institute of Interior Design, Moore College of Art and Design, and Academy of Art College. Mr. Rhodes has testified before Congress numerous times about public policy surrounding higher education, cultural institutions and partnerships. In 2003 Mr. Rhodes was awarded the Distinguished Alumnus Award from Wesleyan University, in 2004 a Gold Medal from the Society of Illustrators, and in 2007 the Award for Outstanding Lifetime Service to Art Education from the University Council for Art Education.

In honor of the artists named in this letter we respectfully submit this for the record.

March 15, 2005

Illustrator's Partnership

Gentlemen,

Re: Orphaned Works Legislation.

Let us suppose you wish to conspire with me to rip off a body of work, normally protected by the copyright law, into the Orphaned Works definition. Let us suppose this work was created by an artist who is in his declining years and whose family overlooks him and his rights with a casualness your children may show to you as you grow older.

Our aging artist does not pour over the Internet daily. In fact, the Internet is not a tool of his generation. He rarely goes to bookstores, though he reads the newspaper daily, watches TV and listens to radio and even plays golf, goes to movies and makes love to the widow down the block.

You and I wish to take advantage of the "old" popularity of his work. In a renaissance of exploitation of his work we do not wish to dig up this "old man" and share with him, but simply, we wish to profit by his work.

So first we explore the Internet. We produce signature tags or "tubes" or jpegs or gifs. We produce prints and publications to sell on the Internet. Then we do a classy book and include his work without featuring his name and his life's body of work will become ours. Good plan? The question we should be asking is why do we have copyright protection in our law? Or more importantly, if I own it, why do you take my ownership away? Is it because I'm older than you and because that is so, I don't deserve "rights" like you?

Why not come into my house when I'm out and give away my furniture or take it yourself? Gentlemen, an artist has only this, his work, and the rights to his work. He has nothing else.

I fought for the rights of Superman's creators, Jerry Siegel and Joe Schuster. Others made millions while Superman's creators lived in near poverty. Jerry was a clerk and Joe was a legally blind man who lived in his brother's apartment, slept on a cot and worked as a messenger. I met and fought for their small remaining rights when they both turned only 60 years old. Not "old" by any definition.

The battle took months and the settlement was meager, but it let the men live the remaining years of their lives with dignity. You know what they cared about most? They cared about having their names, once again, associated with their character, Superman! Why? Because it was what they were as people. They were their work.

Why do we have copyright law? Because we wish to protect people and their creations, even if they are "hard to locate."

Please maintain copyright protection and don't contribute to rotting us from the inside.

Sincerely,

Neal Adams

The Orphan Works Bills: A Call to Get it Right

by C. F. Payne

I would like to thank the members of the Small Business Administration for allowing me the opportunity to provide input on the issues surrounding the Orphan Work Bills. I would also like to thank the Illustrators Partnership of America, the Advertising Photographers and the Artists Rights Society for asking me to submit this statement.

My name is Chris Payne. For 28 years I've worked as a freelance illustrator. I work in the fields of advertising, children's books and for magazines such as Time, Sports Illustrated, Readers Digest, The Weekly Standard and many others. I have also taught illustration at the college level for twenty years. I currently Chair the Illustration Department at the Columbus College of Art and Design.

As both an artist and a teacher, I believe I have an obligation to be a steward of the tradition that nurtured me. I like to teach and I've been told that I am good at it. Illustration work allows me to provide for my family; teaching allows me to give back to the community. My belief in stewardship brings me to the Orphaned Work Bills. This legislation strikes at the core of what we are as illustrators, how we do our business and why we chose to be illustrators.

I like to draw. More importantly, I like to draw well. I devoted my educational experience to the craft of drawing. I spent countless hours learning to draw because I wanted to be the best at what I did. I knew that art is a highly competitive field and I knew I had to be the better than most if I wanted to succeed.

I received my B.F.A. from Miami University in 1976. In college, we never discussed the business of art. Like most art students, we focused our energy on honing our skill. We put art first and trusted that when the time came, business would take care of itself. But soon after graduating, I learned business may take care of business, but it's up to each of us to take care of our own business. As independent contractors, we must each keep up to date with the trends, market forces, technological advancements and business practices that shape and re-shape our field. Of course, no one can fully predict the future and the changes it always brings.

The Internet is a good example of this. Until the advent of the digital era, illustrators were content to compete with each other on an individual basis. We worked alone, with no safety net. The rigors of competition required each of us to create the demand for our own art. We knew we had to meet the requirements of our clients, meet their deadlines and solve their visual problems with esthetically pleasing and relevant art. When one of us failed or had to seek employment elsewhere, no one cried. It was a fact of life; we all moved on.

When the personal computer came along, many argued that it was just a tool. It would save us time, help us better organize our accounting and business information. When the

Internet came along, they said it would help us better communicate and deliver content and information. But for illustrators and photographers, the digital era also created a new form of competition. Large Commercial Stock Photo and Illustration Houses came into existence. At first, they persuaded some artists that they could develop new revenue streams for them by licensing their archival work to new clients in new markets. “Found money,” they promised. Unfortunately, this wasn’t the case. Instead of seeking new markets, the stock “agencies” simply used the art they acquired to enter the traditional markets of photographers and illustrators, selling the work at discount prices, even raiding the markets of the artists who had entrusted them with their work.

Now, as the Internet has made possible new market models such as the “free content” model, best represented by Google, visual content is everywhere at the touch of a button. Google has already said they intend to use millions of orphan works. It is this model that is at the heart the Orphan Works Bills. The ability of corporate search engines to supply customers with “free content” by tapping into the archives of illustrators and photographers presents a model of competition that no freelance artist or photographer can meet. Yet companies such as Google could never afford to license content from rights holders, so something like this bill is necessary to give it to them by legislation. This is why we vigorously oppose this bill. The unjustified competitive advantage it will give to archives will do systemic harm to the illustrators and photographers whose work the bill will make vulnerable.

While I understand that libraries and museums would like greater latitude to digitize their archival collections, this legislation as it is currently proposed is far too broad. It will apply to all artwork, not just art that is truly “orphaned.” The language in the bill does not attempt to properly define “orphaned works.” Drafting a true orphan works bill would give the cultural heritage sector the latitude they need to restore and preserve old works, while guaranteeing contemporary artists and photographers the full protections offered in the Copyright Act of 1976.

The promise of this bill is in fact, its greatest flaw. It promises to protect artists’ work by pressuring them to register every single work of art with commercial databases. But how will this protection work? Will the databases track down infringers who misuse my work? No, they will simply acknowledge that I registered my life’s work and business information with them. But how will they use access to my work? How will they use my business information? For that matter, who will own the databases? Who will run them? What is to stop the owners from using the work they have been entrusted with to do what the stock houses have already done - raid the markets that I and others work in? What is to stop them from setting a low threshold for registration, then piling on service charges, maintenance fees, commissions? Why should I let a for-profit corporation charge me money for clearing the rights to the work I created for the client base I developed myself? Why should I let them build their financial success on the back of my talent and hard labor?

The illustration business has changed a great deal in the last thirty years. How artists create and store their artwork has changed more than once in that time. I have original

artwork stored in print, as 35mm slides, as 4x5 inch transparencies, as 8x10 inch chromes. I have it stored on zip discs and CD's. If I must now digitize all this work to register it with a commercial database, I assume I will have to do so in a format determined by the registry. Over the last 28 years I have created nearly 50 – 75 images each year. That adds up to over 1500 published images – not counting far more unpublished work. Collecting all of that work, digitizing it, transferring it to a single format, key wording all the images, giving written descriptions of each piece for registration would be overwhelmingly time consuming and costly. This would impose an impossible burden of compliance on me. I doubt that I could participate. Yet if I do not, I would be exposing my life's creative output to unfettered infringement. This is not in the spirit or intent of copyright and it is not the way our government should pressure creators to deal with their private property.

I began this statement by saying that I like to draw and that I believe myself to be a steward of the best traditions of our craft. I am grateful for the opportunities this nation has given me to use what I have learned and to pass it on. I am grateful for the work ethics and teachings my parents instilled in me. They taught me to work hard, obey the law, to play by the rules and to be fair in how I treat others.

For thirty years I have worked to build a body of work I can pass on to my children. I hope it will be a source of inspiration for others. For twenty years I have taught, hoping to pass on what I can to the next generation. And, for 10 years I have worked with other illustrators through the Illustrators' Partnership to see that our business concerns are presented in a professional and responsible way. I do not want it said that we in our generation failed to do the necessary work to ensure future generations the opportunities they are entitled to for a fertile career. If government does not emasculate copyright law, my body of work will sustain me for the 25 or so years left in my career. But, I have students with hopes for 50 plus year careers. They want to provide for their children with their art.

In addressing this Roundtable, I hope to have my statement heard by lawmakers. So to them, I would like to say that in opposing this legislation we are not seeking a favor. We are not looking for any special treatment from the law or government. Rather we are looking to Congress for the sense of fair play established by our Constitution. How Congress decides this legislation will be a measure of how we as a nation treat the individual and the individual's property.

As a nation, we believe in the capitalistic system that encourages the individual to stand on their own, take their own risks and work to provide. Artists today freely accept the challenges of the never-ending changes that take place with market demands, stylistic and cultural changes and competitive forces brought on by technological innovations. Each day illustrators work knowing that one day they may become stylistically obsolete or out of date, meaning either they cease to exist or they adapt to survive. Artists continue to produce work knowing the value of their work is under continual pressure. They do it in spite of all of the obstacles, because they believe their art has value and it belongs to them.

If our Congress decides to pass this legislation without change, it will erode the protections contemporary working artists have with their copyrights, allowing outsiders to pirate their art and unfairly profit from the work with no concern of financial penalty. Where then will be our incentive? Take the time to do this right. Reconstruct the language of this Orphaned Works Bill to properly define the term “orphaned works.” Seek the advice of groups like the Illustrators’ Partnership and similar creators groups. Give the supporters of this bill the fair use of the truly orphaned work they seek while maintaining the integrity and protections contemporary artists have with the Copyright Act of 1976.

I am confident it can be done if the will to do it exists.

Respectfully submitted by C. F. Payne

CF Payne is an artist/illustrator and educator whose artwork has graced the covers of Time Magazine, Readers Digest, Sports Illustrated, The New York Times Book Review and Sunday Magazine, der Spiegel, U. S. News and World Report, The Atlantic Monthly and more. He has illustrated 10 children’s picture books, including “The Remarkable Farkle McBride” and “Micawber” written by John Lithgow. CF Payne’s artwork has been exhibited at “The Cincinnati Art Museum, The National Portrait Gallery, The Norman Rockwell Museum, The Society of Illustrators Museum of American Illustration and numerous U.S. college museums and galleries as well as museums and galleries in Germany, Austria, Switzerland and Argentina

9/8/08

Orphan Works Act-Unintended Effects

By Molly Crabapple

For the past four years, I've made my living as a professional illustrator and fine artist. I come from a long line of artists, stretching back to when my great grandfather came to the country, and I'm proud to continue in the family business.

As a young artist, I owe a lot of my professional success to the internet. I think the worldwide web is an amazing boon for creative people, allowing us to share work, swap inspiration, and cultivate fan followings. I keep two websites and participate in online communities. I have a large online fan following, am generous with allowing my work to be used on blogs and websites.

And I'm not alone. The Internet has enabled an enormous flowering of artistic creativity. Every day, I turn on the computer and tune into a network of enormous talent, with creators artists accessible to offer advice and talk shop.

What allows us the freedom of mind to share our work is current copyright law. Most artists don't make very much money. We work hard to promote ourselves and draw attention to our work. Copyright law, as it stands, enables us to share work with our fans online, while knowing it won't be stolen by large corporations. What the Sean Bentley Orphan Works act does is remove this protection.

Here are some arguments I've heard in favor of the Orphan Works act, as well as thoughts from the point of view of a working artist.

Orphan Works are works for which the owner can't be found. If the owner can't be found, doesn't that mean he didn't really care about protecting the work?

If you're not already familiar with an artwork's creator, it's very hard to determine who created the art. There's no image recognition software good enough to accurately identify an artwork's creator (heck-it's not even very good at identifying which celebrity you look like!) Work's frequently posted without attribution online. Watermarks are removed. On published work (especially with advertising), clients seldom want a huge signature and certainly don't print your contact details. Thus, it's very, very easy for artwork and photography to get orphaned.

The user of an orphan work will have to look really hard to make sure they can't find the creator.

Maybe, but there's no great way to search for visual images. The technology's not there yet. You can search for the phrase "striped cat" on Google, but that presents no guarantee you'll actually find the drawing I did of a striped cat that you want to use. So it's easy to make a good faith search and come up with nothing.

This law is for nice people like museums, libraries and dear old grannies who want to reproduce their wedding photos. Do you hate granny?

Actually, this bill is for everyone, including large corporations. Nowhere in the bill does it limit the usage of orphan works to family members, non-profits or artists. The bill is being backed by a number of large corporations, including Microsoft and Google. Remember, an orphaned work is just as likely to be used by a t-shirt manufacturer,

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hateful special interest group, or major media conglomerate as it is by a brilliant documentary filmmaker.

The Orphan Works Act says that if the copyright holder comes forward, they get reasonable compensation. So you'd get paid anyway.

Reasonable compensation is defined as the amount that the copyright holder and the infringer would have agreed to before the infringement. The trouble is- there are no standard licensing rates for images. As any freelancer will tell you, figuring out what price you charge is a complicated process with lots of haggling- and depends on the client. What this law really does is eliminate lawsuits that serve as deterrents to image-theft. If you can steal work, make up a search, and, worst case scenario, pay a small licensing fee, why not do that?

Also, shouldn't an artist have a right to say who uses her work? I'm a pro-choice person. I would not want my work used by National Right to Life- even if they did pay a licensing fee. Isn't that my call?

Artists are just greedy people who want to sue everyone and make a million dollars off of everything they do.

This is a more colorful way of saying what Public Knowledge president Gigi Sohn did at the end of one of her lectures. The truth is, it's very hard to make a living as an artist or photographer. We have no pensions, no job stability, no benefits, no vacations. One of the few ways we can support ourselves when we are too sick or too old to work is by profiting off of our previous creations. It's not greed. It's one of our few safety nets. Why take that away in favor of corporations and freeloaders?

I'm not opposed to a bill that amends copyright law to create exceptions for family members reprinting photos or museums using historical material. But that's not what this bill is about. The Shawn Bentley Orphan Works Act will have a chilling effect on both creativity online, and on small businesses in New York's vital artistic industry.

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(Originally submitted to the U.S. Copyright Office on March 11, 2005)

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It has come to my attention that the copyright office is soliciting input on the issue of “orphan works,” i.e., copyrighted works whose owners are difficult or even impossible to locate. I am a medical illustrator and a university professor. As such, I am both a creator of intellectual property and one who uses others’ intellectual property in my teaching and research. I would like to comment on the issue of orphan works from both perspectives. My comments will focus on artistic works and illustrations since this is my area of expertise, but I believe they apply to all copyrighted materials.

We live in a time when there is little respect for the concept of intellectual property. Modern technology has made it easier for individuals to steal copyrighted works with no compensation to their rightful owners. Software piracy, cable TV theft, and Internet downloads (e.g., Napster) are but a few examples. Our society seems to feel that if something is “out there” on the Internet, it is free for the taking. Even my own students are reluctant to accept the idea that sharing software and music is wrong - not until I explain to them that their future survival as freelance illustrators depends upon strong copyright protection of creative works.

Meanwhile, the “Free Culture” and “Alternative Copyright” movements suggest that open access to information is more important than protecting the rights of creators. This notion is further advanced by BioMed Central and other so-called “Open Access” publishers who insist that all scholarship be available free of charge. While the notion of free access to information is very romantic, it denies the reality that many creators make their living by controlling the distribution of their intellectual property. Researchers who publish in open access journals earn their income from academic appointments and research grants. Freelance illustrators and writers do not.

Defining certain works as “orphaned” will further undermine the value of intellectual property, particularly in the eyes of the general public. Since many people already fail to grasp the concept of intellectual property, they will view this law as condoning the theft of copyrighted material. If it’s not immediately apparent that someone owns the copyright (e.g., by affixing a copyright notice), the average person will feel little obligation to track down the rightful owner before using the work.

Permitting the use of orphan works would have a particularly devastating effect on individual creators such as writers and artists. Big publishing companies can ensure that their works are never orphaned. Through unique identifiers such as ISBN and ISSN numbers, it will always be possible to trace a published work back to its owner. The Copyright Clearance Center, established by the publishing industry, helps ensure that their member companies are compensated for every use or reproduction. However, it is often difficult to identify the contributors to a collective work, even though the individual contributors may retain the rights to their work. Publishers rarely allow an author or artist to post a copyright notice and they remove signatures from artwork as a matter of policy.

Furthermore, copyrighted works are often posted on the Internet without permission and with no attribution to the creator. Illustrations, in particular, are often scanned and separated from the context in which they were originally published. Thus, through no fault of his own, an artist's work may be published with no way of tracing it back to its rightful owner.

Even the Copyright Clearance Center insists that it is not possible to track the use of illustrations which appear in published work. Thus, they refuse to pay compensation to artists, even though those artists often retain all rights - including reprographic rights - to their work. If the CCC is correct that it's impossible to track ownership of illustrations, then virtually all published artwork may be designated as orphaned.

I happen to disagree with the CCC on this point. I believe it is possible to track usage of illustrations and other artistic work, as has been done by several European licensing societies for many years. In fact, this suggests a much more equitable solution to the problem of orphan works. Rather than designating works as orphaned and putting them "up for grabs," we should strive to create a better system for tracing copyrighted works to their rightful owners. For example, we should support the efforts of the Illustrators Partnership of America (IPA) which seeks to establish a clearinghouse for published artwork, similar to the CCC. They have already proposed a model of unique identifiers which would make published artwork traceable to its source.

(Incidentally, this would have a dual benefit. The IPA could also collect reprographic royalties on illustrations and return them to their rightful owners. As I mentioned above, many illustrators retain all rights - including reprographic rights - to their artwork. Currently, these royalties are collected by the CCC and returned to publishers, rather than to the artists to whom they belong.)

This brings me to my second point. As an educator and researcher, I often use the work of others in my teaching and writing. If I wish to reproduce another person's work, I must first obtain their permission and sometimes pay a re-use fee. I have rarely had trouble locating the rightful owner of a work to obtain this permission. However, I recently had an experience that I believe bears on this issue. Specifically, this addresses one of the issues raised on your website regarding the Identification and Designation of orphan works.

I recently wrote an article on the history of molecular illustration. Among other things, the article discusses the work of Roger Hayward, who illustrated several books by famed chemist Linus Pauling. I wished to reproduce some of Hayward's artwork in my article. I contacted the publisher of Pauling's books, W. H. Freeman, and discovered that Hayward had wisely retained the rights to all of his artwork. However, the publisher had no information on his whereabouts. By searching the Internet, I discovered that he had died in 1979. I also discovered that several other individuals were trying to locate the Hayward estate in order to obtain permission to reprint some of his artwork. For example, the Rights and Permissions Editor at *Sky and Telescope* magazine wanted to reprint some of his illustrations from *Scientific American*. The Oregon State University Library posted many of Hayward's drawings on the Internet as part of an online exhibit about Linus Pauling. Neither organization had been able to track down Hayward's heirs to obtain permission.

At this point I had a choice. I could accept that these other institutions had made a reasonable attempt to locate the Hayward estate and I could declare the works as orphaned. I could choose to reprint the work and take my chances that I wouldn't be sued for infringement. If an orphan works law was in place, I could probably do so legally. However, as an artist myself, I strongly value the principles of copyright protection and I felt an obligation to pursue a different course. I chose to continue my search.

A quick Internet search indicated that Mr. Hayward died in Merced County, California. I visited the website of the Merced County Recorder's Office and quickly located documents showing that Hayward left his entire estate to his wife, Elizabeth. Further searching revealed that she died in 1983 and I found other documents in which she bequeathed her estate to the couple's nieces and nephews. After a few more hours of searching the Internet, I located two of these relatives and even had an email address. I emailed Hayward's niece and within a few days

had received written permission to use his work. I passed this information along to the magazine editor and the OSU librarian, so now everyone can obtain the proper permissions. Hopefully OSU will make this information available to anyone who inquires about Hayward's work in the future. What was once an orphan work is now reunited with its rightful owners.

This story reveals an important fact. We all have different ideas about what constitutes a "reasonable" effort when it comes to locating the rightful owners of intellectual property. Even a Rights and Permissions editor at a national magazine and a librarian at an academic institution had failed to locate the Hayward estate. Yet I was able to do so in a matter of hours. This is not a reflection of my searching skill - the tools I used are available to anyone with an Internet connection. It is more indicative of the value I place on intellectual property and how much effort I was willing to invest to uphold the principles of copyright law. Unfortunately, as I stated above, the average person cares little about protecting intellectual property rights. Therefore, they will be quick to declare works as orphaned. It will be extremely difficult - if not impossible - to define what constitutes a reasonable effort in locating the rightful owners of intellectual property.

I should also point out that the Hayward family was well aware that they owned the rights to their uncle's work. They had no intention of abandoning his work or letting it slip into the public domain. Yet they were victims of a system that made it very difficult for potential users to locate them. This further underscores the need for a system to match a published work with its rightful owner.

It is critical that we retain strong copyright laws in this country. Copyright protection ensures that creators control the distribution of their work and, therefore, have an incentive to create. This is far more important than any inconvenience that may result because it is difficult to track down copyright owners. Rather than letting orphan works lapse into the public domain, we should instead focus our efforts on assuring that no work ever becomes an orphan. Developing a system of numerical identifiers for all written and visual works, similar to the ISBN or ISSN number, as well as licensing societies such as the IPA, to complement the existing CCC, will guarantee that potential users will always be able to track down the rightful owners of a creative work.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'James A. Perkins', with a stylized flourish at the end.

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Statement

Dena L. Matthews

**Testimony Before the Office of Advocacy
U.S. Small Business Administration on
The Orphan Works Roundtable and Webcast**

on “How Will the Orphan Works Bill Economically Impact Small Entities?”

August 8, 2008

Director Tom Sullivan and Assistant Chief Counsel Cheryl Johns, Small Business Administration; New York Congressional Staff, Representatives of the U.S. Copyright Office, World Intellectual Property Organization, and the European Union; my name is Dena Matthews and I am a medical illustrator, animator and small business owner. On behalf of small businesses working in the fields of medical illustration and animation, I appreciate the opportunity to address you. I am here today to talk about why Orphan Works bills S. 2913 and H.R. 5889 pose a threat of destruction to medical illustration and animation small businesses in this country.

What is a Biomedical Illustrator?

Let me first take a moment to acquaint you with the profession of biomedical illustration. Medical and scientific illustrators are highly educated professional artists. We supply most of the visuals used to educate health professionals and the general public on health-related topics. Our didactic visualizations are essential to growth in education and research. Our work also helps patients to understand their medical conditions. This knowledge becomes a solid foundation for patients as they become active participants in their own care

The majority of my colleagues has earned masters or doctoral degrees and has been certified in our areas of expertise by the National Organization for Competency Assurance. Our work frequently involves countless hours research to ensure accuracy and to determine the best instructional design for content and audience. We are like translators taking the complex, technical language from experts such as research scientists or surgeons and distilling it to a clear and accurate message for the audience—whether they are medical students, physicians, patients or the public.

Anonymity = Orphan

Illustrators in general are the invisible creative forces that develop the brands, image, style and communications for so many companies across the country. It is common practice for medical illustrations and animations to appear without a credit line, no notice of copyright, nothing to indicate who created the work or who holds the copyright. This is something most of our clients, especially large pharmaceutical manufacturers, insist

upon. They don't want our names or the names of our companies to encroach on their product or brand. Journal, textbook and magazine publishers frequently crop out from our work our signatures and copyright notices. Often, even when a client agrees to include copyright notice, they do not and the artist does not discover this until the work is published. This forced anonymity puts our work at a higher risk of infringement now and will make our work actual "orphans" should this legislation pass Congress. How will a potential infringer of an image find us when our clients—product managers, art directors or marketing directors—change jobs or their businesses close?

My Small Business: Producing 3D Biomedical Animation

My business, LifeHouse Productions, LLC, specializes in one area of medical illustration, creating 3D biomedical animation. Our work is akin to the animation seen on the TV show 'CSI', the nightly news health reports or on a documentary for the Discovery Health Channel. We demonstrate bodily processes and functions, pathologic states, surgical procedures, medical devices in action, prescription drugs' mode of action and more. Our clients range from medical device or pharmaceutical manufacturers and hospitals to lawyers, museums, publishers and TV producers.

Just as a major motion picture has a script, storyboards, actors, sets, costumes, lights, cameras and editing, so too does a 3D animation. But in a 3D animation the computer generated scenes are the sets and the 3D models like the heart or brain cells are the actors that must be animated, rendered and composited. Biomedical animation can take many months of research, development and production to create just a few seconds of video. The high degree of scientific and medical accuracy inherent in our work makes the work extremely valuable, and our unique expertise in visual storytelling, medicine and production technology makes us a strong asset to our clients.

The Technology Threat

Over a decade ago when I began my business, the tools of digital animation, video production and editing were cost prohibitive for the average person. Because 'high definition' was unknown, our animations were a maximum size of 'standard definition'—720 x 486 pixels. At the time, the Internet was slow, so we recorded our motion tests on disks and shipped them overnight. The final broadcast-quality animations were delivered as a series of frames on a disk to an editor, who then inserted our animation into the program. The editor would then record our animation on a Sony Digital Betacam (Digibeta) tape and hand us our final master before deleting all the frames of the animation from his edit system. If someone wanted to reuse our animation, they would need that Digibeta master. As a result, the opportunities for and likelihood of infringement on our work was small.

Much has changed in 10 years, however. Now, we edit video ourselves and deliver high quality, final animations over the Internet. We can provide our animations in various file formats and encoders so that our clients can place the animations directly in a PowerPoint slideshow or play them right from their computer or DVD player. Equipment costs have

come down and average people can take, make, edit, re-mix and share their own or others' animations, videos, TV shows and movies. This, along with the ease of Internet distribution, blurs the line between what is free and what should be purchased.

Companies are springing up in foreign countries—like India—that claim to offer cheap medical animation services. A close look at the work posted on their websites shows that much of their “work” is copied or stolen from companies like mine. All of this makes it possible for those with low budgets and low expectations for accuracy to purchase animation to fit their needs.

In the past few years, YouTube has transformed into an Internet phenomenon now owned by Google. Infringers regularly post copyrighted material to YouTube spreading them virally around the globe in an instant. Such is the foundation of the billion-dollar lawsuit of Viacom v. YouTube, where television shows copyrighted by Viacom were placed on YouTube by infringers¹.

This evolution in the distribution of video has dramatically changed the landscape in which I operate my business. I choose not to upload my videos to YouTube because, in doing so, I would have to agree perpetually to transfer my intellectual property to them, allowing them to profit off my work through their advertising revenue. In addition, Google's YouTube does not proactively remove infringed materials. In fact, YouTube encourages its users to make derivatives of all works posted.

Under current copyright law a user must gain permission from—and often pay a fee to—a rightsholder to make a derivative work, otherwise they are infringing on a copyright. Failure to do so constitutes copyright infringement. Google and YouTube will push forward regardless and are intent on adding more tools to YouTube for the benefit of its users. Just announced on July 31, 2008, Google acquired a start-up company Omnisio², whose technology allows users to mix online videos and add comments. So, by ignoring copyright laws, Google can create greater mass appeal, generate higher traffic and improve their bottom line.

I refuse to give my life's work freely to others so they can profit off of it. I have a special responsibility to maintain the integrity of my content and the exclusive licenses I've extended to my clients. The inherent danger in remixing a medical animation or illustration is that ignorant people can change the meaning, intention or scientific accuracy of an image. They can damage the reputation of the studio from where the work originated. Another problem is the orphaning of our work.

Orphan Works Legislation

¹ Catherine Holahan, *Viacom vs. YouTube: Beyond Privacy*, Business Week (July 3, 2008, 10:01PM EST) http://www.businessweek.com/technology/content/jul2008/tc2008073_435740.htm?chan=technology_technology+index+page_top+stories

² Rafat Ali, *YouTube Does a Rare Acquisition: Buys Video Tools Firm Omnisio*, Washington Post, (July 30, 2008; 6:07 PM) <http://www.washingtonpost.com/wp-dyn/content/article/2008/07/30/AR2008073002608.html>

There is an erroneous assumption at the root of the arguments driving Orphan Works legislation. Proponents of the bills claim there is a widespread market failure because infringers can't find copyright holders. This argument simply has no merit in the context of the current creative market. The only valid context where it does apply is in the limited context that the Copyright Office studied: older historic works where the rights holder is unknown or dead. This legislation clearly takes a limited problem and remedy and seeks to expand it into areas not relevant to the true Orphan works problem.

Prospective clients from around the world regularly find me. In fact, most of our new business comes from our web presence. If someone types "3D medical animation" into a Google search, my business appears on the first page. If a user searches for the image "deer tick", our illustration, with a link that takes users to our website, appears on the first results page. As a service provider we make every effort to be locatable. The trouble is under these orphan works bills if just one person says he can't locate me he could declare my intellectual property an orphan and even claim copyright to it.

There are many problems with the proposed Orphan Works bills, S. 2913 and H.R. 5889, that will be discussed today – particularly in light of the internet, YouTube and Google – but let me focus on two areas: databases or registries, and the infringement safe harbor for nonprofits. Both of these problems will effectively force many medical illustration and animation small business owners out of business as they try to protect their intellectual property from widespread infringement or lose valuable revenue that they were previously entitled to from an existing, thriving sector of the economy.

Databases = Registries = Expense

The current ease with which others may copy, display, and distribute content online makes it a real challenge to control copyrighted work. Under the proposed Orphan Works bills, medical illustrators and animators would have to submit all of our work to private databases or registries—at our own expense—or consider our work orphans. Proponents argue that under the proposed legislation this is not required, but failure to do so puts each image at significant risk of being declared an orphan by an infringer's currently undefined "diligent search." Not only is this a dramatic change from the laws we've been working under in good faith, but this also violates international copyright laws like the Berne Convention, to which the U.S. is a party.

The registry requirement would apply to our prior works. This would include having our old Digibeta masters and backup disks digitized (by an outside vendor) to a format that could be submitted to the proposed private visual databases or we could attempt to resurrect the original computer files and re-render them on our new equipment. There is no guarantee that our current software could even understand these old files, which are now up to 10 years old, let alone create an exact match of the original production.

And if the files are viable, we will have to re-composite the animations painstakingly to match exactly the original production and re-output the animation. The new version of

the software will inevitably output a slightly different looking animation. It will never be exactly the same as the original.

At what cost will this be to my colleagues and me? It would take countless hours and possibly hundreds of thousands of dollars to register our prior and future works. The expense, in time and money, to gather, prepare and register our work would impede us from serving our existing customer base or marketing to prospective clients and could drive us out of business.

We have placed countless numbers of derivative works, illustrations and animations on our website to demonstrate our work to prospective clients. These were not necessarily documented or archived. Some of these visuals did not contain the copyright mark or notice on the image and none of them contained embedded metadata. We placed the visuals on our website under the belief that most people would not infringe on our work. We never expected that entities, like the Internet Archive's Wayback Machine³, were archiving all the pages and images that we posted, and that one day, our works could be considered orphans even though we are an existing, thriving business that manages our copyrights.

Since these registries do not yet exist, there is no way of knowing what the parameters will be for registration of images or animations. There are 1800 still images in one minute of animation. When we register an animation, would we have to register and track each still frame separately? Each animation still image could potentially be used independently as a derivative work. Would we have to register all of the digital 3D models that we've created for use in our animations and illustrations with some sort of digital 3D model registry? Would we have to register all of the texture maps, which are digital images, sometimes photographs or paintings that are applied to the 3D models to give them their texture and color? These Orphan Works bills in their present form are too vague and do not address these enormous and overwhelming issues.

We would have to add metadata, contact information and keywords to each file to make them searchable and processed by a computer. At this time, I know of no standard protocol for providing metadata. If, as the adage goes, a picture says 1,000 words, how much metadata, keywords and descriptions would I have to produce for one animation to ensure someone could find it on a text-based search? Even more alarming, after adding all that information, someone can strip all that information from our work in the click of a mouse. It is known that Flickr and Google are already in the practice of doing just that when a user uploads his or her images to these sites. Under these Orphan Works bills, we would lose any semblance of privacy because each work would have to include all possible methods of locating us. For animators and illustrators who work from home, this would mean listing their home address.

³ Internet Archive
<http://www.archive.org/index.php>

Let's examine how this may impact my business with a real world example. We recently finished two animations that will debut today at the 2008 Olympics in Beijing, China. The animations were created for a medical device manufacturer. The animated portions of just one of the videos, on shoulder injury repair, consist of approximately 3,200 frames – distinct clean recognizable individual pictures, each which could be a derivative and considered an orphan if we don't register. Let's say for the sake of argument and easy math it will cost \$1.00 to register each work in the yet-to-be-created visual databases (in all likelihood it would be much costlier than this). This would amount to an additional cost to me of \$3,200.00, not covered by the purchase agreement with my client. There were at least seven iterations of this one piece. This would amount to 7 x \$3,200.00 or a total cost to register this piece of \$22,400.00. What if the fee was \$10.00 or \$50.00? Keep in mind this is just one of many projects we have produced this year. You can clearly see how the effect of having to register my work (which is now protected under current copyright law) would be catastrophic to my business.

These registries will be commercially based and thus will likely involve fees and maintenance charges. Registration fees would be effectively an unfair 'tax' on intellectual property. As a business, we already pay federal, state and local taxes. Under these Orphan Works bills, we would have to protect our intellectual property by submitting all our work to every database that springs into existence, risk creating orphan works or go out of business. If we didn't do this, an infringer could make the case he failed to find us after making a 'reasonably diligent search' on just one database. If this law is enacted, I expect that we—and others like us—could no longer afford to stay in business. Any hospital, medical school, doctor's office, pharmaceutical company, or other institution that relies on our illustrations and animations would suffer right along with us.

Databases = Registries = Transfer of Wealth and Property?

Sites like YouTube open the door to infringement so they can profit from ad revenues. They require that users sign over a license that they may maintain the video on their servers in perpetuity⁴. It is reasonable to expect the visual databases will act in much the same way. What happens to all that content they are storing if I neglect to renew my contract with them, if a registry changes its business model, is bought by another company or is hacked? Who determines the fate of my intellectual property?

The supposed purpose of the registries is to make it easy to locate the copyright holders to works in question. But this premise is shortsighted and this benefit does not nearly outweigh all the negatives of the registries. For one, having to register our work would violate contractual and confidentiality agreements, which typically prohibit us from placing work on a public site. Our clients, who often must protect patient records, trade secrets, or patents, commonly ask us to sign a confidentiality agreement. An Orphan

⁴ YouTube, Terms of Use, Item Number 6., Your User Submissions and Conduct
<http://www.youtube.com/t/terms>

Works law would force us to violate our contracts in an effort to protect that work, or risk having that work be considered an orphan.

If registries were opened today or even by 2013, they could not completely fulfill their purported purpose of connecting user with rightsholder. There is no technology today that can guarantee, with 100% accuracy, that my animation could be matched to an animation uploaded by a prospective infringer. By all accounts, the earliest this technology could be perfected is at least a decade away. The way the Orphan Works Acts are written, they would take effect whether or not the databases work 100% of the time.

Infringement Safe Harbor Provision for Nonprofits = License to Infringe

The second clause that members of my profession and I object to in the Orphan Works bills is the infringement safe harbor for nonprofits. This provision would significantly, if not completely, eliminate a large portion of our revenue and would put most independent medical illustrators and animators out of business by eliminating a significant client base.

The work of medical illustrators is fundamentally educational in value. Many of our clients are nonprofits, like hospitals, museums or research institutes seeking to educate people about health and science. We may create new work or license existing work to them. Without them, our client base would shrink by at least one third. For some medical illustrators it would wipe out their entire client base.

The word nonprofit is a misnomer. Nonprofits are allowed to earn a profit. The 1.5 million nonprofits registered with the IRS have \$1.9 trillion in revenue and \$4 trillion in assets⁵. The Howard Hughes Medical Institutes alone have liquid assets in at least the tens of billions of dollars⁶. Take a close look at your local magazines, newspapers, and sporting venues, and you will find numerous sponsorships and advertisements—all of which were paid at market rates—by these “non-profit” institutions. There is no justification for why such a prosperous industry sector should be granted to use our work for free. A property owner is entitled to fair compensation when his property is confiscated for the public good. Works of art are intellectual property, shouldn't their owners be compensated for their loss?

If this Orphan Works legislation is enacted these clients could use copyrighted work accidentally or unscrupulously without owing a penny to the rightsholder. This means that they could fearlessly infringe on our work. Copyright holders would have no recourse because all of our legal remedies would be eliminated under this safe harbor clause.

⁵ NCCS All Registered Nonprofits Table Wizard, National Center for Charitable Statistics (August 1995 to June 2008)
http://nccsdataweb.urban.org/tablewiz/tw_bmf.php

⁶ About HHMI: Current Fiscal Year Data
<http://www.hhmi.org/about/financials/current.html>

Under current copyright law, we have the right to decide who may use our work. Under the Orphan Works bills, we would no longer have that right, especially with the nonprofit infringement safe harbor provision. We would have no recourse if our work was used erroneously—medically or scientifically speaking—or for purposes to which we would morally object. Infringers could compromise the medical accuracy and publish misleading information, which could endanger people’s lives and ruin reputations and businesses.

Nonprofit infringers could use our work, like our fetus illustrations, to support a politically charged cause, like pro-life or pro-choice, with which we may not want to be associated with. This could have the added effect of alienating us from our clients.

YouTube now has a nonprofits channel⁷. Under an Orphan Works law, I would have no way to stop nonprofits from using my animation and putting it on this channel. Now, a nonprofit might not be want to knowingly infringe on someone’s copyright but under the following scenario they could do so inadvertently.

Anyone, like a high school student creating a school project, could appropriate our animation, even a small snippet of an animation, like the heart beating or blood clotting animations. They could incorporate the snippet into a larger body of work. Then they could post their remix on YouTube, unwittingly handing over our intellectual property and opening it up to the entire world as an orphan in perpetuity.

A nonprofit could find this work on YouTube thinking it is orphaned and decide to incorporate it into the production they will post on YouTube’s nonprofit channel. This is how our work could be orphaned. This chain of events would open up our work to repeat and unstoppable infringements.

Call for a True Orphan Works Act

The two Orphan Works bills that are in Congress are being sold as an effort to help libraries, museums, archives, documentary filmmakers and genealogists use old works whose copyrights are most likely no longer being managed. While I do not oppose not-for-profits using truly orphaned work, there should be no infringement safe harbor for nonprofit educational institutions, and no orphan works exemption for educational use. Fair use already generously covers scholarship.

Is this bill really about orphans? In the March 13, 2008 hearing before the Subcommittee on Courts, the Internet, and Intellectual Property; Committee on the Judiciary; United States House of Representatives, Congressman Howard Berman said that “we should correct a misnomer. The works we are talking about are not orphans,” but the “scenario we struggle with is how to address what happens when the ‘parent’ reappears. The more accurate description of the situation is probably an unlocatable copyright owner.”

⁷ YouTube Nonprofit Program
<http://www.youtube.com/nonprofits>

There has been no evidence of a market failure of users failing to locate copyright holders. People from all over the world regularly find my company. Despite that, these bills will effectively orphan much of our work.

Technology is moving fast and it's a challenge for everyone to keep up, but that is no reason to enact a law hastily that would wipe out the monumentally important small businesses whose ability to create original content makes ours an enviable nation.

As you can now surely appreciate, the Orphan Works act would create many more dangerous and difficult issues than it could ever hope to solve. Along the way, it would threaten the livelihood of medical artists and illustrators everywhere, and compromise the standards and integrity with which medical and scientific illustrations have traditionally been produced in this country. I don't need to tell you that our country faces enough challenges today without adding to this burden—all because of the avarice of a few, private, megalithic companies. America was founded on the belief that every citizen has the right to pursue their dream, and to earn an honest living. This includes medical illustrators and animators, who have played a vital and significant role in maintaining the high standards of the healthcare delivery and educational systems that we enjoy in this country today.

I suggest a study be done to determine whether or not there truly is a market failure in the commercial markets. Otherwise, if any law is enacted it should be a true Orphan Works law that will not affect works managed by copyright holders.

Thank you for your time and for this opportunity to present the economic impact the Orphan Works bills pose to small businesses like mine.

Respectfully submitted,

Dena Matthews

Dena Matthews
Partner

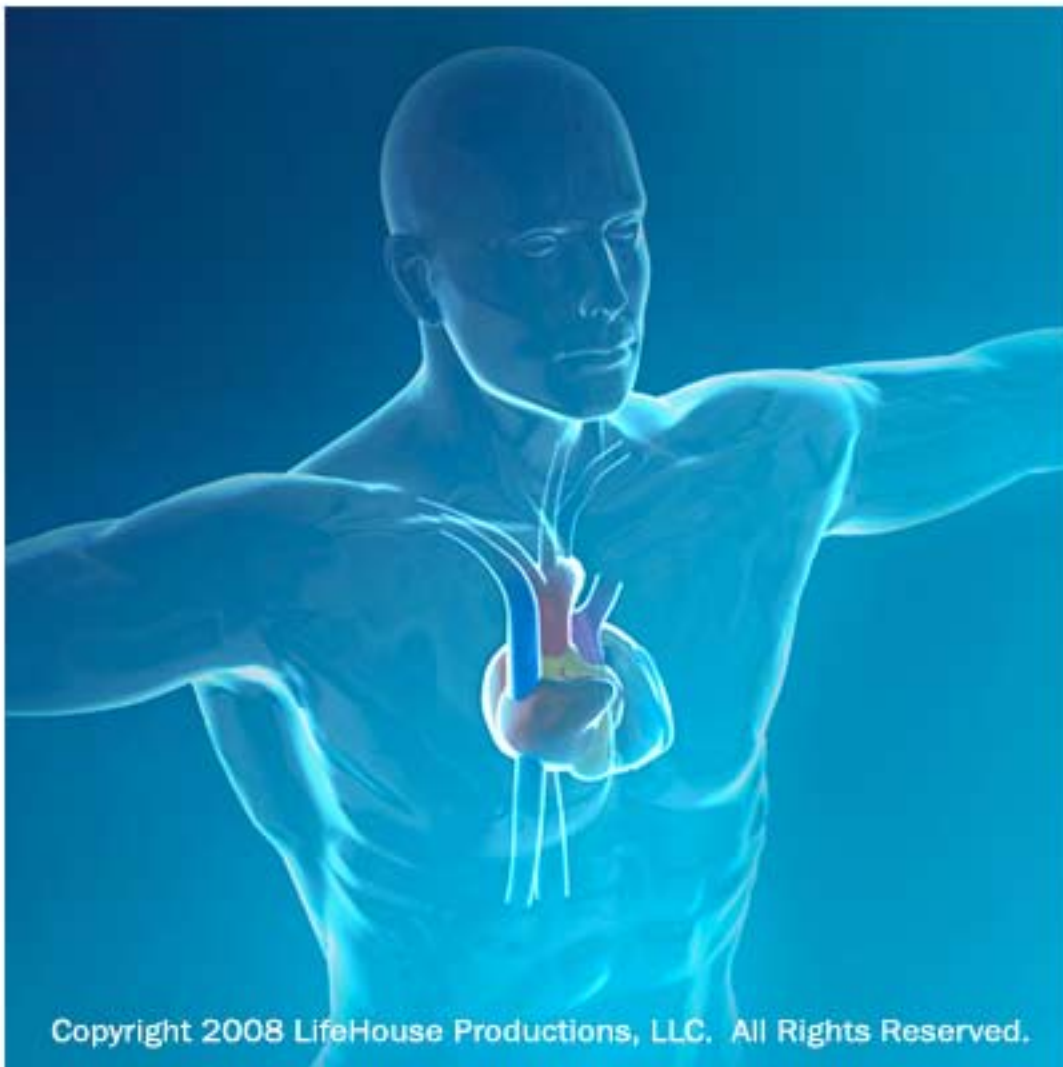
LifeHouse Productions, LLC
<http://www.lifehouseproductions.com>

(860) 432-9177

LifeHouse Productions, LLC

Dena Matthews, MAMS
Partner, Biomedical Visualization Specialist

Dena Matthews earned her B.S. degree in Biology from the University of Connecticut and a master's degree from the University of Illinois at Chicago's Biomedical Visualization program. Accomplished medical illustrator, international speaker, author and teacher, Dena owns LifeHouse Productions, LLC, celebrating a decade of excellence creating award-winning, biomedical animation and illustration.



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www.lifehouseproductions.com
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Biomedical and Scientific Illustrators' Opposition To S. 2913 - The Shawn Bentley Orphan Works Acts of 2008 and H.R. 5889 - The Orphan Works Act of 2008

The safe harbor clauses for nonprofits in the Orphan Works Acts in both House and Senate pose a unique threat to the profession of biomedical and scientific illustration, as well as advancements in American medicine, science and healthcare.

Biomedical and scientific illustrators are highly educated professionals, with the majority having earned bachelor, master and doctorate degrees and certifications in their areas of expertise. These content creators spend countless hours researching their subject material to ensure accuracy and to determine the best instructional design for their content.

These creators supply most of the visuals used to educate medical and allied health professionals and the general public on health-related topics. Their didactic visualizations support growth in medical and science education and research that generates new treatments and technologies and adds to our understanding of the world. Biomedical and scientific illustrators play a key role in patients' understanding of their own conditions, allowing them to be active participants in their own care, and in enriching our children's understanding of science and nature.

The highly specialized creative work of these illustrators generates important intellectual property for US businesses, nonprofit organizations and universities. Nonprofit educational institutions are a sizable and vital client base for these content creators. Their commissions and licensing of visualizations for non-commercial use sustain this valuable growth sector in intellectual property. Under the proposed legislation, biomedical and scientific illustrators would have little or no incentive to create innovative new works that could greatly benefit our society.

Biomedical and scientific illustrators are not opposed to usage of orphaned works by the cultural heritage sector for noncommercial purposes, or use by museums and libraries for preservation and education. However, this legislation makes no limitations for these purposes, and will dangerously expose copyrighted visual content to infringements while stripping the intellectual property holders of any practical means to protect their work. The bills' protections, as currently written, are impractical in providing the tools needed to maintain a visual arts business. And, as these biomedical and scientific illustration businesses would begin to fail under the proposed legislation, if enacted, commercial and nonprofit organizations would lose a valuable, highly trained group of vendors who consistently provide up-to-date and accurate media.

Biomedical and scientific visual content creators request that the safe harbor be limited to not-for-profit libraries, archives or museums accredited by a recognized national authority, for the express purpose of cultural heritage preservation. There should be no loophole for nonprofit educational institutions, and no orphan works exemption for educational use. Fair use already generously covers scholarship. Any other use needs to be licensed according to existing copyright law that protects an artist's exclusive rights, regardless of whether the use is "commercial" or not.



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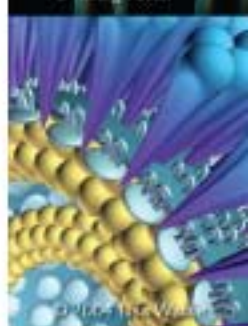
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How Camel Cigarettes Orphaned My Work

by Michiko Stehrenberger

The Orphan Works Act concerns me deeply because I was the plaintiff in a recent copyright infringement case and I can testify that the full remedies of the current law were necessary for me to prevail. Because the law permitted a judge to award me full damages, injunctive relief and legal fees, I was able to persuade a lawyer to take my case on a contingency basis and to retain the expert witnesses necessary to prove the value of my work.

The case took me four years and nearly \$100,000 in legal fees, but I was able to prove that the infringement was a willful act, conducted in bad faith by a major corporation. It involved the removal of my name from a registered work of art – a deliberate orphaning, which when confronted, the company would not admit to.

Of course this was not a true orphan works case. I know that even under the Orphan Works amendment this would be a case of bad faith infringement. The problem is that under that amendment, I would have virtually no way to prove it.

The Orphan Works Act would limit or remove penalties for infringement of works whose owners are said to be hard to find. The claim is that this will provide a safe harbor for responsible users of works whose creators have died or abandoned their copyrights, and the premise is that the law will be used by those acting in good faith. But good faith or bad faith are never self-evident. Under the Orphan Works Act, the infringer could have asserted a “good faith” orphan works defense and said, in effect: “Go ahead and sue me!” In that event, I would have had to risk upfront out-of-pocket legal fees and court costs in the hopes of establishing the infringer’s bad faith. I would also have had to weigh that risk against the fear that a successful “good faith” defense (whether merited or not) by the infringer would have limited my award to a paltry usage fee – far from enough to cover the nearly \$100,000 the suit would eventually cost me. And I would also have to risk it while knowing that there would be no limit to the amount of money the infringer could then extract from me in a counterclaim.

Here are the details: For 15 years I have made my living licensing my work to major corporations and media outlets. I have taken great care to protect the value of my intellectual property. Yet in 2000, my copyrighted image, *Blue Girl*, was infringed by the world’s second largest tobacco corporation. Although the infringer knew how to contact me beforehand, they instead chose to use my artwork without my knowledge or permission in a series of poster-sized cigarette ads that ran in 16 states and reached an estimated 8 million readers. They even branded my art with their logo on a focal point of the image, changing my work into a cigarette endorsement.

My art is registered with the U.S. Copyright Office and bore my copyright line and contact information. I released it on a promotional postcard I had designed, which I later discovered they had used as the source scan for their infringement.

The date of the company’s action is relevant, because the tobacco companies had already been forbidden from targeting teens and kids through the use of cartoon characters in their advertising. The Master Settlement Agreement, negotiated with the states’ Attorneys General,

went into full effect June 2000. Yet just two months later, the tobacco company started using my cartoon character in their ads. By utilizing my art, the company sought to benefit from the strong appeal my style and characters have among my core audience - teens and kids - at a time when my client base consisted of youth-focused companies such as MTV, Playstation, Hasbro and Lego.

The blatant affiliation of my artwork with their tobacco products went very much against my wishes and intentions. I had already turned down a potentially lucrative offer from a competing cigarette company years earlier because I didn't want to promote tobacco use. Additionally, this unwelcome use of my art had the potential to harm my professional reputation among the children's book editors and publishers with whom I was developing professional relationships.

The intentional "orphaning" of my work was total. My original promotional postcard piece contained a copyright notice and website information precisely so that potential clients would know how to contact me. The art also contained a prominent hand-signature on the image itself. This means that all three forms of identifying information had to be deliberately removed in order for a user not to find me. In other words, far from being hard to identify or locate (the standard the Orphan Works Act would use to define an "orphan"), the point of my Blue Girl image was to *encourage* users to find me. Yet it took only one person to find my image and sell it to the tobacco company, and somewhere in those transactions my contact information was completely removed.

Under the Orphan Works Act, this unauthorized third-party infringement would have made my image an orphaned work. And even if I suspected that the removal of my contact information had been conducted in bad faith, how would I be able to prove it?

Thankfully, the current Copyright Act allows for the "discovery" process through depositions from the defendants' staff members as witnesses. In my case, this enabled us to use the defendants' own testimonies, provided under oath (information which they refused to provide to us otherwise) to establish that the removals of my copyright line, web address, and signature were deliberate.

With proof of "willful infringement" we were able to settle out of court by reaching an agreement consistent with the range of statutory damages figures for willful infringements allowed under the law.

The current Copyright Act allows for these statutory damages to be determined by a jury. The figure can be as high as \$150,000 per infringement, plus reimbursement of legal costs. This is not the amount of my settlement figure – a confidentiality agreement prohibits any disclosure of that amount – but the settlement was presumably sufficient to punish a willful infringer who had acted in bad faith, and we can hope that it will in some way be a deterrent against future infringements by the same company.

However, this kind of resolution would have been problematic if not impossible under the Orphan Works Act. Without the tools of discovery, I could not have risked the cost of proving to a judge that this had been a bad faith infringement, even despite strong outside factors pointing to that conclusion. Without the full range of remedies available under current

copyright law, I would not have been able to take the essential steps necessary to establish the specific details behind the company's actions. In my case, expert witness costs, depositions and court costs approached the \$50,000 range alone, and substantial attorneys' fees had to be paid as well.

I believe this case demonstrates the problem with permitting "good faith" infringements of work by working artists: no unscrupulous infringer who gets caught will admit to having willfully removed an artist's name and risk exposing themselves to penalties exceeding \$150,000. Instead, they'll claim the work they infringed had no name on it and assert an orphan works defense.

Nor is a small claims court, as proposed by the Copyright Office, a rational solution for this kind of abuse. If I had had to pursue my case in small claims court instead of Federal court, there would have been no discovery process, and therefore no way to ascertain the facts. A judge would have had to weigh conflicting stories and would have likely "split the difference." My awards for damages would likely have been limited to smaller dollar amounts – in my county, the current small claims maximum limit is \$4000 – and since that sum would be less than the prevailing market rate for a standard commissioned ad with a typical transfer of rights, what would the tobacco company have learned? That the deliberate "orphaning" of an artist's work is a rational business decision! What would stop them from making it a standard practice?

All this would have the effect of devaluing my work, because its market value is determined by the licensing potential protected by an author's exclusive rights. For example, the infringed version of my artwork with my name and contact information removed is still floating around out there for others to find and use. Under current law, these new infringements would also be actionable, which means the current law acts as a barrier to further abuse. But under the Orphan Works Act, no subsequent infringers would be exposed to liability, the barrier to abuse would disappear, and I could no longer avail myself of the full licensing potential ebbing from my work. That first act of intentional infringement would have made my image, in many quarters, a true "orphan" – unless, of course, a user's "reasonable search" had led them to the tobacco company, and the company had charged them a licensing fee for the use of "their" Blue Girl image. This is just one of the possible bad scenarios I can imagine arising from the passage of this bill.

Aside from the confusion and crisis over the source of authorship of newer non-abandoned works, this would harm the lifetime value of these works as well. Illustrators, graphic designers, authors, painters, character designers, product designers, concept licensors, and other creators (not to mention their agents and business clients and others along the licensing chain) all make their living from the authorized repeat usages of this work. The Orphan Works Act will potentially harm all of these small businesses by wiping out the protections for the ownership of the core properties upon which these businesses are based.

In my own business of illustration and character design, the value of an image increases as the image gains in popularity. This can make third and fourth uses of an image more valuable than the primary usage fee, and this allows me to keep control of its licensing potential. This acts as both an incentive and a reward for artists to successfully develop an image or icon based on their own knowledge and instincts regarding trends, marketing, and other cultural

factors.

In other instances, the opposite principle applies: a client will purchase exclusive first-rights to a particular image for a substantially higher fee. In exchange, the client receives increased control of how they can display that image to the public. This higher fee guarantees them exclusivity – an exclusivity that I will no longer be able to guarantee my clients under orphan works legislation. In one swoop, this bill could potentially devalue all the artwork I have so far created and hope to create in the future.

The authors of the Orphan Works Act have drafted their “limitation on remedies” because they say infringers need “certainty” that their actions won’t expose them to great financial loss. But except for the current penalties for infringement, what other mechanism does the law provide to prevent abuse? “Certainty” is not something any of us have in the commercial marketplace, so why should infringers uniquely be entitled to it?

This bill would make it cost-prohibitive for creators to pursue infringers, even when we expect (as I did in my case) that their actions were deliberate. No creator could afford to challenge a major infringing corporation on an issue of copyright without hope that the ordeal of litigation would be rewarded with justice. If an infringer has to pay only after they get caught and if there are no additional penalties imposed for doing so, and if creators are forced to lose money in order to protect their intellectual property, then this creates a massive problem and an injustice against those who strive to innovate new and original work in our marketplace.

Because this is my livelihood, and I am the exclusive controller of the usage of my work (including what sorts of products, services, events and clientele my imagery endorses to the audiences and fan bases of people who follow the progress my work) I do feel it is my responsibility and right to have reasonable control of the integrity of any affiliations with my work, especially since the current Copyright Act has already established this as appropriate.

It takes an infinite number of transactions to make the clockwork of the marketplace work, and I believe that any government should be very careful before passing laws that would interfere with such essential free market relationships. I’m grateful for the fact that the existing copyright law has protected my work, but I’m alarmed that Congress might now consider stripping away the existing protections.

Thank you for taking the time to read this letter. As a woman who has worked for 15 years as a freelance creator, my professional experience has shown me that our current copyright protections are essential, and should not be sacrificed. Thank you!

© 2008 Michiko Stehrenberger.

The Blue Girl image and its infringement can be viewed at:
<http://www.michiko.com/illustratorpartnership/bluegirl>

The Blue Girl Case

How to Create an Orphan

© 1999 Michiko Stehrenberger



geniusinsanity.com

Scan postcard

How the Infringer *Orphaned & Transformed* Blue Girl into “Camel Girl”



Using Adobe Photoshop's Eraser tool, erase unwanted elements like the border, Genius Insanity title, copyright lines, and artist signature from the source image.



In the Photoshop "Paths" menu, convert the selected outline to a vector Path to use for exporting into a page layout program later.



Using similar steps as with the previous Layering, another tint is added which lessens the contrast of the image.



Resulting composited effect.

Using the vector Paths created, the modified image can now be copied or exported into a page layout program to add the other design elements in the advertisements.

Infringement

Infringing orphaned derivative, calculated to appeal to Michiko's young teens fans, in a market to which she refuses to license



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LOS ANGELES New Times

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SINCE 1913

Orphan Works Statement by Cheryl Phelps

Director Tom Sullivan and Assistant Chief Counsel Cheryl Johns, Small Business Administration; New York Congressional and Senate Staff, Representatives of the U.S. Copyright Office, World Intellectual Property Organization, and the European Union.

My name is Cheryl Phelps and I am an Illustrator, Designer, Art Licensor and Adjunct Professor at the School of Visual Arts and Fashion Institute of Technology in New York City. In 1987 I left my job as an artist at Hallmark Cards to open my small business as a freelance art studio. With 21 years of experience as a small business owner I offer the perspective of an Artist that has been successful in licensing my art on a variety of products and managing a vast archive of my own artwork. I have thousands of art images I have created for my small business and my artwork has made the companies I sell and license my art with millions of dollars in revenue.

I appreciate the opportunity to address you today concerning the two “Orphan Works” Bills, S.2913-The Shawn Bentley Orphan Works Act of 2008 and H.R.5889-The Orphan Works Act of 2008 and how the bills will impact not only me but every other Art Licensor and creative image maker. I stand with my distinguished colleagues and thousands of other Artists to oppose both of these two bills.

This year “LIMA” the Licensing Industry Merchandising Association gave statistics at the Licensing Expo in New York City that said Licensing is now a \$187 Billion dollar industry. Hundreds of thousands of art images are used to drive the success of this Multi Billion dollar industry and most of the providers of the creative content are small business owners just like me.

The changes in the copyright law that these two bills would bring will put me and other small business owners in jeopardy of losing revenue that the licensing of our art generates for us. The cost in reregistering complete archives with not yet established multiple “databases” in addition to registering our images with the US Copyright Office will prove daunting and expensive, placing an undo hardship on small business owners, many of which are sole proprietors.

Current copyright law provides us the protection of copyright whether we register with the copyright office or not. Current copyright law gives us the sole control of granting the rights to our derivatives. Current copyright law provides legal remedies that are a deterrent to mass infringement because of the statutory damages if we’ve registered with the Copyright Office that make the punishment for infringement too costly to risk for the infringer.

I have exhibited in 13 years of Art Licensing tradeshow, Surtex for 10 years and the Licensing Expo for 3 years, I have advertised for several years in sourcebooks that make my contact information available to potential clients. I am accessible and reachable if a

company wants to find me to acquire my artwork for their projects and products. As a small business owner I choose who I want to make licensing deals with or sell my art to so that I manage my Art Brand to align with companies that have quality standards and reputations that reflect the standards I set for my own business.

Having to potentially settle for “reasonable fees” if an infringement occurs because someone claims my work was “Orphaned” is more than just a loss of the statutory damages now in place. It literally forces me to have to deal with companies that I would never have made a licensing deal with. In no other circumstance that I know of does the management of one’s own businesses plan of growth and development fall into the hands of an infringer rather than stay with the business owner.

Most all Artists I know support some form of legislation that gives “fair use” to libraries and museums to safeguard our rich artistic cultural heritage. This limitation can be written to reflect truly orphaned works rather than this broad sweep and change in copyright law that in fact excuses potential infringers who have no interest in protecting our artistic heritage but intend rather to exploit our art for extensive financial gain. Not only the potential infringer but also the unknown companies set to establish these so called databases that may or may not be charging the Artist for registering are set to gain millions from the revenues art can bring them.

Filing copyright registration with the US Copyright Office is one expense many Artists can hardly afford now. Add in the multiple databases that may or may not be established by the time the law changes and may or may not charge the Artist to register and the cost of protecting one’s copyright becomes something no small art business will be able to afford.

If we are aiming to truly protect our rich artistic cultural heritage we must first start by protecting the rights of those artists that create that cultural heritage. I ask you to please reflect on the true intent of these two bills and to take into consideration the huge impact these bills will bring to the Creative Small Businesses that are being represented by us here today. I thank you for your time and attention and the opportunity to bring our concerns about this matter to you.

Thank you.

Cheryl Phelps 76 Irving Place 5B NY, NY. 10003 212-533-8236

cheryl@cherylphelps.com www.cherylphelps.com

Orphan Works –Unmasked

By Andrea Mistretta

My name is Andrea Mistretta. I started my small business and career as an illustrator and art licensor in 1979.

My art licensing business grew and thrived not only by the strength of my talent and hard work but also because I was able to protect my unique vision and properties with US Copyright law as do countless thousands of creative small businesses to compete in the business world.

Unique vision made tangible is the valued commodity that our small businesses offer to manufacturers, publishers and advertisers who print art on any surface and is the foundation of success for other large businesses in the US and abroad.

I vigilantly fought to preserve my copyright and prevailed with every infringing matter that would have weakened my business exposing it to eminent failure.

The most recent example of my “working art” being “orphaned” in the chain of infringements occurred when Corbis, a large stock image company privately owned by Bill Gates attained my art without verification of the art’s true property and reproduction rights from photographer, Richard Cummins, who photographed my art and obscured my copyright notice causing the first link in the chain of infringements.

Corbis then offered the art to the public online and subsequently sold my art for a fraction of its value to Alcone Marketing Group, (Omnicom Group), for their new client, Heineken USA, who continues to be my client for the past 9 years. Not only was my art was desecrated and devalued in the “Orphaning” process but my original specialized art was made to compete with me to my own client while others in the chain of infringements monetarily gained from its value and while I received none. The particular stolen art I had intended for use only on posters, limited editions and other licensed merchandise and not for consumer product advertising of alcoholic products. I contract and license different promotion-specific art separately.

My discovery of the infringement of the art of one of my New Orleans Mardi Gras posters included large bottle beer on large satin banners by chance on May 1st 2008 in an establishment in the French Quarter. I brought it to the attention of my attorneys in New Orleans at Shields, Mott and Lund who have had several prior successes settling infringements for me because I had copyright certification. Without the law they could not have fought and negotiated on my behalf.

As a result of the law’s benefits, the matter was brought to conclusion in mid August through a pending settlement.

My relationship with Heineken is still in good standing as they continue licensing for my promotion specific art for their 2009 Mardi Gras season on August 28th.

Over my 24 years of creating New Orleans Mardi Gras posters, the awareness and respect of my copyright ward off many potential infringers. It is the reason why I have been enabled to continue in business today as an art licensor creating fresh new art continually. Without copyright it would not be impossible.

Orphan Works will create no incentive to generate new, fresh, and unique thinking in commerce and culture. In the greater future picture, "Orphan Works" will enable large predatory companies to swipe and reuse imagery from small businesses that originate and produce this special commodity because they will be enabled and its repercussion of staleness will negatively effect larger businesses and their abilities to compete in the global economy.

I conclude this statement with the positive note that I have been grateful for success thanks to the protection of copyright and continue to donate half of the royalties I receive from my Mardi Gras posters on a quarterly basis to New Orleans area Habitat for Humanity since Hurricane Katrina.

Andrea Mistretta
45 White Pond Road
Waldwick, NJ 07463

My general art licensing may be viewed at <http://www.andreamistretta.com>
The Mardi Gras posters gallery may be viewed at <http://www.mardigrasgraphics.com>

About Andrea Mistretta

Andrea's love of art was instilled by her family when she was three. Her parents delighted in seeing her school bus house with a chimney drawing which hangs in her studio today.

Creating art and working with her Dad in his little screen print shop in back of the family home in suburban New Jersey throughout her teen years are some of her favorite memories.

She is a self-taught illustrator who became aware illustration could be her career after visiting the Society of Illustrators Gallery at age 18.

Her sole proprietorship began officially as Andrea Mistretta Illustration Studio in 1979, when she began to freelance with her art. After acquiring a used airbrush she combined its medium with her watercolor and pastel techniques as a fashion illustrator.

Mentored by several great illustrators, her career began to flourish and by age 22 she was creating greeting cards and illustration for companies as NBC-TV, ABC-TV, Ingersoll Rand, WWD, Forbes, various advertising agencies, and publishers in the New York Metro area.

Andrea has received several awards for her art including the prestigious Alberto Vargas Award for her works with airbrush and has written several articles demonstrating her technique for How, Step by Step, and The Artist magazines.

A cover feature article regarding her years creating the enchanting Mardi Gras posters of New Orleans were transcribed in several languages. The Flemish edition caught the eye at Heineken's Amsterdam headquarters and they contracted Andrea to create the first US National Mardi Gras campaign to promote their imported brands and continues to license her art for the past 9 years.

Though she is best known for her Mardi Gras themes for the past 24 years, Andrea's mainstay for the past 15 years has been licensing her art to manufacturers for production on gift bags apparel, puzzles, figurines, stationery and more.

She dreams of a first time public exhibition of all the original paintings of the Mardi Gras poster series to celebrate its 25 years in New Orleans in 2010.

Limited Edition Mardi Gras Poster
Original Art & Design by Andrea Mistretta

*One of a series produced each year since 1986
Each in the series is a popular collector's item*

© 2001 Andrea Mistretta



CERTIFICATE OF REGISTRATION

THE FOLLOWING IS A CERTIFICATE OF REGISTRATION FOR THE WORK OF ART OR DESIGN HEREIN SHOWN, WHICH IS THE PROPERTY OF THE REGISTRAR, AND IS REGISTERED IN THE OFFICE OF THE SECRETARY OF THE U.S. PATENT AND TRADEMARK OFFICE. THE REGISTRAR'S OFFICE IS THE U.S. PATENT AND TRADEMARK OFFICE, 400 MARSHALL STREET, WASHINGTON, D.C. 20530.

1. **Work of Art or Design** (Name of the Work of Art or Design) *Mardi Gras Queen*

2. **Registrant** (Name of the Registrant) *Andrea Mistretta*

3. **Address** (Address of the Registrant) *1000 17th Street, NW, Washington, DC 20036*

4. **Date of Registration** *02/27/01*

NOTE: This certificate is valid for the term of the registration, which is the life of the work of art or design, plus 70 years after the death of the creator. The registrant may, at any time, transfer the registration to another person, or may, at any time, surrender the registration to the U.S. Patent and Trademark Office.

WITH REGARDS TO THE REGISTRAR:

U.S. PATENT AND TRADEMARK OFFICE

Infringement

Image Database **Corbis.com** markets infringing derivative photograph of poster on t-shirt as part of its “Rights-Managed” Collection, marked:
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Mardi Gras T-Shirt and Bead Necklaces

Image: © Richard Cummins/CORBIS
Photographer: Richard Cummins
Date Photographed: ca. 1990-2001
Location Information: New Orleans, Louisiana, USA

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| <input type="checkbox"/> Casual clothing | <input type="checkbox"/> Customs and celebrations | <input type="checkbox"/> Mardi Gras | <input type="checkbox"/> Shirts |
| <input type="checkbox"/> Celebration | <input type="checkbox"/> Decoration | <input type="checkbox"/> Multicolored | <input type="checkbox"/> Southern United States |
| <input type="checkbox"/> Clothing | <input type="checkbox"/> Deep South | <input type="checkbox"/> Necklace | <input type="checkbox"/> T-shirt |
| <input type="checkbox"/> Color | <input type="checkbox"/> Festivity | <input type="checkbox"/> New Orleans | <input type="checkbox"/> USA |

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Infringement Cascade Begins

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August 20, 2008

TO: Thomas M. Sullivan
Chief Counsel for Advocacy
Office of Advocacy
U.S. Small Business Administration

SUBJECT: Why I oppose the Shawn Bentley Orphan Acts of 2008 (S. 2913) and The Orphan Works Act of 2008 (H.R. 5889)

MY BACKGROUND: I am an Illinois illustrator & author who licenses my art and writes published books and magazine articles to earn a living. I am *not* a hobbyist. I am incorporated as Gail Green Licensing & Design Ltd and run my Buffalo Grove studio *as* a business, paying corporate taxes and filing all legal documents per the law. I have been registering my images with the Copyright Office for over 10 years, own the rights to thousands of images and derivatives of images I've created and am currently entitled under the law to be awarded damages and legal fees if I bring suit against an infringer and win the suit.

With 22 years experience as a small business owner, I offer the perspective of an artist that has been successful licensing my art on a variety of products from party goods & veterinary scrubs to scrapbook kits and floor mats. I single-handedly manage a vast archive and own the rights to thousands of art images I have created. My art has made substantial profits for my licensees and been a vital source of family income.

LICENSING IS BIG BUSINESS: In their current form, the Orphan Works bills would impact not only me but every other Art Licensor and creative image maker. Stats given at the 2008 Licensing Expo in NYC by LIMA (Licensing Industry Merchandising Association) emphasize that Licensing is now a \$187 Billion dollar industry. Hundreds of thousands of art images are used to drive the success of this **multi-billion dollar** industry and, with the exception of big brands such as Disney or American Greetings, most of the providers of the creative content are small business owners just like me.

COST AND HARDSHIP: The changes in the copyright law that these two bills would bring will put me and other small business owners in jeopardy of permanently losing the revenue that the licensing of our art generates for us. The cost of registering complete archives with yet-to-be established multiple "databases" in addition to registering our images with the US Copyright Office will not only prove formidable and

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expensive for artists like me who are extremely prolific, but it will also create an extreme hardship for small business owners, especially since so many of us are also sole proprietors with few or no employees.

CURRENT PROTECTIONS UNDER THE LAW include the following:

- (1) Guarantees protection of copyright whether we register with the copyright office or not.
- (2) Gives **the artists** the sole control of granting the rights to our derivatives.
- (3) Provides legal remedies as a deterrent to mass infringement (statutory damages) if we've registered with the Copyright Office, making the punishment for infringement too costly to risk for the infringer.

Products displaying my art have been exhibited at tradeshow, are shown in marketing materials, ads, catalogs, on packaging and, of course, on retail store shelves. My brand "Sweet PETatoes®" includes a registered trademark and my characters are unique and striking enough to have stopped the Disney company in their tracks when my brand premiered at the National Stationery Show. I maintain two public websites and a blogsite, am a member of two high profile professional organizations and can be found via google or other search engine searches under my name "Gail Green" or brand "Sweet PETatoes®". My contact information is available to potential clients and I am accessible and reachable if a company wants to find me to acquire my artwork for their projects and products. However, that does not mean that actual legitimate products bearing any of my art brands or individual images contain that information. That is up to the discretion of individual manufacturers and the nature of the products themselves. (EXAMPLES of scrapbook papers, stickers, etc.—these products have the identification on the packaging but do not have copyright identification on each piece. These products are meant to be used in a creative fashion which means each individual component may become separated from the others and used in another way.) I cannot control individual products or product components losing the identification that would be necessary to contact me for use permission. And yet, under the new legislation, that could become the grounds for declaring my images to be "orphans"! To make matters worse, not only could an infringer use the images without the threat of any real punishment outside of a "fair use fee", but they could also create derivatives of my images and subsequently register them as their own!

INFRINGEMENT SUITS: From my own experience as the plaintiff in a copyright infringement suit, I know how expensive it is just to bring suit against an infringer, much less to continue the suit for years until it is resolved. IP attorneys come with high price tags that can be offset only by taking on a case on contingency. Under the proposed legislation, this would no longer be possible. Without the promise of any damages awards or legal fee recovery, no attorney would accept the case on contingency and no artist I know could afford to pay hourly legal fees of \$300/hour and more. This would most certainly be a "win" for potential infringers and even encourage additional infringement.

RIGHTS TO CHOOSE MY BUSINESS PARTNERS: As a small business owner, I also have the right to choose who I want to make licensing deals with or sell my art to so that I manage my Art Brands to align with companies that have quality standards and reputations that reflect the standards I set for my own business. The new legislation completely changes these rights. Having to potentially settle for "reasonable fees" if an infringement occurs because someone claims my work was "orphaned" is more than just a loss of the statutory damages now in place. It literally forces me to have to deal with companies with whom I would never have made a licensing deal or whose use may even violate another contract I may have with another legitimate licensee--potentially creating a breach of contract through no fault of my own! In no other

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circumstance that I know of does the management of one's own businesses plan of growth and development fall into the hands of an infringer rather than stay with the business owner.

TRUE ORPHAN WORKS LEGISLATION? Most artists & photographers support some form of legislation that gives "fair use" to libraries and museums to safeguard our rich artistic cultural heritage. ***Why then do these bills even include commercial use?*** That was not the original intent. This limitation can and must be written into existing legislation to reflect truly orphaned works instead of this broad sweep and change in our copyright law, which will only serve to excuse potential infringers who have no interest in protecting our artistic heritage but instead intend to exploit our art for their own extensive financial gain.

WHO STANDS TO GAIN FROM THE LEGISLATION AS WRITTEN? While it may be possible for true orphaned works to be used for "fair use" by libraries& museums and for infringers to infringe without damage penalties as long as they perform a "reasonable" search, these entities are not the only ones to gain, especially financially. That is reserved for others who are heavily backing these bills. The "unknown" entities that will be developing and running the yet nonexistent searchable databases that may or may not be charging the Artist for registering are set to gain *millions* from the revenues our artwork can bring them! Filing copyright registration with the US Copyright Office is one expense many Artists can barely afford now. It is expensive, especially if art is published prior to registering...and it is VERY time consuming to do. Add in the multiple databases that may or may not be established by the time the law changes and may or may not charge the Artist to register, and the cost to protect one's copyright becomes something no small art business will be able to afford OR be able to keep up with! Creating art should be my full-time vocation--*not* policing and protecting it!

And, since the legislation does not include any specifications to define these databases or regulate their development, there is no assurance that any and all databases created for this purpose will even be synchronized with each other or with current technology systems with which we already operate. In addition to the expense and time of re-registering images, the potential expense of digital programs, equipment, etc would become mandatory for ALL artists just to register our art, regardless whether they work in traditional methods instead of digital and whether that individual artist has the technological skills to master the process of digitally registering his/her work. Considering the current track record of months' delays when getting our art registered via the Copyright Office, what will happen with any lag time in registering (or re-registering) art under this new "searchable data base" system, including searches that may be performed BEFORE our work is properly displayed or whatever will constitute being searchable under this unknown system & technology??!!! Essentially I could register images on a Friday evening that may not appear on the data base until Monday morning (or days/weeks later...or months later) while someone performs a search on the weekend and declares my work an "orphan" since those images could not be found on the database. How can we have a law based on something that doesn't yet exist? Until we have a foolproof, workable system and the necessary technology for such a system already in place, legislation that includes this system in order to work, should NOT be passed or even considered.

ADDITIONAL LEGISLATION: Additionally, another bill was recently introduced on July 24, 2008: **The Enforcement of Intellectual Property Rights Act of 2008**, According to co-sponsor Sen. Bayh, key provisions are: authorization for the Attorney General to enforce *civil* copyright laws; enhancements to *civil* intellectual property laws; enhancements to criminal intellectual property laws; coordination and strategic planning of federal efforts against counterfeiting and piracy; and increased resources for key programs

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IN SUMMARY: If we want to truly protect our rich artistic cultural heritage we must first start by protecting the rights of artists who create that cultural heritage. I ask you to please reflect on the true intent of these two Orphan Works bills (especially when seen in the light of WHY the bill's backers are moving this legislation so quickly, who the supporters are and how they would benefit from passing the legislation with few changes or mark-ups) and to take into consideration the huge impact these bills will bring to the many creative small businesses that are being represented here today. I thank you for your time and attention and the opportunity to bring our concerns about this matter to you.



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August 6, 2008

Tom Sullivan
Director of the Office of Advocacy
Office of Advocacy
U.S. Small Business Administration
409 Third Street, S.W. Suite 7800
Washington, D.C. 20416

Dear Mr. Sullivan et. al.:

I'm writing in reference to the two bills know as "Shawn Bentley Orphan Works,
S.2913-The Shawn Bentley Orphan Works Act of 2008" and
H.R.5889-The Orphan Works Act of 2008

My name is Brenda Pinnick and I am a small business owner. My company name is Brenda Pinnick Designs, Inc. and I am located in Woodstock, GA. The nature of my business is creating images (art and design) for use on products in many different categories including gifts, home décor and crafting supplies. I do this by using the artistic skills I have honed, developed and nurtured over many years, along with the formal education I've invested my time and money in, for the purpose of positioning myself as a highly qualified and desirable licensed artist. I pay corporate taxes, purchase my local business license each year and volunteer in and belong to industry associations such as:

- Craft and Hobby Association –serving on the Designer Council
- Society of Children's Book Writers & Illustrators

I'm writing today as an independent business owner, speaking outside of the CHA or SCBWI organizations. I feel that in-spite of the numerous letters, faxes and emails that I have sent to my Representatives and Senators, my voice is not being heard and even worse, it has been misrepresented. I am adamantly opposed to both bills as they are currently written. While I do agree with the original intent of freeing up truly orphaned creative works for the benefit of our cultural heritage, the commercial use of these images should not even be addressed or considered in these bills.

With over 3,000 images in my working library of art, the UNFUNDED MANDATE being proposed by these two bills will put an impossible burden to bear onto mine and the businesses of all living, working artists. Having to register each and every design, and then police the universe for infringers in order to protect my income is not an option. My income would not be able to support such activity. The art licensing industry revolves around "exclusivity" contracts. If my art were to be infringed upon and used by a competitor in the same industry, both I, and my

manufacturer would be in breach of our contractual agreements with our customers, the Retail entities who advertise having our products exclusively. As current laws stand, I have passive protection from such infringements. While infringements *do* still happen, the current system provides enough incentive to deter most bad players from exploiting what is not theirs to exploit. There are many instances of products and uses to which art is applied where there is *no possible way* to include identifying ownership of copyright. The crafting industry is especially problematic due to the nature of the products.

Artists already fight a constant battle against infringement due to the vast amount of business being done overseas. If these bills pass, it will not only affect artists, but the manufacturers, their customers and the end users. Artists will cease to offer new designs and within a short time, there will be no new art to distinguish products from one another. An entire industry comprised of artists, designers and creative content providers will vanish. How then will this help our country's cultural heritage? The arts and the artists, who create, are a vital part of not only the heritage of our country, but also of the big wheel of commerce upon which this country thrives. I'm very proud to be a working, functioning part of what makes our country great.

If our government approached any other type of business and told them they could no longer own what makes their business valuable, that their intellectual property including sourcing information, trade secrets, collected knowledge of their industry and so on was now, no longer theirs to own and use to prosper...imagine the outrage. Allowing these bills to pass would amount to sheer discrimination against a specific segment of small businesses, the very ones who foster innovation and bring fresh visions to companies across the globe and in your back yard.

Thank you for listening to MY voice, not the voices of those who claim to speak for me.

Sincerely, Brenda Pinnick
Owner, President, Brenda Pinnick Designs, Inc.
492 Hendon Road, Woodstock, GA 30188

770. 591. 8811
<http://www.brendapinnickdesigns.com>

Kathy Andrews Fincher

Inspirational Artist

September 8, 2008

As an inspirational painter of children, my work is licensed to manufacturers and businesses. The Orphan Works Act of 2008 will create tremendous overhead for my business and an ethics challenge for controlling my message. The message is as important as the artwork; it is my ministry and my career. In the inspirational market, I am one of the most licensed artists in America. My Norman Rockwell-ish paintings of children are sold to non-for-profit organizations and licensed to manufacturers. Kathryn Andrews Fincher, LLC is our family's income, and also a charitable opportunity.

As an artist, I enjoy having complete control over donating and sharing my work with non-for-profit organizations and institutions in which I agree. *The Orphan Act bill makes it easier for those organizations in which I do not agree to use my artwork without my knowledge and also without payment.*

On one occasion, my painting of children using their hands to make a church and steeple in a painting titled "Here's the Church, Here's the Steeple" was displayed with a quote which horrified me from a manufacturer. As artwork is frequently displayed with a caption, often the caption speaks the loudest and it looked like the words were mine. Should this infringer have received broad exposure using my artwork, it would have crippled my business and my reputation. Thankfully, with current copyright protection, I was able to say "take it down" because today's law offers a fair deterrent of up to \$150,000 in damages. We were both "spared" from unnecessary legal action and my property was reclaimed.

If you read about the ability to collect these same damages under The Orphan Works Bill, you won't find them. The courts can actually choose to place me in a *working relationship* with someone in which I do not wish to work. Not to mention that I have no control over reproduction quality, quality of materials; approve text, etc. This infringer may have compromised my other contracts and licensing relations. (For example, an exclusive agreement has been breached by the infringer.) Let's be honest, as the bill is currently written, bad players today, will be legally protect bad players tomorrow.

If my paintings of children are personal property, this bill clearly does not represent my ownership. To prove the point, read this bill and insert a personal piece of property (such as a car) in place of artwork. Replace car owner in place of artists. When you do this you will see that the bill is an assault on property and business.

As a small business owner, I will be required to protect hundreds of fine arts paintings, thousands of sketches and designs, and many thousands of photographs. This financial and time consuming burden will make overhead expenses so high that it will be difficult to show a profit. As a small business owner, this bill is devastating.

Kathy Fincher
Kathryn Andrews Fincher, LLC
1881 Calvin Drive
Duluth, GA 30097

About the artist:

As a designer, writer, and owner of the popular Mama says...® products and paintings, Kathy Fincher's livelihood is in licensing. As one of the most licensed inspirational artists in the country, Kathy's is considered a "feminine Rockwell" for her expressive paintings of children. Kathy's work helps to bring attention to the needs of today's children during a time in which the American family is challenged.

Many charitable non-for-profit organizations such as World Vision, The American Cancer Society, The National Mentoring Partnership, The World Children's Organization, the Hospital Foundation, schools, institutions and more are beneficiaries of Kathy's prints and gifts portraying children.

TO: The Office of Advocacy, U.S. Small Business Administration

Re: Opposition to H.R. 5889 - The Orphan Works Act of 2008 and S. 2913 - The Shawn Bentley Orphan Works Act of 2008

My name is Joanne Fink, and I am the President of Lakeside Design, a Central Florida design studio which specializes in developing products for the gift, craft, and stationery industries. Most of our clients are manufacturers who sell their products to major retailers such as Wal-Mart, Costco, Target and Michaels. These clients range in size from small family businesses to huge international corporations, but they all have one thing in common; they license art to put on their products.

Through my business, I have been involved in the art licensing industry for many years, and often speak about art licensing at major trade shows such as The Licensing Show and The Craft and Hobby Association show. I don't know if you are aware of the devastating consequences that two pending bills (H.R. 5889 - The Orphan Works Act of 2008 and S. 2913- The Shawn Bentley Orphan Works Act of 2008) will have on the entire art licensing industry, so I felt compelled to share my concerns in hopes that the bill could be reworked to address them.

While I oppose the Orphan Works amendment, I applaud the intention of those who created it; there have been several occasions in the past decade that I wanted to use a particular image as part of a design, but because I was unable to determine where the image had originated and/or who owned the copyright to it, I was unable to use it. While I would welcome the ability to use images of this sort, I would NOT welcome it at the expense of undermining the entire Art Licensing world and current copyright protections, particularly as they relate to visual artwork such as photography, painting, and illustration. Unfortunately, as currently written, the Orphan Works amendments will have a devastating economic impact on artists and manufacturers in numerous industries; *it will basically change American copyright and intellectual property laws.*

My belief, from having read the bills in detail, is that whoever drafted them may not have fully considered their impact on the licensing world. Since art licensing is one of my areas of expertise, I thought it would helpful if I could share some information about how licensing works, and why passing this bill in its current state will be detrimental to the millions of people involved in the field.

LICENSING IS BIG BUSINESS

The following statistics have been provided by LIMA (the Licensing International Merchandiser's Association). Licensing is big business; it accounts for **\$175 billion** in retail sales of licensed merchandise worldwide, and **over \$105 billion in the United States.**

In 2006, the \$3.3 billion in retail sales of products featuring a licensed piece of art brought licensors—artists and designers—royalty revenues of \$182 million. These sales came from the following categories, affecting a wide range of American manufacturers:

- 36% gifts and novelties
- 15% home décor
- 15% housewares
- 10% paper products
- 7% accessories
- 5% apparel
- 4% publishing
- 3% food and beverage
- 3% health and beauty
- 2% infant products

HOW THE ART LICENSING INDUSTRY WORKS

Whoever owns the rights to a design (usually the artist/creator of the design) is the LICENSOR, and whoever wants to acquire the rights to reproduce that design is the LICENSEE. Artists/LICENSORS make money by licensing (essentially “renting”) the right to reproduce their design to different manufacturers (LICENSEES) to use on different sorts of products. For example, a sailboat image can be licensed to company A for a greeting card; company B for use on stationery, and company C for an art print. Licensing is an interesting and complex business, and it is a successful and profitable business because our current copyright law protects the creator’s rights and safeguards their ability to profit from their intellectual property. **This \$3+ billion art licensing industry will no longer be able to function should the proposed legislation be passed.**

RAMIFICATIONS OF THE PROPOSED LEGISLATION

When a manufacturer wants to feature an artist’s work on one or more of their products, *it is important to them that they are the only company who has the right to reproduce that design on that particular product.*

If other manufacturers are able to put the same design on the same product then it hurts the licensee, especially if the licensee has to factor the artist’s royalty payment into their price structure while the infringing manufacturer does not and can therefore bring the product to market at a lower price point. In fact, one of the great incentives NOT to infringe on an artist’s copyright, is that currently there is a stiff penalty—up to \$150,000 for each instance that infringement is proven. The proposed Orphan Works bills removes the penalty for infringement, which will make it easy for unscrupulous companies to infringe on someone’s copyright and receive nothing more than a ‘hand-slap’ as punishment. It is bad enough we have to deal with infringement issues from China and other countries—we shouldn’t have to deal with it from our own soil.

PRIMARY OBJECTONS TO THE PROPOSED “ORPHAN WORKS” AMENDMENTS FROM THOSE INVOLVED IN THE ART LICENSING INDUSTRY

1. It changes the 1976 U.S. Copyright Act (enacted in 1978), and makes it virtually impossible for artists to protect their work. It basically allows anyone to use a design without the copyright holder’s permission.

Under current law, you receive basic copyright protection even if you don’t register your work. **Under Orphan Works law your work could be declared an orphan even if you**

have registered it. Congress, in enacting the Copyright Act of 1976, provided that copyright exists in the creation of any work that is copyrightable subject matter, regardless of whether or not the owner has performed any legal formalities, such as registration, or copyright notices, or taken any steps to protect or defend the copyright. Since 1978 (when it was enacted) many creators have relied upon the Copyright Act of 1976, and employed business practices based upon the protections it offered. The proposed Orphan Works Acts of 2008 would have the effect of depriving certain creators of the ability to enforce their copyrights because they did not take steps that the Copyright Act of 1976 did not require them to take. **In essence, it will give infringers the legal means to use a design without the copyright holder's permission.**

2. It requires artists to attempt to protect their work by registering it with a digital data base system (presumably for a fee, in addition to the copyright filing fee)—when no such system exists!

The proposed legislation is predicated on the establishment of private, profit making registries that would establish databases of digital versions of artworks and provide a place for infringers to try to locate the artist, **BUT it will be enacted whether or not these data bases ever come into existence.** This will relieve the infringer of liability if he simply attempts a search that cannot possibly be performed successfully.

In addition, the legislation places no limit on the number of these registries or the prices they would charge. **The burden of paying for digitization and depositing the digitized copy with the private registry would presumably fall entirely on the artist, and even if an image is contained in the registry, as long as the infringer “looks” without finding it, the infringement is allowed.** There is no liability imposed for the failure of a database to find an image registered in that database when it is searched, and no requirement that all available databases be searched, thus potentially requiring multiple registrations (and multiple registration fees). There are also no safeguards to prevent any person or company from fraudulently registering work they do not own.

3. It eliminates statutory damages wherever an infringer can successfully claim an orphan works defense, thus eliminating the only tool the law provides to prevent deliberate infringement.

Current law almost certainly deters rampant infringement because the present remedies – damages of up to \$150,000 per infringing article-- make infringement risky. **By “limiting remedies,” the Orphan Works amendments will effectively create a no-fault license to infringe.**

4. It allows for an infringer to create—and copyright—a derivative work from the original design.

Under current law, the right to create a derivative work is one of an artist's exclusive rights. Section 103 (a) says a user can't copyright a derivative image that he's infringed. **“Protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.”** Under the proposed new bills, since the entirety of an infringed work can be included in a derivative use, then the copyright of the derivative will amount to a copyright of the original. This would be a *de facto* capture of new exclusive rights by the infringer. In other words, **these bills allow infringers to make and copyright derivatives—even if the copyright holder to the original work objects.**

If this legislation passes it would mean a return to pre-1976 U.S. Copyright Act when many artists' works fell into the public domain because they could not afford to comply with the formalities of registration as a condition of copyright protection. This violates the trust under which American artists have worked for the last 30 years, and effectively nullifies our U.S. Copyright registrations. Further, it leaves infringing works (and products incorporating them) subject to seizure in other countries under the Berne Convention for the Protection of Literary and Artistic Works (the international agreement governing copyrights to which the United States is a signatory), and invites sanctions from around the world under the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), to which the United States is also a signatory, because international artists' works would be just as vulnerable to infringement within the U.S. under the terms of the Orphan Works Amendment.

THE HEART OF THE ISSUE

One of the things that I do not understand about this legislation is why it applies to commercial applications. We are extremely concerned about losing our ability to earn a living as small businesspeople and entrepreneurs by licensing our work for commercial use-- which is what we believe will happen if this legislation passes.

I began my career over 25 years ago as a greeting card designer, and I am still extremely active in the greeting card industry; I am on the Board of Directors of the Greeting Card Association, an organization whose members (e.g., Hallmark and American Greetings) publish over 95% of the greeting cards sold in the United States. I am also the Design Editor for Greetings etc. magazine, the major trade publication for the greeting card industry. While the impact of this legislation will initially be felt by the visual arts communities, I would like to point out that it will also impact American manufacturers who utilize artwork in their product lines.

I strongly oppose this legislation, and respectfully request that you do NOT pass it. If you would like any additional information regarding the broad reaching implications this legislation has for our country, the art licensing community and visual artists both here and abroad, please do not hesitate to contact me. You can reach me at my office: 407-330-4465, or on my cell phone: 407-718-8260, or by e-mailing me at joanne@lakeside-design.com.

Sincerely yours,

Joanne Fink, President

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Harry S. Murray
145 Glover Road
Mullica Hill, NJ 08062

April 27, 2008

Ms. Marybeth Peters
Register of Copyrights
United States Copyright Office
101 Independence Avenue, S.E.
Washington, D.C. 20559-6000

Re: Senate Bill S.2913 - "Shawn Bently Orphan Works Act of 2008"
House Bill - H.R. 5889 "Orphan Works Act of 2008"

Dear Ms. Peters

I read with great interest your formal testimony before the Subcommittee on Courts, the Internet, and Intellectual Property, Committee on the Judiciary regarding the Orphan Works Act now being considered in both Houses of Congress.

I noticed how you strongly support this bill and how it seems, in your mind, to solve some rather esoteric issues and problems in the copyright system based on the examples you cited. I can't help but suspect the real motivations behind this legislation are much different because there did seem to be some minor subtext, in so many words, about profit. Particularly in consideration of those lined up to support it and who already stand poised to reap significant financial benefit from it. The word is some have already announced just that in business circles.

However, I really would like to know how you feel about the fact that this legislation, that I understand you helped assemble, will initiate an almost unseen feeding frenzy ... a wholesale harvesting of images now online that under the conditions of this new legislation can very easily be construed as, or easily made, Orphan Works, even though they are hardly that. In essence it will be legalized infringement. Clearly, if an image isn't "found" in a private registry, it is fair game according to your law. That's millions, maybe hundreds of millions of images online right now that are not registered, have no statement of copyright or ownership, and will likely not be registered or removed by the time this legislation goes into effect.

And I do emphasize "FOUND" in my last paragraph as there is ongoing debate about the effectiveness of the technology that your "solution" will entirely depend upon.

I'd also like to know how you feel about the fact that, due to the lack of publicity, the most innocent victims of this harvesting are completely unaware of its impact, if aware of this pending legislation at all. They are certainly not aware that this legislation places the sole responsibility for even finding out if they have been victimized by this unprecedented invasion of their lives and privacy ... entirely in their hands ... and that they have virtually no support at all from THEIR Government and its agents.

Not only is THEIR Government providing no protection from this attack ... THEIR Government will be facilitating this attack.

Who am I talking about? Average American Families who have enjoyed the internet as a way to share the happiest, and even saddest, moments of their lives with their friends and family across the country, and even around the world, through the wonders of technology.

Yes, companies who buy and sell images are poised to harvest images from private web pages, blog sites, share sites and the like, and the people who they steal these images from, most likely, won't even know it. People who don't believe this or see this potential in a proposed legislation that places the burden of proof of ownership solely ... on the creator ... or on the owner ... or on the just plain "poster of an image" online whose intent NEVER REALLY WAS to "PUBLISH" the image and had no idea copyright infringement was even an issue they need be concerned about ... are just naïve ... or worse.

There's GOLD in them thar photos and there are a lot of them to be had for free and resold at substantial profit. Many of the supporters of this legislation know that.

Will you warn the American People to take their photographs off these sites before this law goes into effect ... or ... will you protect the Owners of these sites from loosing all their users and advertising revenues?

I am an amateur graphic artist and photographer who has a "day job". I make very little from my art and do it mostly for fun. While I raise the point of an innocent victim of your legislation YOU clearly don't see, I too have a vested interest and feel the victim. I made 50 cents this past week from my art. I was thrilled. Currently my income from my art represents a \$700 loss in less than a year. But I do enjoy doing it. I have created quite a few images, hundreds, while loosing that \$700 dollars. Your law will increase my losses substantially or simply make it so inhibitive that I won't be able to enjoy creating and selling my one greeting card a week. Unless of course I just want to let people steal, use, and profit from my work under the law you helped create.

The proposed legislation reduces the liabilities and responsibilities of potential users / infringers to a point where infringement is, to put it simply, no big deal. On the other hand your efforts to "motivate some owners (*and don't forget CREATORS*) to participate more actively in the copyright system by making themselves available", places the entire burden of protection, proof, and defense on the owner/creator and amounts to coercion to pay private entities a fee to protect a right that, in a truly ethical and honest society, they already have and all should respect and honor. Trust me ... I am quite available and glad to participate in the process. It's the LEGISLATED fees to, and profit taking by, private entities I, as a creator of minor works, find potentially overburdening and particularly offensive.

I'll repeat this point ... this legislation has the potential to make it entirely unaffordable for me to do something I have enjoyed doing all my life and just started putting out in the public eye to see if I can make what ... a few pennies?? I like creating graphic images, and

I love that people enjoy them and at least a few like them enough to buy something with my images printed on them.

Of course under the new legislation I can still publish, not register, and take my chances by just putting my copyright statement that identifies me and lets people know where to find me. However, one representative of the copyright office when asked if someone chose not to register has already been quoted as simply responding, "If you want to go ahead and create an orphan work, be my guest!" If that is the official position of the Copyright Office ... it is very offensive and clearly something is seriously wrong in your office.

There are a lot of people out here ... in the REAL World outside of Washington D.C. ... just like me who think this legislation is not good at all, personally very damaging, and should not be passed. My group, the thousands of little people making perhaps hundreds of thousands of digital images for Print on Demand sites hoping to make a few bucks here n' there are just some of them. The graphic arts community all over the World is stunned and appalled by the nature of this legislation and its potential impact around the World. They are hoping we in the art community here in the U.S. can stop this legislation that virtually destroys copyright protection as we know it now and takes it back to the Stone Age.

I recently saw a poem by an independent artist describing how she felt about her art. She concluded ... her art ... is her emotions. Should she be required by law to pay a fee to ANYONE for the right to express and protect her emotions?

Do you have children Ms. Peters? If you do, through a quite wondrous process YOU and their father created them. Would you want to pay a fee to multiple private registries for legal proof that you are indeed their Parent? Maybe the analogy is a little over the top but the truth is ... for many artists ... their creations are no less personal. Just ask an artist you know how hard it is for them to sell a one of a kind work. I had a fine painting offered to me in barter for some photography work years ago. The artist didn't have the money to pay me and I could see in her eyes it wasn't easy to make that offer. I couldn't take it. I gave her my services for free.

The Berne Convention was and still is good for the entire World ...

even the United States of America! God bless her ... she sure needs his help!

Thank you for your time and consideration.

Harry S. Murray

A handwritten signature in black ink that reads "Harry S. Murray". The signature is stylized with a large, looped 'H' and a cursive 'Murray'.

harry@emotikey.com

THE ORPHAN WORKS ROUNDTABLE

Conducted by the Small Business Administration
August 8, 2008, Salmagundi Club, 47 Fifth Avenue, New York, NY 10003

How Will the Orphan Works Bill Economically Impact Small Entities?

Part 2: Cartoonists



Visual Artists

Part 2: Cartoonists

Statement of Nick Anderson / Article in Politico President, Association of American Editorial Cartoonists

Statement of Mark Parisi Syndicated Cartoonist

How Copyright and Identification Can be Removed From Your Artwork Lynn Resnick

Step by Step Process to Produce a Digitized Image Lynn Resnick

Letters from Cartoonists

Stan Tusan, National Cartoonist Society
Milt Priggee and Jeffry Finer of FINER & PUGSLEY
Tony Tallarico
Dusty Huggins
Barry Hunau, Cartoonsbybarry.com
Greg Evans "LUANN"
Margaret Shulock, "Six Chix"/ King Features Syndicate
Kirk Anderson
Benjamin Hummel
Jack Pittman
Mark Parisi, off the mark Cartoons
Mike Lester Studios
Michael Gray, Owner, Pencil for Hire
Laurie Snow Hein
Sean Kelly Studio
Terri Libensen, The Pajama Diaries
Donna Ranieri, Photo Specialist
John Kovalski, Creator of "Bo Nanas," Contributor to MAD Magazine
Adrian C. Sinnott
Craig Boldman
Ann E. Sabo
Stuart Rapeport
Peaco Todd

Association of American Editorial Cartoonists and National Cartoonist Society Cartoonists Appeal to Congress

Nick Anders	Sean Kelly
Sergio Aragonés	Rick Kirkman
Brian Bassett	John Kovalski
Dave Blazek	Mike Lynch John Martz
Steve Borman	Patrick McDonnell
Sandra Boynton	Earl Musick
Tim Burgard	John Norton
Daryll Collins	Mark Parisi
Brian Crane	Jack Pittman
Rob Harrell	John Reiner
Benita Epstein	Robert Rich
Ron Evry	David Silverman
Alan Gardner	Rob Smith, Jr.
Mort Gerberg	Rick Stromoski
Anne Bibbons	Mark Tatulli
Cathy Guisewhite	Laurie Triefel
Bill Hinds	Jerry Van Amerongen
Bunny Hoest Carpenter	Sam Viviano
Allan Jaffee	Brain and Neal Walker
Lyn Johnston	
Jeff Keane	



Association of American Editorial Cartoonists

3899 N. Front St.
Harrisburg, PA 17110
Phone: (717) 703-3069
Email: aaec@pa-news.org

I've been drawing all my life, or at least since I discovered crayons were more constructively used for marking on paper than for throwing at the cat. I started my cartooning career humbly, getting cartoons published in my high school paper almost 30 years ago. Although no sentient being with even minimally functional vision would find those early works aesthetically bearable, let alone worth stealing, everything I've ever published was protected by U.S. Copyright law.

You see, our government assured me they were protected under the Copyright Act of 1976. I merely put the copyright symbol and the date on each drawing, and I needed to take no further action. Now our government seems to be on the verge of saying, "Never mind."

Both houses of Congress are currently considering bills known as "orphan works" legislation. The intent is to allow use of copyrighted material whose author or heirs can't be found. While proponents of the legislation allege that it's primarily aimed at the works of deceased or long-forgotten artists, the law would apply equally to cartoons drawn yesterday and posted on the Internet with their signatures removed (which happens all the time).

I've done more than 5,000 cartoons and illustrations in my career. As president of the Association of American Editorial Cartoonists, I represent nearly 400 active and retired members who, collectively, have created hundreds of thousands of cartoons and illustrations.

If the orphan works legislation is passed, visual artists will have to create digital images and text catalogs of everything they have ever created (even though we were previously assured we had copyright protection), then pay a private company to put the works into a searchable registry.

The registries are an attempt to assure that the works aren't "orphaned." But the protections aren't adequate, and they shift the burden of the law onto artists. Under current law, people who want to use copyrighted works are obligated to find the creator. Under the orphan works law, artists will be obligated to police the marketplace for infringements of their work.

Some individuals will remove signatures for nefarious reasons. Others may help to orphan creative works without realizing it. Even the highly respected New York Times does it in its Sunday roundup of editorial cartoons. It cuts off the signature and typesets the name below the cartoon. It's done as an odd quirk of style, but the name could easily be removed completely if someone innocently scanned or clipped out a cartoon he liked and cut off the credit line. Someone might pass the cartoon along to a friend or associate who won't know the creator's name because it was removed from the image.

In the May 18 issue of the Times, the paper mistakenly switched the credits on two cartoons. One was by Rob Rogers of the Pittsburgh Post-Gazette. The other was by Signe Wilkinson, Pulitzer Prize-winning cartoonist from the Philadelphia Daily News. Never mind that the Times attributed two distinct commentaries to the wrong people;

swapping names makes it harder to locate the real artists. Even if someone performed a reasonably diligent search, they might not be successful because of a seemingly innocent clerical error. Even The New York Times may unwittingly contribute to the orphaning of creative works.

Illustrators have it even worse. Clients often don't want a signature on a drawing. Artists would be forced to rely on the reliability of the registries to protect their work — at their own expense, of course.

Even when an artist finds an infringement, damages are severely limited, as long as the infringer can claim they made a “reasonably diligent” search. Works could easily be orphaned by unscrupulous infringers who remove signatures or credit lines or even sufficiently modify works so they are more difficult to identify by the registry's software. In fact, a goal of the law is to encourage derivative works, so there is a provision allowing infringers to copyright their version. As an editorial cartoonist, I'm particularly concerned about infringers making wording changes that twist my cartoons into positions that I oppose.

One of the unintended consequences of the Copyright Act of 1976 was to make it difficult to use a work when its author couldn't be located. Congress is trying to “fix” this unintended consequence with a wholesale revision to U.S. copyright law, but too little consideration is being given to the unintended consequences of this overbroad fix.

What's the appropriate solution to the problem of orphan works? I support the narrow goal of making truly orphaned works (that is, those by deceased authors with no clear heirs) available for use by museums and archivists, and even for commercial use under a few additional restrictions. But the proposed legislation is written so broadly that it will almost certainly unleash a torrent of mischief by disingenuous infringers. In fact, infringers may dodge legal consequences more easily than my childhood cat dodged crayons.

On behalf of the AAEC, I thank you for your time.

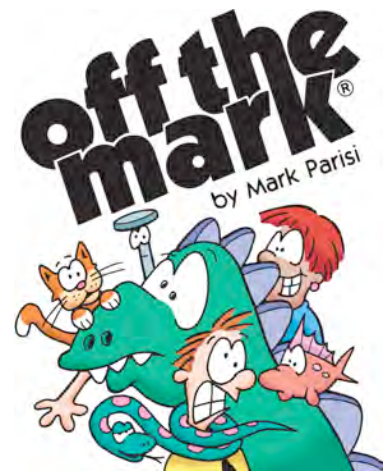
Warmest regards, Nick Anderson



President
The Association of American Editorial Cartoonist

Editorial Cartoonist
The Houston Chronicle
801 Texas Ave
Houston, TX 7700
713-362-7721

This article also appears online at: <http://www.politico.com/news/stories/0608/10984.html>



August 4, 2008

Tom Sullivan
Director of the Office of Advocacy
Office of Advocacy
U.S. Small Business Administration
409 Third Street, S.W. Suite 7800
Washington, D.C. 20416

Dear Mr. Sullivan,

I respectfully request that the US Small Business Administration oppose the following legislation:
H.R. 5889 and S. 2913, the Shawn Bentley Orphan Works Act.

As a small business owner, the proposed legislation would overhaul the copyright system that has proven to be effective, efficient and affordable for artists for the past 30 year and replace it with an untested system that shifts the burden of protecting one's copyrights. There are simpler and easier ways to provide remedy for Orphan Artwork. The new legislation would effectively diminish my ability to protect our company's copyrights, cause increased costs of doing business, and would devalue our company's inventory (our copyrighted visual cartoon art).

We would find it more difficult to protect our copyrights because:

a) If we followed the suggested legislation and provided our images on a privately operated database, we would be in essence making it even easier for people to just help themselves to the images. I run a database of 6000 cartoons and while every image has copyright information and a notice imbedded that permission is required, people just copy the images and strip of the copyright. Having a one-stop visual database to check for ownership would make it even easier for people who perceive that all images on the web are free to access to our inventory without the added image protections we would have from our website.

b) We are supposed to have faith that technology that doesn't exist yet and hasn't been tested would be able to identify our art in these databases.

c) If someone wanted to use our artwork and did as of yet an undefined "diligent search" and didn't find our image and filed a right to infringe, we would encounter the following additional burdens:

1) The House version would require infringers to file a textual description of notice to infringe. How can you possible monitor a textual based description of visual art?

2) If you do find that your artwork has been used, you have to at you own expense subpoena the US Copyright Office to find out if a notice to infringe has been filed. Going back to #1, the time involved in sifting through the notices would be prohibitive. If the infringer did file a notice, we would only be entitled to as of yet undefined list of pricing as just compensation. Who decides that all cartoon artwork has the same value? Mickey Mouse art commands more money than a college student's artwork. There's very little chance that we would be able to discover this infringer and the major "teeth" in current copyright law (up to \$150,000 in fines and legal fees) would no longer be a deterrent. For a nominal fee, an infringer could use our work knowing that the cost of getting caught is far less expensive than paying for the usage.

3) Why is the government or perhaps the infringer allowed to set the cost to use our artwork? Why has it become necessary to regulate artists the way we regulate the financial industry?

4) Why is the decision as to who is allowed to use our artwork being taken away from me. From time-to-time we are approached by organizations that we do not wish to be affiliated with. This change to copyright law would effectively take away our right to decide whom we wish to do business with and whom we wish our art to be affiliated with.

c) Derivative artwork created from our artwork would be even more damaging. Under this proposed legislation a person could make a derivative of our images and then copyright this “art”. If we discovered this misuse and after going to court it was determined that the artwork was a derivative of our artwork we could only receive what is determined as our just compensation. We would no longer have the rights to the image nor prevent how the image is used even if we proved to own the original artwork.

As a small business, the cost to protect our artwork would be prohibitive and consume a large portion of our expenses.

a) The time and labor to digitize most artist archives would be prohibitive. Given that many artists are not computer literate nor have the technology and software to easily digitize their work, they would need to hire outside resources. In the cartoon industry, the Cartoon Research Library charges \$25 per image to scan and digitize.

I personally digitized our archive of over 6000 cartoons. I have a background in computer technology and Photoshop software. I used interns and high school students. I also spent 2 hours a day of my own time for 4 years doing scans. Even with my background and “relative” cheap labor, it four years and nearly \$6000 to digitize our archives. Most artists don’t have an “extra” person to help with this task. I have provided a visual chart to show you the process to digitize print artwork.

b) The cost and time to upload your images into at least two privately owned visual based databases. After I digitized the cartoons, I added them to a database. It takes about 1-2 minutes per image to load each image and put in descriptions. Additionally, what is it going to cost me to have these images posted on these databases. Because the International Copyright Treaty called the Berne Convention specifically prevents the US Government from running registries, the legislation calls them databases and that the US government can not run them so they need to be privately owned. Assuming that a private business would need to make a profit, there will be fees required to have your images posted on these sites. If we were to assume \$1 an image (and this is in addition to the US copyright fees) then our 6000 images on 2 databases would cost us \$12,000. And who’s to say that there will not be more than 2 database since the legislation reads: a minimum of two privately run databases.

Even if we digitize our artwork, paid to have it uploaded on private databases, thousands and thousands of artists would not, could not or wouldn’t know that they would have to do this extra work to protect their copyrights.

As soon as this legislation passed, thousands upon thousands of images would technically become orphaned. Even if we followed the law, we would have to compete with all of the orphaned work and would be competing against free images. Based on Keynesian Supply vs Demand Economics, we would effectively lose a large portion of value of our company’s product because many people would choose free vs paid images and we would be forced to lower our rates to compete against free.

Quite frankly, I’m not sure our business model for revenues could survive this overhaul of copyright law.

off the mark, 16 Slayton Road, Melrose, MA 02176 781-665-4442 email: lynn@offthemarkcartoons.com

Based on a recent National Endowments of the Arts (NEA) study:

"Artists now play a *huge but mostly unrecognized role in the new American economy* of the 21st century," said NEA Chairman Dana Gioia. "This report shows how important American artists are to both our nation's cultural vitality and economic prosperity of our communities."

Numbering almost two million, artists are one of the largest classes of workers in the nation, only slightly smaller than the U.S. military's active-duty and reserve personnel (2.2 million). Artists now *represent 1.4 percent of the U.S. labor force*. While Artists in the Workforce is not an economic impact study, it does report the average income of various artist categories. Based on those statistics, artists earn an aggregate income of **approximately \$70 billion** annually. The study compares artists with the labor force in general, reporting on factors such as geographic distribution, racial, ethnic, and gender composition, employment status, age, and education level.

In conclusion, the amount of economic impact to small business this change to copyright legislation would be enormous while the financial impact for large organizations such as academic institutions, museums, libraries would be minimal. There are much easier solutions to providing Orphans Artwork Remedies such as expanding fair use portion of copyright law, using a system similar to Canada's Orphan Artwork Solution or the recent remedy enacted overseas.

Thank you for your time and consideration,

Regards,



Lynn Reznick Pairsi
Business Manager
Atlantic Feature Syndicate/off the mark cartoons
16 Slayton Road
Melrose, MA 02176
781-665-4442



How your copyright and identification can be removed from your artwork.

I manage a website that features nearly 6000 cartoon images that my husband, Mark Parisi owns the copyright to. We get about 1 million visitors a month to our website.

PREVENTING COPYRIGHT THEFT

To help protect against theft of our images we have disabled the right click download option for Internet Explorer and on EVERY cartoon is a copyright notice, an email address, a signature and a text disclaimer at the bottom of every cartoon that states that the image is copyrighted and may not be used without permission. One our new website about to be launched we are also added a transparent image that will appear over every image to prevent some additional illegal downloading.

THEFT OCCURS EVERY DAY

Even with these protections, it is not uncommon to find our cartoons on thousands and thousands of pages. Often the images have been stripped of our identification, text has been translated and other people have added their copyright instead. When we discover the unauthorized use, we inform the infringer to cease and desist. Often it's difficult to contact a web infringer or we are ignored.

HOW AN INFRINGER USES OUR WORK ON THEIR WEBSITES AND OFTEN REMOVES OUR COPYRIGHT AND CONTACT INFORMATION or EVEN REPLACES IT WITH THEIR OWN

Go to google image search and type in igloo and contractor. On September 4, 2008 I conducted this search and within the first 5 pages of google images, found the cartoon illegally posted 17 times.

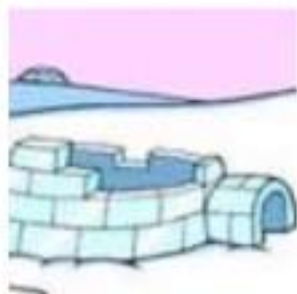
Sometimes they left all our contact info, sometimes they changed our info and sometimes they modified our images:

Samples:

Original



Examples of manipulated images:



Step by step process to produce a digitized image for use in a visual database.

1. Organize Artwork.

Artists don't tend to be organized. It took about 40 hours to organized the artwork by years and date.



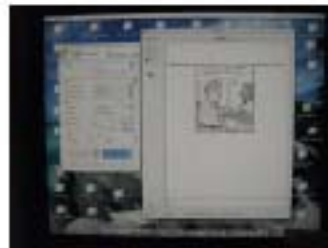
2. Set up cartoon so that the black line on the cartoon lines up with the line on the board so that you can get a straight scan.



3. Set up a preview scan to make sure the image has scanned straight.



4. Crop and do final scan of image.



5. Open file in photoshop, enlarge x 5 and clean up spots, blemishes, etc. Then add headers, copyrights, and web info.



FINAL IMAGE -
ABOUT 5 MINUTES X
6000 IMAGES =
500 HOURS X \$10 = \$5000

NOTE - I am tech savvy.
Most artists are not.



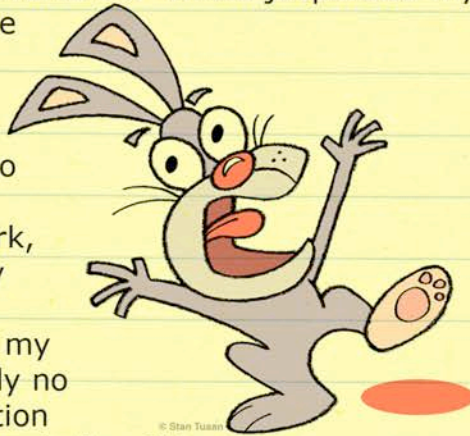
© Mark Parisi, Permission required for use.



105 Breckinridge Drive
Phoenix, OR 97535
541 535-6791

TO: US Small Business Association
August 6, 2008

I've been writing and drawing for a living for over 40 years. Creating and selling artworks for national publishing is my career. The current copyright act has served a logical and practical practice to protect my inherent "Intellectual Rights." An "Orphan Works Bill" would jeopardize my future earnings as well as take away my time to create. As a one-person business, I need to cut administrative time to a minimum. Not to mention having a dark, fearful cloud over my head whereas some stranger could reuse my artworks with possibly no control or compensation to me. I urge you to not allow this kind of scary climate to exist.



Copyright laws can always be revisited and improved, of course. But it should be opened to debate and fairness to all concerned parties. I do not feel this is the case in our current situation.

As I've worked long and hard to perfect my skills and talents, I would hate to feel short-changed. My website speaks for itself: <http://www.stantoon.com>

Thank you for your interest.

Sincerely,

A handwritten signature in black ink that reads 'Stan Tusan'.

Stan Tusan

Member: National Cartoonists Society

August 5, 2008

Tom Sullivan
Director of the Office of Advocacy
Office of Advocacy
U.S. Small Business Administration
409 Third Street, S.W. Suite 7800
Washington, D.C. 20416

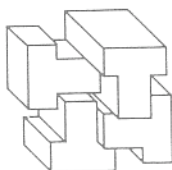
Dear Mr. Sullivan,

I respectfully request that the US Small Business Administration oppose the following legislation:
H.R. 5889 and S. 2913, the Shawn Bentley Orphan Works Act.



Milt Priggee
Jeffrey Finer FINER & PUGSLEY,
P.S. West 505 Riverside • Suite 600
Spokane, WA 99201
miltpriggee@comcast.net

tony tallarico



26 Payan Avenue
Valley Stream, NY 11580
(516) 561-7822

AUGUST 5, 2008

TOM SULLIVAN,
DIRECTOR OF THE OFFICE OF ADVOCACY,
OFFICE OF ADVOCACY,
U.S. SMALL BUSINESS ADMINISTRATION,
409 3RD ST. S.W. SUITE 7800,
WASHINGTON, D.C. 20416

DEAR MR. SULLIVAN,

WE RESPECTFULLY REQUEST THAT THE U.S.
SMALL BUSINESS ADMINISTRATION OPPOSE THE
FOLLOWING LEGISLATION -

HR. 5889 AND S. 2913, THE SHAWN BENTLEY ORPHAN
WORKS,

AS WRITER/ILLUSTRATOR OF OVER 1,000 CHILDREN'S
BOOKS - THIS NEW LEGISLATION WOULD DEMINISH OUR
ABILITY TO PROTECT OUR COPYRIGHTS, CAUSE INCREASED
COSTS OF DOING BUSINESS, AND WOULD DEVALUE OUR
COPYRIGHTED VISUAL CARTOON ART.



THANKS FOR YOUR HELP!

tony tallarico and Tony Tallarico
TONY TALLARICO and TONY TALLARICO



August 5, 2008

Tom Sullivan
Director of the Office of Advocacy
Office of Advocacy
U.S. Small Business Administration
409 Third Street, S.W. Suite 7800
Washington, D.C. 20416

Dear Mr. Sullivan,

I respectfully request that the US Small Business Administration oppose the following legislation:
H.R. 5889 and S. 2913, the Shawn Bentley Orphan Works Act.

Do the authors of this bill realize that the term starving artist is still relevant, and those people that are starving artists are exactly who this is going to affect. These are the people that can barely make their bills as it is, and now congress wants to enact a bill that will essentially charge them to keep ownership of their work? I know I can't afford to do that. It will make me seriously reflect on whether I want to do art in general. If congress wants to squash creativity in America, this is a good first step.

Dusty Higgins
Bryant, AR 72022

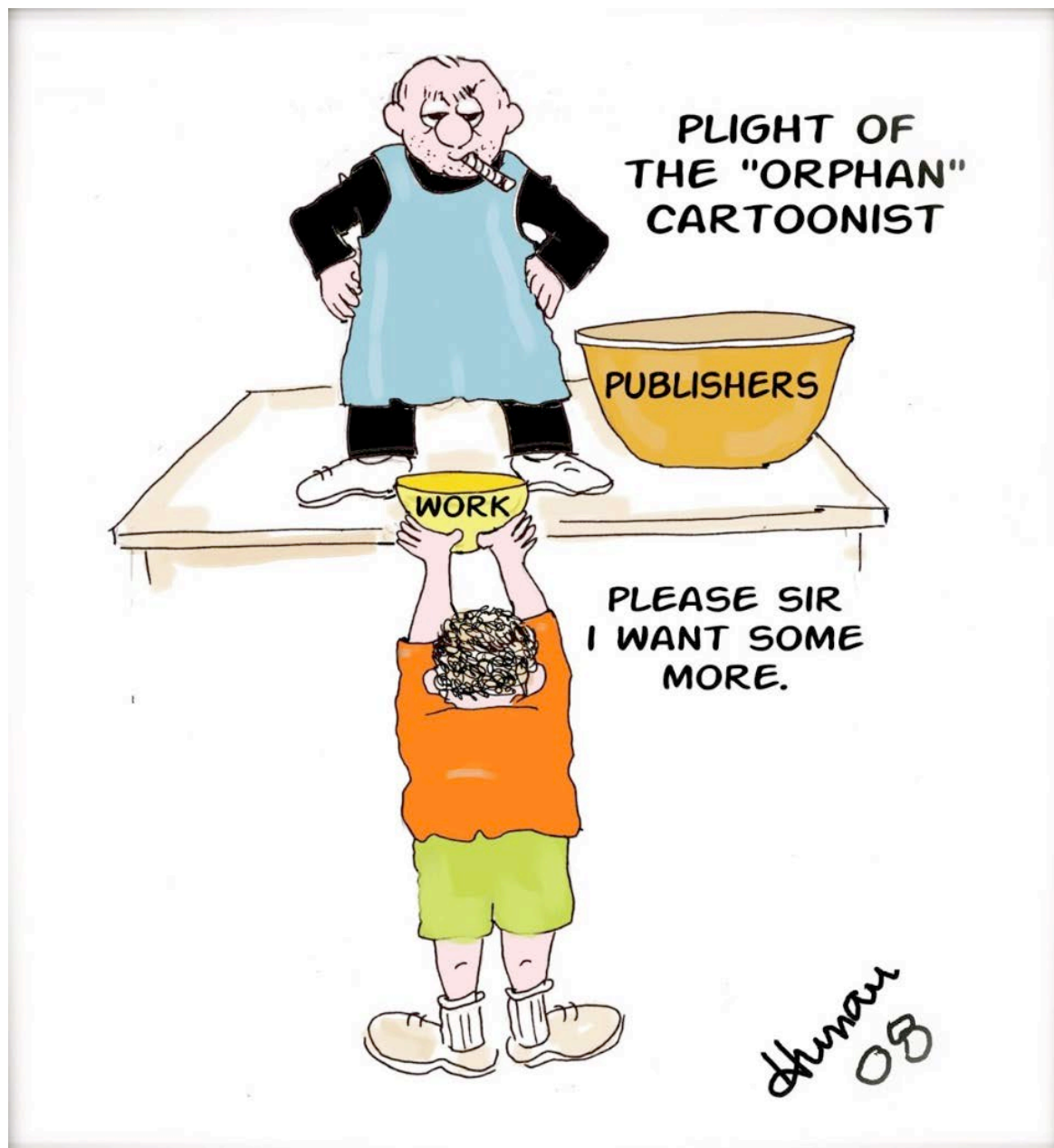
August 5, 2008

Tom Sullivan
Director of the Office of Advocacy
Office of Advocacy
U.S. Small Business Administration
409 Third Street, S.W. Suite 7800
Washington, D.C. 20416

Dear Mr. Sullivan,

I respectfully request that the US Small Business Administration oppose the following legislation:
H.R. 5889 and S. 2913, the Shawn Bentley Orphan Works Act.

Barry Hunau
bhunau1@comcast.net
Cartoonsbybarry.com



August 5, 2008

Tom Sullivan
Director of the Office of Advocacy
Office of Advocacy
U.S. Small Business Administration
409 Third Street, S.W. Suite 7800
Washington, D.C. 20416



Dear Mr. Sullivan,

hope you're getting a heap of opposition to H.R. 5889 and S. 2913.

As a full time cartoonist for 23 years of the comic strip "LUANN" I wholeheartedly stand with my fellow artists in opposing this nonsensical, costly, harmful legislation.

I urge you to do all you can to help defeat this proposal.

Sincerely,
Greg Evans
"Luann"
216 Country Garden Lane
San Marcos, CA 92069

August 5, 2008

Tom Sullivan
Director of the Office of Advocacy
Office of Advocacy
U.S. Small Business Administration
409 Third Street, S. W. Suite 7800 Washington, D.C. 20416

Dear Mr. Sullivan

I respectfully request that the U.S Small Business Administration oppose the following legislation: H. R. 5889 and S. 2913, the Shawn Bentley Orphan Works Act.

As a professional cartoonist and free lance illustrator this legislation would put my work in jeopardy as well as placing an undue financial burden on all individual artists. The loss of copyrights on unregistered work is a devastating prospect in my profession.

Terms like “Diligent Search” and “ Best Practice” are vague and unexplained. The thought of my work being virtually stolen and used for unknown purposes is a nightmare.

The work I create is a part of me not a widget in some vast machine of commerce. Please help all of us protect the value and meaning of our art.

Margaret Shulock
“Six Chix”/ King Features Syndicate
7652 Wideman Road
Friendship, N.Y. 14739
[585] 973-2010

August 5, 2008

Tom Sullivan
Director of the Office of Advocacy
Office of Advocacy
U.S. Small Business Administration
409 Third Street, S. W. Suite 7800 Washington, D.C. 20416

Dear Mr. Sullivan,

I respectfully request that the U.S Small Business Administration oppose the following legislation: H. R. 5889 and S. 2913, the Shawn Bentley Orphan Works Act.

I am writing in opposition to the "Orphan Works Act," a relatively tiny piece of legislation with big repercussions for small fish like me. I am a self-employed freelance cartoonist, and have enough trouble making a living, without this bill making it easier to have my work used without pay. Not infrequently, I get requests for cartoon reprints for books, especially textbooks, which can render \$150-250. I still get requests from time to time for cartoons as old as the late 80s and early 90s. This bill would make it easier for publishers to assume these older works are "orphaned," and use them without permission. This is not "adopting" artistic works, it is kidnapping them, and the bill should more appropriately be named the "Kidnapped Works Act."

This bill is making a much larger problem than it is solving. There is no penalty for a business to get caught kidnapping a work of art (a cartoon, in my case); they simply explain it was a good-faith mistake, they thought it was "orphaned," and they pay the reprint fee. Why bother hunting down an artist for a bothersome permissions form and payment when there's no penalty for kidnapping the artist's work instead?

I would hope that in a matter of private business, on a question of erring on the side of socialism or on the side of capitalism, you would choose capitalism. I hope that you will prefer to see me paid for my work, rather than see other people use my work for free, as if it was public property. I urge you to do what you can to keep the Kidnapped Works Act from passing.

Thank you very much for your time and consideration.

Kirk Anderson
2064 James Ave.
St. Paul, MN 55105
(651)698-4799
www.kirktoons.com
Freelance

August 5, 2008

Tom Sullivan
Director of the Office of Advocacy
Office of Advocacy
U.S. Small Business Administration
409 Third Street, S. W. Suite 7800 Washington, D.C.
20416

Dear Mr. Sullivan,

I respectfully request that the U.S Small Business Administration oppose the following legislation: H. R. 5889 and S. 2913, the Shawn Bentley Orphan Works Act.



Bill H.R. 5889/Bill S. 2913—PLEASE OPPOSE!

This cartoon addresses the Orphan Works bill, an issue that is hugely critical to the possible future careers of artists everywhere and it must be opposed.

The bill, as it stands, is poorly written. It may have come about by good intentions, but it is a far cry from that now. The current copyright laws work just fine. People rip off intellectual property for personal use all the time with no consequence. We don't need a bill legalizing the habit on a much larger scale.

The bill will weaken copyright protections for artists. The bill legalizes the theft of intellectual property, and it will remove from artists the ability to make a living. The end result will be a society that is content with artistic mediocrity, as true artists will simply find other ways to make a living.

I do not think this is an issue about the free exchange of ideas. The bill does not forbid the making of profit on another's intellectual property, which is my biggest contention. The bill also places the burden of proof on the creator instead of the infringer, a large departure from current copyright laws. It would also make the protection of intellectual property a much more time consuming and expensive process, and this is in an industry where most workers can barely make ends meet as it is. Finally, in this litigious society we live in, it comes at a great shock that congress would severely limit damages in this bill, when they continue to do nothing about frivolous lawsuits in other industries.

I am a staunch defender of free speech. However, I do not believe the theft of someone else's intellectual property constitutes free speech.

Sincerely,

Benjamin Hummel
ben@benjaminhummel.com

August 6, 2008

Tom Sullivan
Director of the Office of Advocacy
Office of Advocacy
U.S. Small Business Administration
409 Third Street, S. W. Suite 7800 Washington, D.C. 20416

Dear Mr. Sullivan,

I respectfully request that the U.S Small Business Administration oppose the following legislation: H. R. 5889 and S. 2913, the Shawn Bentley Orphan Works Act.

I am writing to urge you to oppose the Orphan Works Legislation currently being proposed. The bill would put an unfair burden on small business artists, who already act as owner/artist/secretary/bookkeeper of their businesses, requiring them to police their work as well. Additionally, it would undo the existing copyright protection we already have in place which is more consistent with the European copyright protection. And it would force artists to engage the potentially expensive services of private companies who would act as the database for cataloging creative works.

Most of my colleagues and myself have literally thousands of works currently copyright-protected, and to require us to pay registration fees to further protect those same works from being considered an orphan work would be prohibitive from a small business perspective. The Orphan Works bill would effectively remove the copyright protection we already have, and it would add another expensive layer of costs to the copyright process. The internet and digital age has made our jobs more difficult as it has become easier for our images to be lifted without permission and altered electronically as to remove our copyright notices. At least the current copyright law still protects our creative works against such abuse. What gives anyone the right to steal an artist's creative work for personal gain simply because they haven't done the legwork to locate the artist? The proposed Orphan Works legislation gives further ammunition to the unscrupulous use of an artist's creative work because there will be many who will not be able to afford the time and expenses to catalog and register a lifetime of artistic creations beyond what has already been done.

Please lend your support to oppose this proposed legislation.

Respectfully,

Jack Pittman

J. Pittman, Illustrator
1740 Brooks Avenue
Raleigh, NC 27607-6618
www.jackpittman.net
jack@jackpittman.net
919-785-1966

August 6, 2008

Tom Sullivan
Director of the Office of Advocacy
Office of Advocacy
U.S. Small Business Administration
409 Third Street, S. W. Suite 7800 Washington, D.C. 20416

Dear Mr. Sullivan,

I respectfully request that the U.S Small Business Administration oppose the following legislation: H. R. 5889 and S. 2913, the Shawn Bentley Orphan Works Act.

Dear Small Business Administration,

Please note that while the Orphan Works Bill is well-intended, it would be a huge burden for cartoonists. The time and cost for digitizing every image ever drawn (keep in mind many cartoonists do multiple cartoons in a day) plus the cost of paying private companies to host these thousand and thousands images would be unfair and a prohibitive.

This bill would also eliminate the only deterrent there is for copyright infringement. The fear of paying damages. If this bill is enacted, millions of images could be pirated and the cartoonist would not be able to get any damages because the infringer did a "diligent search," with is undefined and could be intentionally circumvented.

Instead of copyrights having inherent protection, cartoonists would have to pay "protection money" to corporations, and even then images could easily be pirated with no damages due the cartoonist. This bill goes against international copyright laws and needs changing.

Most cartoonists are their own small business. This bill would unfairly hurt us.

Thanks for your time,
Mark Parisi
off the mark Cartoons
16 Slayton Rd.
Melrose MA 02176



August 6, 2008

Tom Sullivan
Director of the Office of Advocacy
Office of Advocacy
U.S. Small Business Administration
409 Third Street, S. W. Suite 7800 Washington, D.C. 20416

Dear Mr. Sullivan,

I respectfully request that the U.S Small Business Administration oppose the following legislation: H. R. 5889 and S. 2913, the Shawn Bentley Orphan Works Act.

I adamantly oppose the Orphan Works bill. To survive as a small business is hard enough w/out the added burden of wondering if your product is protected in the marketplace. Small businesses provide the rhythm of our country and our economy. The people who make up these enterprises are brave, initiative and competitive people who deserve to know their intellectual property and livelihoods are protected.

Sincerely,
Mike Lester
Mike Lester Studios, Inc.
www.mikelester.com

Anne Gibbons

cartooning & illustration



August 6, 2008

Tom Sullivan
Director of the Office of Advocacy
Office of Advocacy
U.S. Small Business Administration
409 Third Street, S.W. Suite 7800
Washington, D.C. 20416

Dear Mr. Sullivan:

I respectfully request that the US Small Business Administration oppose the following legislation:
H.R. 5889 and S. 2913, the Shawn Bentley Orphan Works Act because:

*We are the
smallest of
small businesses!*



*Anne Gibbons
(Thursday SIX CHIX cartoonist)*

*The Cost of Compliance
would put me UNDER!*

Sincerely,

Anne Gibbons

August 6, 2008

Tom Sullivan
Director of the Office of Advocacy
Office of Advocacy
U.S. Small Business Administration
409 Third Street, S.W. Suite 7800
Washington, D.C. 20416

Dear Mr. Sullivan,

I am very, very concerned about the effect the legislation H.R. 5889 and S. 2913, the Shawn Bentley Orphan Works Act will have on my business and intellectual property. Because of this, I am asking for your help that the US Small Business Administration fiercely oppose this legislation. As a small business owner, the proposed legislation would overhaul the copyright system that has proven to be effective, efficient and affordable for artists for the past 30 years and replace it with an untested system that shifts the burden of protecting one's copyrights. There are simpler and easier ways to provide remedy for Orphan Artwork. The new legislation would effectively diminish my ability to protect my company's copyrights, increase costs of doing business, and would devalue my company's inventory (my copyrighted visual cartoon art).

If we followed the suggested legislation and provided my company's images on a privately operated database, it would be a huge impact in time and money lost to even attempt this. And, I would be in essence making it even easier for people to just help themselves to the images. According to the legislation, if you do find that your artwork has been used, you have to (at you own expense) subpoena the US Copyright Office to find out if a notice to infringe has been filed. Just the time involved in sifting through the notices would be prohibitive for a small business owner such as myself. If the infringer did file a notice, I would only be entitled as of yet undefined list of pricing for just compensation. Who decides that all cartoon artwork has the same value? There's very little chance that I would be able to discover this infringer and current copyright law would no longer be a deterrent (since for a nominal fee, an infringer could use my work knowing that the cost of getting caught is far less expensive than paying for the usage)! Why is the government or perhaps the infringer allowed to set the cost to use my artwork? Why is the decision as to who is allowed to use my artwork being taken away from my company? Also under this proposed legislation a person could make a derivative of my images and then copyright this "art". If I discovered this misuse and after going to court it was determined that the artwork was a derivative, I could only receive what is determined as what they determine is 'just compensation.' I would no longer have the rights to the image nor prevent how the image is used. Even if I was proven to own the original artwork!

As a small business, the cost to protect my artwork would consume too large portion of my expenses. The time and labor to digitize my own archive would be prohibitive as my company does not have an "extra" person to help with this task. And even worse, because the International Copyright Treaty called the Berne Convention specifically prevents the US Government from running registries, the legislation calls them databases and as such will be privately owned. There will undoubtedly be fees to have your images posted on these sites (and since the legislation specifically reads: a minimum of two privately run databases, that means twice the cost for my company!). The cost to protect my artwork and intellectual property would be staggering to the point that I simply would not be able to do it...leaving me open to have all my work considered "orphaned."

Please help artists and small business owners such as myself, and oppose this legislation,

Sincerely,

 8/6/08

Michael Gray
Owner, Pencil for Hire
9949 Nestling Circle
Elk Grove, CA, 95757
www.pencilforhire.com
916-647-3575 home, 408-505-9820 cell

August 6, 2008

I don't know how to Attach a pdf file so hopefully this will still work for you: Perhaps you can copy and paste:

******(This is typical of many artists. They barely know how to use email.)**

Tom Sullivan
Director of the Office of Advocacy
Office of Advocacy
U.S. Small Business Administration
409 Third Street, S.W. Suite 7800
Washington, D.C. 20416

RE: the Shawn Bentley Orphans Works Act, H.R. 5889 and S.2913

Dear Mr. Sullivan,

I art has been the sole support for my family of 6 children as a professional artist for the past 20 years. This week I will take my youngest to college. It would not have been possible to generate the income without the ability to publish and license my work effectively . That art income I was able to generate was because of the protection offered to me by our existing copyright laws.

The potential effect on my small business, Fine Art Creations Inc., would adversely effect my ability to produce and protect both existing and new work. The continuous cost of time alone would greatly impact creative time and production ability ; not to mention the money needed to deal with the cost of compliance, hiring of legal counsel, and purchasing of new equipment and possibly hiring of people to assist with the burden . It would be overwhelming and unreasonable , especially as I turn 60 next year. It would impact my retirement years adversely, if I am ever so lucky as to be able to retire.

It is everything I can do now just to keep up the pace of creativity , production and managing my small business. This legislation would cripple my ability to stay productive. Consider the cost of keeping records, registration, to digitize and register inventory, the infringement litigation costs, legal services, and the challenge of protecting copyrights in the states, what about abroad? It would kill my incentive to create and only benefit big business while making it impossible for us artist to keep up with the many employees companies can hire . As a artist I do it all myself.

Please do whatever is necessary to stop this legislation and be sure that all artist and creative minds are protected properly and completely.

Thank YOU!

Laurie Snow Hein
14494 Peace River Way
Palm Beach Gardens, FL 33418
www.artistlsh@aol.com
561 799 9610
www.lauriesnowhein.com

Mr. Tom Sullivan
Director of the Office of Advocacy
Office of Advocacy
U.S. Small Business Administration
409 Third Street, S.W. Suite 7800
Washington, DC 20416

Dear Mr. Sullivan,

I kindly ask you and the Small Business Administration to please vigorously oppose the Shawn Bentley Orphan Works Act (HR-5889 and S-2913).

As a small business owner, I can see that this bill will make small businesses beholden to corporate interests and the privately owned, profit-driven registries.

This bill is not a small adjustment to the copyright law as the proponents claim, it is a reversal of copyright law.

This bill is reckless and is far too broad. Libraries and museums can digitize their collections merely through a modest expansion of Fair Use.

Placing millions of images by small business owners into registries will make that work more vulnerable rather than safer. There is too much opportunity for misuse, abuse and irrevocable infringement.

Small businesses like artist's studios do not make enough money to cover the costs that would be required by this bill: costs of compliance, record keeping costs, registration costs, new equipment and software -- and the most serious of all: legal fees. We should not be forced to pay to register our own work, and then pay even more to track down infringers, so we can retain the rights which currently belong to us.

The economic impact to small business would be enormous, compared to the economic impact to large institutions, which would be minimal.

I ask you to oppose the Orphan Works act on behalf of all artists, writers, musicians. And because, in this digital age, all small businesses use images for marketing and promotion, this act endangers all small businesses.

Thank you for your efforts.

Sincerely,
Sean Kelly

Sean Kelly is a freelance illustrator whose work appears regularly in The New York Times, The Washington Post, The Wall Street Journal, Businessweek and Fortune magazine.

SEAN KELLY STUDIO

126 Jackman Avenue
Fairfield, CT 06825
(203) 615-0118

sean@seankellystudio.com

Ms. Kaplan:
We write to inform you that on top
of your **70-hour work week**, two **kids**,
and countless other **commitments**,
you must provide endless **digitized
images**, pay extra **fees**, and possibly
lose future **freelance opportunities**
due to the public access
of **orphaned image** databases.
Have a nice day!



©2004 Terri Libenson. All Rights Reserved. For more information, visit www.pajamadiaries.com

Mr Sullivan: For the sake of struggling artists
and small business owners, please help us
oppose legislation H.R. 5889 and S. 2193,
the *Shawn Bentley Orphan Works Act*.

Sincerely,
Terri Libenson

6550 Hidden Woods Trail Cleveland, Ohio 44143
"The Pajama Diaries" comic strip www.pajamadiaries.com

August 5, 2008

Mr. Tom Sullivan
Director of the Office of Advocacy
Office of Advocacy
U.S. Small Business Administration
409 Third Street, S.W. Suite 7800
Washington, D.C. 20416

Dear Mr. Sullivan,

I am writing to you to request that the US Small Business Administration oppose the following legislation: H.R. 5889 and S. 2913, the Shawn Bentley Orphan Works Act.

As a self-employed, freelance photo researcher who comes into contact with many other freelance and small business owners, I have seen firsthand how this legislation would profoundly impact the work of artists and their ability to support themselves. At the extreme end of this spectrum I have seen elderly, retired photographers who rely on whatever income they can make from their work (outside of a small amount of social security) being grossly taken advantage of and denied compensation for a body of work that has taken them a lifetime to create.

This new legislation would effectively diminish the ability of all artists to protect their copyrights and I urge you to please consider the negative impact this would have for so many who are already vulnerable to unjust copyright laws.

Thank you for your time and consideration,

Kind Regards,

Donna Ranieri
Photo Specialist

360 East 55th Street, #9M
New York, NY 10022
212-759-8959
drani58786@aol.com

August 4, 2008

Tom Sullivan
Director of the Office of Advocacy
Office of Advocacy
U.S. Small Business Administration
409 Third Street, S.W. Suite 7800
Washington, D.C. 20416

Dear Mr. Sullivan,

As a small business owner, I respectfully request that the US Small Business Administration oppose the following legislation: H.R. 5889 and S. 2913, the Shawn Bentley Orphan Works Act.

As you know, we are all finding it harder and harder to make a living and I feel that the Orphan Works Act will only add to that and, in some cases, cause some of us to cease operations.

We all feed our families by selling goods and/or services. The Orphan Works Act will, in effect, diminish the right to our own artwork by overhauling our country's copyright system. Our copyright system does not "give" us the rights to our artwork, but acknowledges that by creating our artwork, we are the owners and we should have the ultimate control over its usage. (The act of registering a copyright merely makes legal recourse easier.) With the Orphan Works Act we will be required to register in order to prove our ownership or it will be considered "orphaned." In our internet-driven world, too many people already think that if one finds something (art, music, writing, etc.) on the web it must be free to use. The Orphan Works Act only enhances that feeling by suggesting that a database is the answer, and that if someone doesn't find said artwork, it must be OK to use. The ease of error in searching for it will only compound this. It is the copyright nightmare version of "guilty until proven innocent" – "orphaned until proven otherwise."

I don't think any business owner wants to put the control of their product into the hands of others, and the Orphan Works Act will do just that. With our work in a privately-operated database we are at the mercy of search mechanisms and we must hope that our artwork is found when looked for. If not, we may have no way of knowing that our artwork is being used illegally. And if we find out, the Orphan Works Act diminishes our legal recourse with inconsequential fines. This is to say nothing of the tremendous cost of registering each and every piece of artwork I create that might come in touch with "the public" and attempting to monitor, well, the entire world in order to protect these rights.

I understand the need for libraries and documentarians and the like to have access to orphaned works. But this is not what the Orphan Works Act is about. It reaches too far into the commercial realm by limiting our rights and making it easier for artwork to be pirated by creating easier access with this database. It's on par with putting a store's inventory in the parking lot and walking away, hoping that everyone will obey the honor system.

Thanks you for your time and consideration.

Regards,

John Kovaleski
Creator of the comic strip "Bo Nanas", contributor to "MAD Magazine."
Kovaleski Illustration
42 South Street
Gettysburg PA 17325
717-334-5926
john@kovaleski.com

August 6, 2008

Tom Sullivan
Director of the Office of Advocacy
Office of Advocacy
U.S. Small Business Administration
409 Third Street, S. W. Suite 7800 Washington, D.C. 20416



Dear Mr. Sullivan,

I respectfully request that the U.S Small Business Administration oppose the following legislation: H. R. 5889 and S. 2913, the Shawn Bentley Orphan Works Act.

*This will take care of those
pesky Illustrators...
Once and for all!*



August 6, 2008

Tom Sullivan
Director of the Office of Advocacy
Office of Advocacy
U.S. Small Business Administration
409 Third Street, S.W. Suite 7800
Washington, D.C. 20416

Dear Mr. Sullivan,

I am the artist/writer of Archie, Jughead, Betty, Veronica and related characters which appear in newspaper comic strips and comic books.

As a small business owner. I have been following developments surrounding the Orphan Works Act with deep concern.

The Act, as it exists, would definitely have an oppressive, and even crippling effect on those of us who create cartoons and comics for a living. Profit margins have been narrow enough in recent years, and I know of many colleagues who are only pressing on in hopes for improved climate in the future.

Passage of the Orphan Works Act could well be seen as a final nail in the coffin for these artists, as it would devalue their art, and reduce their incentive to create original work since, under the provisions of the Act, it might be appropriated without fair compensation.

I would request that the US Small Business Administration oppose H.R. 5889 and S. 2913, AKA the Shawn Bentley Orphan Works Act.

Sincerely,
Craig Boldman
780 Laurel Ave
Hamilton, OH 45015

August 6, 2008

Tom Sullivan
Director of the Office of Advocacy
Office of Advocacy
U.S. Small Business Administration
409 Third Street, S.W. Suite 7800
Washington, D.C. 20416

Dear Mr. Sullivan,

I am a freelance cartoonist who specializes in the creation of custom works for a client base of small businesses and non profit organizations. I interpret this argument of 'fair use of orphan artworks' as a detriment to my industry.

The very basis of this new methodology of copyright protection suggests that creative industries, as a whole, shall leave themselves vulnerable to have a certain percentage of their works possibly interpreted as 'orphaned' (provided that a simple criteria, which seems to lack clear and concise enforcement, is met.) These works in question shall now become 'recyclable' to the general public and may be exploited indefinitely, at possible great financial loss to their originators. To add to such vulnerability is a lacking standard of compensation for those who complied to the new system, yet still found their rights infringed upon. Shouldn't works that are without means to assign credit towards, or to reward compensation to, be rendered as non viable? Perhaps works not listed in these suggested massive data vaults, maintained by a loosely regulated private sector, should indicate the works in question are NOT usable for means of general public profit.

As an independent artist, I keep prices competitive in an increasingly global market by offering a variety of rights packages that accommodates one's budget and individual needs. No smaller end client will feel justified to pay for the entitlement of full rights once it's common practice that such rights are no longer as enforceable, or the damages rewarded in the event of violation aren't worth seeking.

The internet and its flux of content is basically uncontrollable. Very often, works are placed on the web, minus the creator's consent by admirable bloggers and home based web users- unaware of the damage that may now transpire due to their actions. How can I, as an artist, retain economic stability with my work if there lies question if my copyright ownership is truly secure? Without that security, the value and future sale of the work will certainly be compromised.

Also compromising the economic stability of my work will be the loss of income (due to non billable hours) for the requirement of keeping current (possible) numerous database, paying possible upload and storage charges, and having to determine which art remains on the database and copyright secure, and which do not, based on my ability to pay. Thank you for allowing me this platform to voice my concerns.

Regards,
Ann E. Sabo
aesabo@verizon.net

Tom Sullivan
Director of the Office of Advocacy
Office of Advocacy
U.S. Small Business Administration
409 Third Street, S.W. Suite 7800
Washington, D.C. 20416

Dear Mr. Sullivan,

I respectfully request that the US Small Business Administration oppose the following legislation:
H.R. 5889 and S. 2913, the Shawn Bentley Orphan Works Act.

I am the artist of a cartoon published weekly in the Los Angeles Garment and Citizen, "Chicken Boy is Back". I am writing to you because I am concerned about changes to the Copyright laws. As the author of and co creator of the character Chicken Boy I don't want to lose control of the character or the potential for artwork to be reproduced without my knowledge or compensation.

I am a member in the American Association of Editorial Cartoonists and that is how I am aware of the issue, but there are several artists who are not members of professional organizations who won't be aware of changes or have the opportunity to voice their opinions. Before any changes are made to copyright laws let us discuss the issues and impact openly.

thank you for your time.

Stuart Rapeport
Los Angeles Garment & Citizen
Los Angeles, CA
s r <rapeport@earthlink.net>

August 6, 2008

Tom Sullivan
Director of the Office of Advocacy
Office of Advocacy
U.S. Small Business Administration
409 Third Street, S.W. Suite 7800
Washington, D.C. 20416

Dear Mr. Sullivan,

I respectfully request that the US Small Business Administration oppose the following legislation: H.R. 5889 and S. 2913, the Shawn Bentley Orphan Works Act.

As a small business owner, I am deeply concerned that the proposed legislation would eviscerate the copyright system that has proven to be effective, efficient and affordable for artists for the past 30 years. Instead the burden of protecting my copyrights would shift into an untested and dubious system. This would have a great impact on my costs of doing business and devalue my inventory of copyrighted visual art.

This legislation will make my process of protecting my copyrights much more time-consuming, costly and unreliable. I know you have heard, and will continue to hear, from visual artists all over the country who, like I am, are deeply concerned. I won't reiterate the reasons that I know have been eloquently presented to you by people such as Lynn Parisi of Atlantic Feature Syndicate/Off the Mark Cartoons – I concur with every one of the positions that she and others have expressed. Certainly this legislation would cause undue hardship for me and might very well drive me out of business. Better ways have been suggested to deal with orphan works that don't burden visual artists with these Draconian measures.

I urge you to stand with visual artists and artists' organizations all over the country in opposition to this harsh and questionable legislation.

Thank you for your time and consideration.

Regards,

Peaco Todd

THE ORPHAN WORKS ROUNDTABLE

Conducted by the Small Business Administration

August 8, 2008, Salmagundi Club, 47 Fifth Avenue, New York, NY 10003

How Will the Orphan Works Bill Economically Impact Small Entities?

Part 3: Photographers



A R S
ARTISTS RIGHTS SOCIETY

APA

ADVERTISING
PHOTOGRAPHERS
OF AMERICA

view archived webcast: <http://videos.cmitnyc.com/asip.html>



Visual Artists

Part 3: Photographers

Leading Photographer Associations Urge Congress to Amend Orphan Works Legislation

The Advertising Photographers of America (APA)

National Press Photographers Association (NPPA)

Stock Artists Alliance (SAA)

Editorial Photographers (EP)

Statement of Constance Evans National Director, Advertising Photographers of America

Statement of Barbara Bordnick Fashion and Portrait Photographer

Statement of George Fulton George Fulton Photo Imagery, Inc.

Statement of John Harrington Editorial and Press Photographer

Orphan Works: The High Cost of Compliance Debra Weiss, Photographer and Creative Consultant

Statement of André Cornellier, Copyright Chair and Ewan Nicholson, President CAPIC
Canadian Association of Photographers and Illustrators in Communication

Orphan Works Statement to Members CAPIC
Canadian Association of Photographers and Illustrators in Communication

Statement of Don Schaefer Photographer, Don Schaefer Studio

Letter from Don Schaefer. United States Co-Administrator, Pro-Imaging

Letter from Richard Kenward. United Kingdom Co-Administrator, Pro-Imaging

July 16, 2008

FOR IMMEDIATE RELEASE

**LEADING PHOTOGRAPHER ASSOCIATIONS URGE CONGRESS
TO AMEND ORPHAN WORKS LEGISLATION**

A growing chorus of concern, even outrage, about the current Orphan Works legislation demonstrates the importance of this issue for most photographers and other visual artists.

Meantime, representatives from organizations that include the largest share of U.S. advertising, editorial and stock photographers have been meeting with members of Congress and key staff. Their discussions have focused on seeking solutions for the problems of unidentified creative works and missing creators, while preserving constitutional protections for intellectual property.

The [Advertising Photographers of America](#) (APA), the [National Press Photographers Association](#) (NPPA), the [Stock Artists Alliance](#) (SAA) and [Editorial Photographers](#) (EP) have all stated they cannot support the Orphan Works bills in their current form. Together, these groups represent more professional media photographers than other U.S. organizations.

In recent months, representatives from APA and NPPA have met with members of Congress and legislative staff to express their concerns regarding Orphan Works bills S2913 and HR5889. The photographers' representatives offered potential solutions for limiting the legislation to works that are truly "orphaned," for non-commercial use by the cultural heritage sector - particularly non-profit libraries, museums and archives.

The associations stressed the legislation must not violate international trade agreements or cause harm to existing commercial markets. Also, a well-crafted bill can and should maintain the rights of working artists as they exist under current copyright law.

International photographer groups have also expressed their opposition to the orphan works legislation in its current form. Among those groups are the UK's Association of Photographers (AOP), FreeLens, Union des Photographes Créateurs (UPC), and the Canadian Association of Photographers and Illustrators in Communications (CAPIC).

Very vocal in their opposition are groups collectively representing more than a quarter-million visual artists and other creators, including leading associations in North America and Europe. More than 60 groups have endorsed an online resource, created by the [Illustrators' Partnership](#), that facilitates sending opposition messages to Congress. These groups comprise a broad community of creators, including illustrators, fine artists, graphic artists, digital artists, cartoonists and musicians. To date, more than 100,000 artists have used this resource to contact their senators, representatives and Judiciary Committee members.

This coalition of artists groups agrees Orphan Works legislation must be narrowly crafted to serve the needs of the cultural heritage users for whom it was originally conceived - giving them access to truly orphaned works - while protecting the copyrights and livelihoods of artists.

For more information about Orphan Works, please click [here](#).

CONTACTS

Constance Evans, APA
646-216-8754 / execdirector@apanational.com

Betsy Reid, SAA
404-881-6482 / betsy@stockartistsalliance.org

Brian Smith, EP
305-301-0191 / brian@briansmithphoto.com

Greg Smith
843-757-6557 / mediasmith@hargray.com



ADVERTISING
PHOTOGRAPHERS
OF AMERICA

**Statement of Constance Evans
National Executive Director
Advertising Photographers of America**

**The Office of Advocacy
U.S. Small Business Administration**

**Small Business Roundtable
*How Will the Orphan Works Bill Economically Impact Small Entities?***

**August 8, 2008
New York, New York**

Statement of Constance Evans
National Executive Director
Advertising Photographers of America

The Office of Advocacy
U.S. Small Business Administration

Small Business Roundtable
How Will the Orphan Works Bill Economically Impact Small Entities?

August 8, 2008
New York, New York

Chief Counsel Thomas Sullivan and Assistant Chief Counsel Cheryl Johns, U.S. Small Business Administration; Staff of the New York Congressional Delegation; Staff of the U.S. Senate Small Business Committee; Representatives of the U.S. Copyright Office, World Intellectual Property Organization, and the European Union:

As Executive Director of the Advertising Photographers of America (APA), I am speaking today on behalf of the APA membership, a constituency of diverse and extraordinarily talented advertising photographers and image makers from across the country. I would like to thank the Small Business Administration for conducting this critically important field hearing to gather information directly from and on behalf of the creative community and small business owners – the individuals whose work and lives will be radically affected by this proposed major change in copyright law.

From the onset, APA has been actively engaged in the effort to help solve the orphan works dilemma. We made public our support for the crafting of an amendment that would give libraries and museums access to verified, i.e. true, orphaned works for specific uses by way of procedures clearly defined in the statute or regulations, while retaining remedies for use by copyright owners in the event of abuse.

A narrowly written bill dealing explicitly with issues of truly orphaned works would be readily embraced by the creative community, but not so this legislation. The proposed Orphan Works legislation (HR5889 and S2913) represents a major reversal of America's historically staunch protection of property rights and the creative process. Rather than achieving the goal as originally intended, it is a road map for the unprecedented infringement of the contemporary works of photographers and artists working in commercial markets worldwide. If left unchanged, this legislation will likely destroy the businesses and livelihoods of thousands of artists, as well as the collateral small businesses that serve the industry, and are dependent on, creators, not to mention the ramifications on trade agreements between the U.S. and countries around the globe.

For most artists, the ability to create new works, to operate their businesses, and to support their families is inextricably tied to the rights and protections afforded them by Congress under copyright law. The majority of artists are not in the business of selling art. Their medium may be photography or illustration, but their business – and often their sole means of generating income – is the licensing of the copyrights in their creations. Among the smallest of this nation's small businesses, artists are particularly vulnerable to any legislation that serves to weaken or remove their rights or protections.

Ironically, without the protections afforded creators by copyright law, artists could not afford to create new work, and the museums, libraries and scholars that have fought so hard to bring the orphan works issue to the fore would have no works to exhibit, no books to check out, and no art or literature to study. For many, the phrase “orphan work” might conjure up an image of a dusty, aged photograph of a long dead matriarch. But under this proposed legislation, works that are being created by artists working in their studios across the country right now are destined to become “orphan works” under the law.

While Congress considers and approves any number of enhancements to the copyright protections and remedies afforded to large corporate copyright owners, legislation is on the table that virtually eliminates all meaningful remedies afforded to individual artists in instances where an artist’s name happens to be separated from an artwork, or where a search otherwise fails to locate the artist. The proposed legislation removes the remedies of actual damages, statutory damages, injunctive relief (for derivative works) and attorney’s fees when an orphaned work is exploited without permission or license from its creator or owners. These remedies collectively represent the meaningful legal protections available to artists today and provide the protections that artists rely on to deter the unauthorized use of their works, encourage licensing, and generate the revenues on which they depend.

Photographs and illustrations, in contrast to most other protected works, are rarely published with credit to the author. With no author name attached, the vast majority of published images are destined to become orphan works immediately upon publication. Despite best efforts, the author’s name and contact information is frequently separated or removed from the image itself by parties handling the work after delivery. This is particularly true with electronic copies, in which an author’s name is often lost when the image is saved in various digital formats. Digital file names are frequently changed, and metadata bearing copyright information is often removed (intentionally or unintentionally), making the source of the files (along with the author’s name) almost impossible to determine.

The resulting punishment to artists: the removal of all legal remedies for the unauthorized use of a work, and the removal of the artist’s right to set the value of one’s own work at his or her discretion. These measures are draconian when considered in the context of the trend toward increasing the rights and protections afforded other copyright owners – those owners of works that are not vulnerable to becoming orphans.

Exploiting the Loopholes

With infringement remedies removed, there is no deterrent to unauthorized use, provided that a user fails to locate a copyright owner. The Orphan Works bill creates an incentive to fail in searching for an artist. Rather than paying to license works, users will have every incentive not to find the artist, and can proceed to exploit the artist’s work with abandon, knowing that even in the remote likelihood that the use is discovered, the artist will only be able to collect a minimal fee, and will have little means of enforcing payment, and no means of stopping the unauthorized use of the work, if the use is a derivative.

Without changes to the pending legislation, orphan works aggregators will enter the marketplace, specializing in offering ultra-fast search and clearance services for orphan works. Commercial interests will develop large websites where anyone can browse through hundreds of thousands of works that have failed an ownership search, and select any number of works for unauthorized exploitation, knowing that their subsequently required search is certain to fail. (Within two weeks of the issuance of the Copyright Office Report on Orphan Works, multiple

domain names associated with orphan works were registered by commercial interests, in preparation for the profit-taking that will result if the legislation is passed without significant revision. Among them: orphanart.com, artorphanager.com, orphanedphotos.com, findorphanworks.com, and dozens of others.) While neither the Copyright Office nor Congress intends the Orphan Works bill to result in the rampant exploitation of works, it is a certainty unless exclusions to commercial use and protections are restored.

A Model for Litigation: Rights of Publicity and Rights of Privacy

By opening the floodgates to unauthorized use of protected works, the legislation will result in a tidal wave of litigation as the result of rampant and widespread violation of the rights of publicity and rights of privacy of persons pictured in the orphan works. A photographer's right to exploit copyright in a photograph (and to grant licensed rights to others) is effectively limited by the right of any person appearing in the photograph to control or otherwise limit the use of his or her likeness. State laws governing rights of privacy and publicity very often require that permission be obtained from pictured subjects prior to the exploitation of a photograph bearing likenesses of persons. Such permission is most often granted to photographers and their clients by execution of agreements known as "model releases."

The terms and conditions of model release agreements often limit the use of the photographs, and may specify certain excluded uses. For example, some model releases prohibit commercial use or use related to tobacco or alcohol products, pornography, or political causes. When a photographer or copyright owner controls the use of a photograph, the photographer acts as a gauntlet through which all use of the photograph must be approved. In this way, photographers carefully control and limit such use so as to avoid the violation of rights of privacy and publicity of pictured persons.

Under the proposed legislation, that gauntlet no longer exists, and that control goes out the window. Parties making use of orphan works will serially violate the rights of publicity and privacy of pictured persons. Photographers will be sued by models for allowing the works to "go orphan." This wave of litigation between models, photographers and the users of orphan works over publicity and privacy rights will be a particularly disastrous consequence of the proposed amendment.

Corrupting the Marketplace

As in other markets, pricing in the photography and illustration marketplace is determined by the fundamental market forces of supply and demand. In this free market, scarce, high quality images garner the highest fees, while the most common images typically garner the lowest fees. The market value of a particular license for a given photograph by a given photographer is often based upon a number of contributing factors, most notably the quality and scarcity of the image and the location of the photographer, but also in great measure the brand equity of the photographer.

The Orphan Works bill upsets the apple cart of free market forces by legally sanctioning the flooding of the market with free product, and then mandates that upon discovering unauthorized use of a work, the rightful owners are only entitled to receive "reasonable compensation" based upon a mythical "fair market value" of the work. **The imposition of such artificial price controls will corrupt the entire marketplace, and is another disaster in the making.**

The bill assumes that a license fee paid for a particular photograph or photographs determines the fair market value of reasonable compensation for the use of another photograph. What is overlooked is the fact that all photographs are not equal, and that by extension, the fees associated with the use of any one photograph or group of photographs does not necessarily determine the fair market value of the fees associated with the use of any other photograph. Also assumed is that one photographer would agree to provide a particular license to a client at a certain price, or even for free, just because other photographers have done so. This assumption is both incorrect and unreasonable.

The application of fair market value to orphan works is problematic. Under this bill, upon discovering an unlicensed use, a copyright owner is not a willing participant, has no accurate means of determining the relevant facts (the extent of the use) and is required to act. In addition, the copyright owner has few practical remedies, given that injunctive relief (for derivative works), statutory damages and attorney's fees are eliminated.

Congress is, in effect, proposing that fair market value is to be determined by the prevailing lowest fees for a particular use. This proposal is inconsistent with the definition of Fair Market Value, and is anything but "fair" to copyright owners. Further, the determination of any prevailing fees would be problematic, as photographers are prohibited by anti-trust laws from discussing fees.

Effectively the burden will be placed on the artist to establish "reasonable compensation" based upon "fair market value." This requirement will force artists to divulge confidential and proprietary information and financial records, such as income tax returns, past licenses to other clients, accounting books, and contracts with third parties. Artists will be required to do this for each and every party that uses an image under the proposed amendment. **This places an undue burden on artists, who have limited resources and whose clients often require confidentiality.**

Notwithstanding these considerations, the provision for reasonable compensation is almost entirely useless to artists without the leverage to collect such fees. Without the remedies of injunctive relief, statutory damages and attorney's fees, artists cannot afford to retain legal representation or to otherwise pursue collections. The cost of a suit will far exceed the amount owed, invoices will go unpaid, and debts will be uncollectible.

The Cost of Compliance

The fallout from this bill, whether intended or not, will necessitate that artists register their works, professional or personal, published or unpublished, with as-yet-to-be-created private, commercial registries, i.e. databases. As users come to rely on these databases to conduct a "reasonably diligent search" for rights holders, any works not found in these databases could potentially be infringed as orphans.

Such a registry of works will by necessity need to include all works of all artists and copyright owners. Each copyright owner will need to digitize and upload many thousands of artworks, and to continue doing so on a continual basis. Even if the cost of registration is minimal, the costs in terms of preparation and registration will bankrupt most artists. Photographers have tens of thousands of works in undigitized form and create works at such a pace that one or more full time employees will be required just to upload works to the registry.

If Congress is to amend copyright law in such a way as to force the creation of registries so as to comply with the law, Congress should appropriate necessary funds for the creation and maintenance of the registry. As part of the Library of Congress' digitizing initiative to create digital access to its collections, it should begin with the Copyright Office records of Visual Artists' registrations, and create the very database described by this new legislation. The database should not expose the works to public view online where they could be stolen. Instead, it should allow searchers to upload an orphan image to be matched against the collection via image-recognition technology, and return the rights holders name and contact information to the searcher.

Any registry that is mandated as a result of Orphan Works legislation should not be in the private sector. If Copyright law requires registration for full copyright protection, and Copyright law is to now be amended to require an image registry to maintain full copyright protection of visual works, then the Copyright Office should first provide a searchable image recognition database of registered works, and bring its collections into compliance to honor the registrations it has issued for decades.

It is also proposed that centralized databases of orphan works *inquiries* be created, so that owners can monitor attempts to locate orphan works and connect with users. Most professional photographers have very limited resources, and to survive, must concentrate on creating and licensing photographs. At the same time, they must struggle to identify and police infringement of their works. This challenge was difficult enough before the advent of the internet, but now that images can be easily scanned from printed matter and copied from the internet, the challenge is overwhelming.

It is unreasonable to expect that photographers and other artists will be able to dedicate precious limited resources to sift through huge numbers of orphan works inquiries in an attempt to identify their works and to reply before their works are exploited by third parties.

An artist who has diligently complied with legal formalities so as to best protect his rights should not lose those rights based solely upon an utter stranger's desire to exploit the artist's protected works. As justification, the Copyright Office Report on Orphan Works asserts that registered works are unlikely to become orphan works, because a search of copyright registration claimants by name will locate the author. Unfortunately, this assertion by the Copyright Office is not rooted in the facts.

Loss of Exclusive Rights

Under copyright law, artists own the exclusive rights to copy, distribute, display, transform, and perform their works. Most artists earn their living by licensing elements of those rights to others, on an exclusive or non-exclusive basis. By allowing anyone to use a protected work simply by failing to locate the author, the proposed amendment effectively prohibits the granting of an exclusive license. When artists lack the ability to control and monitor use of their works, they will have no means to determine the use status of a work, and thus no means of guaranteeing or offering exclusivity to any customer.

Without the ability to guarantee exclusivity to customers, the value of an artist's works is significantly diminished. This proposed elimination of the most fundamental rights of a certain class of copyright owners is not only inequitable, but is a travesty. The proposed amendment will allow users to exploit orphaned works without limitation, and without the owner's knowledge or permission. Each such unauthorized use will serve to diminish the value of the copyright in the work, by imposing limitations on the exclusive rights of the copyright holder. If an

orphaned photograph were to be used on the cover of a book, it is highly unlikely that the copyright owner could ever interest another publisher in licensing the right to use that photograph on the cover of a book. In addition, certain objectionable uses of an orphan work may damage or destroy the residual value of the exclusive rights in a work over its entire copyright life, leaving the owner with a worthless work. In such instances, and in many others, the limitations on rights and remedies imposed by the orphan works amendment conflict with the owner's normal exploitation of the work, and prejudice the legitimate interests of the owner, in direct violation of TRIPS.

As an unintended result of the Orphan Works legislation, artists and other independent creators will suffer a significant loss of revenues, due to a preponderance of readily available of free orphan works on the marketplace. In this already challenging economy, this will be the last straw for many small business owners, many of whom will be forced to lay off their employees and fold their businesses.

What stands today as the barrier between continued employment and economic devastation is the effectiveness of current copyright law. Please convey our message to Congress – without significant alterations to the proposed legislation, it has the very real potential to destroy the businesses and livelihoods of thousands of artists, cost thousands of jobs, and result in a massive wave of litigation related to the use of orphan works.

Thank you for this opportunity to comment on the impact of the proposed Orphan Works legislation and for your consideration of its consequences on artists and small business owners.

This addendum includes responses from working photographers:

ECONOMIC IMPACT OF THE ORPHAN WORKS BILL ON PHOTOGRAPHERS THE COST OF COMPLIANCE

PHOTOGRAPHER JD (CA)

1. How many images have you created in your professional career?

Overall - approximately 500,000 images.

2. How long would it take you to digitize these images and at what cost?

Cost: prohibitive. If it was mandatory, we'd be forced to either find the cheapest outside supplier or hire & train a scanner. It took a year to organize a modest set of portfolios for Digital Railroad. My entire set of images would take years to scan, spot and organize at an astronomical, prohibitive cost.

3. In addition to the cost of getting images ready for input into one of these registries/databases, there is the time/cost of uploading these images.

It would be equal to having another full-time job with no pay/compensation.

4. What is the potential loss of income in terms of continuing pressures on assignment photography?

Incalculable. No way to measure these costs at present.

PHOTOGRAPHER RB (NC)

1. How many images have you created in your professional career?

I've been shooting for over 30 years. Easily close to 100,000 images.

2. How long would it take you to digitize these images and at what cost?

I've been with Corbis for many years and I believe they estimated years ago that the cost to properly digitize a single image would run around \$70. Scan, spot, optimize color, add metadata, etc. I do not have a full time person to do this and would not have time to do this myself. I'd have to shut down my business and do nothing else for years even if I just selected and worked on the best images. I expect that most shooters would be forced to outsource their images to an out of the country service (such as India) and then only do a fraction of their images. (I think this outsourcing to other countries may be an important aspect

3. In addition to the cost of getting images ready for input into one of these registries/databases, there is the time/cost of uploading these images.

Absolutely. Another cost that is an unrealistic burden on photographers.

4. What is the potential loss of income in terms of continuing pressures on assignment photography?

I have seen a drastic downturn in assignment fees and it gets harder every year to demand normal and realistic usage fees. Part of this comes as much from the change over to digital from film as it has from the Corbis and Getty models. There is this pervasive reasoning by clients that digital is cheaper than film yet in reality it is the opposite. Add to that that clients think digital is easier (hey, their home pics look better so it must be easier! Heck I can shoot that.) And there is also the new generation of shooters and AD's that grew up with Photoshop and think that everything can be fixed in post production. Yet don't factor in the time and costs (or not willing to pay) for this post production.

5. Have you already been impacted or how are you impacted by the Getty and Corbis models?

Bottom line to me is that the business model that would be created from this legislation as written, would doom such a large portion of the creative community that the end result would drastically reduce the artistic diversity our country has prided itself on and the rest of the world has been envious of. Oh, the big national shooters with deep pockets would survive, but the bulk of photographers would suffer to the extent that it would be difficult at best to make a good living. The diversity I spoke of would be eroded to the extent that coming generations would look elsewhere for a career and the very agencies and entities that may be behind the push for this legislation, would have a dwindling pool of quality images (and shooters) to choose from.

PHOTOGRAPHER MK (NY)

1. How many images have you created in your professional career?

I've been a professional photographer since 1969, if I averaged ten pictures per week (not including out-takes), that would be 20,280 pictures. The actual figure is much higher, but you get the point.

2. How long would it take you to digitize these images and at what cost?

It would cost about \$2 each to digitize the images (just for a rough, record image of each), about \$40,560. Furthermore, it would take an enormous amount of time to sort and prepare the images for digitizing, then to re-stock them would be even more time. Figure a minimum of ten minutes per photograph, each way. Uploading the images, filling out the forms and keeping records will be an additional ten minutes per photograph, would be 10,140 hours, or 195 work weeks, about four years (BTW, would I be covered during that four-year period?). Let's say that I could get someone competent for \$10 per hour-- that would be \$104,000, but lets not forget FICA, health insurance, etc-- make it about \$150,000. There's also overhead. I would have to rent an office briefly to accommodate this procedure --the teeny-tiniest crappiest rat hole of an office in New York is about \$1,500/month for 4 years = \$72,000 (+ utilities and NY commercial real estate tax).

Total scanning, personnel, overhead= \$262,560

Additionally, I would have to supervise the operation, losing about two months per year.

And how would all that be handled by the IRS? Would it be an investment, taxable as income, then amortized over 3, 5, or 7 years? Or would it be an ordinary business deduction? In either case One would have to generate the income to cover those expenses on a reduced schedule.

3. In addition to the cost of getting images ready for input into one of these registries/databases, there is the time/cost of uploading these images.

(See above)

4. What is the potential loss of income in terms of continuing pressures on assignment photography? Have you already been impacted or how are you impacted by the Getty and Corbis models?

(See above, 2.)

PHOTOGRAPHER RR (NY)

1. How many images have you created in your professional career?

Over the past 25 years, assuming maybe the equivalent/average of 800 rolls of film a year, so something like 720,000. So, allowing for many years of shooting chromes, and editing out some, but adding thousands of fine art Polaroids, let's say 700,000 images. And that is not including anything I shot in the previous 10 years of school & before that- including jobs I did before graduation.

2. How long would it take you to digitize these images and at what cost?

Let's see- maybe 18 years of film, both slides, & negatives, plus Polaroids (maybe 510,000 images)- I would have to hire a full time person to do this. Assuming he/she could scan 12 images

an hour, including the bare minimum of post production- adding metadata & entering numbers, in an 8 hour day, that would be 96 images a day, so it would take 5,312.5 days, or working 40 hours a week/52 weeks a year, (no vacations!) 20.43 years.

At approximately \$15 an hour, plus 22% for Smith & Stilwell, that would be about \$38,064 a year- before any benefits or bonuses (or a raise). So, figure at least \$777,749.98 just to input images. And inflation probably would run conservatively 5% a year.

Add in a computer, ram, monitor, additional hard drives, electricity, office space, possible extra bandwidth for uploads- so figure in another \$4,000 a year, or \$81,720 for over 20 years (not including inflation). So, \$859,469.98 just for my film archives.

Seven years or so of digital images (about 25,000 a year, as I delete a lot of bad ones), so say 175,000 as of today. Assuming they are easily accessible, maybe someone could open, reduce them, add any necessary metadata, save as a jpeg in a minute each, so 480 a day, would be about 365 days, which is 73 work weeks, at \$732 a week, is \$53,436.

So, just to bring myself current & register all my professional existing as of today, \$912,905.98- almost a million dollars, conservatively.

And of course, over that 20+ years, I am creating approximately 481 images a week, so that is 510,995 images that will also need work, so the ongoing cost would be roughly 1 day a week for every week I spend shooting, so another \$7,612.60+ a year in salary going forward, before inflation of course.

3. In addition to the cost of getting images ready for input into one of these registries/databases, there is the time/cost of uploading these images.

As they would need to be uploaded or submitted somehow to one of these as yet to be created registries, which could take as long as it took to digitize the images, so add another 20+ years, or another \$859K.

4. There is the unknown cost in terms of potential fees charged by these registries for input into their systems.

No kidding: at a minimum of \$1 an image, that would be \$700,000, plus another \$25,000 a year going forward.

5. What is the potential loss of income in terms of continuing pressures on assignment photography? Have you already been impacted or how are you impacted by the Getty and Corbis models?

Well, I could not afford to do this- period. It would cost over 1.75 million. My previous work would out there for the taking, and unless I budget \$32,000- ??? a year to register my new work, it too would be ripe for the picking.

As far as pressures...Let it suffice to say the current economic viability for professional photographers has never looked bleaker. If any of us are still around in 5 years, we will be rhapsodizing about the good old days of 2008.

PHOTOGRAPHER MT (CA)

1. How many images have you created in your professional career?

I have been actively working professionally since 1973 and think a reasonable average of 50,000 images a year are produced. Many are duplicated and similar, so say 50% are something to keep and or protect, 25,000 per year, times 35 years. 875,000 keepers. (Ballpark estimate)

2. How long would it take you to digitize these images and at what cost?

Figuring 875,000 images (Getty quotes 20 minutes per image) x 17,500,000 minutes, divided by 60 minutes = 291,667 hours, divided by 8 hours = 36,458 days, divided by 7 days = 5,208 weeks, divided by 52 weeks = 100 years to scan, add meta data and key words them all... This would not be practical.

3. In addition to the cost of getting images ready for input into one of these registries/databases, there is the time/cost of uploading these images.

*Getty the biggest distributor has suggested that the "average cost" of scanning a medium res file , adding meta data and key wording runs in 1999 dollars \$75 per image. I would consider that "high" since there will be similars, and metadata and key wording can be done on more than one image at a time. However, the scanning takes the most time and most of my collection is on film, un-scanned. I would discount the 75.00, 25%, thus 56.25 per image x 875,000 = **\$49,218,750**, plus the cost of uploading to the unknown registry(s) (could be more than one to upload too). The cost of uploading is dependent on the bandwidth, which has yet to be determined.*

This would not be practical.

4. There is the unknown cost in terms of potential fees charged by these registries for input into their systems.

Nothing is free. The U.S. Copyright Office did not want to be involved "because it was too expensive" and the private data bases will not provide such services for free. So, 875,000 x whatever the "per piece" fee.

5. What is the potential loss of income in terms of continuing pressures on assignment photography?

Assignment fees are down generally, but the future impact will force a rise in fees just to offset the "new fees" associated with the new registries. Since assignments will cost more, more customers will turn to non-assignment images, orphaned or not. There will always be sophisticated clients that do understand new original images are an investment and not an expense, but they, because of economics will become fewer.

Have you already been impacted or how are you impacted by the Getty and Corbis models?

Yes, I have been impacted. In the past, you would get assignment for say 20 images, now it will be 3-5 images instead, since "stock is good enough" dumbing down, not building up a brand for the balance of a project.

PHOTOGRAPHER WJW (CA)

1. How many images have you created in your professional career?

Over forty some years, in the hundreds of thousands.

2. How long would it take you to digitize these images and at what cost?

I have been doing just this for the last four years; editing 35mm originals, scanning, processing in Photoshop, embedding IPTC metadata, captions & keywords. If your quality standards are high, as mine are, it is a very time consuming, with nobody to invoice.

I spend about an hour retouching artifacts at 100% of 60Mb files, another half-hour adjusting contrast, color, gamut, other technical standards; then a half hour writing caption & search keywording. So call it 2 hours per image.

Were I to pay a service provider for equivalent scans, it would probably be between \$25.00 & \$50.00 each image.

I make the investment at the expense of time devoted to assignments, making a living. I do so as an investment, my only Retirement Plan after a career of self-employment, touch & go income.

3. In addition to the cost of getting images ready for input into one of these registries/databases, there is the time/cost of uploading these images.

Another issue of time, increased investment in an ever-more competitive market with diminishing returns.

Nearly impossible to enforce Copyright laws, as is. We are now required to register with USCO just to qualify for Statutory Damages, (the only thing now making it possible to recruit an attorney on contingency basis).

4. There is the unknown cost in terms of potential fees charged by these registries for input into their systems.

I assume the question pertains to proposed commercial registries. I absolutely oppose any such requirement as the registries' interests are not mine and may conflict. It's mandatory that whoever serves the role acts in the public interest and on the behalf of the artists/authors, free of conflict.

The only 'Registry' that makes sense is one maintained by the U.S. Copyright Office, since they are already collecting the data and are in the business of keeping track of authorship.

To mandate any other scheme is a monstrous intrusion and imposition on my livelihood.

5. What is the potential loss of income in terms of continuing pressures on assignment photography? Have you already been impacted or how are you impacted by the Getty and Corbis models?

'Orphan Works' legislation as currently proposed will effectively destroy my ability to enforce my © authorship. It nullifies any value in statutory or actual damages, making any infringement worthless for an attorney to pursue.

It will be taken as a license to steal by those who now find it more profitable to willfully infringe, paying and settling only when discovered and served with law suit; (at that only on the verge of trial).

The deck is already stacked against the photographer without additional hoops to leap through, obstacles to copyright enforcement. As I understand the original intent of the discussion was to enable librarians & archivists to freely copy existing works for the single purpose of conserving the information.

Those noble public ends can be accomplished with a very simple Amendment to the existing laws, without remaking several industries with favoritism to narrow commercial interests.

The supply & demand of photographic services and existing 'Stock' images have made a career as a photographer very problematic. Getty, Corbis, et al. have lead the consolidation of the stock business, commoditizing it and price-competing ever downward on licensing rates; this even as the internet has created a huge oversupply in most categories.

The oversupply of usable images has had a downward pressure on commissioned assignments, the mainstay of most photographers' earnings.

While these trends weigh heavily, the cost of doing business has gone through the roof; pro-cameras costing ten times as much as they did before digital and lasting a tenth of the life-expectancy.

Many creative artists, photographers, are seeing their livelihoods challenged as never before; without any added burden in proving ownership.

As if these effects weren't dire enough, 'Orphan Works' makes us look like Capitalism Gone Mad to the international Intellectual Property community who promise a Perfect Storm of Litigation. This is one legislative initiative begging for a stake through the heart!

PHOTOGRAPHER GF (SC)

1. How many images have you created in your professional career?

In the past 25 years we estimate that I have created 2 to 3 million images. Using the most recent 5 years of the collection there are hundreds of thousands of images. Many of these images continue to be shot on film. I would estimate that approximately 80% of the entire collection is film with 20% of the collection in RAW digital format. RAW digital format is how the images are captured digitally in crude form and the file size is very large. To prepare them to be seen, uploaded, or sent one still has to create an offspring version, which is similar to the scanning process.

2. How long would it take you to digitize these images and at what cost?

The job of digitizing/preparing all of my images is simply not practical from a small business perspective. I would estimate that it would take approximately 2 years to digitize/prepare the entire collection. If I were to hire an entry level employee strictly dedicated to this project it would easily cost me \$40,000 a year of solid work, given their salary, unemployment insurance, required insurance benefits, Withholding, FICA and workman's comp as well as other benefits afforded other employees within the business that I would be required by law to match. And then in two years I would have to lay this employee off, which would also likely raise my unemployment

insurance. This totals, at minimum, \$80,000 for the two year period alone, and does NOT include my time for the cost of hiring, training, overseeing, catalogue decisions, etc., which I estimate on a true cost accounting basis would cost around \$8,000 per year or around 20% of the employee expense to my business.

To hire an outside source would be far more expensive even at the most minimal of scanning charges per image, given the quantity of images. Even if the scanning charge were \$.25 per image, which is FAR below the current scanning prices available today, That would cost me approximately one half million dollars (2,500,000 images x 80%) x .25= \$500,000--).

In the context of today's market neither option is something I will be able to do. I can not expect to recoup those expenses through re-licensing, or if I can, it is at least highly speculative and unrealistic.

3. What is your time and cost of uploading these images to an approved registry database?

Much of this is uncertain until such time as an industry qualified registry takes the forefront. This begs several questions as to which database registry will prevail as the industry standard? Will just any registry constitute the due diligence a company that is researching the ownership of one of my images be sufficient? How many registries will I eventually have to upload to in order to protect my images that are already copyrighted with the U.S. Copyright Office?

If I upload to a privatized registry and that registry becomes defunct, will I have to reinvest my time and money with another registry? Assuming that a qualified registry takes the forefront, what will they charge for my registration? Hence, the uncertainty.

In addition is the time for me to upload existing and new images to a registry or possibly multiple registries. (Not including the time and cost of registering the copyright with the U.S. Copyright Office.) I would estimate it would take 6 months to a year to upload the images to the new registry complete with metadata and contact information. Using the formula in question #2, I would therefore estimate the cost to me would be between \$20,000 - \$40,000, again not including my time for training and overseeing the position, adding another 20%, totaling \$24,000 - \$48,000.

This would make the grand total of protecting my life's work from being Orphaned between \$104,000 to \$128,000. This is in addition to copyright registrations already filed with the U.S. Copyright Office, which would still need to take place for all new images, based on the fact that registering the images with an Orphan Works database does not provide any damages under the law.

4. What will be the cost of potential fees charged by these registries for input into their systems?

Again, this is completely unknown and if and when such time a bonafide registry takes the forefront one can only expect such a registry to be fee based and even if the charge were only 1 penny per image, which is highly unlikely, this would result in a minimum cost of \$25,000 in uploading costs for existing images only.

5. What is the potential loss of income in terms of continuing pressures on assignment photography? Have you already been impacted or how are you impacted by the Getty and Corbis models?

As a successful advertising and commercial assignment photographer, I have seen the results of microstock and royalty-free stock photography - as pushed forth by Getty and Corbis - erode the marketplace for custom and unique assignment models. I am no longer able to employ staff. In the past 2 years I have gone from having 4 full-time employees at full benefits, to just myself. My wife was my last employee to have to leave the business and it was perhaps the saddest day in my entire career, as she was the mainstay of my business and it afforded us the opportunity to travel, vacation and manage our daughter's schedule with the flexibility that we had earned over 20 years of doing business. This downturn has affected every aspect of our lives. But that is business, and business changes.

The pressures on independent business people are enormous even in the best of times. Citing bonafide business research sources such as the Thomas Registry, the cost of operating an advertising photography business compares to running a group dental practice! Equipment and facilities are a major expense, and in today's industry the technology changes nearly every 18 months. In the case of a photographer the equipment we buy today is nearly obsolete 1.5 years from now.

Now that I am working by myself, time is harder to come by. Yes, I may have saved money by contributing to the U.S. unemployment rolls. But there is a greater cost to innovation, to training and value in our collective marketplace. And there can be no cost savings passed on to my customers.

The hats worn by the independent business person, especially those that now have to lay off all their workers, are many. But by adopting the Orphan Works Bill, there will be no reason for me to continue in this business. This bill will benefit the largest of corporations. It is the 'Googles' of the world who will benefit. The distribution channels for photographs will be made happy, while the creators of photographs and illustrations will perish.

Summary:

Imagine all the publications we see on a daily basis with black boxes where our photographs used to be. Image the impact on headlines, on print ads, on politics. Powerful photographs have shaped our view of history, and hence our past. They have bolstered the dreams of what the future holds.

Photographs are as strongly American as the automobile itself. Kodak moments started didn't start in China. We do not need our photographers to fall beneath the wheel of the moving train of Google, Yahoo and the like, made possible by the steam of Orphan Works. Doing so would mean that those countries without meaningful copyright protection such as China, would likely become our image providers and would shape our vision of things to come.

That would be a sad blow to independent American innovation. Of all the legislative help the small business person needs, this bill seems particularly ill-timed and focuses on bolstering big business at the expense of working citizens like me. I will be buried in bureaucratic and compulsory activities if I wish to maintain the licensing privileges already afforded to me by law under the copyright act, even with me properly registering my copyright with the U.S. Copyright Office as recommended by that great agency.

Is there not better legislation to be focused on especially at this time of rising fuel costs, home foreclosures, and economic downturn? This bill will adversely affect unemployment, it will be inflationary and will deal a major blow to the individual entrepreneur, the individual creator and will be little more than one more example of bureaucratic support of big business interests at the worst of all possible times.

PHOTOGRAPHER JS (CA)

1. How many images have you created in your professional career?

1.5 million

2. How long would it take you to digitize these images and at what cost?

70% are digital. Some images are duplicates and similars, but it would take too much of my time to re-edit all shoots to select hero shots in preparation for scanning. This would be time away from revenue generating activities such as marketing and production. Any image that has ever left the studio whether as film, print, or digital would need to be scanned for submission to orphan works databases, as other parties may have copies on file, and such copies can be reproduced or further distributed. Safe to say that at least 1 million images would need to be scanned. Some of these may exist on film that is in the possession of clients and would need to be recalled for scanning purposes, which will involve dedication of resources for coordination and shipping expenses. Clients will also take a productivity hit as well. I have two employees and they are entirely occupied with revenue generating activities. Scanning for an orphan works database is not revenue generating activity – it is required so as to provide users with the ability to identify me as the owner of my images and to contact me. Without my images in the databases, the searches conducted by the users will fail and they will use my works without my knowledge, often in competition with my own efforts to monetize my assets. If I hired an employee to scan my works, he could complete at most 50 scans each day. At that rate, 20,000 total days would be required. 4 days per week of scanning, and one day per week would need to be dedicated to re-filing all of the works. At that pace, scanning my works would require approximately 96 years to complete. This does not include the time required to upload works to a registry or to add metadata to each work before uploading. The cost of that employee, at \$25,000 per year would be \$2.4 million not including other costs associated with the employee, and not including the affect of inflation on wages over a 96 year period. I could not afford to wait 96 years, so I would outsource this project, and would expect a net cost of \$5 per image for scanning, metadata and uploading. Total cost, \$5,000,000. Could not afford that either.

3. In addition to the cost of getting images ready for input into one of these registries/databases, there is the time/cost of uploading these images. See Above.

4. There is the unknown cost in terms of potential fees charged by these registries for input into their systems.

If these fees were \$1 per image, I would incur an additional \$1,000,000 in registration expense.

5. What is the potential loss of income in terms of continuing pressures on assignment photography? Have you already been impacted or how are you impacted by the Getty and Corbis models?

Independent pro photographers are under tremendous pressure. There are many means of connecting with clients, and many means for clients to connect with photographers. That is not the issue in the marketplace. Consolidation and an abundance of supply has placed downward pressure on pricing.

PHOTOGRAPHER GS (CA)

- 1. More than a million images total, though I'd only consider about 100,000 to be released to the public*
- 2. Most of my images are on film - they'd have to be scanned first, probably by an outside service, though I could have an employee do low-res in house scans, to convert all valuable images to a digital form, and keyword them, I'd estimate at least 2 years of work, at a cost ranging from \$50K to almost \$750K (for an outside service)*
- 3. The most significant cost would be the personal database and keywording, before the images can be released to the registries and the public - this could easily cost \$25K by itself! Uploading would also include registration and review of the accepted submissions, for accuracy - many, many hours - if done by an employee, it could cost up to \$5K.*
- 4. If the registries charge \$1/image, my cost would be \$100K!! even at a bulk discount of \$0.05/image, that's still \$5K*
- 5. My entire career is built around assignment, location photography - stock has demolished my market, to the extent that my current bookings are no more than 33% of my bookings during the 1990s, despite my growing reputation, visibility, and marketing. should a new industry of "orphan" stock develop, it would further entice my clients away from assignment work! I can not put a number on this, other than guess at a possible additional 50% drop in assignments!*

PHOTOGRAPHER JS (NC)

I would have 200k in Images in film, pre 2001. I would have 400k in Digital images, post 2001. Scanning would be over 2 million dollars to include keywording from an outside source. This is a very complicated operation and would take hours of my time to prepare. It's too expensive.

My assignment work has dropped off 50% to the clients using stock photography in the fast five years. Orphan Works would hurt even more.

PHOTOGRAPHER MG (CA)

I have about a million images from a 30 year professional career. At a cost of \$20 per image to process, scan and edit these images, it would cost me almost \$20 million dollars and take years. It has taken us a year and a half to do 1,500 images ourselves for Getty for the archive. It's a daunting task.

Barbara Bordnick Photography

39 East 19th Street

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212 533-1180

Director Tom Sullivan and Assistant Chief Counsel Cheryl Johns, Small Business Administration; New York Congressional Staff, Representatives of the U.S. Copyright Office, World Intellectual Property Organization, and the European Union, thank you for the opportunity to speak to you today.

I have been a commercial photographer in New York City for forty years. I spent the majority of those years as a fashion and portrait photographer working for clients who include most major magazines, ad agencies, design firms, and major retail stores, and my work has been published worldwide. Most recently, I have published three books of photographs of flowers and Volume I was one of the first fine art books of digitally-captured images.. I have been honored with many awards and in a then overwhelmingly man's world of photography I served as the first woman president of the AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS and New York's ADVERTISING PHOTOGRAPHERS OF AMERICA.

As a small business, I have employed models, photo assistants, production assistants, hairdressers, makeup artists, set builders, fashion stylists, prop stylists, food stylists, location scouts, digital technicians, custom printers, as well as the services of photo labs, photo rental studios, equipment rentals, location van rentals, messenger services, location services, caterers, and many other outside services, contributing substantially to the economy.

Photography is particularly important to New York City, since it's the advertising, magazine and fashion capital of the United States. The fashion industry is vital to New York's commerce and tourism, but the fashion industry is nothing without the magazines and the magazines are nothing without photographers.

Photography fees are based largely on usage, combined with complexity of the shooting and the expertise and reputation of the photographer. A huge part of a photographer's income is strictly usage and that usage is based on the photographer's control of the rights of the photograph and its exclusivity.

When I hire a model for a client, the model agency allows very specific and limited usage to any photographs I make with her. If I license a photograph of the model for any purpose other than that which has been negotiated and agreed upon, I am liable to be sued for very costly damages. If, for example, a model should lose a very lucrative fashion or beauty account because she appeared in my photograph infringed for some other ad or placement that would be a conflict, she could conceivably lose several million dollars for which I could also be liable. Because I work almost exclusively with high fashion models and celebrities, with very limited-usage model releases, I can't give most these images to a stock agency. I have to control all sales myself and seek additional usage from the model agencies. I therefore keep very careful records of all model releases and of all usage of my work. If this work should fall into "orphan works," it could have a devastating effect on me financially and professionally.

I ask what will constitute a "good faith, reasonably diligent search?"

The advent of digital photography has made the market much larger and more accessible to photographers and those who want to find them. I am hardly difficult to find. I have had a website for many years and last time I checked, there are 31,200 listings under my name on Google. I have been at the same address with the same telephone number for over 37 years, yet people have attempted to use my photographs without compensation or my permission. Because I was protected by copyright I was able to take legal action in all those cases. It was thanks to my mother finding my photograph of her used in an ad for a newspaper, a model in London finding an insertion in an English magazine and an assistant finding a photograph he'd assisted on, that led me to even know that my rights had been infringed.

The expense of keeping abreast of and equipped with the new technology has added greatly to the cost of my business. If, in addition, I had to scan all the images I have made in the past 40 years, or even those that were published, in order to post them to a registry, the burden of such an expense would cripple me.

Perhaps most distressing of all is the fact that for the past 40 years I have been building a library of my creative work believing that this was my retirement and my estate. If I have no protection of this work than my estate will have been essentially bankrupted.

Photographers have no protection against the immense legal departments of those corporations who are waiting in the wings to make a grab for our work and our rights.

Is it not reasonable to expect the government of the United States to value and protect the creators and their works that have made American culture so innovative, diverse and the envy of the world?

Thank you.

Page 2

SBA Roundtable

Barbara Bordnick

www.barbarabordnick.com

STATEMENT - SBA Roundtable on Orphan Works

As Submitted by George Fulton, George Fulton Photo Imagery, Inc.
Past President – Advertising Photographers of America

To esteemed Director Tom Sullivan and Assistant Chief Counsel Cheryl Johns, Small Business Administration; New York Congressional Staff, Representatives of the U.S. Copyright Office, World Intellectual Property Organization, and the European Union.

I would like to address the proposed U.S. congressional bill herein known as the Orphan Works bill from the perspective of a working professional advertising photographer of over 20 years, as well as addressing the concerns of the photographic community at large.

In addition to a successful career in commercial and advertising photography, garnering many of the industry's most prestigious awards, I have been honored to serve on behalf of photographers throughout the U.S. as a past national president of the Advertising Photographers of America (APA), an organization dedicated to education, standards and professionalism on behalf of its many members.

As the President of APA, I was afforded the unique perspective as to how industry changes have affected both average photographers as well as the most successful photographers throughout our great land, in addition to my weathering those changes firsthand within my own small business.

From our country's heartland to our urban epicenters, photographers all face tremendous economic challenges in today's marketplace. Rising costs of doing business most greatly impacting the small business person, rapid technological advances that render capitalized equipment obsolete in 18 months or less, conglomerate distribution of images within the market place, infringement and outright theft of images via the internet, rising fuel prices and a weakened economy have all made this business in which I and others have committed a lifetime to, perilous at best.

Even those photographers who might be considered at the top of their game, whose images fill the pages of our every magazine and newspaper, whose images appear on the covers of the bestselling books, or in ads for the most recognizable brands of our day find this business to be challenging to such an extent that the path to retirement from this business narrows exponentially. In most instances, this isn't a business that a photographer can sell. They are hired for their own personal expertise, their personal artistic vision and such personal assets are seldom seen as transferable and are rarely deeded.

Comparisons have been made that the overhead costs of a working photographer to be similar to those of a group dental practice. The difference being that the majority of photographers do not employ other photographers, and a photography practice, if you will, is rarely saleable. In a sense, a better comparison exists to that of an athlete, whose career is truncated and whose skill sets can not be sold upon retirement.

But what has enabled this business to rise above that of pleasant artistic avocation, and has made these and a myriad of other formidable challenges worthy of facing, rests upon that right given to us as artists by way of the Copyright Law of 1976, that recognizes that visual works are tangible property and are to be afforded steadfast protection and remedy under the law, to the author of those works.

It is the foundation of that legislation that photographers have been able to create highly valued works by way of licensing their use. This model of licensing one's work existed before that law, but authors were given remedies to protect the works, benefiting clients, media, publishers and the very culture of visual communication itself. For it is indeed this landmark law that has helped to fill our countless magazines, our books, our newspapers with indelible images, that have without question enriched our historical culture, our national culture and identity.

The spirit of this law is to protect the authors of these many works. Because of this law photographers have braved the battlefield risking life and limb. And because of this law indelible images have seared the

collective memory of our people. The street photograph of the Saigon soldier held at gunpoint, JFK's rocking chair, the photos of our Twin Towers, and countless other iconic images produced and published daily, advance our consciousness beyond Madison Avenue, beyond our epicenters, to the planes, to the tundra across our heartland, and remain protected by this law today. Those images now have life, longevity and iconic value today as a result of that great legislation.

Imagine for one moment all the newspapers, magazines, book jackets, advertisements, bereft of photographs, besieged by little black boxes where images once resided. Imagine that our memories of the floods of Missouri, the Holocaust, the devastation of 9/11, void of all compelling images, with only text and anecdotal evidence to support their having taken place. Such is the richness, the power of pictures, both moving and still, to our culture, our freedom, and our humanity.

Currently, photographers who register their work with the U.S. Copyright Office receive remedy available under the law for willful infringement. Unfortunately, we now find before us this 'Orphan Works' bill that weakens and effectively disables such remedy beyond the practical reach of the average working photographer.

This bill transfers the diligence required to use a photographer's most valuable tangible property – their images – from the publisher back to the photographer, even if they have already faithfully registered the work with the U.S. Copyright Office. In order to fully protect one's work, photographers will need to catalog their photographs with a registry or database, noting that the U.S. Copyright Office is not a database or registry, and is therefore not searchable.

Furthermore, such an industry standard database or registry system yet exists. Such a system will surely cost the photographer additional funds for every image they are forced to catalog. Using a true cost accounting method I calculate the cost to digitize and register my 20 year body of work to be in excess of \$600,000 dollars. (See attachment at the end of this statement)

This proposed bill renders visual works not cataloged with an industry database, whether registered with the Copyright Office or not, as 'Orphaned'. Consider the context of any other tangible property; a piece of furniture, for example. Would we make an Orphan of a chair if we didn't know who the creator was? Would the rightful owner or even a renter of that chair have no protection against theft simply because they did not register that chair with a database? Are we therefore going to now likewise apply this dynamic to other tangible property? Shall we then create new legislation that begs the rationalization, "Well, I can't tell who the owner of this chair is, so I'll just take it and use it as I see fit. It must be an Orphan!"

This bill undermines the spirit of the U.S. Copyright Law of 1976, which recognizes that the copyright belongs to the author, and that a photograph or illustration is indeed tangible property with the rights and privileges that appertain to any other tangible property. There should not be additional burdens put upon a visual artist as the holder of that copyright in order to protect their images as tangible property. One must register one's automobile, and one must deed their home, but one can hardly expect a photographer with hundreds of thousands of images to re-register them with a database, particularly after they have registered them with the U.S. Copyright, office; especially when that database heretofore does not exist.

To enact this bill is to favor big business and media conglomerates. It will deal a crushing blow to the independent photographer and illustrator in their quest to reflect our history and that which we aspire to, It will relegate image-making to the stuff of cell phone snapshots, by making it all but impossible for independent image makers to succeed in their respective small businesses.

At a time with a plethora of urgent national issues regarding our national resources, our economy, and our security, upon our national table, this bill is simply one more thing that will place an overly zealous nail in the coffin of the independent artist and will thereby signal the lowering of it, along with our visual prosperity.

ATTACHMENT - True Cost Accounting Overview of Registering My Body of Work

1. How many images have you created in your professional career?

In the past 25 years I estimate that I have created 2 to 3 million images. Using only the most recent 5 years of the collection there are hundreds of thousands of images. Many of these images continue to be shot on film. I would estimate that approximately 80% of the entire collection is film with 20% of the collection in RAW digital format. RAW digital format is how the images are captured digitally in crude form and the file size is very large. To prepare them to be seen, uploaded, or sent one still has to create an offspring version, which is similar to the scanning process.

2. How long would it take you to digitize these images and at what cost?

The job of digitizing/preparing all of my images is simply not practical from a small business perspective. I would estimate that it would take approximately 2 years to digitize/prepare the entire collection. If I were to hire an entry level employee strictly dedicated to this project it would easily cost me \$40,000 a year of solid work, given their salary, unemployment insurance, required insurance benefits, Withholding, FICA - and workman's comp as well as other benefits afforded other employees - within the business that I would be required by law to match. And then in two years I would have to lay this employee off, which would also likely raise my unemployment insurance. This totals, at minimum, \$80,000 for the two year period alone, and does NOT include my time for the cost of hiring, training, overseeing, catalogue decisions, etc., which I estimate on a true cost accounting basis would cost around \$8,000 per year or around 20% of the employee expense to my business.

To hire an outside source would be far more expensive even at the most minimal of scanning charges per image, given the quantity of images. Even if the scanning charge were \$.25 per image, which is FAR below the current scanning prices available today, That would cost me approximately one half million dollars ((2,500,000 images x 80%) x .25= \$500,000--).

In the context of today's market neither option is something I will be able to do. I can not expect to recoup those expenses through re-licensing, or if I can, it is at least highly speculative and unrealistic.

3. What is your time and cost of uploading these images to an approved registry database?

Much of this is uncertain until such time as an industry qualified registry takes the forefront. This begs several questions as to which database registry will prevail as the industry standard? Will just any registry constitute the due diligence a company that is researching the ownership of one of my images be sufficient? How many registries will I eventually have to upload to in order to protect my images that are already copyrighted with the U.S. Copyright Office? If I upload to a privatized registry and that registry becomes defunct, will I have to reinvest my time and money with another registry?

Assuming that a qualified registry takes the forefront, what will they charge for my registration? Hence the uncertainty. In addition is the time for me to upload existing and new images to a registry or possibly multiple registries. (Not including the time and cost of registering the copyright with the U.S. Copyright Office.) I would estimate it would take 6 months to a year to upload the images to the new registry complete with metadata and contact information. Using the formula in question #2, I would therefore estimate the cost to me would be between \$20,000 - \$40,000, again not including my time for training and overseeing the position, adding another 20%, totaling between \$24,000 - \$48,000.

This would bring the cost of registering my life's work my life's work to between \$104,000 - \$128,000. I would additionally need to continue to register my work with the U.S. Copyright Office.

Therefore, the cost of both digitizing or scanning all of my images as well as registering them would cost in excess of \$600,000.

4. What will be the cost of potential fees charged by these registries for input into their systems?

Again, this is completely unknown and if and when such time a bonafide registry takes the forefront one can only expect such a registry to be fee based and even if the charge were only 1 penny per image, which is highly unlikely, this would result in a minimum cost of \$25,000 in uploading costs for existing images only.

5. What is the potential loss of income in terms of continuing pressures on assignment photography? Have you already been impacted or how are you impacted by the Getty and Corbis models?

As a successful advertising and commercial assignment photographer, I have seen the results of microstock and royalty-free stock photography - as pushed forth by conglomerate distributors of images such as Getty and Corbis - erode the marketplace for custom and unique assignment models. I am no longer able to employ staff. In the past 2 years I have gone from having 4 full-time employees at full benefits, to just myself. My wife was my last employee to have to leave the business and it was perhaps the saddest day in my entire career, as she was the mainstay of my business and it afforded us the opportunity to travel, vacation and manage our daughter's schedule with the flexibility that we had earned over 20 years of doing business. This downturn has affected every aspect of our lives. But that is business, and business changes.

The pressures on independent business people are enormous even in the best of times. Now that I am working by myself, time is harder to come by. But there is a greater cost to innovation, to training and value in our collective marketplace. And there can be no cost savings passed on to my customers.

6. What is the cost to visual artists?

The hats worn by the independent business person, especially those that now have to lay off all their workers, are many. But by adopting the Orphan Works Bill, there will be no reason for me to continue in this business. This bill will benefit only the largest of corporations. It is the conglomerates, and the 'Googles' of the world who will benefit. The distribution channels for photographs will be made happy, while the creators of photographs and illustrations will perish.

Photographs are as strongly American as the automobile itself. Kodak moments came to be right here in America. We do not need our photographers to fall beneath the wheel of the moving train of Google, Yahoo and the like, made possible by the steam of Orphan Works.

Testimony Concerning How the Proposed Orphan Works Bill Will Economically Impact Photographers

By John Harrington, Professional Photographer

Office of Advocacy Small Business Administration Roundtable: How Will the Orphan Works Bill Economically Impact Small Entities?

Director Tom Sullivan and Assistant Chief Counsel Cheryl Johns, Small Business Administration; New York Congressional Staff, Representatives of the U.S. Copyright Office, World Intellectual Property Organization, and the European Union, as a certified 8a Small Disadvantaged Business (SDB) located in a HubZone, the economic impact of the current version of Orphan Works legislation is a crushing contemplation. A majority of photography businesses are small businesses, and as such, I would like to thank the Small Business Administration for taking the time to consider this here-to-fore unattended to, yet significant implication of the proposed bill before Congress. As the author of the book *Best Business Practices for Photographers*, the end result of this bill would stand out as a candidate for a "worst business practice" that every photographer would ignore at their own peril.

I will touch on three areas where I, and many of my photographers would be adversely affected.

The vast majority of photographers are one-person operations, juggling creating images - which is the reason they got into the business - against the challenges of getting new clients, doing their accounting and maintaining a constant vigilance in the maintenance and upkeep of a costly set of computer and camera systems, and so forth. Adding in the burden of policing a wild west of image bandits will be, at the very least, a time-consuming endeavor. For those with the wherewithal, it would not be unreasonable to have to hire someone whose sole responsibility is to ensure that their photographs are "ownership aware". In a business where the lack of certification or licensing means that anyone with a camera can become a photographer and put forth un-sustaining pricing models, thus slimming profit margins to nominal amounts, the ability to afford personnel to maintain a constant vigilance against bad actors is substantially burdensome both in the potential time that a photographer would have to commit to that endeavor, but also to the costs of hiring this personnel.

While proposals exist for a free ownership registry, other registries are expected to have a pay-for-submission model. Requiring individual photographers to register their images under a pay model will be a financial disastrous

requirement. Consider that I have submitted several-hundred-thousand of my images to the Copyright office for my registrations that date back to 1989, and I did so and paid fees for each registration, exactly because I wanted to protect my images. For example, in 2006, I registered 58,731 images, and in 2007, 71,919 images. If a registry charged \$0.50 per image to submit and process, I would have to pay \$29,365.50 to protect my 2006 images, and \$35,959.50 to protect my 2007 images, for just those years. For the remaining 16 years of registrations, those costs would increase at least ten-fold. Even if the cost were to drop to \$0.01, just those two years would incur a cost of \$6,532.50. This on top of what I have already paid for my registrations - registrations that include all those images on CD, as well as my contact and ownership information. I submit that any images that had already been registered at the copyright office and received a certificate of registration should have all re-registration fees waived. The registry fees that would apply could reasonably be deemed a modern day poll tax, unjust at best.

This per image fee for the submission does not contemplate the costs for preparations by the photographer. The organization and submission process would be onerous and time consuming. While I am in the rare position that all the images I would submit to a registry are already scanned, the cost to pay a photo technician \$10 an hour to convert, what is likely to approach 350,000 images is extreme both in terms of time, and money. A modern scanner can scan, at best, scan an analog negative or slide at one a minute, but the organization and preparations will likely increase that time, with a scanner, to 4 minutes per image. Using a standard 35mm digital camera and add-on accessories could accelerate that to a 3 images or so a minute with organization and prep time establishing a minimum amount of time per image to 2 minutes. Thus, the time at one image per 4 minutes would be 23,333 hours ($350,000 \times 4 / 60$), or 11.21 years, at 40 hours a week. Even at one every 2 minutes, that's just under 6 years of 40 hour work weeks to prepare those files. it would have cost in dollars (and could arguably be said I have spent over time) approximately \$233,330 for that \$10 an hour technician. The problem becomes exacerbated because by the time a photographer of even five years in the field begins to scan his or her images, images that were not yet scanned but found, and orphaned, become non-revenue-generating images because of their status as an orphaned work. Even the preparation of digital files that do not need to be scanned would be extensively time consuming. Even at one image every 30 seconds, processed in batch form, it would take 1 year and 20 weeks non-stop to process that same 350,000 images if they were digital ($350,000 \times 0.5 \times 60 \times 40$ hours in a week).

Finally, there's the economic loss because commercial interests are using my images and I am not being compensated for their use. I have images that have been licensed for \$50 or \$100 on the low end, and many thousands of dollars on the high end. The diversity, breadth and depth of use is what, in part, determines the costs for the images' use by a prospective client. From a small image in a parish newsletter, to several full-page advertisements by a Fortune 50 company,

the fees for that use vary. Yet, there are literally billions of images on photo sharing sites like Flickr, and many of those images are available for free, and some websites that charge for uses, charge nominal fees like \$1. This sets forth the notion that free and \$1 are reasonable amount of money to pay for the use of a photograph. The current proposed legislation requires both parties to negotiate in good faith for reasonable licensing fees, and based upon those sites pricing structures, an infringer could point to that model as the basis for their taking a reasonable position. Reasonable could better be based upon a historical model of past licensing fees, but even that would be prejudicial to new or up-and-coming photographers without that track record working for their benefit.

Through the Office of Advocacy's role under the Regulatory Flexibility Act, I encourage you to convey to Congress how these proposed regulations will adversely impact small business and to urge the inclusion of "commercial use" as a category of use for which orphaned works would not be a defense, as well as the addition of a rolling time limit of, say 20 years or more where any image that is younger than that is not eligible for an orphaned works defense would go along way towards diminishing the first and third concerns I have. Yet the overly burdensome costs to pay for images to be in a registry, not to mention the costs in time and money to prepare them for submission - especially for those already sitting in the records of the Copyright Office - makes being in a registry - even just one - the proverbial "bridge too far." By conveying this message, and those of my fellow panelists, you will help to ensure that our voice – the voice of small business – is not lost within this legislative process.

Since time is of the essence, I include here in my written testimony a much more comprehensive list of problems with the current proposed legislation, as well as actual amendment language to make the needed orphan works legislation a livable solution.

I welcome any questions you may have.

Orphan Works: The High Cost of Compliance

The high cost of complying with the proposed Orphan Works legislation is likely to put many artists and photographers out of business. It is unrealistic to believe that artists, in order to protect their rights, will be able to financially afford to register their huge archives with these yet to be determined databases. Many of these archives span decades. While the artist will still have to pay to register the work with the Copyright Office, the additional burden of paying for registration at private databases will be too much.

Passage of this bill in its current state will have a disastrous impact – both financially and creatively. Why would *conflict photographers* who risk their lives on a daily basis to cover important news stories so the world can remain informed, be willing to do so if they thought their work could and would be easily appropriated by others? Documentary photographers more often than not must finance their own projects. The ability to create their bodies of work comes from the security in knowing these images are theirs to do with whatever they choose. Without these currently in place protections that rightfully belong to them, why would they continue? Why should they? The public will be the big loser here.

I've attached a picture of bins that represent part of the approximately one million images photographer Doug Menuez has in his archive. And these are just the images shot with film, not the hundreds of thousands of digitally captured images. Imagine the cost of registration.



Debra Weiss History:

Former: Agent, Black Book Consultant, CEO, APA National

Present: Lecturer, Moderator, Independent Curator, PLUS Coalition (Picture Licensing Universal System) Website Curator and Industry Committee Coordinator, Writer (Photo District News, Spark!, Editorial Photographers.com) Advisory Board Member of PLUS, JBC Images, Art Institute of California

August 7, 2008

Thomas M. Sullivan,
Chief Counsel,
Office of Advocacy,
U.S. Small Business Administration

Dear Mr. Sullivan:

Attached please find a letter that was sent to the members of the following organizations as well as to the media: CAPIC (Canadian Association of Photographers and Illustrators in Communication), CRA-ADC (Creators' Rights Alliance), RAAV (Regroupement des artistes en arts visuels), and AIIQ (Association des illustrateurs et illustratrices du Québec) PPOC (Professional Photographers of Canada).

These groups represent over 140,000 creators in Canada in all fields of the arts: music, visuals arts, film, and literature.

Although we feel that the concerns behind the conception of the Orphan bill are just, we feel that we could support it if, in reality, it would only address instances of legitimate orphan works.

However, the manner in which this bill is constructed creates problems that will negatively affect the rights of billions of artworks authored by millions of artists in the United States and around the world. In trying to solve a legitimate concern with this bill much larger issues are created.

We urge you to read our concerns and consider modifying the Orphan Bill to respectfully address the rights of American artists and those around the world, so the livelihoods of both their families and their works are protected.

Andre Cornellier
Copyright Chair
CAPIC

Ewan Nicholson
President
CAPIC

Dear Members,

The United States Congress is on the verge of voting on a Bill called "The ORPHAN WORKS BILL". Lobbyists from the motion picture industry, the Internet industry, associations of museums and others are promoting this Bill. This bill stipulates that any work where the author is not known could be used and commercialized at will if a "reasonably diligent search." has failed to find the author. The scope of this "reasonably diligent search" could be determined by the user/infringer.

This Bill targets all types of work: from professional paintings to family snapshots, artistic work, commercial work, personal and wedding photos, published or non-published, from literary works, to music, to visual arts, to film and works that reside or have ever resided on the internet or have been disseminated by any media. The Bill may be more damaging to the visual arts and music because this kind of work is more frequently disseminated on the web without due credit or, in some instances, with the artists' name removed. This will also have an enormous impact on Indigenous people's culture since their work is never attributed to any individual.

Consider an example: How would a person from Arkansas or Nigeria know about this law, that it even exists, that it affects him, that he has to register in an American registry for a fee, to protect his wedding picture or pictures of his children from being used by an American corporation or a non-for-profit-organization that may reflect values that are against his religion or his ethics which could add insult to injury? This is the just one instance of the damage the passage of this bill into law could do.

At the same time this Bill will promote the creation of privately held commercial registries. Private corporations will be able to create registries where all authors will have to register all of their work to protect them from becoming orphaned: ie; for a photographer, every click of the camera for an illustrator, every sketch. Any work not registered could become orphaned and could be used and/or commercialized by any American entity. It will be the private sector that will decide the cost and the means of registering one's work.

Even if this Bill becomes a law in the United-States it will have a very big impact on creators around the world, on creators like you and me. Obviously this Bill when passed into law will not make any difference between the works created by an American citizen and the works created by anyone else in the world. The implication is that EVERY work from everyone in the world would have to be registered in the USA. This will create two different worlds with unfair competition: Only Americans will be able to appropriate most of the world work's, while this practice will stay illegal in the rest of the world. Meanwhile, it may well induce a crash in the price of licensing work everywhere else.

This law violates the international Berne Treaty and the TRIP negotiations (Agreement on Trade Related Aspects of Intellectual Property TRIPs UNESCO.)

Many American creators' associations are against this Bill. They are asking their members to write letters to Congressman and Senators. They are also asking the same from the international community.

When this law is enacted in the US, the same lobbies will ask other governments to do likewise. If we do not voice our concern now it may be difficult to voice it later with credibility when the same law may be presented in one's own country.

We are asking you, your members and your associations to take a minute and write to Washington. Do not think it won't make a difference. It will.

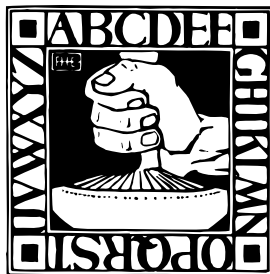
A letter to be sent is reproduce bellow. Here is the link to the Illustrators' Partnership in the US. We develop our position base on their point of view.

http://www.illustratorspartnership.org/01_topics/article.php?searchterm=00267

This Bill could be voted in the next few days. We urge you to act immediately.

Andre Cornellier
Copyright Chair
CAPIC

Ewan Nicholson
President
CAPIC



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August 6, 2008

Tom Sullivan
Director of the Office of Advocacy
Office of Advocacy
U.S. Small Business Administration
409 Third Street, S.W. Suite 7800
Washington, D.C. 20416

RE: H.R. 5889 and S. 2913, the Shawn Bentley Orphan Works Act

Dear Mr. Sullivan,

As a small business owner and graphic image creator who earns a modest living, as afforded by the protection of the current U.S. copyright laws, I am greatly disturbed to learn of the huge shift being proposed by the Orphan Works Acts of 2008, to essentially place the burden of copyright protection on the shoulders of small business owners and off that of potential big business infringers, like Corbis, Getty, and Google. The result of this legislation will be a further transfer of wealth from our nation's small, independent producers to a very small percentage of the very wealthy.

Not only is the effect of this proposed legislation morally wrong, it violates individual property rights, a foundation of our economy and our heritage. I know of no other trade or product that requires its creators to register with one government agency and two private ones in order to protect their rights and property from theft. The cost for me just to comply, i.e., digitize and register my life's work is not only beyond my economic ability, but it will be beyond my power to search for infringers and file suit, at my own expense as proposed, with little hope of any net gain. Any punitive damages that could be awarded under current law will disappear with "orphaned" work, work that, if not placed in yet-to-be defined registries, and if not registered with the Copyright Office at significant cost to me, will strip me of my ability to pay legal fees to protect my rights, fees that could be paid out of "punitive damage" claims under current law. Just the threat of damages with today's law settles most infringements I encounter. The new bill will essentially make piracy of independent artists' work legal. It will shift both the cost and the burden of proof of infringement onto my shoulders - a nearly impossible task as a small business owner, but a completely unwieldy one for a disabled, small business owner, as I am.

I have no objection to endorsing a rewriting of the "fair use" definition in the current copyright law to include the legitimate interests of libraries, universities, and research institutes. I know of no artist who objects to fair use. But current language in Orphan Works 2008 is nothing but a giveaway to large commercial interests, and the fact that no meaningful public hearings have been offered for this legislation tells me it has been crafted by special interests to place small business people in servitude to the large corporate interests, essentially for the commercialization of our national culture and heritage.

Please use the power of your office to stop the current legislation from passage and ask that a new bill be written, with direct input from the people most affected by the legislation, not from narrow-minded but powerful special interests.

Thank you for conducting this roundtable.

Don Schaefer
Don Schaefer Studio
535 Albany Street
Boston, MA 02118-2500

September 5, 2008

Dear Honorable Members of the House and Senate Small Business Committees,

I am the U.S. representative of Pro Imaging, an international organization of professional image makers from over 30 countries, China to South Africa. My American colleagues and international friends are deeply troubled with H.R. 5889, the Orphan Works Act of 2008. Please do not vote this bill out of committee until Congress can hold proper hearings into the harm it will do to small businesses, individual creators and ordinary citizens.

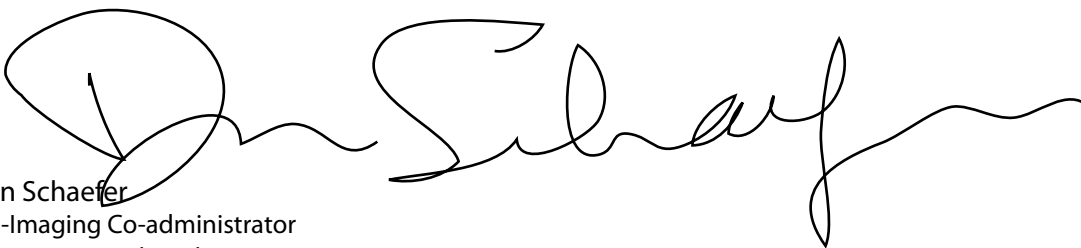
While our members support a bill that would give libraries and museums a legitimate expansion of fair use, H.R. 5889 is far too broad. It would cause trillions of dollars of private property to be transferred into the control of a few corporate databases with no guarantee as to how these assets will be protected, used or abused. It will undermine the passive copyright protection that all citizens now enjoy – and that threatens individual creativity, freedom of expression and the right to privacy embodied in copyright law.

There is no reason for the reckless scope of this bill. It is based on a Copyright Office study of orphaned work. Yet it will permit the infringement of contemporary work by creators working in today's commercial markets - a subject the Copyright Office never studied. Its stated purpose is to let libraries and museums digitize their collections and let ordinary folks duplicate family photos. But these modest goals can be met with a modest expansion of Fair Use. I do not believe citizens should have to hand over their personal intellectual property to a few corporate special interests.

The unintended consequences of this bill could be a rights grab of monumental proportions, and would likely contravene the Berne Convention for the Protection of Literary and Artistic Works (the international agreement governing copyrights to which the United States is a signatory) and TRIPS (World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights).

Please look behind the talking points of the special interests promoting the Orphan Works Act. Do not support a major revision of copyright law without an open, informed and transparent public debate.

Sincerely,



Don Schaefer
Pro-Imaging Co-administrator
listmaster@pro-imaging.org

U.S. headquarters:
535 Albany Street
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617 792-6512

06 August, 2008

Tom Sullivan
Director of the Office of Advocacy
Office of Advocacy
U.S. Small Business Administration
409 Third Street, S.W. Suite 7800
Washington, D.C. 20416

RE: H.R. 5889 and S. 2913, the Shawn Bentley Orphan Works Act

Dear Mr. Sullivan,

I am writing to you with great concern as co-owner, and on behalf of, Pro Imaging, an international coalition of professional image makers from over thirty countries, including China, the U.S., Australia, the U.K. and E.U., and South Africa. We believe that Orphan Works 2008 legislation will do irreparable harm to huge numbers of vulnerable artists in all parts of the world.

Just this last week we have taken firm action against Microsoft's Photo Competition here in the UK called "Iconic Britain". What is interesting is that their competition relied on entrants selecting any images they fancied on the Internet, and then putting them forward as their competition entry to feature on the competition web site!

We have received this utterly amazing statement from Microsoft, especially as Microsoft are themselves so determined in protecting their own intellectual property from theft.

"All images that feature on www.iconicbritain.co.uk are images from the Internet that are already in the public domain."

We are astounded that a large international company such as Microsoft could believe that just because images are available for viewing on the Internet, that this makes them in the public domain, and thus free to use on their photo competition web site without the owners permission, and without paying for the privilege. This shows the reality of the danger of allowing the Orphan Works bill to succeed and the flawed basis on which it has been drafted. It should be noted that the images gathered by the Microsoft search facility in tests we made were all stripped of their identification and were therefore Orphaned works!

I hope you realize this example only scratches the surface of the confusion and piracy opportunities Orphan Works 2008 will create, and that you understand the monumental task of enforcing copyright will now fall on the shoulders of small business owners, as proposed in the legislation - a difficult enough burden for our U.S. members, but think of the impossible task for our international members!

Thank you for addressing our concerns in earnest.

Richard Kenward
Co-listowner Pro-Imaging <<http://www.pro-imaging.org>>
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THE ORPHAN WORKS ROUNDTABLE

Conducted by the Small Business Administration

August 8, 2008, Salmagundi Club, 47 Fifth Avenue, New York, NY 10003

How Will the Orphan Works Bill Economically Impact Small Entities?

Part 4: Musicians & Writers



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ARTISTS RIGHTS SOCIETY

APA

ADVERTISING
PHOTOGRAPHERS
OF AMERICA

view archived webcast: <http://videos.cmitnyc.com/asip.html>



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Creators

Part 4: Musicians, Songwriters, Composers, IP Attorneys

Statement of Rich Bengloff President, A2IM
speaking for:

- American Association of Independent Music (A2IM)
- American Federation of Musicians (AFM)
- American Federation of Television and Radio Artists (AFTRA)
- Association of Independent Music Publishers (AIMP)
- Music Managers Forum (MMF)
- Nashville Songwriters Association International (NSAI)
- Native American Music Association (NAMA)
- Recording Artists' Coalition (RAC)

A2IM Position Paper on Orphan Works Rich Bengloff, President, A2IM
American Association of Independent Music (A2IM)

Copyright Orphan Works Act - Are all Copyright Owners to Become Orphans?
Cheryl Hodgson, Esq., President, California Copyright Conference (CCC)
(with Letter to MaryBeth Peters, Register of Copyrights, from Congresswoman Zoe Lofgren)

AIMP and CCC Joint Position Paper on Orphan Works.
Association of Independent Music Publishers (AIMP) and California Copyright Conference (CCC)

Statement of Tess Taylor National Association of Record Industry Professionals (NARIP)

Statement of Gene Poole Songwriter, Musician

Statement of Jonathan T. Yasuda Musician

Writers

Statement of Gerald Colby President, National Writers Union

SBA Roundtable: *How Will the Orphan Works Bill Economically Impact Small Entities?*- The American Association Of Independent Music (“A2IM”)
Statement on Friday, August 8, 2008

Director Tom Sullivan and Assistant Chief Counsel Cheryl Johns, Small Business Administration; New York Congressional Staff, Representatives of the U.S. Copyright Office, World Intellectual Property Organization, and the European Union, my name is Richard Bengloff and I am the president of the American Association of Independent Music, also known as A2IM.

But today I am not just representing A2IM. I am also representing a number of other music organizations as we are united as music organizations in our concern over the proposed Orphan Works Legislation. Those organizations include:

American Federation of Musicians (“AFM”)
American Federation of Television and Radio Artists (“AFTRA”)
Association of Independent Music Publishers (“AIMP”)
Music Managers Forum (“MMF”)
Nashville Songwriters Association International (“NSAI”)
Native American Music Association (“NAMA”)
Recording Artists’ Coalition (“RAC”)

A2IM is a not-for-profit trade organization that represents the U.S. Independent music label community in the United States and we have a number of large members, for example Concord Music in California, Curb Records in Nashville, and Razor & Tie Records here in New York City but the vast number of our members are very small businesses just getting by during this transformative period in the music industry.

Today you will hear about many issues related to the proposed Orphan Works legislation about which music creators have issues. We agree with all the issues but given the limited time I would like to stress two of these. The creators control over the use of their works and creators limited resources to protect their copyrights.

If passed this legislation could result in the infringer altering the musical work for use as part of another musical composition, for example a mash up, or could result in the music being linked with a product the creator may not approve of, with no prior approval by the music creator. A second major concern is if these works are used for any purpose the creator must first find out about this usage and then have the resources to either stop this usage or get fairly compensated for this usage. With no public central archive to do copyright searches or provisions in the law for recovery of legal fees for infringements our small businesses will not have the resources to protect their copyrights use by businesses large or small as most do not have the in-house resources. These are just two of our concerns, our position paper is attached and also available at our website, www.A2IM.org

Rich Bengloff, President A2IM
212-937-8975X200, Rich.Bengloff@A2IM.ORG,

Rich Bengloff joined A2IM as its President in January of 2007. Rich also serves as a board member representing the Independent music label community on the boards of the SoundExchange and the Alliance of Artists and Recording Companies ("AARC"). Rich has spent much of his career in the music and entertainment industry, having served in various capacities at SONY Corporation of America. As Vice President of Columbia Pictures Entertainment; as Vice President, Finance and Administration at Relativity Records/R.E.D. Distribution; and as Vice President, Distribution Operations for Sony Music Distribution between 1989- 1998. He then joined Elektra Entertainment Group to become Senior Vice President/CFO. In 2005, he became WNYC Radio's Vice President of Finance and Administration and Chief Financial Officer.

Rich holds a BA degree from SUNY–New Paltz and an MBA from Columbia University. Rich also co-teaches the music industry course in the Media and Entertainment Department of Fordham University's MBA program.

About A2IM (www.a2im.org)

The American Association of Independent Music (A2IM, www.a2im.org) is a non-profit trade organization fighting for and protecting the rights of the Independent music label community. A2IM is an organization made up of Independent music labels that have banded together to form a central voice advocating for the health of the Independent music sector. Our membership includes both labels and associate members (those who work with, depend upon, or support Independent music). A2IM's mission statement is to obtain tangible economic gains for its members via lobbying, commerce opportunities, and member services. INDEPENDENT LABELS MEAN BUSINESS! A2IM is hard at work every day to improve the business of Independent music companies.



American Association
of Independent Music

**American Association of Independent Music (“A2IM”)
Position Paper on the Current Proposed
Orphan Works Legislation in the United States –6/08**

Senator Patrick Leahy (D-VT) introduced the Shawn Bentley Orphan Works Act of 2008 (S. 2913) in the Senate, (authored by Senator Leahy and Senator Orrin Hatch (R-UT), and named after the former Senate Judiciary Committee staff counsel. Congressman Howard Berman (D-CA) introduced the Orphan Works Act of 2008 (H.R. 5889) in the House, authored by Congressman Berman and Congressman Lamar Smith (R-TX). Both bills were introduced on April 24, 2008. This document outlines A2IM’s position on these important bills.

What is an “Orphan Work”?

Most of our members have encountered in their business what are now called “orphan works”. They have typically found a way around the problem that respected copyright without need of legislation.

Under the Orphan Works Legislation, an “orphan work” is defined in the negative—a work is “orphaned” when an “infringer” can’t find the copyright owner after a “good faith” and “reasonably diligent” search for same in accordance with “best practices” that have yet to be established for this bill should it become law. (“Infringer” is what the new user is called in the bills.)

If the infringer conducts that search but cannot find the owner, the infringer is free to use *any* work in *any* manner for *any* purpose. Under the Senate bill, the infringer doesn’t have to notify anyone that they have used the infringed work. The House bill does have a notice requirement—*but the notice goes to a non-public archive in the Copyright Office that only has to be disclosed to the copyright owner if the copyright owner sues the infringer*. We get the decided impression that even that is likely to come out of the bill in the coming days or weeks.

The infringer is free to use *any* work—without regard to nationality of the copyright

owner, or whether a comparable use in the copyright owner's country would violate that country's laws.

The infringer is free to use any work in *any* manner—there are no restrictions on how a particular work may be used. One of our members recordings could end up in a motion picture—of any rating—a political advertisement or other commercial, or in a mashup that will alter the sound quality and characteristics of the original recording beyond recognition.

The infringer is free to use *any* work in *any* manner for *any* purpose—the infringer could use a recording in a way that would violate marketing restrictions in the copyright owners recording, license or distribution agreement with the artist, giving the infringer even greater rights than the copyright owner herself could have. So even if the copyright owner found the infringer, approving the use might put the copyright owner in breach of their own rights agreement with the artist depending on what use was made by the infringer.

And if the original recording was made under a collective bargaining agreement—such as the Phonograph Record Labor Agreement of the American Federation of Musicians or the Sound Recordings Code of the American Federation of Radio and Television Artists, there may well be residual payments owed and trust fund payments almost certainly owed as well as pension, health and welfare contributions. None of these would be paid by the infringer—unless they are found.

The record company will very likely still have the obligation to make these payments under the union agreement—even if a court were to determine that the residuals were not “reasonable compensation”.

But since the Congress does not require the infringer to notify anyone of the infringement, even though the infringer has relief from statutory damages and payment of legal fees if they did the search in a “good faith” and “reasonably diligent” manner, *how would the copyright owner ever know the infringement has occurred?*

The current orphan works controversy began officially in 2005 when the U.S. Copyright Office began preparing the Orphan Works Report. Before its introduction a few weeks ago, the concept of the legislation had been largely messaged as a change in the U.S. Copyright Act designed to assist museums and libraries to better utilize their archives—a *noncommercial* emphasis. Since its introduction, the interests involved have taken a decidedly *commercial* turn, which has caused A2IM to reconsider the effect of the Orphan Works Legislation on our members.

The Orphan Works Legislation is also moving at “light speed” through the Congress. It has passed both the Subcommittee on the Courts, the Internet and Intellectual Property of the House of Representatives as well as the Senate Judiciary Committee—all in less than a month.

“Reasonable Compensation”

If the infringer begins exploiting the orphaned work and the copyright owner finds the infringer, the copyright owner can try negotiating with the infringer, but if no deal can be made, the copyright owner has no choice but to sue the infringer.

However, the only time that the copyright owner can get back the remedy of statutory damages is if the copyright owner sues the infringer and can prove in the lawsuit that the infringer did not conduct a good faith reasonable search in accordance with best practices.

The copyright owner will have the right to sue for “reasonable compensation” as determined in the lawsuit, and the court is supposed to take into account comparable licenses when determining reasonable compensation. Even so, nothing in the statute requires the infringer to pay the copyright owner’s legal fees, so it seems predictable that the infringing use will have to be significantly in excess of the anticipated legal fees or there must be almost perfect evidence that the infringer did not conduct a proper search in order to get an attorney to take the case on a contingency. Since it is nearly impossible to determine how the search was conducted or if one was even made without filing a lawsuit, the statute creates perverse incentives.

“Best Practices”

The Orphan Works Legislation requires that copyright owners in each sector of the creative community come together to determine what the “best practices” should be for a “reasonably diligent search”.

This includes not only record companies and music publishers, but also illustrators, motion pictures, television, visual art, choreography, graphic arts just to name a few. All these groups are supposed to decide what “best practices” should be in their industry, and then deliver these standards to the Copyright Office who is supposed to make them available online. No timetable or process for this determination is in the statute. Perhaps more importantly—no funding for the time involved in setting these standards is in the bills either.

And of course within each sector there are competing interests—we would not want RIAA making our decisions and in fairness RIAA would not want A2IM making theirs. Setting these “best practices” is a tremendous productivity loss for A2IM. We would have to stop dealing with our business and the business of our members to help to develop standards for a statute we did not want, do not need, and have not budgeted the resources to address.

It is important to note that there is nothing in the Orphan Works Legislation that limits who can make these important decisions regarding best practices. We could find ourselves at the table in a government mandated standard setting process with corporations and other organizations that are not in our industry and do not understand our business—and worse yet, may actually be interested in the outcome of these processes because these corporations and organizations either want to use orphan works themselves or want to develop a search capability to profit from the proposed law.

If A2IM does not appear at these meetings, our members bear the significant risk of

having these important standards set without them.

It is also important to realize that the House bill as currently drafted has the law potentially going into effect on January 1, 2009 regardless of whether the “best practices” have been agreed to by then.

A2IM’s Positions on Orphan Works

The positions that A2IM has taken on the Orphan Works Legislation come down to simple fairness in a statute clearly designed to benefit online companies, museums, libraries and some users.

Noncommercial Uses

If a museum, which is a 501 (c) (3) not-for-profit or a library want to use works for which they cannot find the copyright owner after putting their organization’s reputation on the line by claiming to have searched hard for that owner, then A2IM has no problem encouraging noncommercial and largely cultural or archival activities by these known entities. If the Guggenheim Museum, for example, wants to offer a retrospective on world music, we understand. If the for-profit Corporation X Museum that was started last week and only exists online suddenly has the need for featuring “orphan” works that others may link to, we would not support that kind of activity.

Commercial Copy

We believe that anyone seeking to take advantage of the Orphan Works Legislation and its safe harbor from statutory damages should be required to begin their search with a “commercial copy” of the work—the actual physical copy authorized by the copyright owner for sale, not a copy found on an Internet P2P site. This is to prevent infringers from downloading illegal copies of our members’ sound recordings and trying to create something legal from something that is illegal.

Most importantly, however, is that the commercial copy of the work is likely to contain some references to the copyright owner, the artist, the songwriter, the music publisher, the performance rights society affiliation—some hard data that at some point was gathered and created for release to the public in commerce by the copyright owner.

If the Congress required an infringer to start with a commercial copy of the sound recording, there would be a much greater level of transparency and many fewer “false negatives” in search results.

Mandatory Use of Existing Identification Systems

Any orphan works statute should mandate that infringers be subject to minimum search requirements such as utilizing systems already in place in an industry that the industry uses for the identification of works.

In our business this would involve searching for the title of the work and the names of the artist, songwriter, music publisher and PRO via all available information sources. This would include Copyright Office registrations, UPC codes, International Standard Recording Codes, ASCAP, BMI, and SESAC databases, record company catalogs and catalog numbers, distributor names, etc. Very often in the independent business legal lines may give the impression that a distributor or distributing label is the copyright owner, but

the actual copyright owner is outside the US or has been acquired and is not out of business.

Excluded Uses

Most artists do not want their work associated with certain kinds of uses—political advertising, tobacco or alcohol products, pharmaceuticals, personal hygiene products, motion pictures with a rating indicating there may be objectionable material in the film, games with a violent theme. We all know the list because these are marketing restrictions that are frequently agreed by record companies so that our artists feel that their work and sensibilities are respected.

Plus, independent labels frequently distribute or license content from copyright owners outside of the United States. This provides the livelihood for a number of our members. Those agreements will customarily prohibit anything even remotely like an orphan work permission.

It should be very easy for the Congress to agree that some uses of orphan works would be restricted because the Congress has refused to require infringers to include artists in the standard of “reasonably diligent search”. If an artist search cannot be included in the search for the copyright owner, then the artist should at least be afforded some base line level of restriction on how their performances can be used.

Legal Fees for Copyright Owners:

As smaller independent labels will likely need to engage counsel as they typically do not have in-house counsel the denying of a recovery of legal fees is unduly harsh and will preclude smaller copyright owners from enforcing their rights.

Notice of Infringing Use

A2IM believes that it is only common fairness that an infringer is required to file a notice of use with the Copyright Office and that the filing be made public. The Copyright Office maintains a database where transfers of copyright and other documents are filed that are not copyright registrations, but just relate to copyrights regardless of whether the works are actually registered for copyright. The Copyright Office is required by law to maintain this database and has done so for decades. It would be very simple to require the infringer to file a notice of use in this database. While there would be a cost to file for the user of the copyright, the user would be paying no copyright cost, if a valid search was done, so there should be a more than offsetting savings. This would give the copyright owner a location to search for infringements on their copyrights.

However, the Congress has consistently rejected any obligation on the part of the infringer to require this simple notice. A2IM believes that failing to require notice of the infringement is at odds with the stated purpose of the Orphan Works Legislation—helping owners and users connect.

Copyright Orphan Works Act — Are all Copyright Owners to Become Orphans?

Posted By Chev On July 15, 2008 @ 1:17 pm In Copyright, Entertainment Law, Intellectual Property, Legal, Legal News, Music | No Comments

Two bills introduced in the House and Senate in SB 2913 (the “Shawn Bentley Orphans Works Act of 2008, Senate Bill 2913 and H.R. 5889 (“Orphan Works Act of 2008”) threaten to dismantle copyright protection under the guise of protecting users of works whose owners can not be found. The burden is shifted to copyright owners, and all the benefits to those who steal from them. One way of reading the bills is **“Steal now, pay a little, if ever caught.”** One provision, already labeled the “Dark Archive” conjures up images of the need for Jedi intervention to prevent copyright protection from a permanent move to the “Dark Side.” Are copyright owners destined to share the same fate that befell Anakin Skywalker, better known as “Darth Vader?”

I am the current President of the California Copyright Conference, (“CCC”), and we are proud to announce a joint position paper with the Association of Independent Music Publishers (“AIMP”) on this important issue. The final report is the result of a collaborative effort from a panel of distinguished experts who bring together differing viewpoints on copyright matters. The unanimity of the voice with which they have chosen to speak underscores the reason *all* copyright owners should read and understand the issues. [Report attached].

Politics is not normally my business. However, badly written, politically motivated legislation that threatens the legal rights of our clients becomes my business—and yours!

Attorney Steve Winogradsky, Site and Bio , Past President of both the CCC and the AIMP concurs:

The Orphan Works bill has the potential to erode the protection that copyright owners have fought for over many years. It puts the burden on the copyright owner to find the offending parties and either negotiate with them without the remedies currently available to bring about reasonable compensation or bring costly litigation. In short, for copyright owners, the Orphan Works bill is a disaster.

The original premise of this legislation was to protect libraries, museums, and other not for profit users in efforts to digitize archives of materials for which owners could not be located. However, as drafted, the legislation goes much further and applies to *any use* of a copyrighted work including commercial users. In short, it creates an incentive to steal first, and pay later *if* caught! Policing infringing uses on the Internet is already difficult. This bill raises the bar and the burden on copyright owners to protect their works while reducing remedies.

Anyone could use a copyrighted work without permission or payment to the copyright owner, with reduced legal consequences. The user, **if discovered and sued**, need only

claim a “diligent” search was performed to locate the owner. The details of such a search are to be disclosed only in later litigation, an absurd provision benefiting only infringers. Even if works are properly registered with the U.S. Copyright Office, copyright owners would lose rights to statutory damages and attorney’s fees and be limited to payment of “reasonable compensation.”

Many works are never registered with the Copyright Office, largely because Congress created automatic protection for all works upon creation. Owners of unregistered works are *already* sufficiently limited in their remedies, since, without a prior registration, a copyright owner suing for infringement cannot claim statutory damages or attorney’s fees. This legislation, if passed, could become the stage for a frontal assault on the rights of *all owners* by users who want to steal and pay-little-later.

On May 6, 2008, Marybeth Peters, Registrar of Copyrights wrote to Representative Zoe Lofgren of the Judiciary Committee, [See attached letter] **endorsing** this legislation and recommending elimination of the proposal to create a “Dark Archive.”

The so called Dark Archive would result from a provision in the House version that a Statement of Use be filed with the Copyright Office by the User of the Work, to be accessed by copyright owners only upon the terms and conditions of regulations it is to proscribe. As if a “Dark Archive” over which copyright owners must fight for access to is not bad enough, the Registrar in her recent letter advocates **total elimination** of filing a Statement of Use, *i.e.*, elimination of the Dark Archive completely.

The Registrar’s position of eliminating any such archive, leaving copyright owners to discover the existence and contents of “diligent searches” only in expensive litigation needs rethinking. Why not earmark private donations to the Library of Congress as a resource to implement a user friendly “Transparent Archive” system? The Copyright Office ignores the realities of the market place and places the rights of copyright owners at great risk.

The reasons cited in Ms. Peters’ letter are that it will be costly to administer and the filing will be too much to expect of unauthorized users. This position, if adopted, would leave copyright owners with *no means* of locating users relying upon the proposed statute other than sheer luck in discovering them, particularly difficult in the digital jungle.

The U.S. Trademark Office has done an amazing job over the last 10 years of making all files and contents available on line with the click of a mouse. The Copyright Office, while having made progress, is lacking in user friendly digital access beyond basic registration information. If the Registrar is determined to support for Orphan Works legislation, that support should include a request for public funding to support proper implementation of online access to the Dark Archive accessible from the date a Notice of Use is filed.

According to Ms. Peters’ letter the Dark Archive is unnecessary, based upon an assertion that sufficient safeguards are included elsewhere in the bill. These “safeguards” include:

1) the User must put a symbol or notice on the work; **[Is this: “Hello I stole this.”]**; 2) the User must assert the statute as a defense in any lawsuit **[Comment: What lawyer won’t be using this as a defense in every case where permission was not sought?]**; 3) The User consents to jurisdiction of the U.S. District Court. **[This is nothing new, since copyright cases have always been in Federal Court since the 1909 Copyright Act. Further, when works are used on the Internet, acts of infringement are not local in nature]** ; and 4) the Copyright owner is able to obtain copies of the “search” in court discovery **[Short for: “Copyright owners have to sue to find out if a user even performed a search to justify taking the work without permission!”]**.

The legislation also includes a provision for Copyright Office certification of third party data bases as a source meeting search requirements. No standards are specified for certification of such data bases. While, the music industry can point to organizations such as BMI, ASCAP and SESAC as sources of information for publishers and copyright owners, even those databases are far from complete. Some industry groups such as photographers and visual artists lack such information and are likely to be the most vulnerable to abuse.

Ms. Peters also opposes this requirement as being beyond the expertise of the Copyright Office. If the entire universe of copyright owners must change on a dime to accommodate new legislation endorsed by the Copyright Office, then the Registrar should attend the party.

Ms. Peters’ letter leaves us wondering,

“Just whose interests does the Copyright Office have at heart?”

We urge all copyright owners to voice their written concern over the structure of the proposed legislation.

Cheryl Hodgson, Esq.
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California Copyright Conference

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This statement appears online: <http://brandaideblog.com/?p=51&print=1>

Attorney Profile

Cheryl Hodgson

With more than 25 years of experience in trademark and copyright legal matters, Hodgson offers a unique combination of legal expertise and practical business experience gained prior to beginning her career as an attorney. Her practice focuses primarily on the registration, licensing, and enforcement of agreements pertaining to trademark and copyright properties, helping clients to protect their valuable intellectual property.

Hodgson has participated in several landmark cases related to trademark and music related matters, including one case resulting in the largest jury verdict in trademark law history on behalf of a major international corporation. She also draws on her prior experience in the music industry – as a former licensed talent agent and artist manager – to assist clients in the entertainment business with trademark and agreement-related issues.

Hodgson's services include registration, licensing and enforcement of trademarks and copyrights; domain dispute resolution; brand management; corporate registrations; and licensed use of trademarks in merchandising. On behalf of clients in the entertainment industry, she provides assistance in the registration and protection of entertainment service marks; artist management; music publishing, artist recording and talent agreements; royalty audit claims settlement; film and TV rights acquisition, production and distribution agreements; and music catalogue acquisition. Her clients range from the smallest start-up ventures to the largest international corporations. For smaller clients that don't have general counsel, Hodgson often serves as ad hoc counsel, efficiently coordinating the services of other legal specialists as needed.

A regular speaker and guest lecturer on trademark and copyright law matters, Hodgson has lectured at the California Copyright Conference, Los Angeles Copyright Society, CLE International, University of Miami School of Law, University of Denver College of Law, University of Colorado Denver Center, and Tulane University Law School. Drawing on her experience in the entertainment industry, she has addressed the Eat'm Music Conference, American Bar Association Sports & Entertainment Law Forum, University of Texas/Texas State Bar Entertainment Law Seminar, New Orleans Jazz Festival Legal Symposium, San Francisco Music Fair, and California Lawyers for the Arts. She has also shared her expertise as a guest author for industry publications such as the ABA Entertainment and Sports Lawyer, Colorado Lawyer, and Denver Law Journal.

Hodgson has completed training for arbitration and mediation of Intellectual Property Disputes and Advanced Workshops for the Uniform Resolution of Domain Disputes at the World Intellectual Property Organization in Geneva, Switzerland. In July 2007, she was named to the WIPO List of Mediators and Arbitrators for Intellectual Property Disputes. She is also serving a two term as a member of the ADR Programs Committee of the International Trademark Association. Hodgson has been named President of the California Copyright Conference for 2008-2009.

Hodgson has been admitted to practice law in California, Colorado, New York, Tennessee and Oregon, and has served as Professor of Music Law at Loyola University School of Law. She serves on the Board of Directors of the California Copyright Conference and is a member of the Los Angeles Copyright Society, the Intellectual Property section of the California State Bar, and Big Sisters of Los Angeles. She is also the founder of Canto Novo Music, a copyright administration company focused on the rights of Spanish composers. Hodgson holds a J.D. from the University of Denver College of Law and a B.A. from Louisiana Tech University.



The Register of Copyrights of the United States of America

United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000 · (202) 707-8350

May 6, 2008

Congresswoman Zoe Lofgren
Subcommittee on Courts, the Internet,
and Intellectual Property
Committee on the Judiciary
Congress of the United States
102 Cannon House Office Building
Washington, D.C. 20515-0516

Dear Representative Lofgren:

Thank you for your letter of May 1, 2008 requesting my views on certain provisions of H.R. 5889 (the "Orphan Works Act of 2008"), namely (1) the duties that the legislation places on the Copyright Office and (2) the ability of the Library of Congress and similarly situated libraries and museums to avail themselves of the bill's provisions, particularly with respect to the "safe harbor." I address these provisions below and, where appropriate, include drafting recommendations.

As a preliminary matter, I wish to express my gratitude to the Subcommittee for addressing orphan works legislation. There is strong support among a wide array of stakeholders for the general approach of the bill, which is to limit the exposure of good faith users who conduct and document a qualifying (but ultimately unsuccessful) search for the copyright owner. The Copyright Office recommended the same approach in its 2006 report.

Duties of the Copyright Office

1. Statement of Use: "The "Dark Archive"

By way of background, both H.R. 5889 and S. 2913 (the "Shawn Bentley Orphan Works Act of 2008") introduce several new conditions of eligibility that did not exist in H.R. 6052 ("The Copyright Modernization Act of 2006"). The new conditions that appear in both bills, and which I support, are:

- 1) a requirement that the user include a symbol or other notice of use on the work or in connection with the use to help copyright owners track uses;
- 2) a requirement that the user assert in the initial pleading of any suit brought by the owner the ability to claim orphan works limitations, rather than surprising a copyright owner by pleading it at a later date (such as during the remedies phase of a trial);
- 3) a requirement that the user consent to, or be held to be within, the jurisdiction of United States district court; and

- 4) a requirement that the user state with particularity the basis for the ability to claim orphan works limitations at the time the initial discovery disclosures are required, including by handing over the documentation of the search.

These provisions were not included in the orphan works legislation considered in the 109th Congress. Some owner groups, however, have expressed concerns that the prior legislation contained insufficient safeguards to deter bad actors from attempting to use the orphan works regime in bad faith to mask piracy. I believe that the four additional hurdles outlined above offer appropriate safeguards because each of them (to varying degrees) achieves significant deterrent effect with a relatively small amount of burden on the user and relatively little administrative cost and waste.

However, H.R. 5889 goes further than these four and adds a fifth condition of eligibility: the requirement that a user file with the Copyright Office a “Statement of Use” for inclusion in what has been informally labeled the “dark archive.” In my view, the “Statement of Use” condition would create an unnecessary administrative impediment for good faith users that is likely to deter many beneficial uses because of the costs and burdens it would impose on users of orphan works. Since there are already multiple provisions in the bill to address bad actors, including those mentioned above, the impediment is unjustified.

I would like to stress that documentation is an important part of the orphan works regime but one that is already sufficiently clear. The proposed statute specifies that the user must document the search prior to making use of the copyrighted work. Users thus have the burden of presenting evidence of this documentation, and a user who fails to present persuasive documentation in copyright infringement litigation will lose all the benefits of the orphan work regime. Adding on top of this a requirement that the user file a statement related to the documentation will add little in the way of incentive but could disqualify users who have otherwise fully satisfied the search and documentation conditions.

I also expect that unless the fees that users would submit with their “Statements of Use” are supplemented by government appropriations, the cost of filing Statements of Use would deter many of the valuable uses that could be made of orphan works. The Copyright Office would have to charge a fee to receive, index and store dark archive material, consistent with its fees for registration and recordation of documents. At a minimum, the fee would have to recover the cost of processing and retaining the materials received for the archive. In reality, the fee would have to also cover the cost of maintaining, preserving and retrieving the materials over many, many years. Users would of course have to consider this cost before filing and we are concerned that many users are likely to determine that the hurdle is too expensive to justify. I must stress that any cost that is not passed on to users would have to be recouped from appropriations, something that would be very difficult to accomplish in the current budgetary environment. We do not know what the actual cost to users would be without studying it, but by way of comparison, registration fees are \$45 for physical filings and \$35 for electronic filings. The fee for recordation of documents is \$95 for a single title plus an

additional \$25 for every group of 10 titles listed. We would also have to charge any party needing to retrieve the filings, including copyright owners, to cover the costs of retrieval and, if requested, reproduction.

One way to analyze the orphan work problem is to consider it a market failure resulting from high transaction costs. It seems futile to pass a law that reduces those transaction costs in the market place to the point where the use can go forward, but then puts in place an administrative fee paid to the government that raises the transaction cost back up to a point where the transaction is once again impractical. It amounts to giving with one hand and taking away with the other.

From the perspective of cost, the users most likely to be deterred from beneficial uses by a dark archive requirement are those who wish to make large numbers of works available: museums, libraries, archives and others who have the potential to digitize or publish large amounts of orphaned material. These, of course, are the types of uses that everyone embraces when they point to the need for orphan works legislation. Such users normally would conduct searches on an on-going basis, posting or publishing the material (the photograph, e.g.) as they complete the search and relevant legal analysis for that particular work. If dark archive filings were made mandatory, these users would (they have stated) need to send bulk filings of multiple searches at one time to reduce cost. (This assumes the Copyright Office could provide a “group” filing option, something that has proved to be far from simple in the context of copyright registration.) However, they are fearful that if they wait until they have accumulated a critical mass of filings, they would run the risk of having stale (and therefore un-qualifying) documentation.

Finally, it is by no means only nonprofits that object to the condition of a statement of use. We have also heard from publishers, documentary filmmakers, independent scholars, and other users.

2. Best Practices

One of the most important challenges in constructing orphan works legislation is creating search criteria that are both strong and flexible. I recognize that the Copyright Office may be uniquely qualified to play a significant role in maintaining best practices for purposes of orphan works legislation, provided we have clear direction in the statute as to what our duties are. It is particularly important for us to know what we may do in the context of contradictory or duplicative practices submitted to us. I understand users and courts will have little guidance if there are multiple (and perhaps diverse and even contradictory) sets of best practices available to choose from. However, I would like to underscore that it is important for copyright owners, authors, and users of works of authorship to participate in the development of best practices. There have been many constructive discussions in recent days along these lines and we are heartened by the manner in which copyright owners and users have come together in crafting appropriate language. Crafting a mechanism by which appropriate best practices can be developed that will offer clear guidance to users and copyright owners may be the most difficult and important task facing the legislator in drafting this legislation.

3. Certification of Electronic Databases

I have concerns about Section 3: “Database of Pictorial, Graphic, and Sculptural Works.” If that provision remains in the legislation, consideration should be given to phasing the provision out over time, to correspond with the date on which the legislation becomes effective for pictorial, graphic and sculptural works.

I am skeptical of the merits of giving the Copyright Office a role in evaluating databases or related technology, other than in the context of reviewing best practices that are submitted to us. The Office lacks experience with the task of accreditation and, quite frankly, we lack the technical expertise that would seem to be required. Moreover, we are not persuaded that certification should be a central concern. A user should take advantage of the tools that are likely to lead him to the copyright owner, regardless of whether the government has recognized that tool.

We are confident that the marketplace offers, and will continue to offer, an array of databases and search technologies, which will result in more choices for the copyright owner and more aids for the prospective user. On December 8, 2007, the Copyright Office organized a briefing and showcase of technology for Congressional staff. At the briefing, companies highlighted image recognition, fingerprinting, watermarking, audio recognition and/or licensing features, and discussed their efforts to develop business models and standards, including database security, population fees, and allocation of user fees or subscriptions. I believe that the content owners and users in the respective copyright industries will be the parties most knowledgeable about whether a particular image recognition database or other electronic product is a viable search tool. If copyright owners or users are aware of a database or tool that is helpful, they will direct users to that tool in the formulation of “best practices.” This is a process that is already underway but, certainly, an orphan works amendment would provide additional incentives for copyright owners and database companies to work together.

That said, I am aware that Congress may wish to tie the effective date of orphan works legislation to the date on which the Copyright Office has certified a particular number of electronic databases. If this is the case, I would suggest that the certification process be changed to a temporary obligation of the Office. Once the legislation is effective, we would cease certifying databases and, instead, review them as part of best practices. This approach would also prevent the Office from inadvertently shaping or—worse—harming the technology market.

Libraries and Museums

1. Monetary Relief: The “Safe Harbor”

The safe harbor is a crucial provision for cultural organizations such as libraries, archives and museums. In my view, if the legislation does not provide a functional safe harbor, many of the users we most want to motivate will, in fact, receive only a marginal

benefit from the legislation. The works that are in the archives of museums and libraries are often unregistered works and therefore not eligible for statutory damages. Nonetheless, the users are risk-averse. They are fearful of the expense of litigation and unwilling to risk the negative publicity that such litigation would cause. Consequently, they do not make use of orphan works under current law, other than on an occasional basis. A strong safe harbor would move these users forward because it would allow them to make multiple works available without fear that reasonable compensation, in aggregate, will prove to be too much. My hope is that museums and libraries will be able to make many of the important images and other orphan works in their archives available to the public over time. If an owner emerges, the institution will have a choice: it can either pay reasonable compensation and continue use, or it can cease use expeditiously. I think that this provision functions as a necessary, narrowly-crafted, “half-exception” with the general framework. I call it a half-exception because unlike existing exceptions within the Copyright Act, it only applies if the user ceases use.

First, in terms of safe harbor eligibility, I note that the current drafting applies to educational institutions, libraries, archives, public broadcasting entities and, in the case of S. 2913, museums. Although I believe that the intent in the House bill may have been to capture museums under the rubric of educational institutions, I think it is important to include museums expressly in the statute. Indeed, while many museums are incorporated as educational institutions and have educational missions, some are incorporated as charitable institutions or trusts. Museums have testified three times in the past two years, including most recently, the Holocaust Memorial Museum on March 13th before the Subcommittee. It is essential to clarify their eligibility. Similarly, it is likely an oversight that the employees of such institutions are not expressly captured in the draft language. This is easily fixed by including the employee language that appears in section 504(c).

Beyond the above technical issues, I have some substantive recommendations that would ensure that the institutions we wish to motivate with the safe harbor will actually be able to use it. Unfortunately, as drafted, the provision includes three provisos that make the sum total confusing and contradictory. These are 1) the user must act without any purpose of direct or indirect commercial advantage; 2) the infringing activity must be educational, religious or charitable in nature; and 3) if there any proceeds attached to the use, the nonprofit user may be required to pay a percentage of the proceeds to the copyright owner. In order to make the safe harbor functional and sound, my recommendation would be to leave the second provision and delete the first and third.

The first proviso regarding commercial advantage is a vestige of the Orphan Works Act of 2006, when the safe harbor was more broadly available to any user acting for noncommercial purposes, including private copiers and for-profit companies. Now that the safe harbor applies only to nonprofit entities, the proviso is no longer necessary, especially because the second proviso already ensures that the institution is acting with an educational, charitable or religious purpose. Moreover, it could be interpreted to mean that any sale by a nonprofit (e.g. the sale of a book by a historical society) is commercial activity, even where the sale is for a nonprofit purpose and mission.

In my view, it is not important in the context of orphan works whether a nonprofit institution is selling a scholarly book to recoup the cost of producing it or posting images on a website by virtue of grant money. The activity is the sort which we wish to motivate to afford greater circulation of culturally important orphan works. Finally, it is worth noting that some copyright owners may be concerned that nonprofits will claim an overly broad array of uses under the umbrella of education—items such as some coffee mugs, t-shirts, tote bags and hats. In response, we make two points. First, we do not consider these items to be educational, charitable or religious in nature (and the fact that the proceeds might be used for an educational, charitable or religious purpose would not make the use itself educational, religious, or charitable in nature). Second, we note that the House bill excludes any use of an orphan work by fixing it on a useful article that is offered for sale or distribution to the public. Useful articles are defined in the Copyright Act and would cover the gift store items mentioned above.

The third proviso—which requires a user to account for and potentially share “proceeds directly attributable to the use”—diminishes the functionality of the safe harbor and is unacceptable, in my view. The premise of the safe harbor is that the user is a nonprofit actor and that it is ceasing use. To require a user to submit to challenges that proceeds that the user earned as part of its nonprofit business are traceable to the use of a particular work, say a photograph, is untenable. The mere exercise of rendering an accounting and /or hiring legal counsel will cost more than it would ever cost for an institution to pay reasonable compensation (the measure of damages for infringement of an orphan work when the safe harbor is not available). Thus, the provision would have the odd and perhaps unintended result of making it less expensive for a nonprofit to continue use than to cease use. But of course, as discussed above, many institutions will not make greater orphaned material available if they do not have a strong safety net in place.

2. Injunctive Relief

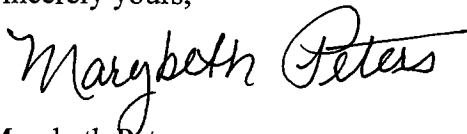
The provision on injunctive relief in the Orphan Works Act of 2006 proposed in the 109th Congress included the following language at the end of the subsection: “except that, if the infringer has met the requirements of subsection (b), the relief shall to the extent practicable account for any harm that the relief would cause the infringer due to its reliance on subsection (b).”

H.R. 5889 does not include similar language. I believe that consideration should be given to reinstating that language. A user who has relied on the orphan status of a work may well make a major investment of time, effort and money in using the work and it seems perfectly appropriate to me to direct a court to take such reliance efforts into account in fashioning injunctive relief. For example, some users will make orphan works accessible to others by “migrating” technology and investing in new technical formats. In such instance, the users will not be incorporating orphan works into new works of authorship and, as such, it will be possible for an emerging copyright owner to obtain injunctive relief. While I believe that injunctive relief should be available to the copyright owner in such instances, I also believe that the court be directed to consider the

user's reliance and costs. Since this is a significantly important issue, the statute should be clear. Without the clarity, it is difficult to see why a user would invest in bringing valuable works to the public.

In closing, I sincerely hope that I have responded to your questions. Again, I believe that orphan works legislation is necessary and I am truly heartened that the Subcommittee has made it a central focus at this time. I believe that H.R. 5889 in many respects represents an improvement over the legislation considered by the previous Congress, but at the same time it contains some provisions that cause some concern. Thank you for asking for my views, and please do not hesitate to call if I can be of further assistance.

Sincerely yours,

A handwritten signature in black ink that reads "Marybeth Peters". The signature is written in a cursive, flowing style.

Marybeth Peters
Register of Copyrights

cc: Chairman Howard Berman

Association of Independent Music Publishers (AIMP) and California Copyright Conference (CCC) Joint Position Paper on Orphan Works Legislation

INTRODUCTION

Two comparable bills which threaten to erode fundamental protections for copyright authors and owners, the Shawn Bentley Orphan Works Act of 2008 (S. 2913) and the Orphan Works Act of 2008 (H.R. 5889), were introduced on April 24, 2008 by Senator Patrick Leahy (D-VT) and Congressman Howard Berman (D-CA) respectively. The bills encourage copyright infringement and objectionable uses across the full spectrum of protected artistic works. This legislation is being introduced at a time of broad public and government awareness that creators of original works, and the copyright industries which bring their products to market, are in many instances struggling for survival against a backdrop of massive and unprecedented infringement. The bills strip authors and owners of basic legal remedies to combat copyright infringement. In particular, they limit otherwise available remedies for stemming infringement, such as recovery of attorney's fees and statutory damages, and actually offer incentives to unauthorized users by insulating them from detection and accountability. Under the proposed legislation, if an author should learn of an infringing use, he would have to undertake a time consuming and expensive determination by a court as to whether or not the infringer took sufficient steps to locate the author and whether the compensation requested for the unauthorized use was reasonable.

The "problems" which the legislation would address include helping a family make an album from Grandma's photos, helping a college professor use an obscure (but still fully protected) manuscript, or allowing a documentary film maker to use someone else's materials without consent. In the process of "helping" appropriate other people's personal property, the legislation promotes the incremental dismantling one of our nation's primary economic growth engines. The Internet, computer and consumer electronics industries utilize vast amounts of copyrighted works to attract customers to their websites, from which they derive enormous profits from advertising and subscription fees. These industries have long sought to eliminate copyright protections and to avoid paying for the content they use to lure consumers. At the same time, companies such as Google and other computer-related interests have provided more than \$150 million dollars to the Library of Congress, of which the U.S. Copyright Office (which initiated the Orphan Works legislation) is a part.

The bills' sponsors have overlooked an administrative solution within the U.S. Copyright Office, online availability of the existing Address File system of records, which could readily match proposed users with owner contact information, and obviate the need for so-called Orphan Works legislation.

The proposed legislation provides that an author or owner of an artistic work is presumed to have abandoned his property, if a member of the public claims that such owner or author cannot be identified or contacted. The U.S. Copyright Office, which maintains public records of all copyright registrations, renewals and ownership filings, has chosen to make available only a small percentage of those records in its online databases. However, under the bills, even an author or owner who holds a valid certificate of copyright registration from the U. S. Copyright Office has nevertheless “orphaned” his work by not publicizing his current ownership and contact information. The bills deprive authors and owners who have allegedly “orphaned” their works of critical deterrents to infringement, by removing the longstanding entitlement to recover statutory damages and attorney’s fees from infringers. To bypass these deterrents, all a member of the public must preliminarily do is to say in effect “I tried, but couldn’t find you.” If the unlicensed use is later discovered by the author or owner, and the infringer refuses to pay reasonable compensation for such misappropriation, the author or owner must then expend the time, energy and cost of prosecuting a lawsuit in the hope that damages, if awarded, are sufficient to recover those lost resources.

In 2004, the Copyright Office initiated a theory, with the enthusiastic support of the anti-copyright lobby, that the public was being harmed because it didn’t have enough current contact information for authors and owners. The Copyright Office then requested Orphan Works legislation without having conducted a needs assessment study, an independent audit of its registration and copyright history records, an economic impact analysis, or an evaluation on how the public, society and authors would be affected by reduced quantity and quality of art, film, television, music, video games and other copyrighted works in the future.

BEST PRACTICES

The proposed legislation limits the copyright owner’s remedies for infringement in cases where the infringer can claim that he performed a good faith search and was unable to locate the owner of the infringed work. However, it sets forth no specific criteria for such a search, merely requiring the infringer to undertake a “diligent effort,” based on a “reasonable and appropriate” search and “applicable best practices.” “Best practices” are not defined; instead the legislation leaves it up to the Copyright Office to create a statement of best practices, in effect creating an unjustified “safe harbor” for willful infringers. We are doubtful that the “best practices” would be adequate, developed in a timely manner, or would address the unique requirements for searching musical compositions. There is no single public or private database of all musical compositions in the United States, and even if all of those database resources were merged, they would not be comprehensive. More specifically and most untenably, all unpublished and published works would have to be registered with the Copyright Office regardless of the public policy prohibition against such requirement. The U. S. performing rights organizations, ASCAP, BMI and SESAC maintain databases of primarily

published works by their respective members. Most unpublished musical works will not appear in a search of these databases. Likewise, the Harry Fox Agency only maintains a database of the works of its members, but much of that information is not currently available to the public under Harry Fox guidelines. Not all music publishers are members of the Harry Fox Agency and therefore their works would not appear in a search of the Harry Fox database.

“NOTICE OF USE” REQUIREMENT

The current version of the Senate legislation would eliminate the related House bill’s requirement for the Copyright Office to create and maintain an archive of “Notice of Use” filings by the users of orphan works (infringers). However, even the House bill would only make the Notice of Use filing available to the copyright owner under conditions to be specified by the Copyright Office, i.e., in the event of litigation. The Senate version has no “Notice of Use” requirement at all. The burden would be imposed on the copyright owner to somehow learn of the existence of the infringement, identify and locate the infringer, and then try to negotiate a fair license for the unauthorized use. The absence of publicly available Notice of Use filings could enable unauthorized users to conceal their infringements and avoid the related license fees indefinitely.

REASONABLE COMPENSATION

Both bills provide that once found, the missing owner should be paid “reasonable compensation” in a “reasonably timely manner” after the amount of such compensation has been agreed upon with the owner of the infringed copyright or determined by the court. These requirements are impossibly vague. While certain aspects of licensing are prescribed by statute, such as the compulsory mechanical license section of Section 115 of The Copyright Act, in many other instances terms are negotiated between the parties. The bills provide an incentive to infringers to drag out negotiations and/or offer nominal amounts of compensation, as they would no longer be subject to the traditional deterrents of statutory damages and awards of attorney’s fees for infringement. In effect, the copyright owner’s only practical recourse would be to agree to whatever the user offers to pay, or incur the prohibitive costs of litigation.

LEGAL REMEDIES FOR COPYRIGHT OWNERS

Two of the most effective means to prevent copyright infringement, the recovery of attorney’s fees and statutory damages, are severely limited in the present legislation. Once a work is subject to the definition of orphan work (for example, if an owner’s address changes or the title of the work is misspelled in one of the available databases), the copyright owner is from that point on effectively denied

the remedies available to other copyright owners. The infringer could undertake a perfunctory search, and if he eventually located the copyright owner, make a lowball offer. Even if the owner would have otherwise declined to license the work for the proposed use, he would no longer be entitled to recover attorney's fees and statutory damages. In order for a copyright owner to enforce his limited rights, he would have to incur the legal expense of taking the claim to trial, without the possibility of winning a summary judgment motion. Each case of infringement involving a so-called "orphan work" would become a factual determination requiring witness testimony and therefore not susceptible of resolution by a judge; the dispute would have to go all the way to trial. An author of a single copyright would not find it economically feasible to litigate and would be forced to negotiate a token license fee or risk not being compensated at all for the use of his work. In effect this provision deprives the copyright owner of his right to control the distribution of his work. For example, a musical composition could be used in a commercial for an industrial chemical, an article of personal hygiene or an alcoholic beverage, even though the author might strongly object to associating his song with such advertised product. This limitation on the recovery of legal fees and statutory damages is unacceptable, and particularly so for the individual author or small copyright owner. It would result in coerced licenses that do not provide the reasonable compensation which the copyright owner could otherwise expect to receive.

ALTERNATIVE REMEDIES FOR SMALL COPYRIGHT CLAIMS

The proposed legislation requires the Register of Copyrights to conduct a study on alternative remedies for infringement claims by owners seeking small amount of relief. We support this concept as an option available for authors and owners to choose between litigation or arbitration. It is prohibitively expensive for the owner of a single musical composition to file a suit for copyright infringement. As a result, many users of copyrighted musical compositions are blatantly infringing our member's works, knowing they do not have the resources or wherewithal to pursue copyright litigation.

CONFLICT WITH INTERNATIONAL TREATY OBLIGATIONS

This legislation provides another instance in which the United States copyright laws could potentially conflict with international copyright treaty obligations such as the Berne Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS") of the Uruguay Round Agreement of GATT. This creates the risk of retaliation against U. S. copyrighted works abroad, harkening back to the Fairness in Music Licensing Act of 1998, which denied songwriters their performance royalties in restaurants in the United States and resulted in the World Trade Organization levying reparation fines against the United States.

CONCLUSION

The Orphan Works bills are deeply flawed and would have serious unintended, but far reaching adverse effects. We recommend that the U.S. Copyright Office be directed to (i) activate an online version of its Address File system of records in which authors and owners can update their records and provide full contact information and licensing submission procedures; (ii) extend its registration and histories databases to include all of its copyright records prior to 1978 to facilitate full public record searching; and (iii) make scanned images of copyright documents available on-demand to the public free of charge or on a cost recovery only basis. These administrative tools will bring proposed users and owners closer together, without resorting to harmful legislation.

* * * * *

The Association of Independent Music Publishers (AIMP) was formed in 1977 and has chapters in Los Angeles and New York. Its members consist of independent music publishers, publishers affiliated with record labels, motion picture and television production companies, songwriters, music producers, artist managers and members of the legal and accounting professions. Its primary focus is to educate and inform local music publishers about the most current industry trends and practices by providing a forum for the discussion of the issues and problems confronting the music publishing industry.

The California Copyright Conference (CCC) was established in 1953 for the discussion of copyright-related areas pertaining to music and entertainment. The organization has over 300 members from all areas of the music and entertainment industry, including publishers, songwriters, attorneys, representatives from trade publications, performing rights societies, motion pictures, television, multimedia, Internet and record companies. Its mission is to encourage, foster and promote an interest in, and the study of, all materials relating to the copyrighting and other protection of intellectual and creative properties.

TAKE ACTION: DON'T LET CONGRESS ORPHAN YOUR WORK

By Tess Taylor, National Association of Record Industry Professionals

June 23, 2008

I've been analyzing Orphan Works legislation for several weeks, have researched it and received input from many sources. I wanted to be circumspect about this before reporting to you, our members and readers. The legislation is a threat to the livelihood of creators, and I urge you to be as assertive as possible with all members of Congress and the Senate in voicing your objections to it. I include a link to a template in this article for a letter you can send to your Congressmen and Senators. It takes 2 minutes.

Big Changes To The Copyright Act That Will Affect You

Congress is quietly passing a significant change to the Copyright Act that will radically restructure copyright law and legalize the infringement of artists' rights. Driven by commercial interests, the Shawn Bentley Orphan Works Act (named for the late AOL lobbyist) creates a safe harbor that will allow the use of songs, sound recordings, illustrations, music videos or any other copyright in any manner by anyone (whom the Shawn Bentley Act defines as an infringer) who is unable to find the copyright owner after a "reasonably diligent" search "in good faith." No requirements exist for a "reasonably diligent search" in the Act.

"Safe Harbor" For Infringers

In a nutshell, the Shawn Bentley Orphan Works Act gives infringers yet another "safe harbor" from statutory damages or legal fees unless the infringer acted in bad faith in his search, which can only be proven in a lawsuit. The burden of proof (and court costs) lies with the copyright owner.

In Orphan Works Land, the infringer is not required to notify anyone of his use of a copyright under the terms of the Senate bill. The House bill requires notice, but only to a secret "dark archive" in the Copyright Office that can only be seen by the copyright owner if he files a lawsuit.

What If You Track Down The Infringer?

What if the copyright owner somehow manages to track down the infringer? The copyright owner must sue for "reasonable compensation" — not statutory damages, not costs, but "reasonable compensation." That means the court gets to decide. What if the artist was a Democrat and his recording was used by a Republican in a campaign ad? Or vice versa? What if a sound recording was a soundtrack recorded with orchestra, with the musicians entitled to residuals? What if a featured performer was entitled to negotiate for separate compensation under his union agreements? Tough luck. Get a lawyer to help you fight this union-busting law.

Altruistic vs. Commercial Business Interests

When the "Orphan Works Act" surfaced a few years ago, it was touted as a way for non-profit museums, archives and libraries to bring old works to the public without fear of lawsuits for statutory damages. The trouble with the proposed legislation is that it now applies to both "altruistic" and purely commercial business infringers. (Google is a major proponent of this legislation and has in fact testified it intends to use "millions" of orphan works.) No restrictions exist in the Shawn Bentley Orphan Works Act as to who gets to benefit from the admitted infringement — NONE.

Needs Assessment

The Library of Congress has never conducted a needs assessment, any kind of independent study or economic analysis of the consequences to what it now actively promotes to the detriment of creators. The Orphan Works legislation is being pushed by Google and the Electronic Frontier Foundation (EFF), among others, each of whom has its own economic motive for wanting to deprive authors and creators of their rights.

NARIP's Position to Orphan Works Legislation: Emphatically Opposed

NARIP takes issue with this legislation because there is no responsibility to the creative community, it's all about users. We've seen a remarkable shift from incentivizing creators and enabling them to protect their personal property, to "let's provide a means and find a way to protect infringers so we can make sure they're not prosecuted."

A Shell Game

The people who want to use these copyrights don't want to sift through thousands of works like Grandma's poems or Johnny's kindergarten crayon sketches, they want to use works that have commercial recognition and value. Their argument that the vast treasure trove of America's creativity will be lost but for this proposed legislation is a shell game. It's not true. The real objective is to have immunity from infringement. This is not absolute, sometimes infringers won't get away with it, but it puts the onus on the creator/author to enforce an ever-broadening swath of infringement and downright theft. And it IS theft – it's taking something that you didn't create and that doesn't belong to you just because you want it.

Use of YOUR Works

The Orphan Works Act will allow the use of an "orphan" work in any manner, including motion picture (of any rating including X), television or radio advertisements for any product (including political advertising in a nice gift of the Congress to themselves),

remix, mash-up, whether commercial or non-commercial. The exploitation could also be a re-release of the original work with no changes. The Senate Judiciary Committee and the IP Subcommittee of the House of Representatives have both passed their versions of the bill, which are very close to each other.

Next Steps

The Senate bill must pass the whole Senate, and the House bill must pass the House Judiciary Committee and then be voted on by the whole House. This is cause to be very concerned.

International Ramifications

International copyright laws mandate that no country can require registration as part of the ability of copyright holders to enjoy the protections of their exclusive rights — including in these United States. The Shawn Bentley Orphan Works Act does not come right out and say "you must register," but it is hard to see how an artist or copyright owner will get protection from failing to register, in effect, having his work "orphaned." Under this bill, to keep their works from being orphaned, artists would have to register their works in some database (for a fee, no doubt) that an "infringer" is likely to search.

Google

The database could be run by an Internet company such as Google (one of the bill's backers), which would stand to make a huge profit. In fact, Creative Commons announced on May 22 that they intend to start such a database. (Creative Commons receives long-term support from Google as well as thousands of dollars.)

Proposed Orphan Works Legislation Makes It Easier for Infringers To Infringe

In effect, this bill places any copyrighted works (including paintings, photographs, artwork, etc.) in a quasi-public domain state. U.S. copyright recognizes copyright as a personal property right, but the proposed legislation up-ends this, suddenly making it much easier for infringers to infringe, profit from your work and get away with it.

Fight Back!

We hope you share NARIP's outrage and fight back! Included below are links for more information, and a link to a site which makes it possible to write your Senators and Congressmen in 2 minutes. Or use the template provided below.

By the way, this outrage is not limited to artists, songwriters, record companies and music publishers, it is a threat to all who create and/or own copyrights.

All Authors and Creators Urged To Oppose This Legislation

We welcome all authors and creators who wish to oppose this legislation.

Contact Your Congressmen And Senators NOW

Click <http://capwiz.com/illustratorpartnership/home/> to go to the site to contact your Congressmen and Senators and select the letter captioned "For Owners & Authors of Musical Works & Sound Recordings." Over 90,000 e-mail messages have been sent to Congress from this site since its launch several weeks ago. As Rep. Delahunt's office told the Boston Herald recently: "In response to the outcry against the bill, U.S. Rep. Bill Delahunt (D-Quincy) wants to give artists more of a say. 'It's been a while since we've heard from that many people from the artists community,'" said Mark Forest, Delahunt's chief of staff. 'If they're concerned, we're concerned.'"

Please join in this email and telephone campaign. Let your representatives in Congress know you're concerned — or furious! As you can see from Rep. Delahunt's comments, the smart ones do listen to their constituents. Particularly in an election year. Please pass this on.

Tess Taylor is the author of numerous articles and interviews with top record executives. She is editor of the official publications of NARIP and LAMN. From 1988 to 1993 Tess was employed at MCA Records, Inc., last serving as Associate Director of Marketing. A classically trained pianist, she studied music at the University of Vienna, and is a Phi Beta Kappa, Magna Cum Laude graduate of the University of Redlands' Johnston College where she received her BA degree in music, German and literature. As a soloist, she has performed professionally in Europe and the United States. A music and record industry career strategist, Tess works with groups such as the European Music Export Office, Danish Songwriters Guild, French Music Export Office, German Independent Label Association (VUT), Brazilian Independent Label Association, World Championships of Performing Arts and others to connect their members to meaningful opportunities in Los Angeles, the entertainment capital of the world, and throughout the U.S. Tess has consulted businesses such as MySpace.com, InsideSessions (a joint venture between the Universal Music Group and Penguin Putnam, Inc.), The Walt Disney Company, BMG Entertainment (now Sony BMG), Concord Records and others. A frequently quoted analyst of industry developments, Tess has been a featured expert on national and international television and radio, and her analyses have appeared in national and international business press.

Orphan Works

One of the most disturbing aspects of Orphan Works is that the burden of evidence to substantiate proof of rightful ownership will flip from owner to user.

Just because an artist does not “seem” to exploit his work, and that apparent monetary value is diminishing, that in and of itself is not a good enough reason to allow his work to be classified as abandoned, or Orphaned. It is still his property and should be until 70 years after his death.

The intent here surely is to match users with owners. Not to burden the Courts with having to figure out what is in the mind of the originator or make decisions based on the presumed decreased market value of his work. This is a dangerous direction.

Are we really conducting this change in the law to enable large corporations access to these works? Google have said, on record at the roundtables that they envision over 1 million works. And yet Mr Segall in his report claims that the 'large scale commercial use' is 'generally speaking' limited to Museums and other non profits.

That report in 2006 which became the core of this bill, referenced commenters or comments, alluding to the 850 who had written to the library of Congress, no fewer than 220 times in a 127 page document. This highlights the importance of these comments and attendees at the roundtables. And yet, astonishingly enough not one individual songwriter was either present at these nor on one single comment. There was one who was a self proclaimed amateur. This may not be the forum to discuss why the songwriter was not informed by his industry, suffice to say today I call the PRO;s on record to task for this failing.

Let me address the flaws in the bill briefly if I may. The 'limitations on remedies' so to speak and the lack of clarity on how an industry by industry 'best practices' can be truly monitored means that with no injunctive relief or statutory damages, the rightful owner is faced with having to establish a perfect case before he intends to litigate.

With no notice of use or and as of yet to be defined reasonably diligent search standard established the burden clearly once again falls on the owner who by the way will have to wait until 'discovery in court to find out what steps the infringer has indeed taken.

Now the cost issue. The real cost to small publishers will be tremendous. Faced with an increased registration process and of course new vigilance, and perhaps litigation, the business of a publisher will be more consumed with protection than creation. A songwriter somewhere will have less time with his publisher. Less songs being considered means less recording, fewer musicians with studios and engineers having fewer paying clients coming through the door. These are real concerns.

I live in Nashville, Music City USA. Many there in my community called Music Row make an honest, and often modest working class to middle class living. Kids being put through school and making car and mortgage payments are more of a reality than the superstardom of Dolly Parton or Carrie Underwood but every bit as vital to that proud tradition in Nashville.

With the economy hitting everyone in the belt and at the pump many festivals and industry events in Nashville are down as much as 40% and in some cases 60%. This bill could put some, already on the edge, over and under.

, I would like to thank the Nashville Songwriters Association and Fintage House for enabling me to be here today. And of course I applaud on record the wonderful efforts of Brad and Cynthia and all at Illustrators Partnership.

Office of Advocacy has as it's Mission. 'To encourage policies that support the development and growth of American businesses.

I encourage you, and I invite you to come to Nashville. See for yourself. Judge for yourself

Lastly, I realise it is our duty to be aware of laws as they change with every new era. Technology is our ally not our foe. We embrace it. But the administrative and speculative nature of the added work of registration and the cost means less time in the studio and maybe more time in court.

Would you rather Charlie Parker had a law degree and a well maintained data base or his bird qualities. Or would you rather see Jimmie Hendrix bend his head around “Reasonably Diligent Search” or bend a string from here to eternity.

I recall these wonderful words. “ the infringer shall forfeit all and every copy-all and every sheet-to the author or proprietor who shall forewith destroy the same” George Washington 1790 signed First US Copyright Law.

We have waited this long. Lets wait a little longer and get it right.

Thank you.

Gene Poole

Gene Poole
1016 16th Ave South apt 205
Nashville Tennessee 37212

To whom it may concern
Re Orphan Works

Dear Sir/Madam.

I am a professional songwriter/performer living in Nashville Tennessee.
Despite having had gold album sales and been nominated for MTV awards and
performed for over 130,000 people on numerous occasions, songwriting is still the basis
of my, and many others in this music communities' present and future earnings.
My professional colleagues in the music industry are by their own admission just
now realizing how damaging this bill in it's present form will be for EVERY songwriter,
his family and his future heirs.

I appeal to you at this time.

Please allow the music community a little more time to air our views.

Thank you

Gene Poole

JONATHAN T. YASUDA

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21 Beacon St., Boston, MA 02108
jtyasuda@gmail.com

Re: Help me help you ... and me.

Dear Friends,

I speak to you today not as a Republican nor as a Democrat. I speak to you today as a musician living in the 21st century. Upon interning with the Volunteer Lawyers for the Arts of Massachusetts, I have witnessed the numerous legal challenges facing artists of all disciplines, trying desperately to protect their livelihood, their art, and their artistic integrity. As technology forges ahead, artists have more opportunities than ever to express and market their artistic voice. An art gallery in Madrid can post the painting of a Tokyo calligraphist online. A flutist hailing from New York City, with the quick click of a mouse, can send the mp3 of her Mozart flute recital to a distant fan residing in Melbourne. Technology has never been better. Art can instantly travel across the seven seas, walk over political boundaries, and ultimately foster global unity. It's an awesome time to be an artist.

Us artists realize, however, that this awesome time is not heralded without its own set of pitfalls and challenges. I speak to you today because I am perfectly poised to help solve the problems affecting the livelihoods of artists. We all hear and maybe practice the "art of pirating," if you will, and it is not my chief intention to condone or admonish this worldwide, illegal discipline. Rather, I come to you today as a musician with a greater, ancillary topic of discussion. I come to you today as a musician who has recently

fallen victim to the unfair and deceptive trade practices of a giant corporation and its for-profit accomplices.

I would like to distinguish the following two activities: (1) the individual downloading recorded music from the pleasure of his/her own personal computer or mobile wireless device without paying the musician for whatever reason, versus; (2) the multi-million dollar corporate entities that do not follow through paying their contracted musician under written agreement and, consequently, without the musician's permission, send the musician's work product to other companies who quickly analyze the musical ideas, skillfully alter the original ideas through various computer software programs and electronic studio equipment, and then commercially broadcast via television and Internet the "new" composition.

As you may have already surmised, I was that musician in the aforementioned latter activity. Creating a "derivative work," that is, "an expressive creation that includes major, basic copyrighted aspects of an original, previously created first work (US Copyright Office Circular)," without the express, written permission of the copyright owner is illegal. Allow me to venture one step further: it is categorically unethical. Granted, we all hear songs which inevitably lead to the late-night instant messaging conversation of, "Hey, man, doesn't that Creaky Board Song sound like Coldplay's newest hit?" Then, the friend either responds, "Nah, totally different feel, dude" or "OMG! Yes!!"

I assure you, the purpose of this letter is not to ask you to compare or distinguish my work versus the derivative work that was aired during and post Summer 2008 Olympic Games. I have the support of internationally renowned musicologists, composers, theorists, and music lovers. I have the support of the biggest and best intellectual property law firm in the world, the wonderful support of their pro bono department and the pro bono departments of other law firms. Further, I registered my work with the United States Copyright Office which entitles me to federal statutory damages for acts of copyright infringement. The evidence plainly speaks for itself.

What I ask of you today is your willingness and consideration to think about the millions of artists in this world who don't have the incredible resources at my disposal, who didn't grow up in an affluent suburb of Boston, who couldn't afford a first-rate education or know the best super-lawyers in America to arm themselves with the intellectual arsenal which I have amassed. My rent does not depend on the outcome of this case. My trip to the supermarket is not accompanied with anxious thoughts of, "I hope whole wheat bread, milk, and eggs are on sale." I am not the single mother musician living gig-to-gig supporting her infant daughter.

You see, I'm not even the tip of the iceberg. In fact, I'm nowhere close to the North or South Pole. I've only seen how artists are exploited through the lens of a born and raised Wellesley, Massachusetts boy, but I can firmly and resolutely state that I'm not standing on the sidelines to bear silent witness to these cowardly, ignoble business practices. With respect to my own lawsuit that is progressing quite well in the stage of pre-litigation, I can also state for the record, *they messed with the wrong musician*.

So as I lay in bed from the comfort and security of my lofty citadel atop Beacon Hill, I call out to you. If you think it's legally and morally reprehensible for a company to covertly send a musician's mp4 file to their production house, without paying the musician one penny for any of the work completed, and subsequently use the work to generate hundreds of thousands of dollars for the company's charitable fundraising campaign, then my friends, I appreciate and commend your moral rectitude. You have a conscience.

But today I ask of you to just think about the vast majority of artists out there who aren't perfectly poised like me – musicians who don't have a penchant for law and a whole network of supporters – and who can't draft their own federal copyright infringement claim complete with a business-business consumer protection count, G.L.C. 93A §11, of unfair and deceptive trade practices.

If you would like to show your interest in changing the current business practice and trajectory of which I speak of today by either signing or commenting on this letter, my words of thanks and appreciation would be overwhelmed by the ineffable joy that would fill my heart, the hearts of fellow musicians, and the hearts of beautiful artists yet to enter into this world. In short, I would be humbled and emotionally restored by your unconditional act of moral support.

Thank you for your time. God bless.

Sincerely,

Jonathan T. Yasuda
Founder of www.puxinatux.com



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Statement Before the Small Business Administration Forum
How Will the Orphan Works Bill Economically Impact Small Entities?
Salmagundi Club, New York City
Friday, August 8, 2008
by
Gerard Colby
President, National Writers Union/UAW Local 1981

I first want to express my appreciation to the organizers of this forum for this opportunity to speak as a professional writer and author since 1970, and on behalf of thousands of writers including those in my own union, the National Writers Union/UAW Local 1981. I am here as President of the National Writers Union to express our grave misgivings about the proposed Shawn Bentley Orphan Works Act. We do not believe it will be as a viable solution to the problems presented by copyright protected works whose creators and rightsholders cannot be located.

Let me start by giving my own experience as a journalist. In 1976, supported by Crown Publishers and the Fund for Investigative Journalism, I was part of a team of four journalists that traveled to Central and South America to investigate what was behind the genocide of indigenous tribes in the vast Amazon basin. This investigation required traveling through some of the remotest areas of eight countries, the majority of whom were then under military rule, and three of which had death squads in play. Two of my colleagues were forced to flee for their lives from Brazil after being shot at. That left just two of us to complete the job, requiring us to spend six months in the jungles of the Amazon. For our own safety, and those of our sources, most of that time we were required to function incommunicado to our agent, our publisher, and even our own government embassies. During that time, unauthorized use of my then-out-of-print book, *Du Pont: Behind The Nylon Curtain*, published two years before by Prentice-Hall, could not, except for fair use, occur. When no one could get in contact with me while I was pursuing my rather precarious profession, my ownership of rights to *Du Pont* was protected by copyright law, backed by the copyright clause of Article One, Section Eight of the U.S. Constitution, from copyright infringement.

If, however, the proposed Shawn Bentley Orphan Works Act had been in place then, along with the prospects of contracts for sales of an electronic version through the Internet, a search for me, even one carried out with a diligence with stronger guidelines than what we see in the proposed Orphan Works Act, would have failed and exposed me to an infringement of my copyright. Without minimum standards, I could be gone for only six weeks, never mind six months, and my copyright could be infringed. So let me state now that my and all writers' and artists' Constitutional right to copyright protection should not suffer from those who, for commercial gain, would use an act of Congress to infringe on our rights.

And what about the need of libraries to digitally preserve and make available, for no commercial gain, copyrighted works whose creators cannot be located?

Here we are talking about the digital preservation and dissemination of information and works of literary and visual art. If that is what we are concerned about, and not talking about Google's illegal copying of works for commercial gain through advertising, then it will behoove society to establish standards that protect the creator. Such standards will fulfill the obligation to long-term preservation of original content on the web in a world where "harvesting" of web content and its resulting degradation is sadly routine.

We will also need a national database containing metadata – information on the work’s rightsholder and rights – so that by providing clarity and transparency the quantity of orphan works can be reduced in the future.

And we would need this database sited at a Rights Clearance Center administered, as proposed by the International Federation of Reproduction Rights Organizations (IFRRO, of which the National Writers Union is a member), by a Collective Management Organization, such as a Reproduction Rights Organization whose governing board is composed of equal percentages of representatives of creators’ organizations (such as now exists jointly in the Authors Coalition of America) and publishers, and whose functioning would be so transparent as to warrant growing trust and confidence in its mission.

Based on voluntary participation by creators directly and, in the case of orphaned works, by creators’ organizations in the relevant genre, the terms and fees for use of works would be much more tangible and predictable than IFRRO’s vague “some form of remuneration to the rightsholder.” Nor should we adopt IFRRO’s suggestion that the creator who appears and withdraws an orphaned work should bear the costs of that withdrawal. Instead, a fund, administered by the Collective Management Organization, using revenues gained by the licensing of orphan works, should compensate the creator according to standards and contribute to withdrawal costs borne by the licensee as a cost of doing such business.

The devil is indeed in the details. To make this system work, we must spare the licensee who honestly does a diligent search, from exposure to punitive damages for willful infringement. The search must therefore have minimum standards as a benchmark for judging when infringement occurs. Again, here I disagree with IFRRO’s suggestion that changing information sources and search techniques require that “Any regulatory initiative should refrain from prescribing minimum search steps or information sources to be consulted.” Professional standards are always subject to improvements as a profession advances. This is a basic provision in law when deciding liability. To do otherwise, and leave standards vague, is to invite abuse. This is one of the most important reasons, among others, why the National Writers Union joins with visual artists in strongly opposing the bill that would, if allowed to pass, become the Shawn Bentley Orphan Works Act:

1. It makes it virtually impossible for writers to protect their work because it basically allows anyone to use a writer’s work without the copyright holder’s permission.

Under current law in accordance with the copyright clause of Article 1, Section 8 of the Constitution, you receive basic copyright protection even if you don’t register your work. Under the proposed Orphan Works law, your work could be declared an orphan even if you have registered it. Congress, in enacting the Copyright Act of 1976, provided that copyright exists in the creation of any work that is copyrightable subject matter. Copyright exists regardless of whether or not the owner has performed any legal formalities such as registration or copyright notices. Since 1978 (when it was enacted), many writers have relied upon the Copyright Act of 1976 and employed business practices based upon the protections it offered. The proposed Orphan Works Acts of 2008 would have the effect of depriving creators the ability to enforce their copyrights because they did not take steps the Copyright Act of 1976 did not require them to take. In essence, it will give infringers the legal means to use a writer’s work without the copyright holder’s permission.

2. It requires artists to protect their work by registering it with a digital database system (presumably for a fee, in addition to the copyright filing fee)—when no such system exists!

The proposed legislation is predicated on the establishment of private, profit making registries that would establish databases of digital versions of writers' works and provide a place for potential infringers to try to locate the author. But the bill will become effective whether or not these databases ever come into existence. The legislation places no limit on the number of these registries or the prices they would charge. The burden of paying for digitization and depositing the digitized copy with the private registry would presumably fall entirely on the writer, and even if a writer's work is contained in the registry, as long as the infringer "looks" without finding it, the infringement is allowed. There is no liability imposed for the failure of a database to find a writer's work registered in that database when it is searched (even if copyright has been filed), and no requirement that all available databases be searched, thus potentially requiring multiple registrations (and multiple registration fees). There are also no safeguards to prevent any person or company from fraudulently registering work they do not own.

3. It eliminates statutory damages wherever an infringer can successfully claim an Orphan Works defense, thus eliminating the only tool the law provides to prevent deliberate infringement.

Current law almost certainly deters rampant infringement because the present remedies – damages of up to \$150,000 per infringing article-- make infringement risky. By limiting remedies the Orphan Works amendment will effectively create a no-fault license to infringe.

4. It allows for an infringer to create—and copyright—a derivative work from the original image.

This bill effectively turns copyright law on its head. Under current law, the right to create a derivative work is one of an artist's exclusive rights. (Section 103 (a)) states that a user cannot copyright an infringed derivative work. "Protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully." Under the proposed new bill, since the entirety of an infringed work can be included in a derivative use, then the copyright of the derivative will amount to a copyright of the original. This would be a de facto capture of new, exclusive rights by the infringer. In other words, these bills allow infringers to make and copyright derivatives—even if the copyright holder to the original work objects.

5. It leaves infringed works (whether a story, a song or software), along with products like books, musical plays, or computers that incorporate them, subject to seizure in other countries under the Berne Convention for the Protection of Literary and Artistic Works (the international agreement governing copyrights to which the United States is a signatory).

It also invites sanctions from around the world under the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), to which the United States is also a signatory, because international writers' works would be just as vulnerable to infringement within the U.S. under the terms of the Orphan Works Amendment. If this legislation passes, it would mean a return to pre-1976 U.S. Copyright Act when many writers' works fell into the public domain because they could not afford to comply with the formalities of

registration as a condition of copyright protection. This violates the trust under which American writers have worked for the last 30 years and effectively nullifies our U.S. Copyright registrations.

For these and other reasons, I ask you, on behalf of thousands of writers, to consider the harm this bill can do to visual artists, their businesses and the commerce that relies on us, and vote against it unless it is amended to precisely define an orphan work as a work whose copyright is no longer held and managed by a rightsholder.

THE ORPHAN WORKS ROUNDTABLE

Conducted by the Small Business Administration

August 8, 2008, Salmagundi Club, 47 Fifth Avenue, New York, NY 10003

How Will the Orphan Works Bill Economically Impact Small Entities?

Part 5: Press Articles

H.R.5889 and S.2913 Amendments

Submissions to 2005 Copyright Office Orphan Works Study



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view archived webcast: <http://videos.cmitnyc.com/asip.html>



Part 5: Background

Amendments for H.R. 5889 and S.2913

Summary

H.R. 5889 and S. 2913 Amendments

European Union Memorandum of Understanding on Orphan Works

Final Report regarding the June 4, 2008 i2010 European Union Digital Libraries

Agreement between Cultural Institutions and Rights Holders on Orphan Works

Submissions to 2005 Copyright Office Orphan Works Study

3.24.05 IPA Comment

Joined by 42 Arts Organizations in the U.S. and internationally, and over 2,000 artists

<http://www.copyright.gov/orphan/comments/OW0660-Holland-Turner.pdf>

Part 5: Background

Amendments for H.R. 5889 and S.2913

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Articles in the Press

Oliver Pascal-Moussellard, Article in *Telerama* Magazine, France

Frank Stella, Painter, Commentary in *The Art Newspaper*

David Wildman, Article from *Boston Herald*

Dugie Standeford, Article from *IP Watch*, Geneva

Abby Christopher, Article from *IP Law & Business*

Greg Piper, Article from *Washington Internet Daily*

Jeff Ignatius, Article from *River Cities Reader*

Gene Poole, Article from *Nashville Business News*

Press Release, Association of Medical Illustrators

Linda Fantin, Article from *Salt Lake Tribune*

Submissions to 2005 Copyright Office Orphan Works Study

3.24.05 IPA Comment

Joined by 42 Arts Organizations in the U.S. and internationally, and over 2,000 artists

<http://www.copyright.gov/orphan/comments/OW0660-Holland-Turner.pdf>



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We can summarize our hopes of this bill quite simply: we'd like to work with Congress to see that this bill becomes a true orphan works bill, with no unnecessary spillover effect that would damage the everyday commercial activities of contemporary working visual artists.

For example, we should note that on Thursday, June 5, the EU announced an orphan works regime that would permit European libraries, museums and archives to digitize their collections of orphaned work. We believe a bill of similar specificity in the U.S. would not only solve the problems confronting libraries and archives here, it would harmonize U.S. policy with our trading partners overseas and win wide praise from the creative community in the U.S., whose members would benefit from increased access to these works without seeing the rights of their own work put at risk.

We believe this could be accomplished by a precise expansion of USC, Title 17, § 108: Limitations on exclusive rights: Reproduction by libraries and archives. Unlike the present bill's all-encompassing creation of a new § 514: Limitation on Remedies (which covers all works for any use), this approach would not lead to the widespread violation of exclusive rights under the 1976 Copyright Act, The Berne Convention and TRIPS. We believe similar orphan works situations - family photo restoration and duplication, personal genealogy usage of orphan works, and orphan works rights clearance for documentary filmmakers – can all be resolved in a similar manner, by carefully and precisely expanding Fair Use: USC, Title 17, § 107: Limitations on exclusive rights.

For example, family photo issues could be resolved with a simple contractual agreement: the person who wishes to duplicate or restore a photo of Grandma could sign an easy-to-understand agreement, (with either companies such as Walmart or with the photographer next door) stipulating that they've made a reasonably diligent search but failed to identify or locate the photographer of record and thereby qualify for a precise limited copyright exemption to restore or duplicate the work for home and/or family use only.

Under this scenario, should the photographer (or artist) of record subsequently come forward, the contract would define the specific remedies. The case of an individual who wishes to duplicate his or her own family photos would be even simpler to deal with: the individual would simply sign a form stipulating that he/she is the author and copyright holder of the work. Period. Any bad-faith assertions or violations of such agreements could then be dealt with as a contractual matter between individual parties, with no unnecessary damage to the rights of others.

We believe this kind of contractual solution to individual orphan works problems would create certainty by specifying the terms of each transaction and would, in fact, mirror the kind of indemnification that professional artists and photographers regularly supply to publishers and other clients, stipulating that our work is original and doesn't infringe the rights of others. It would have the additional virtue of requiring that only those who avail themselves of a right to infringe would be required to understand the law, unlike the present bill which would require every citizen to understand the risks and obligations inherent in the present bill.

Finally, we would like to note that a current law already exists to limit statutory damages to not less than \$200 for "orphan works" infringements by an employee or agent of a nonprofit educational institution, library, archive or public broadcasting entity acting within the scope of his or her employment. See USC, Title 17, § 504 (c)2(i) and (ii): Remedies for infringement: Damages and profits.

With this specific exemption already on the books, we believe the kinds of solutions we've sketched in here could be arrived at amicably by working with members of the creative community who are familiar with how copyright law intersects with standard business practice. This kind of imaginative solution should win widespread praise from all parties, while preserving the sanctity of existing copyright-related contracts. It would protect the small businesses that are the heart and soul of the creative community and would continue to act as an on-going incentive to further the creation of new work.

Thank you again for your time and attention. We are available for any questions and clarifications.

Kind Regards,

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Attached: Amendments to H.R. 5889, H.R. 5889, S. 2913, Memorandum of Understanding (MOU) and the Final Report regarding the June 4, 2008 i2010 European Union Digital Libraries Agreement between Cultural Institutions and Rights Holders on Orphan Works



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June 20, 2008

**Suggested Amendments to H.R. 5889
The Orphan Works Act of 2008**

Submitted on Behalf of
**The Illustrators' Partnership of America
Artists Rights Society
Advertising Photographers of America**

to the
**Committee on the Judiciary
U.S. House of Representatives**

by
**Brad Holland, Co-Founder & Director and Cynthia Turner, Director
Illustrators' Partnership of America**

**Dr. Theodore Feder, President
Artists Rights Society**

**Constance Evans, National Executive Director
Advertising Photographers of America**

Amendments to H.R.5889 **The Orphan Works Act of 2008**

Amendment 1: Limitation on Scope of Use of Orphan Works and Qualifying Users of Orphan Works

This act shall only apply to the usage by the cultural heritage sector for the express purpose of digitization, online access, preservation, education and other noncommercial purposes of orphan works contained within the collections of not for profit libraries, archives or museums that have been accredited by a recognized national authority and approved by the Register of Copyrights.

Recommended as an amendment to USC, Title 17, § 108: Limitations on exclusive rights: Reproduction by libraries and archives. This amendment clarifies U.S. Orphan Works legislation to preserve and access cultural heritage, recognizing that in particular older material may include works whose rightsholders are not identifiable or, if they are identifiable, can no longer be located while emphasizing respect for copyright, exclusive rights, related rights and economic rights regarding the use of orphan works.

It emphasizes the need for adequate certainty when cultural institutions deal with orphan works, with respect to their digitization and online accessibility within the framework of the libraries, museums and archives for the lawful use of orphan works. It harmonizes S. 2913 with the June 4, 2008 i2010 European Union Digital Libraries Initiative: Agreement between Cultural Institutions and Rightsholders on Orphan Works.

It preserves contemporary commercial markets and the exclusive rights of contemporary creators who are alive, in business and managing their copyrights by “confining limitations and exceptions to exclusive rights to certain special cases, which do not conflict with a normal exploitation of the work, and do not unreasonably prejudice the legitimate interests of the rights holder” in accordance with the TRIP’s 3-Step test. It makes S.2913 compliant with the Berne Convention for the Protection of Literary and Artistic Works and its prohibition on registries.

Amendment 2: Parity for Visual Artists and Textile Designers

(Version 1) On Page 14, line 23, after “in or on a useful article” and before “that is offered for sale or other distribution to the public” insert: “or, in the case of a work of visual art, in or as part of a collective work,”.

(Version 2) On page 14, line 14, after “in or on a useful article” and before “that is offered for sale or other distribution to the public” insert “or in the case of a work of visual art, in or as part of a collective work or standing alone.” (Underlining is provided for the purpose of highlighting the differences with version one.)

This amendment extends to illustrators and other creators of visual images the same protection afforded by the bill to authors of designs – such as textile designs – that are included in other works. Version one is limited to works of art that are included in another – larger work – and, therefore is most parallel to the provision regarding works that are included in useful articles. Version 2 expands the amendment to include free standing works, such as works of fine art that often are included in collective works following their creation.

Amendment 3: The Copyright Office is Best Able to Maintain the Database

On page 15, lines 15 and 16 delete “undertake a certification process for the establishment of” and insert “create”.

On page 15, delete lines 20 through 25, and insert the following:

“(2) STANDARDS FOR THE COPYRIGHT OFFICE DATABASE – The electronic database created pursuant to subsection (a) (1) of this section shall contain – ”

On page 17, delete all after “shall” on line 11 through line 22 and insert “not take effect until the Copyright Office has made available to the public, online and at no cost to authors, the database created pursuant to subsection (a) (1) of Section 3.

This amendment requires the Copyright Office to create a publicly searchable electronic database of works of visual art that can serve as a basis for conducting searches involving such works under this bill. The Copyright Office and the Library of Congress are more capable of creating such a database than any private sector organization due to the fact that the copies of all visual images that have been registered with the Copyright Office already are archived in the Library of Congress and the Library is in the process of digitizing these images through its “digital library” project. This leverages the existing registration system to support the objectives of this bill and relieves visual artists – who are in almost all cases individuals with limited financial resources – of any requirement to establish the means to protect themselves against infringement of their works.

Amendment 4: The Act Should Not Violate U.S. Treaty Obligations with Respect to Article 5 (2) of the Berne Convention on Literary and Artistic Works Prohibiting Registration for Foreign Works

On page 20, after line 19, insert the following new section:

“SEC. 8. Relationship to Foreign Works Protected Under the Berne Convention on Literary and Artistic Works.

This Act shall not apply to works of foreign authors.”

Article 5 (2) of the Berne Convention on Literary and Artistic Works provides that “The

exercise of their (authors') rights shall not be subject to any formality." Compliance with this provision is required of all countries, including the United States that adhere to the TRIPS Agreement under Article 9 of that treaty.

By requiring that all copyright holders must register their works in electronic databases as a condition of protection against infringement as orphan works H.R. 5889 violates these treaty obligations prohibiting the imposition of formalities on non-U.S. nationals as a pre-condition to enforcement of their copyrights.

The Copyright Act currently requires that works created by U. S. domiciliaries be registered with the Copyright Office and accompanying copies be deposited with the Library of Congress as a pre-condition to bringing an infringement action in a Federal Court. Also, in the case of U.S. domiciliaries registration prior to infringement is a condition of the right to receive statutory damages. Both of these provisions are limited to U.S. -based authors only because to do otherwise would violate Berne Article 5 (2) and TRIPS Article 9. A similar limitation to U.S. domiciliaries is necessary with regard to this legislation to avoid violating the international treaties.

Amendment 5: The Act Should Not Violate U.S. Treaty Obligations Under Article 13 of the TRIPS Agreement relating to Limitations and Exceptions

On page 17, delete all after "shall" on line 11 through line 22 and insert "not take effect until the Register of Copyrights, the Secretary of Commerce and the United States Trade Representative have certified in a joint communication to the President of the Senate and the Speaker of the House of Representatives that this Act does not violate Article 13, regarding limitations and exceptions, of the Agreement on Trade Related Aspects of Intellectual Property Rights.

This amendment assures that this legislation would not violate U.S. treaty obligations with regard to works of visual art under the three step test required of any exceptions and limitations to exclusive rights of copyright owners under Article 13 of the TRIPS Agreement. That Article requires that legislation passed by any signatory state "shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder." (emphasis supplied.) Failure to meet the requirements of TRIPS Article 13 would expose the United States to claims of unfair trading practices under the WTO Treaty and expose U.S. industry to retaliatory actions by signatories to the WTO Treaty and the TRIPS Agreement.

Amendment 6: Impact on Small Business Entities

On page 17, delete all after "shall" on line 11 through line 22 and insert "not take effect until the Small Business Administration has certified in a joint communication to the President of the Senate and Speaker of the House of Representatives that individuals and small businesses will effectively be able to prevent through their own due diligence and at reasonable cost their works from becoming orphaned by complying with the provisions of this Act."

The bill contemplates a system of private registries that must be used by copyright owners to provide a means of searching for ownership information regarding their works. If an artist or other copyright owner fails to use the services of one of these registries an infringer who uses such a registry to meet the “reasonable search” obligation will be able to do so with no possibility of locating the rights holder. In such a situation the rights holder’s work will automatically be orphaned.

The cost and complexity of using the services of these private – presumably for-profit – registries is unknown. However, the Copyright Office has testified that the cost and complexity of its maintaining such a registry is too great for it to manage. The Copyright Office has taken this position even though it operates on a budget of over \$300 million and already maintains a digitized database of the works registered with it and the Library of Congress maintains an archive of deposits of best copies that must accompany copyright registration.

All visual artists are small businesses or sole proprietorships. Before placing a financial and administrative burden on them that they may not be able to meet, the Congress should have the advice of the government agency responsible for the well being of such small businesses and sole proprietorships.

Amendments 7: “Best Practices”

On page 8, line 17 delete “(ii) and insert (iii).

On page 8, after line 16 insert the following new subsection (B) (ii):

“(ii) BEST PRACTICES. – The best practices maintained by the Register of Copyrights shall:

(1) include only practices recommended either by authors or organizations representing solely authors of the class of works addressed by the best practices;

(2) require use of existing identification systems, including all databases currently maintained by the Library of Congress;

(3) include the name or names of any identifiable person including the publisher, distributor, artist, designer, and art director associated with the work or the use of the work;

(4) may not include best practices recommended by non rights holders or any other databases owned, maintained, or financed directly or indirectly by infringers.

On page 17 delete all after “section 2” through line 22 and insert: “shall take effect only after the date on which the Copyright Office certifies best practices under section 3.”

This amendment provides that the “best practices” that are adopted for databases of works be established by those who know those works the best – the class of authors that has created them. Especially in the case of the visual arts, it is the artists themselves who best understand how to create a workable database. In any event infringers should not be in the position of creating the system that immunizes them from liability for their violation of the copyright law. To do otherwise would be putting the fox in charge of the chicken coop.

Amendment 8: Safe Harbor for Not for Profit Institutions

On page 10, delete all after “if the infringer is” on lines 21 and 21 through line 23 and insert “a not for profit library, archive or museum accredited by a recognized national authority and approved by the Register of Copyrights and the infringer has not used the infringed work for any purpose of direct or indirect commercial advantage such as marketing, promotion of brands, products or services.

This amendment is directed at that provision of the Act that provides a safe harbor that virtually immunizes the infringer from any meaningful liability provided that that infringer is a non profit archive, library or museum. This undoubtedly is directed at institutions such as the National Holocaust Museum, whose representative has testified at hearings that lead to the bill’s introduction. Visual artists recognize the special circumstances associated with such non profit libraries, museums and archives. This amendment will assure that only institutions that legitimately fall into this category receive the benefits of the safe harbor. And, it would assure that such institutions do not unfairly use the safe harbor to compete commercially against the very creators whose works they are dedicated to preserving. Commercial exploitation does not deserve a sweeping safe harbor.

This amendment also removes nonprofit educational institutions from safe harbor infringement protection to prevent the special harm that will be exerted on medical education and the advancement of science. Medical illustrators create critically accurate visualizations for nonprofit organizations, universities and research foundations. § 107 already generously covers scholarship. Any other use by non-profits needs to be licensed according to existing copyright law and protect an artist's exclusive rights, regardless of whether the orphan work user’s use involves a direct or indirect commercial advantage. Adding a new provision that essentially performs the same function as fair use under § 107 may erode that body of established law, while providing no more certainty than applying § 107 and its related case law to the other provisions of the Act.

Amendment 9: Review by the Department of Justice on the Impact on the Judiciary and the Need for a Small Claims Court

On page 17, delete all after “shall” on line 11 through line 22 and insert “not take effect until the Department of Justice has certified in a joint communication to the President of the Senate and Speaker of the House of Representatives that the relief provided under the bill will not be less in most cases than the legal costs – including attorneys’ fees, court

costs, and costs of discovery – necessary for a plaintiff effectively to litigate an action for infringement in a United States District Court. The certification by the Department of Justice also shall advise Congress on the impact of the Act on the federal court system and whether an alternative system of administrative litigation should be substituted for the existing system of remedies for copyright infringement.”

On page 16 through page 18 delete lines 16 through 18 and renumber Sec. 7 as Sec. 6.

Section 6 of the bill recognizes that the remedies afforded rights holders by the bill may not be sufficient to support effective enforcement under the current system of infringement litigation in United States District Courts. However, the bill gives the Register of Copyrights the mandate to study this issue and report to Congress on the advisability of a different system of litigation. This is an issue that is within the authority and expertise of the Department of Justice, not the Copyright Office. This amendment gives responsibility for advising Congress on matters relating to the federal court system to the Department of Justice, not the Copyright Office. Further, given the acknowledgment inherent in the study authorized by Section 6 that there is a serious possibility that the judicial remedies provided by the bill will be too expensive for rights holders in relation to the damage awards they will receive, the bill should not go into effect until the Congress has had the expert opinion of the Department of Justice.

Amendment 10: Sunshine for the Notice of Use Archive

On page 9, line 2, after “shall create and maintain an archive” insert “that is publicly accessible without charge through the Internet”.

On Page 9, line 7, before “(A)” insert “Part I”

On page 9, line 21, after “used” insert:

“(G) a best edition copy of the image to be infringed from a commercially available, non-infringing publication or other source;

(H) a precise list of the infringing uses, including the print run, number of copies, geographic of any work that includes the infringed work, and the media such as print, Internet, or broadcast in which the infringed work is being distributed;

(I) the legal name of the infringer and all those associated with the diligent search and the proposed use, such as employers, institutions or corporate entities associated with the infringement;

(J) a working telephone number at which the infringer may be contacted that will be answered by the infringer;

(K) a unique identifying number for the infringing use issued and maintained by the Copyright Office;

(L) and, the Federal ID tax number, or social security number of the infringer or infringing entity.

Part II, to be completed within 30 days from the infringing use,

(M) a best edition copy of the infringing work.”

This amendment deals with the requirement of the bill that infringers file notice with the Copyright Office prior to infringement. If this requirement is to have any meaning the database of such notices must be easily available to rights holders so that they can effectively use it to make sure that their work is not classified as an orphan and that they can contact the infringer to be in a position to negotiate whether or not to license the work prior to infringement. This bill assures that rights holders will have the access they need to the notices filed with the Copyright Office and the information they need to contact and effectively negotiate with the entity desiring to use their works before that entity becomes an infringer.

Amendment 11: Modify Exclusion for Fixation in or on Useful Articles

On page 14, line 19, after “EXCLUSION FOR” AND BEFORE “FIXATIONS” insert “INFRINGEMENTS PROMOTING COMMERCIAL PRODUCTS OR SERVICES AND FOR”

On page 14, line 22, after “infringements” insert “promoting commercial products or services, or”

On page 14, line 23, after “useful article” and before “that is offered” insert “, or packaging or other media intended to promote such article,”

On page 14, end of line 24, after “public” and before “.” insert “, or where an infringer aggregates copies of orphan works and offers to distribute such copies of orphan works to other persons or organizations in exchange for compensation resulting from sale, subscription, licensing, advertising revenue or other means.”

This amendment expands the scope of the useful objects exclusion and prohibits the aggregation of orphan works for purposes of sale or distribution. The real need for use of orphan works for cultural heritage and preservation purposes does not in any way justify the commercial exploitation of orphan works.

Examples illustrating the primary basis for orphan works legislation invariably include (1) the Holocaust Museum’s inability to make use of photographs and letters in their collection, and (2) a family that has a photograph of a deceased relative, and is unable to contact the photographer, and thus unable to reproduce the image for personal usage. Other examples of course include libraries, archives and other similar organization seeking to use orphan works for cultural heritage or educational purposes, entirely legitimate examples illustrating the need for amending copyright law to allow for such uses. However, never is there an example such as “Advertising agency McCann Erickson could not use a photograph in its worldwide \$20 million advertising campaign for Microsoft because they could not locate the photographer.”

Visual artists have a broad spectrum of tools at their disposal for marketing, distributing, and presenting their works for licensing across the global marketplace. For example, in the world of photography, photographers not only use their own websites, direct mail and email marketing campaigns to market their works and their services, but also use third party sites, commissioned agents, and publications expressly purposed for such use. In addition, photographers successfully market and distribute their work using stock agencies, where customers can search databases of millions of images, find an image to suit almost any purpose, supplied by any of tens of thousands of photographers, and purchase the right to use the image.

While the need for cultural heritage and preservation use of orphan works is clear, there is no reasonable justification for disrupting the marketplace for commercial usage of works by allowing the usage of orphan works for commercial purposes.

This amendment prohibits commercial services that could aggregate orphan works for sale to third parties. Such transactions would not be labeled as a “sale” or “license” but would likely be masked as subscription fees for qualifying searches. This would result in broad distribution of orphan works on a scale that would frustrate the attempt by any rights holder to secure reasonable compensation from third party users.

Amendment 12: Copyright in Derivative Works

On page 15, on line 10, after “103(a)” and before “an infringer” insert: “but subject to injunctive relief under subsection (c)(2),”

On page 15, line 13, after “copyrighted work” and before “shall not be denied” insert “to which the infringer contributes significant original expression, resulting in a derivative work or compilation, the infringer”

On page 15, at end of line 16 insert: “The infringer’s copyright protection in a derivative work based in whole or in part on a work infringed under this section shall not entitle the infringer to remedies under this Title in the event that the owner of the copyright in the infringed work infringes on such derivative work in the normal course of exploiting the owner’s copyright.”

This proposed amendment establishes a threshold of significant original expression, and ensures the consideration of the previous section regarding injunctive relief. The amendment also enjoins the infringer from copyright claims against the owner, in the event that the owner creates derivatives similar to the infringer’s derivative based on the owner’s work.

In the Bill the threshold for derivative works is very low. The contribution of any original expression to an orphan work results in a derivative, owned by the infringer. The derivative work, no longer an orphan, may be marketed, freely distributed and licensed to third parties by the infringer. Such use by the infringer of the derivative work may not only occur in direct competition with the owner of the orphan on which the derivative is based (without knowledge of the owner), but may otherwise cause market confusion, as competitors acquire and make use of each other’s works.



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June 20, 2008

**Suggested Amendments to S.2913
The Shawn Bentley Orphan Works Act of 2008 (Reported in Senate)**

Submitted on Behalf of
**The Illustrators' Partnership of America
Artists Rights Society
Advertising Photographers of America**

to the
**Committee on the Judiciary
United States Senate**

by
**Brad Holland, Co-Founder & Director and Cynthia Turner, Director
Illustrators' Partnership of America**

**Dr. Theodore Feder, President
Artists Rights Society**

**Constance Evans, National Executive Director
Advertising Photographers of America**

Amendments to S.2913
The Shawn Bentley Orphan Works Act of 2008
(Reported in Senate)

Amendment 1: Limitation on Scope of Use of Orphan Works and Qualifying Users of Orphan Works

This act shall only apply to the usage of orphan works by the cultural heritage sector for noncommercial purposes, or use by a not for profit library, archive or museum, accredited by a recognized national authority and approved by the Register of Copyrights, for preservation and education.

Recommended as an amendment to USC, Title 17, § 108: Limitations on exclusive rights: Reproduction by libraries and archives. This amendment clarifies U.S. Orphan Works legislation to preserve and access cultural heritage, recognizing that in particular older material may include works whose rightsholders are not identifiable or, if they are identifiable, can no longer be located while emphasizing respect for copyright, exclusive rights, related rights and economic rights regarding the use of orphan works.

It emphasizes the need for adequate certainty when cultural institutions deal with orphan works, with respect to their digitization and online accessibility within the framework of the libraries, museums and archives for the lawful use of orphan works. It harmonizes S. 2913 with the June 4, 2008 i2010 European Union Digital Libraries Initiative: Agreement between Cultural Institutions and Rightsholders on Orphan Works.

It preserves contemporary commercial markets and the exclusive rights of contemporary creators who are alive, in business and managing their copyrights by “confining limitations and exceptions to exclusive rights to

certain special cases, which do not conflict with a normal exploitation of the work, and do not unreasonably prejudice the legitimate interests of the rights holder” in accordance with the TRIPs 3-Step test. It allows S.2913 to comply with the Berne Convention for the Protection of Literary and Artistic Works and its prohibition on registries.

Amendment 2: Parity for Visual Artists and Textile Designers

(Version 1) On Page 31, line 22, after “in or on a useful article” and before “that is offered for sale or other distribution to the public” insert: “or, in the case of a work of visual art, in or as part of a collective work,”.

(Version 2) On page 31, line 22, after “in or on a useful article” and before “that is offered for sale or other distribution to the public” insert “or in the case of a work of visual art, in or as part of a collective work or standing alone.” (Underlining is provided for the purpose of highlighting the differences with version one.)

This amendment extends to illustrators and other creators of visual images the same protection afforded by the bill to authors of designs – such as textile designs – that are included in other works. Version one is limited to works of art that are included in another – larger work – and, therefore is most parallel to the provision regarding works that are included in useful articles. Version 2 expands the amendment to include free standing works, such as works of fine art that often are included in collective works following their creation.

Amendment 3: The Copyright Office is Best Able to Maintain the Database

On page 33, lines 5 and 6, after “The Register of Copyrights shall” delete “undertake a process to certify that there exist and are available databases that” and insert “create an electronic database to”

On page 33, delete line 9 through 17 after “title 17, United States Code.”

On page 32, delete all after “shall” on line 7 through line 23 and insert “not take effect until the Copyright Office has made available to the public, online and at no cost to authors, the database created pursuant to subsection to Section 3.

This amendment requires the Copyright Office to create a publicly searchable electronic database of works of visual art that can serve as a basis for conducting searches involving such works under this bill. The Copyright Office and the Library of Congress are more capable of creating such a database than any private sector organization due to the fact that the copies of all visual images that have been registered with the Copyright Office already are archived in the Library of Congress and the Library is in the process of digitizing these images through its “digital library” project. This leverages the existing registration system to support the objectives of this bill and relieves visual artists – who are in almost all cases individuals with limited financial resources – of any requirement to establish the means to protect themselves against infringement of their works.

Amendment 4: The Act Should Not Violate U.S. Treaty Obligations with Respect to Article 5 (2) of the Berne Convention on Literary and Artistic Works Prohibiting Registration for Foreign Works

On page 35, after line 25, insert the following new section:

“SEC. 7. Relationship to Foreign Works Protected Under the Berne Convention on Literary and Artistic Works.

This Act shall not apply to works of foreign authors.”

Article 5 (2) of the Berne Convention on Literary and Artistic Works provides that “The exercise of their (authors’) rights shall not be subject to any formality.” Compliance with this provision is required of all countries, including the United States, that adhere to the TRIPS Agreement under Article 9 of that treaty.

By requiring that all copyright holders must register their works in electronic databases as a condition of protection against infringement as orphan works H.R. 5889 violates these treaty obligations prohibiting the imposition of formalities on non-U.S. nationals as a pre-condition to enforcement of their copyrights.

The Copyright Act currently requires that works created by U. S. domiciliaries be registered with the Copyright Office and accompanying copies be deposited with the Library of Congress as a pre-condition to bringing an infringement action in a Federal Court. Also, in the case of U.S. domiciliaries registration prior to infringement is a condition of the right to receive statutory damages. Both of these provisions are limited to U.S. –based authors only because to do otherwise would violate Berne Article 5 (2) and TRIPS Article 9. A similar limitation to U.S. domiciliaries is necessary with regard to this legislation to avoid violating the international treaties.

Amendment 5: The Act Should Not Violate U.S. Treaty Obligations Under Article 13 of the TRIPS Agreement relating to Limitations and Exceptions

On page 32, delete all after “shall” on line 6 through line 23 and insert “not take effect until the Register of Copyrights, the Secretary of Commerce and the United States Trade Representative have certified in a joint communication to the President of the Senate and the Speaker of the House of Representatives that this Act does not violate Article 13, regarding limitations and exceptions, of the Agreement on Trade Related Aspects of Intellectual Property Rights.

This amendment assures that this legislation would not violate U.S. treaty obligations with regard to works of visual art under the three step test required of any exceptions and limitations to exclusive rights of copyright owners under Article 13 of the TRIPS Agreement. That Article requires that legislation passed by any signatory state “shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.” (emphasis supplied.) Failure to meet the requirements of TRIPS Article 13 would expose the United States to claims of unfair trading practices under the WTO Treaty and expose U.S. industry to retaliatory actions by signatories to the WTO Treaty and the TRIPS Agreement.

Amendment 6: Impact on Small Business Entities

On page 32, delete all after “shall” on line 6 through line 23 and insert “not take effect until the Small Business Administration has certified in a joint

communication to the President of the Senate and Speaker of the House of Representatives that individuals and small businesses will effectively be able to prevent through their own due diligence and at reasonable cost their works from becoming orphaned by complying with the provisions of this Act.”

The bill contemplates a system of private registries that must be used by copyright owners to provide a means of searching for ownership information regarding their works. If an artist or other copyright owner fails to use the services of one of these registries an infringer who uses such a registry to meet the “reasonable search” obligation will be able to do so with no possibility of locating the rights holder. In such a situation the rights holder’s work will automatically be orphaned.

The cost and complexity of using the services of these private – presumably for-profit – registries is unknown. However, the Copyright Office has testified that the cost and complexity of its maintaining such a registry is too great for it to manage. The Copyright Office has taken this position even though it operates on a budget of over \$300 million and already maintains a digitized database of the works registered with it and the Library of Congress maintains an archive of deposits of best copies that must accompany copyright registration.

All visual artists are small businesses or sole proprietorships. Before placing a financial and administrative burden on them that they may not be able to meet, the Congress should have the advice of the government agency responsible for the well being of such small businesses and sole proprietorships.

Amendments 8: “Best Practices”

On page 26, line 20 delete “(ii) and insert (iii).

On page 26, after line 19 insert the following new subsection (B) (ii):

“(ii) BEST PRACTICES. – The best practices maintained by the Register of Copyrights shall:

(1) include only practices recommended either by authors or organizations representing solely authors of the class of works addressed by the best practices;

(2) require use of existing identification systems, including all databases currently maintained by the Library of Congress;

(3) include the name or names of any identifiable person including the publisher, distributor, artist, designer, and art director associated with the work or the use of the work;

(4) may not include best practices recommended by non rights holders or any other databases owned, maintained, or financed directly or indirectly by infringers.

On page 32 delete all after “this section shall” through line 23 and insert: “take effect only after the date on which the Copyright Office certifies best practices under 2 (B)”

This amendment provides that the “best practices” that are adopted for databases of works be established by those who know those works the best – the class of authors that has created them. Especially in the case of the visual arts, it is the artists themselves who best understand how to create a workable database. In any event infringers should not be in the position of creating the system that immunizes them from liability for their violation of the copyright law. To do otherwise would be putting the fox in charge of the chicken coop.

Amendment 9: Safe Harbor for Not for Profit Institutions

On page 28, delete all after “if the infringer is” on lines 3 and 4 through line 21 and insert “a not for profit library, archive or museum accredited by a recognized national authority and approved by the Register of Copyrights and the infringer has not used the infringed work for any purpose of direct or indirect commercial advantage such as marketing, promotion of brands, products or services.

This amendment is directed at that provision of the Act that provides a safe harbor that virtually immunizes the infringer from any meaningful liability provided that that infringer is a non profit archive, library or museum. This

undoubtedly is directed at institutions such as the National Holocaust Museum, whose representative has testified at hearings that lead to the bill's introduction. Visual artists recognize the special circumstances associated with such non profit libraries, museums and archives. This amendment will assure that only institutions that legitimately fall into this category receive the benefits of the safe harbor. And, it would assure that such institutions do not unfairly use the safe harbor to compete commercially against the very creators whose works they are dedicated to preserving. Commercial exploitation does not deserve a sweeping safe harbor.

This amendment also removes nonprofit educational institutions from safe harbor infringement protection to prevent the special harm that will be exerted on medical education and the advancement of science. Medical illustrators create critically accurate visualizations for nonprofit organizations, universities and research foundations. § 107 already generously covers scholarship. Any other use by non-profits needs to be licensed according to existing copyright law and protect an artist's exclusive rights, regardless of whether the orphan work user's use involves a direct or indirect commercial advantage. Adding a new provision that essentially performs the same function as fair use under § 107 may erode that body of established law, while providing no more certainty than applying § 107 and its related case law to the other provisions of the Act.

Amendment 10: Review by the Department of Justice on the Impact on the Judiciary and the Need for a Small Claims Court

On page 32, delete all after “shall” on line 6 through line 23 and insert and insert “not take effect until the Department of Justice has certified in a joint communication to the President of the Senate and Speaker of the House of Representatives that the relief provided under the bill will not be less in most cases than the legal costs – including attorneys’ fees, court costs, and costs of discovery – necessary for a plaintiff effectively to litigate an action for infringement in a United States District Court. The certification by the Department of Justice also shall advise Congress on the impact of the Act on the federal court system and whether an alternative system of administrative litigation should be substituted for the existing system of remedies for copyright infringement.”

On page 34 delete lines 1 through 26 and renumber Sec. 6 as Sec. 5.

Section 6 of the bill recognizes that the remedies afforded rights holders by the bill may not be sufficient to support effective enforcement under the current system of infringement litigation in United States District Courts. However, the bill gives the Register of Copyrights the mandate to study this issue and report to Congress on the advisability of a different system of litigation. This is an issue that is within the authority and expertise of the Department of Justice, not the Copyright Office. This amendment gives responsibility for advising Congress on matters relating to the federal court system to the Department of Justice, not the Copyright Office. Further, given the acknowledgment inherent in the study authorized by Section 6 that there is a serious possibility that the judicial remedies provided by the bill will be too expensive for rights holders in relation to the damage awards they will receive, the bill should not go into effect until the Congress has had the expert opinion of the Department of Justice.

Amendment 11: Modify Exclusion for Fixation in or on Useful Articles

On page 31, line 18, after “EXCLUSION FOR” AND BEFORE “FIXATIONS” insert “INFRINGEMENTS PROMOTING COMMERCIAL PRODUCTS OR SERVICES AND FOR”

On page 31, line 20, after “infringements” insert “promoting commercial products or services, or”

On page 31, line 22, after “useful article” and before “that is offered” insert “, or packaging or other media intended to promote such article,”

On page 31, end of line 23, after “public” and before “.” insert “, or where an infringer aggregates copies of orphan works and offers to distribute such copies of orphan works to other persons or organizations in exchange for compensation resulting from sale, subscription, licensing, advertising revenue or other means.”

This amendment expands the scope of the useful objects exclusion and prohibits the aggregation of orphan works for purposes of sale or distribution. The real need for use of orphan works for cultural heritage and preservation purposes does not in any way justify the commercial exploitation of orphan works.

Examples illustrating the primary basis for orphan works legislation invariably include (1) the Holocaust Museum's inability to make use of photographs and letters in their collection, and (2) a family that has a photograph of a deceased relative, and is unable to contact the photographer, and thus unable to reproduce the image for personal usage. Other examples of course include libraries, archives and other similar organization seeking to use orphan works for cultural heritage or educational purposes, entirely legitimate examples illustrating the need for amending copyright law to allow for such uses. However, never is there an example such as "Advertising agency McCann Erickson could not use a photograph in its worldwide \$20 million advertising campaign for Microsoft because they could not locate the photographer."

Visual artists have a broad spectrum of tools at their disposal for marketing, distributing, and presenting their works for licensing across the global marketplace. For example, in the world of photography, photographers not only use their own websites, direct mail and email marketing campaigns to market their works and their services, but also use third party sites, commissioned agents, and publications expressly purposed for such use. In addition, photographers successfully market and distribute their work using stock agencies, where customers can search databases of millions of images, find an image to suit almost any purpose, supplied by any of tens of thousands of photographers, and purchase the right to use the image.

While the need for cultural heritage and preservation use of orphan works is clear, there is no reasonable justification for disrupting the marketplace for commercial usage of works by allowing the usage of orphan works for commercial purposes.

This amendment prohibits commercial services that could aggregate orphan works for sale to third parties. Such transactions would not be labeled as a "sale" or "license" but would likely be masked as subscription fees for qualifying searches. This would result in broad distribution of orphan works on a scale that would frustrate the attempt by any rights holder to secure reasonable compensation from third party users.

Amendment 12: Copyright in Derivative Works

On page 31, on line 12, after “103(a)” and before “an infringer” insert: “but subject to injunctive relief under subsection (c)(2),”

On page 31, line 13, after “compilation or derivative work” insert “to which the infringer contributes significant original expression”

On page 31, at end of line 17 insert: “The infringer’s copyright protection in a derivative work based in whole or in part on a work infringed under this section shall not entitle the infringer to remedies under this Title in the event that the owner of the copyright in the infringed work infringes on such derivative work in the normal course of exploiting the owner’s copyright.”

This proposed amendment establishes a threshold of significant original expression, and ensures the consideration of the previous section regarding injunctive relief. The amendment also enjoins the infringer from copyright claims against the owner, in the event that the owner creates derivatives similar to the infringer’s derivative based on the owner’s work.

In the Bill the threshold for derivative works is very low. The contribution of any original expression to an orphan work results in a derivative, owned by the infringer. The derivative work, no longer an orphan, may be marketed, freely distributed and licensed to third parties by the infringer. Such use by the infringer of the derivative work may not only occur in direct competition with the owner of the orphan on which the derivative is based (without knowledge of the owner), but may otherwise cause market confusion, as competitors acquire and make use of each other’s works.

**Memorandum of Understanding
on Diligent Search Guidelines
for Orphan Works**

In the framework of the European Digital Libraries Initiative, which aims to provide a common multi lingual access point to Europe's cultural heritage,

The Undersigned

- *Appreciating the importance of the European Digital Libraries ("EDL") initiative and of preservation of and access to European cultural heritage;*
- *Recognising that in particular older material may include works whose rightholders are not identifiable or, if they are identifiable, can no longer be located;*
- *Emphasising respect for copyright and related rights, economic and moral rights, regarding the use of orphan works;*
- *Emphasising the need for adequate certainty when cultural institutions deal with orphan works, with respect to their digitisation and online accessibility within the framework of the EDL;*
- *Considering that standards of due diligence can best be established in collaboration between stakeholders, i.e. representatives of rightholders and cultural institutions;*
- *Having actively engaged on a voluntary basis in defining generic due diligence guidelines as one practicable and flexible tool to facilitate the identification and location of rightholders for the lawful use of orphan works,*

Have agreed on the following:

1. That the due diligence guidelines (Joint Report and relevant Sector Report(s)) should be observed, to the extent applicable, when searching for rightholders and that a work can only be considered orphan if the relevant criteria, including the documentation of the process, have been followed without finding the rightholders.
2. To promote the guidelines as acceptable standards for due diligence in dealing with orphan works across the European Union, and to encourage their national member organisations or entities to relate the generic information resources provided in the Joint Report and the Sector Reports to national resources, when and where applicable.
3. To encourage and support the further development of tools to identify and mechanisms to facilitate the lawful use of orphan works, and to advocate for measures suitable to prevent future orphan works.
4. To invite the Commission to call upon the signatories to review the implementation of the guidelines after an appropriate period of time, such as one year.

Representatives of rightholders and cultural institutions:

ASSOCIATION DES CINEMATHEQUES EUROPEENNES (ACE), Audiovisual sector, Claudia Dillmann, 4 June 2008

(Signature) _____

ASSOCIATION OF EUROPEAN PERFORMERS' ORGANISATIONS (AEPO-ARTIS), Audiovisual and Music/Sound sectors, Xavier Blanc, 4 June 2008

(Signature) _____

BIBLIOTHEQUE NATIONALE DE FRANCE (BNF), Text sector, Bruno Racine, 4 June 2008

(Signature) _____

BRITISH LIBRARY (BL), Audiovisual, Music/Sound and Text sectors, Dame Lynne Brindley, 4 June 2008

(Signature) _____

BRITISH SCREEN ADVISORY COUNCIL (BSAC), Audiovisual sector, Fiona Clarke-Hackston, 4 June 2008

(Signature) _____

CONFERENCE OF EUROPEAN NATIONAL LIBRARIANS (CENL), Text sector, Elisabeth Niggemann, 4 June 2008

(Signature) _____

EUROPEAN BUREAU OF LIBRARIES, INFORMATION AND DOCUMENTATION ASSOCIATIONS (EBLIDA), Text sector, Andrew Cranfield, 4 June 2008

(Signature) _____

EUROPEAN FEDERATION OF JOURNALISTS (EFJ), Audiovisual, Text and Visual/Photography sectors, Marc Gruber, 4 June 2008

(Signature) _____

EUROPEAN FILM COMPANIES ALLIANCE (EFCA), Audiovisual sector, Laura Vilches on behalf of Kim Magnusson, 4 June 2008

(Signature) _____

EUROPEAN NEWSPAPERS PUBLISHERS' ASSOCIATION (ENPA), Text sector, Valdo Lehari jr., 4 June 2008

(Signature) _____

EUROPEAN VISUAL ARTISTS (EVA), Visual/Photography sector, Carola Streul, 4 June 2008

(Signature) _____

EUROPEAN WRITERS' CONGRESS (EWC), Text sector, Myriam Diocaretz, 4 June 2008

(Signature) _____

FEDERATION OF EUROPEAN PUBLISHERS (FEP), Text sector, Jonas Modig, 4 June 2008

(Signature) _____

FEDERATION EUROPEENNE DES ÉDITEURS DE PERIODIQUES (FAEP), Text sector, David J. Hanger, 4 June 2008

(Signature) _____

FEDERATION EUROPEENNE DES REALISATEURS DE L'AUDIOVISUEL (FERA), Audiovisual sector, Cécile Despringre, 4 June 2008

(Signature) _____

FEDERATION INTERNATIONALE DES ASSOCIATIONS DE PRODUCTEURS DE FILMS (FIAPF),
Audiovisual sector, Benoît Ginistry, 4 June 2008

(Signature) _____

GROUPEMENT EUROPEEN DES SOCIETES D'AUTEURS ET COMPOSITEURS (GESAC), Music/Sound
sector, Martine Rezzi, 4 June 2008

(Signature) _____

INTERNATIONAL ASSOCIATION OF SCIENTIFIC, TECHNICAL AND MEDICAL PUBLISHERS (STM), Text
sector, Michael A Mabe, 4 June 2008

(Signature) _____

INTERNATIONAL CONFEDERATION OF MUSIC PUBLISHERS (ICMP/CIEM), Audiovisual, Music/Sound
and Text sectors, Ger Hatton, 4 June 2008

(Signature) _____

INTERNATIONAL FEDERATION OF FILM DISTRIBUTORS (FIAD), Audiovisual sector, Marie-
Andrée Vander Elst, 4 June 2008

(Signature) _____

INTERNATIONAL FEDERATION OF PHONOGRAPHIC INDUSTRY (IFPI), Music/Sound sector,
Shira Pearlmutter, 4 June 2008

(Signature) _____

IFRRO THE INTERNATIONAL FEDERATION OF REPRODUCTION RIGHTS ORGANISATIONS, Text
sector, Olav Stokkmo, 4 June 2008

(Signature) _____

PYRAMIDE EUROPE, Visual/Photography sector, Martin Beckett, 4 June 2008

(Signature) _____

UK NATIONAL ARCHIVES, Text sector, Natalie Ceeney, 4 June 2008

(Signature) _____

03/06/2008

**i2010: Digital Libraries
High Level Expert Group – Copyright Subgroup**

**Final Report on Digital Preservation, Orphan Works, and
Out-of-Print Works**

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The present report follows an Interim Report on Digital Preservation, Orphan and Out-of-Print works, presented by the Copyright Subgroup at the second meeting of the High Level Expert Group on 17 October 2006 and the Report on Digital Preservation, Orphan Works, and Out-of-Print Works presented at the third meeting of 14 April 2007.

The Interim report is available at

http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg_minutes/copyright/interim_report_16_10_06.pdf

The second Report is available at http://ec.europa.eu/information_society/newsroom/cf/document.cfm?action=display&doc_id=295

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EXECUTIVE SUMMARY

The Final Report prepared by the Copyright Subgroup of the High Level Expert Group (HLG) on European Digital Libraries intends to respond to the Mandate entrusted to it. It identifies three areas which have to be dealt with as priorities, as far as IPR challenges encountered by the Digital Library initiative are concerned: digital preservation of content, including via web-harvesting and the facilitation of clearances concerning rights on orphan and out-of-print works. It indicates what actions and arrangements could, if properly implemented, reduce the difficulties currently encountered in these areas.

The solutions proposed by the Report are based on a set of high level principles, which should govern actions in the field. The recommendations put forward are underpinned by consultation with main stakeholders, particularly in connection with the issue of identification and use of orphan works.

In the area of digital preservation, the Report proposes several actions at the Member State level which are in conformity with current European legislation and would clear the ground from legal obstacles encountered in certain Member States by institutions engaged in digitisation. The measures envisaged encompass the possibility of creating multiple digital copies for preservation purposes and of providing for web-harvesting under national legal deposit legislation.

The approach recommended by the Subgroup in the area of orphan works builds on the specifically European concept of mechanisms in each Member State having a minimum common denominator and mutual recognition of national solutions concerning orphan works. Once common core principles are established, including in the area of due diligence guidelines for identifying and/or locating rightholders, material whose rightholders have been considered diligently searched for should also be considered accordingly in the other Member States.

It is also suggested that out-of-print works, once digitised, could be made available to a larger range of users than currently occurs on the basis of a licensing solution. To encourage this availability, the Copyright subgroup developed two Model Licences, one intended for use in secure networks, the other on line over open networks.

The Report describes a mechanism based on Data Bases and Rights Clearance Centre to facilitate lawful use both of orphan and out-of-print works. It also suggests a number of deployment issues, including the identification of test-beds for the measures, a specific e-content Plus Project (ARROW) and actions, including dissemination, by the European Community.

1. INTRODUCTION

The first meeting of the High Level Expert Group (HLG) on European Digital Libraries, held in Brussels, 27 March 2006, took up a number of issues highlighted by the Commission Communication “i2010: Digital Libraries”¹ and discussed various legal, technological and economic questions involved in the Digital Library Initiative. The agenda of the meeting listed a number of key IPR challenges: **“What are the key IPR challenges? What different actions and arrangements could be undertaken jointly by stakeholders to reduce tensions surrounding copyright? Is there a need to**

¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions “i2010: Digital Libraries” Brussels 30.9.05 COM (2005) 465 final.

harmonise at Community level exceptions and limitations that relate to libraries, archives, museums? What are possible ways for facilitating the clearance of rights for cultural institutions?”

At the end of the meeting, the HLG took the decision to appoint some members to work together as “the Copyright Subgroup” to analyse and discuss relevant IPR issues and to report to the plenary sessions of the HLG on available options. The following were appointed as members of the Copyright Subgroup: Dr. Arne J. Bach (President of FEP – Federation of European Publishers), Ms Lynne Brindley (Chief Executive of the British Library), Ms Claudia Dillman (Director of Deutsches Filminstitut and President of ACE – Association de Cinémathèques Européennes), Ms Tarja Koskinen-Olsson (Honorary President of IFRRO – International Federation of Reproduction Rights Organisations), Mr Emmanuel Hoog (President of INA– Institut National de l’Audiovisuel), and Prof. Marco Ricolfi (University of Torino) to act as the Chair of the group.

The Copyright Subgroup presented an Interim Report at the second meeting of the HLG, held in Brussels, 17 October 2006 concentrating on issues of digital preservation, orphan and out-of-print works. The Commissioner Viviane Reding and the other members of the HLG encouraged the Subgroup’s members to bring forward their work, with a view to presenting a report extending to implementation measures. At the next meeting of the HLG held in Brussels 18 April 2007 the Copyright Subgroup presented a second Report on selected implementation issues in the areas covered by the earlier report.

The Copyright subgroup has in the meantime completed its findings and presents them in this Final Report.² The Final Report in part presents new analysis, recommendations and proposals, with particular emphasis on implementing mechanisms and deployment; in part it consolidates the analysis and recommendations in the two previous reports.

2. OBJECT AND PURPOSE OF THE REPORT.

The Commission has made digital libraries a key aspect of i2010. In its Communication ‘i2010: digital libraries’ of 30 September 2005, it set out its strategy for digitisation, online accessibility and digital preservation of Europe’s collective memory. As indicated in recital 1 of the European Commission Recommendation of 24 August 2006 on the digitisation and online accessibility of cultural material and digital preservation,³ this collective memory includes print (books, journals, newspapers), photographs, museum objects, archival documents, and audiovisual material. The Council endorsed the Digital Library Initiative in the Council Conclusion on the Digitisation and Online Accessibility of Cultural Material, and Digital Preservation.⁴

On this basis, the Copyright Subgroup has taken up the issues indicated in the mandate. It has identified three areas considered a priority in dealing with the IPR challenges faced by the Digital Library Initiative, namely digital preservation of cultural material, including web harvesting, the status of orphan works and possible actions and arrangements concerning their identification; finally, actions and arrangements concerning out of print works.

² Contributions to the different sections came from the Copyright Subgroup members and by outside contributors selected by the Subgroup, identified at the beginning of each section.

³ (2006/585/EC), in *OJ* 236 of 31 August 2006, 28 ff.

⁴ (2006/C 297/01), in *OJ* of 7 December 2006, 1 ff.

In this connection, the Copyright Subgroup used as a frame of reference a number of **high level principles**, intended to govern all work items of their work.

All proposals should be in full compliance with all international obligations of the European Union and of its Member States⁵ as well as respect the principle of subsidiarity as enshrined in the EU Treaty.⁶

For rightholders the governing principles are:

- Respect for copyright and related rights, including moral rights of creators and performers of copyrighted works;
- Digitisation and use within the premises of libraries should take place with rightholders' consent or be based on statutory exception;
- Online availability should take place with rightholders' consent;
- Rightholders' consent means in principle rights clearance, which should be based on individual or collective licensing or a combination thereof.

For libraries, archives and museums the governing principles are:

- For these institutions it is important to have legal certainty in their activities;
- Access means either within the premises of libraries, archives and museums or online availability;
- For born-digital works or works digitised by rightholders this means getting permissions for access to works;
- For analogue works this means getting permissions for large scale digitisation and access;
- Legal certainty presupposes a solution for so-called orphan works: unknown or non locatable rightholders and their works.

The proposals discussed and advanced by the Copyright Subgroup of the High Level Group on the European Digital Library should be read as practical solutions to be agreed by the different stakeholders to solve issues raised by digitisation, including the requests made by libraries and other cultural establishments. The proposals intend to take into account the national usages and best practices in the respective fields in each of the European Union Member States. Their main focus is on printed works and text; however, works in the audiovisual, visual photography and music/sound sectors are also, to the extent possible, taken into consideration.

In connection with the issue of works that are out of print, the Subgroup shares the concept advanced by item 6(b) of the European Commission Recommendation of 24 August 2006 whereby the mechanisms intended to facilitate the use of such works should in principle be established or promoted on a voluntary basis. Thus the proposals which follow should not be understood as a blueprint for future legislation.

The Google representative⁷ fully supported the objective of the subgroup, in particular with regard to the far reaching and long term benefits to the user and citizen that digitisation offers through better

⁵ These include TRIPs, the Berne Convention, WCT and WPPT as well as Article 17 of the European Charter of Fundamental Rights, Articles 6(1) and 10 of the European Human Rights Convention and Article 1 of the Protocol thereto, Article 6 of the EU Treaty, Article 27 of the Universal Declaration of Human Rights and Article 15 of the International Covenant on Economic, Social and Cultural Rights of 1966.

⁶ In particular some members of the Copyright Subgroup suggested that the proposals must take into account the national usages in each of the EU Member States.

⁷ Antoine Aubert, who took part in the meetings from the second part of 2007.

access to information. In this respect, he submitted comments and expressed reservations on some of the key principles for orphan works and out-of-print works, and without opposing the adoption of the copyright subgroup report was not in position to endorse it. It is in the interest of all concerned that the i2010 digital libraries initiative is allowed to progress and solutions developed by the Copyright Subgroup be tested out. There was a general agreement in the Copyright Subgroup that proposed solutions will have to be reviewed in the light of practice and best practices.

3. DIGITAL PRESERVATION⁸

The Copyright Subgroup acknowledges that in some cases digitisation may be the only means of ensuring that cultural material will be available for future generations and may therefore be essential to enable continued access to it. It notes that some Member States' laws allow libraries and other institutions to make one single copy for preservation purposes pursuant to Article 5(2)(c) of the Copyright in the Directive 2001/29/EC.⁹

The Copyright Subgroup notes however that this exception to the exclusive reproduction right conferred by copyright may prove insufficient with regard to digital preservation on account of the format-shifting that may be required for continued preservation due to technical obsolescence of recording media and the resulting need for recurrent "migration" from one format to the next. Moreover, in the audiovisual sector, not even current digitisation might always be a panacea for preservation, as current digital media might last a shorter time than analogue media. Hence, in this latter sector other complementary but equivalent solutions need to be envisaged.

In consequence it recommends that, where a Member State has implemented an exception to allow digital copies of a work and where copies are made for the sole purpose of preservation:

- rightholders should authorise certain institutions (namely: publicly accessible libraries, educational establishments, museums and archives) to make more than one copy (an open-ended number of copies), if this is necessary in order to ensure the preservation of the work. Successive copying should be allowed to take place if and when technological developments are seen to require such a measure, for preservation purposes only, subject to the safeguarding of the individual publication's identity and integrity;
- preservation should be justified only for works that are no longer commercially available in any format. If the work is available on the market, there is no need to preserve it except within national libraries' deposit schemes;
- coordination should take place amongst the various preservation initiatives at regional and national levels and across the European Union, to avoid duplication both among different initiatives and also with national 'legal deposit' libraries;
- in the case of national deposit libraries and concerning born-digital works which have an embedded protection device, it should be noted that publishers and national librarians have agreed that this device should be disabled in the deposit copy (i.e. for the purposes of the national library, but not for access by the end-users) so as to allow permanent and unhindered access to the document.

⁸ This section is based on a draft originally prepared by Mrs Anne Bergman-Tahon and Mr Toby Bainton.

⁹ Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, in *OJ L 167* of 22 June 2001, 10 ff.

In the discussions concerning the Digital Library Initiative the formula “to digitise once, to disseminate widely” has frequently surfaced. The Copyright Subgroup notes in this connection that the effort to avoid duplication is important and should be encouraged. It also notes that the precept to “disseminate widely” does not by itself entail the liberty to disseminate *freely* under all circumstances, lest the opportunity for uncontrolled *secondary* dissemination destroy the incentives to create in the first place and to invest in the *primary* exploitation on works. Indeed, in many contexts creators and publishers may not be expected to engage in the difficult and risky task of creating a new work, if the initial digital copy were to be available without limits immediately after it is first made.

Therefore, the Copyright Subgroup wishes to underline that these recommendations deal with digital copying for the purpose of preservation only and are strictly limited to the purpose of preserving, for the long term, items of cultural and national heritage produced and distributed in different formats and editions. Any copies made in excess of that permitted by applicable law may not be used to increase the number of copies available for access to end users until the expiry of copyright, provided that access to any copy may occur only for onsite consultation.

The Copyright Subgroup also notes that in certain cases, national legislatures have implemented Article 5(3)(n) of the Directive 2001/29 allowing libraries to make use of communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in Article 5(2)(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections. The recommendations made in this document do not conflict with any such provision.

The Copyright Subgroup noted that archives and museums may face a number of problems in connection with digital preservation and access which are peculiar to them. The costs of digitisation tend to be higher in connection with multimedia and audiovisual works than for text; and the number of users accessing the premises of archives and museums may be substantially lower than in the case of libraries. Additionally, audiovisual works entail the need for clearances by vast numbers of rightholders, including holders of related rights. Issues of privacy and of right of publicity may also frequently arise. Typically these more complex situations should be dealt with in what sometimes is described as a “second basket” of measures, on the basis of experience accumulated in more traditional contexts, such as text. However, the Subgroup surmises that even in this area mechanisms intended to facilitate the use of works held in archives and museums can be established or promoted on a voluntary basis. Collective licensing may be actively encouraged; it may, depending on the context, concern digitisation, access, or, under given circumstances, even commercial uses to the extent that they do not compete with the primary exploitation of works.

4. PRESERVATION OF WEB-CONTENT AND WEB-HARVESTING¹⁰

4.1 BACKGROUND

The Commission Recommendation of 24 August 2006 describes web-harvesting¹¹ as follows:

¹⁰ Based on a draft originally prepared by Ms Tarja Koskinen-Olsson and Mr. Jean François Debarnot.

¹¹ Preamble 14 of the Recommendation.

“Web-harvesting is a new technique for collecting material from the Internet for preservation purposes. It involves mandated institutions actively collecting material instead of waiting for it to be deposited, thus minimizing the administrative burden on producers of digital material, and national legislation should therefore make provision for it.”

The Commission recommends¹² the Member States to:

“Make provisions in the legislation for the preservation of web-content by mandated institutions by using techniques for collecting material from the Internet such as web harvesting, in full respect of Community and international legislation on intellectual property rights¹³.”

4.2 RELEVANT COMMUNITY LEGISLATION

As for material on the Internet protected by intellectual property rights, it is important to assess the relevant Community legislation which, in this regard, is the Directive 2001/29. The most important provision in that Directive is Article 9 entitled “Continued application of other legal provisions”, which explicitly states that:

“This Directive shall be without prejudice to provisions concerning in particular ...legal deposit requirements...”

Article 5 includes two optional provisions on exceptions and limitations that concern libraries and other cultural institutions, as follows:

2. (c): in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage;

3. (n): use by communication or making available, for research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2 (c) of works or other subject matter not subject to purchase or licensing terms which are contained in their collections.

The quantity of web-content is increasing in the new media and communication environment and with the development of the information society. As more and more content is only available online, preservation of web-content is becoming a matter of priority. The obligation to preserve web-content is a matter for legal deposit legislation.

The Copyright Subgroup has studied the legislative provisions in two Member States, France and Finland. In these two countries, current legislation supports long-term preservation of web-content. The Case Studies (Annexes 1 and 2) are enclosed for information.

4.3 RECOMMENDATION

Based on the considerations above, the Copyright Subgroup submits the following recommendation:

¹² Point 11 of the Recommendation.

¹³ Emphasis added.

- 1) It is essential that Member States address web harvesting as a priority issue, because an increasing amount of material is created and updated only in electronic form as web-content. The obligation to preserve web-content by specially mandated organisations is a matter for legal deposit legislation.
- 2) The current Community legislation on intellectual property rights, in particular the Directive 2001/29 and Articles 9 and 5.2 (c) therein, provides for the preservation of web-content.
- 3) The following issues concerning the preservation of web-content should be addressed in any legislation concerning copyright and related rights:
 - a) Whereas copyright legislation uses the term of “right of reproduction”, long-term preservation of web-content necessitates acts such as copying and migration of material, and this should be clarified in the terminology.
 - b) Web-content may have been harvested and deposited, either in the country or abroad, before an obligation arose for legal deposit, and in order to permit the use of such deposited material from the copyright point of view, the issue of retroactivity needs to be addressed, aiming at widest possible preservation of web-based cultural heritage.

5. ORPHAN WORKS¹⁴

5.1 OVERVIEW

Clarification and transparency in the copyright status of a work is an essential element in the European Digital Library initiative. In some cases rightholders cannot be identified or, if they can be identified, they cannot be located, hence the term “orphan”. Comprehensive, large scale digitisation and online accessibility could be greatly hampered, if adequate solutions are not found to the problem of orphan works.

From the beginning, the Copyright Subgroup concluded that it is important to offer solutions to orphan works. It acknowledges that various voluntary and regulatory mechanisms to facilitate the use orphan works exist in different countries, and new proposals are pending. It also shares the view, expressed by the Commission Recommendation of 24 August 2006, that this is an area where Member States, in consultation with the stakeholders, need to formulate policies. Based on that approach, the Copyright Subgroup emphasised the need for interoperability and introduced the concept of mutual recognition of national solutions as a possible way forward.

Under all voluntary or regulatory measures, there needs to be guidance on what constitutes diligent search required before the use of a work. Stakeholders in different cultural sectors confirmed the view of the Copyright Subgroup that due diligence guidelines can best be established in collaboration with rightholders and cultural institutions. Based on that understanding, the Commission invited representatives of several stakeholders to discuss and agree upon due diligence guidelines for four creative sectors on European level. The European level guidelines including generic information resources can be linked to national resources (such as the name and contact details of a Collective

¹⁴ This section is based on a draft originally prepared by Ms Tarja Koskinen-Olsson on the basis of inputs, discussions and comments by Ms Lynne Brindley and Mr Toby Bainton, Mr J.F. Debatot, Ms Claudia Dillmann and Mr Olav Stokkmo.

management organisation (CMO)), thereby establishing a map of available information resources across Europe.

The development of databases of information on orphan works can facilitate users in their search. The rationale of a database is to provide assistance to users in their search. The interlinking of national databases and registries is needed to achieve a common multilingual access point and a European-wide resource. In this, different cultural institutions, such as libraries, archives and museums, can contribute their varied resources (catalogues, bibliographies, filmographies etc.) and their specific expertise. Aiming to ensure interoperability, enhance coordination and facilitate a multilingual access point, the Copyright Subgroup has developed a set of Key Principles for Databases and Rights Clearance Centres for Orphan Works (see below Section 9). As a result of preliminary work in this area, it appears that this will be implemented as a test-base in a forthcoming project, called ARROW¹⁵, short listed by the Commission under the eContent Plus Programme. Several representatives of rightholders and cultural institutions are partners in the project.

Development of a rights clearance procedure and a Rights Clearance Centre (or centres) to grant licences to use orphan works is another proposal by the Copyright Subgroup. Rights clearance can take place where licences are offered by a mechanism set up by rightholders. This is an integral part of the ARROW Project.

At the same time, the Copyright Subgroup has advocated suitable measures to minimise the quantity of future orphan works, which occur basically as a result of missing or inadequate information. Improved inclusion of metadata (information on rightholders and rights) in the digital material will be one measure to eliminate or diminish future orphans.

CMOs or other intermediaries can play an active role in finding out the status of a work.

Good practices in the Member States - regulatory measures, voluntary mechanisms or combinations of both - are important. Some mechanisms already exist and more are forthcoming. The Copyright Subgroup also stresses the crucial role of the Commission as an information resource and recommends the publication of good practices and examples on its website.

Both the Directive 2001/29 and the Commission Recommendation of 24 August 2006 emphasize contractual solutions that can be negotiated between stakeholders. The Copyright Subgroup has used this as a point of departure and has listed a number of measures that greatly reduce the problem of orphan works. It thus offers a toolbox of possible contributions to a solution to the issue.

In the sections that follow, each of the elements and recommendations will be dealt with more in depth.

5.2 THE DIFFERENT SOLUTIONS TO THE ORPHAN WORKS ISSUE

Clarification and transparency in the copyright status of a work is an important element in the European Digital Library initiative. Cultural institutions need adequate certainty in dealing with orphan works, and this principle is also included in the high level principles that govern the work of the Copyright Subgroup.

¹⁵ Accessible Registries of Rights on Orphan Works (towards the European Digital Library (EDL)). For more detail see below, Section 10.3.

The following general prerequisites need to be fulfilled when considering the use of orphan works:

- A user wishes to make good faith use of a work with an unclear copyright status;
- Due diligence has been performed in trying to identify the rightholders and/or locate them;
- The user wishes to use the work in a clearly defined manner;
- The user has a duty to seek authority before exploiting the orphan work, unless a specific copyright exception applies.

Guidelines on “due diligence” need to be established, based on what is reasonable under the circumstances.

In some countries regulatory and voluntary mechanisms for orphan works have been established. These can be tailored for orphan works, or designed for more general purposes.

A short summary of these solutions is given below¹⁶.

THE CANADIAN REGIME FOR NON LOCATABLE COPYRIGHT OWNERS

Pursuant to section 77 of the Canadian Copyright Act, the Copyright Board of Canada¹⁷ may grant licenses authorising the use of published works, fixed performances, published sound recordings and fixed communication signals, if the copyright owners cannot be located. The copyright owner is entitled to collect royalties within a deadline of five years from the expiry of a licence. The Board has decided to involve CMOs in the process.

In general, the Canadian model allows works and other subject matter to be used where it is not possible to locate copyright owners. The fact that a licence is issued protects the licensee from subsequent prosecution.

OTHER REGIMES WHERE A PUBLIC BODY MAY ISSUE THE LICENSE

There are various regimes where a public body is empowered to issue a licence. In the following, some of them are briefly described:

- Copyright Tribunal: the UK (s. 190) and Fiji (s. 190) Acts provide that the Copyright Tribunal may consent to a person making a recording from a previous recording of a performance where the identity and whereabouts cannot be ascertained by reasonable inquiry.
- Government Body: The Japan Act (s.67) authorises the Commissioner of the Agency for Cultural Affairs to issue a compulsory license for the exploitation of a work that has been made publicly available if, after due diligence has been exercised, the copyright owner is unknown or cannot be found.
- Copyright Commission: In South Korea (s. 47 of the Act), the Minister of Culture, in practice the Copyright Commission for Deliberation and Conciliation, can issue a license for the exploitation of a work if, despite considerable efforts, the owner of the copyright cannot be located.

¹⁶ For a more extensive analysis see the 2006 Report.

¹⁷ <http://cb-cda.gc.ca/unlocatable/brochure-e.html>

THE FRENCH MODEL FOR AUDIOVISUAL WORKS

The French National Audiovisual Institute (INA) has the task of preserving and exploiting audiovisual archives produced or co-produced by public television companies. INA has concluded general and collective agreement with representatives of various categories of rightholders through their CMO¹⁸ or the trade unions.

Under this regime, there is a collective management of the relevant authors' rights; this solution only concerns authors who have contributed their royalties on the works involved to the societies of authors that are signatories of these agreements with INA. Regarding the artists-performers, the agreements concluded by INA with trade unions authorise INA to exploit the presentations of "all" the performers on its archives' fund (subject to possible restrictions appearing in some employment contracts) for all modes of exploitation (even the one which didn't exist when their employment contracts have been signed).

The French intellectual property code (Art. L122-9 and 211-12 for related rights) includes a provision for dealing with the risk of a blockage. The Act of 1 August 2006 also introduces a special provision connected to the exploitation by Ina of its archives including performances of artists-performers.¹⁹

POWER TO EXTEND THE APPLICATION OF A SCHEME OR LICENCE

The UK Act (s. 167 and 168) includes an implied indemnity in certain schemes and licences for reprographic copying which is valid "within the apparent scope of the licence". For reprographic copying in educational establishments in connection with teaching activities (s. 168), the Minister may by order provide that a licensing scheme or license shall extend also to works of such rightholders that the licence does not cover.

EXTENDED COLLECTIVE LICENCES

Since the early 1960s, Nordic Countries have applied a legislative technique to deal with certain complex usage situations. This legal technique, called "extended collective licence (ECL)"²⁰, is a support mechanism for freely negotiated licensing agreements. During the years 2002 and 2006, the Nordic countries extended the ECL to cover certain activities in libraries, museums and archives. Whereas an ECL is not tailored for orphan works, to a large extent it can eliminate the issue of unknown or non-locatable rightholders in the designated area.

In Denmark, a recent revision of the copyright law (January 2008) foresees an organisation to be appointed to issue licences for orphan works under an ECL stipulation. The provision will enter in force on 1 July 2008.

¹⁸ SCAM, SACD, SACEM, SDRM, SESAM.

¹⁹ See also the comprehensive Report on Orphan works issued in March 2008 and now available at <http://www.culture.gouv.fr/culture/cspla/rapoeuvor08.pdf>

²⁰ Extended collective license, leaflet prepared by the Ministry of Education and Culture, Finland, June 1991.

HUNGARIAN PENDING LEGISLATION

The Hungarian copyright system has several different rules which can help the users in searching and finding the rightholders of the works. There is a functioning extended licensing system managed by CMOs and on the basis of that system the users can get licenses for the use of orphan works as well.

The Hungarian Government has proposed an amendment of the Copyright Act that will give more solutions for the problem of orphan works. The proposed amendments are “to insert a new heading and Article 57A into the Copyright Act “Authorisation of use in case if the author or his/her location is unknown”. According to the proposal, a non-exclusive, non-transferable authorisation of use for at most 5 years at the request of the user could be given by the Hungarian Patent Office.

US PENDING LEGISLATION ON ORPHAN WORKS

In 2006, a draft bill was proposed by the Copyright Office, with a short title “The Orphan Works Act of 2006”. According to the bill, a user would be allowed to use an orphan work without an authorisation. The bill is based on the concept of limited liability (a “limits-on-remedy” system) whereby, once the threshold requirement of a reasonably diligent search to find a copyright owner is met, liability would be limited. – Legislation is pending. In April 2008, the US House and Senate versions of the Orphan Works Act of 2008 were made available. The proposal is based on the elements included in the 2006 draft bill, with enhanced proposals concerning identification of certain types of works with the help of databases among others.

5.3 THE EUROPEAN APPROACH: MUTUAL RECOGNITION OF NATIONAL SOLUTIONS

Taking into account that various alternative mechanisms exist to deal with the issue of orphan works, the Commission has recommended that Member States, in collaboration with stakeholders, establish mechanisms to facilitate the use of orphan works. Under this approach, interoperability and mutual recognition of existing solutions become an important issue, especially if the cross-border nature of the use is considered.

The Copyright Subgroup has suggested that in order to ascertain the interoperability between the Member States, common “diligent search” criteria for finding rightholders should be established. It has further recommended that Member States recognise solutions in other countries that fulfil “diligent search” criteria in order to achieve the cross-border effect. As a result, material whose rightholders are considered diligently searched for in one Member State would also be considered accordingly in another. The solution would be based on the concept of mutual recognition.

Thus it is a prerequisite that all Member States have solutions which are interoperable and agree to mutually recognise any mechanism that fulfils the generally accepted core principles.

5.4 DILIGENT SEARCH GUIDELINES

Solutions in different Member States may be different, but they need all to fulfil certain commonly accepted core principles, such as:

- Cover all orphan works (those with unidentified or non locatable rightholders), on the basis of a shared definition;
- Include guidance on diligent search;
- Include provision for withdrawal if the rightholder reappears;
- Offer cultural, not-profit establishments a special treatment when fulfilling their dissemination purposes, to be further discussed between stakeholders;
- Include requirement for general remuneration or remuneration if the rightholder reappears.

The Copyright Subgroup suggested that the notion and conditions of “diligent search” in the context of orphan works need to be elaborated. The work would be based on the following parameters:

- Any solution for orphan works should be applicable to all kinds of protected works.
- The potential user of orphan works should be required to conduct a thorough search in good faith in the country of publication/production if applicable, with a view to identifying, locating and contacting the copyright owner, prior to the use of the work.
- A flexible approach should be adopted to ensure an adequate solution in dealing with individual circumstances of each orphan work, taking into account various categories of works.
- Guidelines or best practices specific to different kinds of work can be worked out by stakeholders in different fields.
- Any regulatory initiative should refrain from prescribing minimum search steps or information sources to be consulted, due to rapidly changing information sources and search techniques.

At the recommendation of the Copyright Subgroup, the Commission organised a meeting called “Stakeholders’ Perspectives” on 14 September 2007. It was the wish of the Copyright Subgroup to include representatives of different cultural sectors in deliberations on due diligence guidelines for their respective sector.

The following is a summary of the findings of the meeting:

- All representatives of stakeholders confirmed that “orphans” exist;
- Representatives of cultural institutions gave examples of concrete cases;
- The necessity of addressing the issue separately in each creative sector was emphasised by rightholders;
- It was acknowledged that legal certainty is important for cultural institutions.

The spirit of cooperation was eminent at the meeting and representatives of cultural institutions and rightholders were willing to engage in a constructive dialogue in order to establish due diligence guidelines for their respective sector.

As a follow-up to the deliberations at the Stakeholders’ Perspectives meeting, the Commission set out a plan for facilitating the creation of sector specific diligent search criteria. Such criteria could be a voluntary measure in a form of Industry Guidelines or Best Practices that European representatives of relevant industries and cultural institutions endorse. The main creative sectors working in accordance with the plan are: text, audiovisual, visual/photography and music/sound; consequently, four different Working Groups (WGs) were nominated to decide on the guidelines for their sector. The work on diligent search guidelines took place from October/November 2007 and is at its final stage. Endorsement is foreseen to begin on 4 June 2008, after the work is concluded.

The Copyright Subgroup has initiated the work and encourages it, but is not a participant in the sector-specific groups. The work is thus a spin-off of the Copyright Subgroup. The WGs work independently and report on their work to the High Level Group and the Commission.

Diligent search guidelines on European level are by their nature generic (European). They will include a common understanding on information resources and the procedure to be followed. It will be important to “customise” the generic information resources locally and link national resources into a European-wide information pool. This will be particularly important as the country of origin of the work will normally be the place where the search will be initiated.

Spreading of good practices in the Member States, be they regulatory, voluntary or a combination of the two, is important for all dealing with orphan works. Some measures already exist and many more are under planning.

For instance, CMOs and other intermediaries can play an active role in finding out if the status of a work is orphan. They can for example search for missing authors by “advertising”; many CMOs already have such procedures. Other intermediaries, such as “Books in Print”, can play a similar role. This recommendation of the Copyright Subgroup finds practical implementations in the ARROW project and in national contractual arrangements between CMOs and cultural institutions.

5.5 DATABASES AND RIGHTS CLEARANCE MECHANISMS

While due diligence guidelines are an important feature in facilitating the use of orphan works, they need to be supplemented by practical tools to serve the users.

The Copyright Subgroup concluded that databases and Rights Clearance Centres will be a useful part of the overall solution of orphan works. Aiming to ensure interoperability, enhance coordination efforts and facilitate a multilingual access point incorporating national and local initiatives, the Copyright Subgroup decided to develop a set of Key Principles for Databases and Rights Clearance Centres for Orphan Works and Out-of-print Works (see below Section 9).

5.6. MEASURES TO PREVENT FUTURE ORPHANS

A work becomes orphan just for one reason: information about it is missing. The best way to ensure that works do not become orphan is to address the creation, maintenance and accessibility of relevant information.

Different measures to improve the availability of information on works, rightholders and rights have been mentioned, among them the following:

- Use of electronic and other identifiers;
- Creation, use and maintenance of metadata in the digital files;
- Recognition of the value of standard identifiers.

Preventative measures also include enhanced contractual practices, in particular in the audiovisual field.

Follow-up and implementation of preventative measures are to a large extent a matter of private sector stakeholders. It could be an area where representatives of rightholders and cultural institutions have a joint interest. Cooperative efforts can bring a win-win solution for the future.

5.7 CONCLUSION

Both the Directive 2001/29 and the Commission Recommendation of 24 August 2006 put emphasis on contractual solutions that can be negotiated between stakeholders. The Copyright Subgroup has had this as its point of departure and has listed a number of measures that greatly reduce the problem of orphan works. It thus offers a toolbox of contributions to a solution to the issue. It is thus important to foresee a combination of measures.

6. WORKS OUT OF PRINT

For out-of-print works²¹ the Copyright Subgroup proposes pragmatic solutions within the existing legal frameworks to meet specific requirements put forward by libraries and archives. It addresses mainly printed works and does not analyse in detail the extent to which the suggested solution could be adapted also to other categories of work.

6.1 DEFINITIONS AND BASIS FOR A SOLUTION

Definitions

A “work” means the work itself, e.g. a poem, a novel, an article, etc., as well as a physical copy of it, e.g. a book, a journal, etc.

A work which is “out-of-print” means that the rightholder concerned has declared it not to be commercially available.

- A work is not considered to be out-of-print albeit it may be out of stock and there may be no printed tangible copies available if:
 - it is still commercially available, typically by being offered for online access or for print on demand;
 - the rights have reverted²² to the author and the author offers the work in the market place directly, through an agent or a CMO, e.g. a Reproduction rights organisation (RRO);
 - the author or publisher directly, through an agent or through a RRO⁴ offers a permission to use the work, e.g. through a licence.

Withdrawal of the edition/Alternative editions

The work may have been withdrawn from the market deliberately, either by the publisher or by the author. In this context, providing online access to works which are no longer available might conflict with the normal exploitation of the newer version of the work or prejudice the economic interest and possibly also the moral rights of the rightholders.

²¹ For audiovisual works: out of distribution.

²² The rights may or may not revert to the author depending on the contracts.

Authorisation to digitise the work

Digitisation of works for preservation purposes is dealt with in part 4, “Digital preservation”.

6.2 PROPOSED SOLUTION – KEY ELEMENTS²³




The solution proposed by the Copyright Subgroup is based on four main elements:

- (1) Two Model Agreements – for (i) authorised users in closed networks only; and (ii) for online access to copyright out-of-print books
- (2) National DataBases (DB) of out-of-print works
- (3) National Rights Clearance Centres (RCC)
- (4) A defined procedure for the clearance of rights.

The elements of the proposed solution were presented in a report to and approved by the High Level Expert Group at its meeting on 17 October 2006. The Model Agreement for the digitisation and making available of out-of-print works by libraries to authorised users in closed networks was endorsed by the High Level Group on 18 April 2007. It is presented in Section 7 of the Report. The Model Agreement to allow libraries to provide online access over open networks to out-of-print books is presented in Section 8, whereas the Criteria for Databases and Rights Clearance Centres are dealt with in Section 9 of the Report together with the Criteria for Databases of and Rights Clearance Centres for Orphan Works.

6.3 THE LICENSING OF DIGITISATION AND THE MAKING AVAILABLE OF WORKS OUT-OF-PRINT. GENERAL LICENSING CRITERIA

In respect of copyright works that are out of print according to the definitions in this document, authorisation by the rightholder²⁴ through a licensing agreement is needed for the:

-  digitisation beyond what is authorised by law;
-  making available of the work on the library premises unless permitted through a statutory exception (as enabled by implementation of Article 5(3)(n) of the Directive 2001/29);
-  making available to a user outside the library premises.

Although libraries and archives may be authorised by law to digitise a work, the communication to the public including making it available by way of interactive on-demand transmissions remains covered by an exclusive right. Such interactive on-demand transmissions are characterised by the public being offered access to the works from a place and at a time individually chosen by them. This requires permission from the rightholders concerned.²⁵

²³ Based on a draft originally prepared by Mr Olav Stokkmo (team leader) discussed with Mr Toby Bainton, also on behalf of Lynne Brindley, Ms Tarja Koskinen-Olsson, Dr Myriam Diocaretz and Mrs Anne Bergman-Tahon. In the work on the Model Agreements the group has also drawn on the expertise of IFRRO’s General Counsel Franziska Schulze.

²⁴ In this context, the author, the publisher or both may be considered rightholders, depending on the contractual arrangements between themselves.

²⁵ Recital 40 of the EC Directive 2001/29 states that Member States may provide for an exception or limitation for the benefit of certain non-profit making establishments, such as publicly accessible libraries and equivalent institutions, as well as archives. However, this should be limited to certain special cases covered by the reproduction right. Such an exception or limitation should not cover uses made in the context of online delivery of protected works or other subject-matter. The Directive is without prejudice to the Member States’ option to derogate from the exclusive public lending right in

National legislation and/or existing licensing arrangements already grant certain rights to libraries/archives, including the making available of works on the premises of these establishments on dedicated terminals. The proposed Model Agreements allow acts that are not already covered by law and by existing licensing arrangements. Licensing conditions observe established balances in the Intellectual Property framework and deliver conditions whereby rightholders are allowed to be rewarded for their creativity and investment while at the same time creating the climate for future inspiration through public access to the creative output.

The Copyright Subgroup considered proposals put forward in certain Member States, whereby it would be for copyright legislation to indicate the conditions and terms under which out-of-print works, once digitised, might be made available to the public at large.²⁶ It considers that a contract based solution is more in line with international obligations, including TRIPs.

General licensing criteria

The proposed licensing mechanism to facilitate the digitisation of such works by libraries and archives beyond what is generally authorised by law and their subsequent online accessibility builds on current national and community legislation. It does not propose new legislation or mandatory stipulations beyond those which already exist. In line with the European Commission Recommendation of 24 August 2006 it is based on voluntary solutions.

The following general licensing criteria apply:

- ✚ The Model Agreements recognise that the rightholder shall have the liberty to choose to digitise a work her/himself. Thus access to the work including that of the library/archive could then be obtained from the rightholder's database.
- ✚ The rightholder may at her / his sole discretion decide that a work shall be treated as a work in print if there are other editions commercially available and the making available of the out-of-print edition would conflict with the legitimate interest of the rightholder in the commercialising of the alternative edition.
- ✚ The Model Agreements grant legal certainty to the library / archive providing online access to works
 - The licensing agreement includes the right to digitise and provide online access to the work including the right to make the work available.
- ✚ Works the rightholders of which are not identified / located should be handled as orphan works (*see* above, Section 5 of the Report).

Some form of remuneration to the rightholders, which the rightholders will be at liberty to waive, is made possible for the digitisation and the making available of their works.

The use of the Model Agreements

There are two Model Agreements: (i) Model Agreement I that covers the digitisation and making available of copyright *material to authorised users in secure networks* only, presented in Section 7 of

accordance with Article 5 of Directive 92/100/EEC. Therefore, specific contracts or licences should be promoted which, without creating imbalances, favour such establishments and the disseminative purposes they serve.

²⁶ See F. STASSE, *Rapport au ministre de la culture et de la communication su l'accès aux œuvres numériques conservées par les bibliothèques publiques*, April 2005.

this Report; and (ii) Model Agreement II which encompasses online accessibility over open networks to *books in libraries*²⁷ which the rightholder has declared as no longer being commercialised as well as access to out-of-print works for authorised users in secure networks, presented in Section 8.

If the relevant agreement between the library and the rightholder is limited to providing access to authorised users in secure networks only, it is recommended to base the agreement on the Authorised User/Secure Network Model Agreement (Model Agreement I). The Online Accessibility Model Agreement (Model Agreement II) is intended as a basis for the negotiations of an agreement when the rightholders and the library agree that some or all of the digitised out-of-print books can also be made accessible online on the library's website.

A necessary incident to the functioning of the mechanism is that the library/archive wishing to digitise will be informed whether another institution has already proceeded to digitisation and whether such an institution is authorised to provide access also to other libraries and their users (see below Section 7).

The Model Agreements are intended to be used as a basis for negotiations. They will have to be adapted to the situation in the library and Member State concerned. Although they are directed mainly towards libraries, they may also be used by archives and others who wish or need to agree with rightholders on the use of works which are out of print/distribution/commerce. The definition of out-of-print works allows the scope of the licence to be generic and thus not limited to print material. At least the Authorised User/Secure Network Model Agreement may also be adopted by other copyright sectors.

Moreover, the Model Agreements have been drafted with a view to being used on national as well as on a multinational and European level. They may be used by libraries and individual rightholders, their agents and representatives including Collective Management Organisations such as Reproduction Rights Organisations (RROs).

The Copyright Subgroup also notes that no dispute settlement mechanism is in place on the European level. The Model Agreements therefore turned to the World Intellectual Property Organisation (WIPO) for a solution.

6.4 DATABASES OF AND RIGHTS CLEARANCE CENTRES FOR OUT-OF-PRINT WORKS

Right Clearance Centres (RCC)

With the aim of facilitating the licensing of out-of-print works, it is recommended that each Member State considers encouraging the establishment of national Rights Clearance Centres (RCC). These clearance centres could act as national portals for clearance of rights in respect of out-of-print works unless the proposed user finds it simpler to contact the rightholder directly. Existing CMOs such as RROs could run the portals. The rightholders may also opt for other solutions. Subject to the mandate from the rightholder, the RCC may:

- a. Grant the permission and offer a licensing agreement;

²⁷ Whereas the remit and the competence of the team was limited to out-of-print “books in libraries” the stipulations in the Model Agreement may well be applicable beyond this. This is left to be decided by the negotiating parties in each case through adapting the Model Agreement and taking into account, if necessary, specific national and local requirements.

- b. Redirect the request to the pertinent rightholder;
- c. Refuse permission (which may e.g. be the case if the CMO does not have the mandate to grant the permission).

The RCC will not encompass all rightholders and all works. It would, however, be expected to represent a substantial portion of them.

Databases (DBs) of out-of-print works

The Rights Clearance Centre should also consider building a register of works for which permission has been granted *inter alia* to avoid duplication of efforts. The data would provide information and metadata about what has been digitised; by whom; where the digitised work is preserved; and how and by whom access to the work is provided. The solution would take the form of a portal. The national portals need to be interlinked to offer a pan-European register.

6.5 GRANTING OF AUTHORISATION TO DIGITISE AND MAKE THE WORK AVAILABLE

Authorisation to digitise and make an out-of-print work available can be granted

- (a) Directly by individual rightholders;
- (b) Through a joint administration, i.e. joint licensing through an intermediary e.g. in the form of redirection from a joint portal for rights clearance to the individual rightholder concerned for the granting of the permission and the licence;
- (c) Collectively via Rights Clearance Centre administered by a CMO such as a RRO. Depending on the mandate, the license offered by the CMO may either be offered on a transactional basis (i.e. case by case) or offered as a repertoire licence. A “repertoire licence” means that the library/archive through the licence is (a) granted preauthorisation to digitise and make available the works that the Rights Clearance Centre has in its repertoire (b) normally at a standardised set of conditions.

Procedure for clearance of rights and obtaining a license

The following procedure for clearance of rights is proposed:

1. The library/archive that wishes to digitise in order to provide online access to an out-of-print work makes a request to the rightholders [give a (list of) work(s) for which it seeks permission]. The request can either be made to:
 - i. The rightholder directly which will often be the case if there is only one rightholder involved and the rightholder’s contact details are known or easily available
 - ii. The Rights Clearance Centre (RCC)
 - iii. The CMO where the CMO is not the RCC
2. Depending on the mandate, the rightholder or the CMO / RCC will
 - i. Grant the permission
 - ii. Refuse to grant permission, with or without justification
 - iii. Redirect to the pertinent rightholder

In case of transactional licensing by CMOs, individual direct licensing and licensing through joint administration, a reasonable time must be defined to respond to the library's/archive's request for permission. This is addressed in the Criteria for Rights Clearance Centres (See Section 9)²⁸

7. THE MODEL AGREEMENT FOR THE DIGITISATION AND MAKING AVAILABLE OF OUT-OF-PRINT WORKS TO AUTHORISED USERS IN CLOSED NETWORKS

The scope of the licence

The Model Agreement I annexed as Annex 3 offers a practical solution to specific needs as defined by libraries and will assist them in satisfying user requirements for access to information and content once printed and published. It has been designed to be adaptable to the different legal regimes and models for administration of rights in force throughout the European Union Member States.

Access should be offered in a way that does not interfere with the copyright holders' legitimate interest in controlling the commercialisation of their works. The Model Agreement allows the library to digitise and provide access to out-of-print works to authorised users through closed networks. It is not limited in respect of territory, but access may not be offered through open networks.

The content of the Model Agreement

The Model Agreement grants the library a non-exclusive and non-transferable right to digitise and make the licensed work available to users in closed networks. The rightholder is entitled to payment which (s)he is at liberty to waive. The pertinent author/publisher retains copyright in the work and in the digitised version and may at any time revoke the licence, *inter alia* to re-commercialise the work in question. The author / publisher may require information from the library on the use of the work to better assess its commercial potential. If the licensor withdraws from the library any part of the licensed material and the material withdrawn represents more than 10% of a title, the library is entitled to a reimbursement of its actual costs.

Under the licence the library may digitise, access the digitised version, store it in a systematic way to facilitate search and retrieval, provide access to it to authorised users through secure networks, and reproduce it electronically or on paper for internal back-up or preservation purposes.

Subject to a separate agreement with the rightholder or his/her representative the library may provide other libraries with online access to the digitised work in order for them to make it available in closed networks to their respective authorised users. Also, subject to a separate licence the library may provide on-line access to a third party such as an enterprise or a university.

The authorised user is allowed to search, view, retrieve and display the digitised work. The library may also agree with the author or publisher who holds the right that the authorised user may electronically save and make single copies of parts of the work.

²⁸ In certain specific cases, also the new Nordic "library-specific" Extended Collective Licensing scheme might be a good way forward; yet, as negotiation of the required agreements with the stakeholders is still underway, it is suggested that the adaptability of the mechanism to out-of-print works needs to be further scrutinized.

8. THE MODEL AGREEMENT AUTHORISING LIBRARIES TO ALLOW ONLINE ACCESS TO OUT-OF-PRINT BOOKS²⁹

8.1. THE SCOPE OF THE AGREEMENT

In line with the Copyright Subgroup's intention to work out practical solutions to specific needs and expectations indicated by the cultural institutions in the digitisation and making available process of copyright works, a team was established tasked with the development of a solution to enable online access to books which are out of print³⁰. As with other solutions proposed by the copyright subgroup under the i2010 Digital libraries initiative the stakeholder representatives agreed that this should be done in a way that does not interfere with the copyright holders' legitimate interest in commercialising their works.

The Copyright Subgroup including the online accessibility team has limited its considerations to the digitisation and providing access online to out-of-print *books* by *libraries*. It concluded that the most appropriate solution would be to offer a Model Agreement, hereafter referred to as the Model Agreement II annexed as Annex 4. It is further assumed that a library that offers online access to out-of-print books will also grant access to the same categories of works to authorised users in closed networks. Therefore, the Model Agreement that has been worked out therefore comprises both options.

It has not been assessed whether Model Agreement II may also be applied to other types of works than books, to other sectors such as the music and/or visual and/or audiovisual sectors, or other institutions than libraries. However, the terms that are used are generic and the Model Agreement II's applicability should be possible beyond out-of-print books in libraries.

The content of the Model Agreement II

The agreement grants the library a non-exclusive and non-transferable right to digitise and make the relevant out-of-print books covered by the agreement available to users on line over open networks. In addition it may offer authorised users access through secure networks to works which are not otherwise accessible online on the same conditions as granted by the Authorised User/Secure Network Model Agreement I for out-of-print works described in Section 7 of this Report.

For out-of-print books that may be accessed online over open networks the Model Agreement grants the library the right to digitise the book and make the digitised version either freely available on its website to anyone who accesses the website or subject to registration, depending on the option agreed with the rightholder or her/his representative. The library may index the digitised copy in its system. Only the Licensee is authorised by the Agreement to offer the content on its web-site.

The User may search, retrieve and display the digitised version of the book, store it electronically on a hard-drive or other storage and, subject to it being specified in the agreement or other agreement, or authorised by law, make single copies of parts of it. The Model Agreement II also allows the library and the rightholder / rightholder representative to specify allowed uses.

²⁹ The Online accessibility Model Agreement has been developed by a Team made up of Mr Olav Stokkmo (team leader), Ms. Anne Bergman-Tahon, Mr. Vianney de la Boulaye, Dr. Myriam Diocaretz, Ms. Mette Møller, Mr Toby Bainton, Dr. Elisabeth Niggemann, Mr. Ben White and Ms Tarja Koskinen-Olsson. In drafting Model Agreement II the team has also drawn on the expertise of IFRRO's General Counsel Ms. Franziska Schulze.

³⁰ For the definition of an out-of-print work see 6.1

The agreement does not allow the library or the user to make systematic print or electronic copies of multiple extracts of the book, or alter, abridge, adapt or modify it in any way. Moral rights have to be respected.

As with the Authorised User/Secure Network Model Agreement (Model Agreement I) the rightholder is entitled to payment which (s)he is at liberty to waive. The pertinent author / publisher retains copyright in the work and in the digitised version and may at any time revoke the licence, *inter alia* to re-commercialise the book; the author / publisher may require information from the library on the use of the work to better assess its commercial potential; and the withdrawal from the library of the book – partly or in total – may cause reimbursement by the rightholder of the library’s costs.

9. KEY PRINCIPLES FOR ORPHAN WORKS AND OUT-OF-PRINT WORKS DATABASES (DB) AND RIGHTS CLEARANCE CENTRES (RCC)

9.1. BACKGROUND

The Commission Recommendation of 24 August 2006 on the digitisation and online accessibility of cultural material and digital preservation noted the strong roots of the European digital libraries in national and local efforts to digitise and preserve the cultural heritage. Creating the European dimension through a common multilingual access point requires thus a high degree of interoperability.

The Recommendation further noted that “Licensing mechanisms in areas such as orphan works [] and works that are out of print or distribution (audiovisual) can facilitate rights clearance” and “should therefore be encouraged in close cooperation with rightholders.”

Concurrent with the Commission Recommendation, the Report of the Copyright Subgroup of 18 April 2007 stressed the voluntary aspect of solutions to be implemented within the framework of the i2010 digital libraries initiative. The Report further affirmed that among the governing principles for rights holders are (i) “digitisation and use within the premises of libraries should take place with rightholders’ consent or be based on statutory exception”; and (ii) “Rightholders’ consent means in principle rights clearance, which should be based on individual or collective licensing or a combination thereof.” One of the governing principles for the cultural institutions is that “Access means either within the premises of the libraries, archives and museums or online availability.”

Inter alia on this basis the Copyright Subgroup Report of 18 April 2007 concluded that Databases and Rights Clearance Centres must be a part of the solution both for orphan works and out-of-print works. Aiming to ensure interoperability, enhance co-ordination efforts and facilitate the multilingual access points incorporating national and local initiatives, the Copyright Subgroup decided to develop a set of Key Principles for Databases and Rights Clearance Centres for Orphan Works and Out-of-Print Works. A team³¹ was established to draft the Key Principles presented by the Copyright Subgroup and incorporated in this Report.

³¹ Team led by Mr. Olav Stokkmo (IFRRO) and otherwise made up of Mr. Toby Bainton (SCONUL and EBLIDA), Ms. Claudia Dillman (Association des Cinémathèques Européennes), Ms. Anne Bergman-Tahon (FEP), Dr. Myriam Diocaretz (EWC), Ms. Sophie Scrive (ENPA) and Ms. Tarja Koskinen-Olsson (IFRRO). Members of the Copyright Subgroup who

9.2. ORPHAN WORKS

General point of departure

The overall solution for orphan works consists of:

- i. Diligent search criteria that a user needs to fulfil prior to the use of the work. (Diligent search for rightholders to the work, and clearance of rights, will normally be carried out in the country of origin of the work when identifiable) (see above, Section 5.4);
- ii. Database(s) (DB) of orphan works to facilitate users in their search, which is needed irrespective of any legislative solution;
- iii. A rights clearance procedure and (a) Rights Clearance Centre(s) (RCC) to grant licences when they can be offered by a mechanism set up by rightholders;
- iv. National solutions which may include legislative/regulatory support and mutual recognition of different solutions in various Member States to achieve the cross-border effect needed for the European Digital Libraries (EDL) (see above Section 5.4).

The Key Principles proposed by the Copyright Subgroup with this Report concentrate on three implementation issues, which are not dependent on each other, and are needed in an overall solution to find a workable mechanism to use orphan works, primarily by cultural institutions but also by other users:

- Sector specific criteria for diligent search for rightholders to copyright works
- databases of orphan works; and
- a mechanism to clear the rights to use an orphan work.

Database and Rights Clearance Centre

The rationale of a Database (DB) is to provide assistance to users in their search endeavours. Interlinking national databases and registries is needed to enable a European common multilingual access point and a European wide resource possible. It should take account of the variety of existing and future information resources.

The national Rights Clearance Centres (RCCs) could act as portals and common access points for clearance of rights and be accessible across borders. The user, defined as the one who requires a licence to digitise and/or make available the work and/or make other use of it, has the full responsibility for carrying out a diligent search for rightholders to the orphan works. The diligent search must be carried out and documented prior to the granting of a licence. The process could typically be:

- The institution or individual wishing to digitise, make available or otherwise make use of a work states the interest and includes a description of the required use with a declaration that the user has been unsuccessful in identifying or locating the rightholder and that the work may be an orphan work
- The potential orphan work is described with whatever metadata (name of the author, producer, etc.; title of the work, etc.) is available, and, in the absence of metadata, makes use of other means to describe the work such as snapshots, a facsimile, photo, video clip, excerpt of a piece of music

were not on the team have been copied in. Ms. *Patricia Moll* (Google) commented on the OPW Key Principles, Mr. *Jean François Debarnot* (INA) on the OW Key Principles.

- The licensing conditions of the work if it remains orphan following a diligent search for the rightholder should be available prior to the start of the diligent search
- Diligent search for the rightholder(s) is carried out according to established search criteria and guidelines for the sector concerned
- Evidence that a diligent search has duly taken place according to the sector specific criteria and guidelines are presented
- The intention to make use of the work and by whom as well as the evidence of the diligent search for the rightholder(s) are registered in and publicised in the Orphan Works DB
- The RCC assesses whether the search is diligent, and, if so, informs about licensing criteria for the work in question and grants/refuses to grant a licence within a defined period of time
- The RCC may wish to take up an insurance to limit financial risks in respect of future claims that may be raised
- The required fees, i.e. transaction costs and, when applicable, the licence fee are paid to the RCC by the user
- The information on the granting of the licence and the licensing conditions including the further use of the work are publicised in the DB
- If the rightholder, or his/her representative reappears the RCC examines the claim and certifies that the claimant is the correct rightholder and pays out, when applicable, the collected fees
- Upon certifying the right claimant, the information on the rightholder and the consequences, etc. for the licence is published in the Orphan Works DB.

The Key Principles

The Database foreseen to be interlinked in the European Digital Libraries initiative is a register of metadata rather than a works database. In order to facilitate interoperability also with existing resources a general principle is that it should, as a starting point, be based on existing standards rather than developing new ones. The Key Principles encompass

1. Policy of the Database
2. The Database structure and content
3. Metadata to be contained as a minimum and how to address the absence of metadata
4. Standards and how to address issues of standards
5. Interoperability criteria, including a registry of works which have been digitised and for which authorisation has been granted.

The Rights Clearance Centre Key Principles include

1. Policy of the Rights Clearance Centre
2. Licensing policy and issues
3. Licensing conditions and how to address them
4. Remuneration policy
5. Interoperability issues
6. Transparency issues.

9.3. Out-of-Print Works

General point of departure

The solution for out-of-print works is based on

- (i) Model Licence;
- (ii) Database registers on works declared to be out of print/distribution/commerce; and
- (iii) National Rights Clearance Centres to be used by rightholders on a voluntary basis to complement individual direct licensing by rightholders.

The Model Licence has already been approved by the Copyright Subgroup and the HLG and is posted on the European Commission's website. With this Report the Copyright Subgroup presents the Recommended Key Principles for the establishment of Databases and Rights Clearance Centres in connection with the i2010 Digital Libraries initiative.

The Key Principles build on previous conclusions taken by the Copyright Subgroup as approved by the HLG, including the definition of works out of print/distribution being those declared by the pertinent rightholder(s) to be no longer actively commercialised. Moreover, the Rights Clearance Centres are foreseen to be used on a voluntary basis by rightholders who often will be in a position to enter themselves into direct licensing agreements with libraries, museums and archives. It is, however, necessary to consider clearance centres which can act in a complementary fashion to individual, direct licensing.

The Database

The Database foreseen to be interlinked in the European Digital Libraries initiative is a register of metadata and not a works database. The rationale is to provide assistance to cultural institutions on works that are no longer being commercialised by the rightholder(s). Users may be offered access to such works on conditions that may be different from those which apply for works in print. The Key Principles aim to provide information on such works to be available across border and thus to facilitate a European wide solution through interoperable national databases.

The optional use of the database is recognised. The result of this is that the registry will not be complete. It is, however, assumed that it will be in the interest of all stakeholders that a high quality registry of out-of-print works be established. Its quality depends largely on the use of the opportunity that such a database provides. It is assumed that institutions will present to rightholders and/or their representatives a request to digitise a work. The out-of-print works register will typically be built up through registering the work upon a declaration by the rights holders of their lack of intention to commercialise it further. The rightholders may also wish to register a work with the database as being out-of-print regardless of a request for digitisation or other use of it.

In order to facilitate interoperability with existing resources a general principle is that it should, as a starting point, be based on existing standards rather than developing new ones. The Database Key Principles further address

1. Policy of the Database
2. The Database structure and content

3. Metadata to be contained as a minimum and how to address the absence of metadata
4. Standards and how to address issues of standards
5. Interoperability criteria, including a registry of works which have been digitised and for which authorisation e.g. under the Model Licence has been granted

The Rights Clearance Centres

The Rights Clearance Centre can, subject to the mandate, both grant licences to digitise and make available works and redirect to the pertinent rights holder for possible direct licensing. The Key Principles address

1. Policy of the Rights Clearance Centre
2. Mandating by rightholders
3. Licensing policy and issues
4. Licensing conditions and how to address them
5. Remuneration policy
6. Interoperability issues
7. Transparency issues

9.4. POSSIBLE COMMUNITY MEASURES FOR ORPHAN WORKS AND OUT-OF-PRINT WORKS

The European Commission could

- A. Based on the Commission Recommendation of 24 August 2006 on the digitisation and online accessibility of cultural material and digital preservation
 - i. Recommend to the Member States that they encourage rightholders to establish Rights Clearance Centres for orphan works
 - ii. Publish the Key Principles for Orphan Works Databases and Rights Clearance Centres on its website and recommend that they be used when such databases and rights clearance centres are established
 - iii. Publish the Key Principles for Out-of-Print Databases and Rights Clearance Centre on its website and recommend that they be used when such databases and rights clearance centres are established
- B. As a prerequisite for establishing the suggested measure A. above, provide financial assistance to the development of technical standards and test beds for orphan works and out-of-print works Databases and Rights Clearance Centres, such development to take place in collaboration with rightholders, cultural institutions and other stakeholders.

10. IMPLEMENTATION OF THE PROPOSED SOLUTIONS

10.1 IMPLEMENTATION OF THE MODEL AGREEMENTS

The actual impact of the Model Agreements (MAs) shall depend on their implementation. A prospective deployment plan has been formulated through a process of consultations with libraries representatives and other stakeholders; therefore, a number of actions are recommended for full dissemination, promotion and implementation.

The European Commission might wish to promote the adoption of the MAs, post them on the digital libraries home page and encourage their use.

They should be disseminated and brought to the attention of potential users through relevant channels in the EU Member States which should include: pertinent ministries; national libraries and library organisations; authors' associations, publishers' associations and RROs. The model agreements should be available through relevant portals and web sites on a national and Community level including those of the Member States ministries, rightholder associations, library associations and Collective Management Organisations.

The voluntary use of the MAs can be effectively deployed through the establishment of test-beds. For this purpose, national libraries and other digitising institutions should be encouraged by the EC to use either of the MAs as a solution to digitise and make available out-of-print works. Cultural institutions can thus build examples of "effective practices" as a result of their voluntary institutional actions.

The multiplier effect is a key factor for implementation. The test-beds deployment will be enhanced if the Commission invites current relevant initiatives such as EUROPEANA project and additional EU digitising initiatives to consider implementing the MA. Moreover, the Commission could encourage the adoption of the MA through a selection of "Champion Projects" to promote best practices.

Moreover, the Commission could contribute to identifying and publishing best practices on the use of the MAs. The text of the MAs may be set in a national context to be in line with the respective laws, economic models and related factors. This information needs to be gathered. Furthermore, cultural institutions need to have information about already existing model agreements at national level in other Member States; it would be beneficial for all to have a collection of these examples.

For the above strategic approach, the Commission's support and endorsement is essential.

10.2. POSSIBLE COMMISSION MEASURES

The Model agreement for a licence on digitisation of out of print works for closed networks exists in the following languages: English, German, Spanish, French, Italian, Dutch, Polish and Romanian. The Commission may contribute to its dissemination by helping to make the Model Agreements known and

available throughout the EU, in all main EU languages and by resorting to its legal and linguistic expertise to review the Model Agreements both in the original version (English) and in the translations. The deployment potential for MA test-beds largely depends on the communication to and engagement of the Member States. The Commission is advised to give prominence to the potential use of the MA from the very beginning of its adoption by the HLG, to ensure that it is acknowledged in all Member States for national and/or cross-border contracts. An important support and involvement in this direction needs to emerge from **Member States' Expert Group on Digitisation and Digital Preservation**. Both the mandate and the strategic role of this Expert Group within policy making and major ongoing initiatives in digitisation and digital preservation³² ensures a coordinated approach which can help to avoid duplication of efforts. Thus, they are the most appropriate body to support the further adoption of the MA for additional test-beds. The Commission is advised to announce and promote the solutions proposed by the Copyright Subgroup in the MS Expert Group meetings and to invite further dissemination in each MS for a prospective endorsement at national level that would facilitate a widespread voluntary adoption by cultural institutions.

The implementation process will require **coordination** to gather best practices, to promote the exchange of experience and knowledge, as well as to collect the different national views and procedures existing in the MS. There is an increasing interest amongst libraries and other digitising cultural institutions in finding out about the situation and procedures for out-of-print works in other European countries. Parallel to the test-beds, it will be important to gather information and feedback from currently existing digitising practices, business models within private-public partnerships, national and regional initiatives (Norway, France, Germany, among others). The implementation requires EU-wide research on a country-by-country basis, concerted analysis, follow-up, dissemination, and discussion. Such coordination should aim at providing the driving force for a much needed cross-fertilisation. If no such coordinating body exists, it will be important to consider these identified needs for a future EC Call (FP7).

The Commission is advised to identify initiatives within the Seventh Framework Programme (FP7), of community funded EU digital libraries projects, such as *eContentplus* programme, in order to select Champion Projects that would be willing and ready to start the implementation. The new *eContentplus* project ARROW (see Annex 5 to this Report) is a good example of a concrete beginning of deployment.

³² Established by the Commission on 22 March 2007, the group's mandate includes: "To monitor progress and assess the impact of the implementation of the [Commission Recommendation of 24 August 2006](#) on the digitisation and online accessibility of cultural material and digital preservation.[...] To provide a forum for cooperation between Member State bodies and the Commission at European level and to exchange information and good practices of Member States' policies and strategies on the digitisation and online accessibility of cultural material and digital preservation."

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March 24, 2005

Jule L. Sigall
Associate Register for Policy & International Affairs
U.S. Copyright Office
Copyright GC/I&R
P.O. Box 70400
Southwest Station, Washington, DC 20024

RE: Orphan Works Study (70 FR 3739)

On behalf of the undersigned illustrators and arts organizations, we respectfully petition the U.S. Copyright Office to maintain copyright protection of so-called orphaned works on all visual artistic works for the following reasons:

It's not valid to infer that a protected work of art has been abandoned simply because a potential user has difficulty identifying or locating an artist. Many works appear in print or on the internet as a result of unauthorized usage, and unsophisticated users may copy art from multiple sources. Also, as publishers adapt previously printed editions to the internet, artistic works may be separated from their original context without attribution. If a work of art is orphaned because of unlawful or feckless usage, its integrity will be irreparably compromised by stripping it of protection.

Automatic protection of visual artistic works is guaranteed without formalities. To strip past work of existing protections would bring copyright law into disrepute. Authors have been guaranteed protection under U.S. copyright law, the Berne Convention and other international copyright treaties. Because a searchable international registry of published visual artists does not presently exist for users to clear authors' rights, it would be unjust to penalize authors because new technology has given users a greater appetite for their work and easier access to exploit it.

Many published artistic works are independently copyrighted contributions to collective works. Even if a collective work is orphaned because a publication ceases or a publisher fails, an artist still retains the rights to his or her own individual contribution to the publication.

Authors' rights are exclusive. The public interest does not compel artists to publish their work. Therefore the public cannot demand that an artist's published work, even if orphaned, be made available for free usage before its copyright has expired.

BRAD HOLLAND, *ILLUSTRATOR*

C.F. PAYNE, *ILLUSTRATOR*

BRUCE LEHMAN, *ATTORNEY AT LAW*

ELENA PAUL, *ATTORNEY AT LAW*

DAVID LESH, *ILLUSTRATOR*

DUGALD STERMER, *ILLUSTRATOR*

CYNTHIA TURNER, *ILLUSTRATOR*

Authors' rights are their incomes. The *exclusive* right to publish or not publish gives the artist the right to determine what compensation is due for usage. Most freelance artists and writers have no other source of income but their creative work and the accumulated value of that work is no different than the value that accrues to one's home. Therefore the copyright that protects creative work does not deprive the public of an "entitlement" any more than does the ordinary ownership of private property.

Creativity is not chilled by protecting orphaned works. The human imagination is not dependent on unlimited access to an unlimited body of other people's work to physically appropriate. Even with copyright protection intact, orphaned work can inspire and influence others.

Free speech is not restricted by protecting orphaned works. Since ideas and influence are not copyrightable, no one's free speech is restricted by placing legal limits on their appropriation of other people's tangible expressions.

Archival preservation is not hampered by copyright protections. Copyright law already permits the copying of work for archival preservation and does not necessitate giving anyone a broader privilege to copy and distribute work without the author's permission.

Culture is not impoverished by protecting orphaned works, because orphaned works will still be available for study and enjoyment. But if copyright protection, once given, can be taken away, the thread of broader rights could unravel. Stripping orphaned works of their protection would encourage some users to attribute orphaned status even to works whose authors *can* be located, but with a bit of effort. This would endanger the rights of known authors.

The internet has destabilized the environment in which creators must work. And as artistic works become available worldwide, there is an increased demand for content. But the opportunity this presents to artists for disseminating their work is currently menaced by the threat to authorship that comes with unauthorized usage by others. Artists, like other creators, are trying to meet the organizational, financial and legal challenges necessary to create licensing systems to let them compete with corporate content providers. But it takes time, investment, and creative organization to achieve these goals, and in the meantime, artists must still be able to protect their works. Removing protection from work that has fallen through the cracks of this system-in-flux will unfairly reward opportunists at the expense of creative individuals. It would foreclose the ability of future licensing systems to protect and distribute that same work at a future date in a way consistent with the intent of copyright protections.

To strip orphaned works of their protection would invite unjust exploitation. Commercial stockhouses, databases and print and web publishing industries could freely gather "orphaned" images for use by simply declaring authors hard to locate. The Copyright Clearance Center, which currently claims they cannot track usage or identify authorship, would see their continued failure to pay artists legitimized.

To strip orphaned works of their protection would favor corporate interests over individual creators. Corporate copyright holders could easily staff up to handle the increased cost of monitoring and maintaining copyright protection while individual creators might well find the added burden of maintaining multiple copyrights prohibitive.

To strip orphaned works of their protection would threaten an author's integrity. It's a natural evolution for artists to create derivatives of their own work throughout their

careers. To force an artist's "orphaned" work into the public domain for others to "remix" without consent is hostile to the centuries-old recognition of authors' rights. It would allow others to create a bastard body of derivative work to compete with the artist's self-created derivatives. This could injure both an artist's reputation and the value of his or her work.

The removal of copyright protection for orphaned work would reinforce the agenda of the "free culture" movement to subvert existing copyright protection for other work. The alternative copyright drafted by Creative Commons and being promoted as law in various countries includes a "Share Alike version" that "requires derivative users to adopt a similarly open license." In the words of a proponent: " Widespread voluntary adoption of this [alternative] license will render measures like the extension of copyright irrelevant... The greater the volume of material with this kind of license that is out there, the greater the incentive to make use of it, even at the cost of forgoing commercial copyrights. Since most commercial culture depends ultimately on unpaid appropriation of older material, the effects will be cumulative, even VIRAL [emphasis added]." – "Lessig on the Limits of Copyright" by John Quiggin 1/26/05
<http://johnquiggin.com/index.php/archives/2005/01/26/lessig-on-the-limits-of-copyright/>

Since it is not self-evident that "most commercial culture depends ultimately on unpaid appropriation of older material," we should be cautious about accepting this argument as a legal premise. If users of unprotected "orphaned" work could embed their "new derivative creations" with a "viral copyright," then standard copyright law could become as vulnerable to its unintended consequences as computers to an internet worm.

The "Free Culture" argument is at odds with the principle of tangible expression, which is the only aspect of the creative process protected by copyright law. By arguing that creative work is only a "remix" of the work of others, the critics of copyright ignore the factors of experience, personal development and individual vision that are embodied in any author's tangible expression of an idea. The computer and internet, as well as Photoshop, stock and royalty-free content have all made it possible for many people to become content providers by "sampling" the work of others. But the demands of this "new modality" for free and easy access to usable work should not induce lawmakers to legislate as if creativity can be adequately defined by the "remix" model. There is a difference between the alchemy of new creation and the assembling of "found work." Legal protections for this difference have been built up over centuries and once eroded, would be painful and costly to recover.

The internet has created a culture of appropriation, and immediate global access to artistic works has facilitated piracy, unintentional infringement and plagiarism. But instant and unrestricted access to work should not be construed as a *necessity* just because technology has made it a *possibility*. That an artist's work now can be instantly transmitted around the world without the artist's permission or control does not justify a user's "right" to take the work. And if inability to trace a work to its author becomes the justification for creating such a "right," who and what will define the inability to trace the work?

The "orphaned" works currently under consideration by the Copyright Office include the work of many artists now in the prime of their careers. To remove copyright protection from this work has the potential to undermine the important public policy behind copyright: To promote the creation and dissemination of culture by rewarding incentive. Rescinding guaranteed protection from copyrighted works will do more harm than good to the creative community and by extension, to the public good.

Please maintain copyright protection of so-called orphaned works on all visual artistic works.

Sincerely,

By Brad Holland and Cynthia Turner, Illustrators' Partnership of America

Arts Organizations

UNITED STATES

Illustrators Partnership of America (IPA)
American Institute of Architects (AIA)
American Society of Architectural Illustrators (ASAI)
Artists Rights Society New York (ARSNY)
Association of Medical Illustrators (AMI)
Association of Science Fiction and Fantasy Artists (ASFA)
Guild of Natural Science Illustrators (GNSI)
National Cartoonists Society (NCS)
Pittsburgh Society of Illustrators
San Francisco Society of Illustrators (SFSI)
Society of Children's Book Writers & Illustrators (SCBWI)
Society of Illustrators Los Angeles (SILA)
Society of Illustrators New York (SI)
Society of Illustrators San Diego (SISD)
Society of Photographers & Artists Representatives (SPAR)
Akron Society of Artists

AUSTRALIA

Illustrators Australia (IA)
Australian Graphic Design Association (AGDA)
Australian Association of Architectural Illustrators (AAAI)

CANADA

Association des illustrateurs et illustratrices du Quebec
(Quebec Illustrators' Association)
Island Illustrators Society (British Columbia)
Canadian Association of Photographers & Illustrators in Communications (CAPIC)

PAN EUROPEAN

Association Européennes des Illustrateurs Médicaux et Scientifiques (AEIMS)
France – Germany - United Kingdom - Italy - Switzerland - Belgium – Holland

BELGIUM

Flemish Illustrators Association

FRANCE

La Maison Des Illustrateurs Francia / French Society of Illustrators

GERMANY
Illustratoren Organisation / German Society of Illustrators

GREECE
Aesopos / Greek Society of Illustrators

IRELAND
Illustrators Guild of Ireland

ITALY
Associazione Illustratori / Italian Society of Illustrators

JAPAN
Japan Architectural Renderers Association (JARA)

KOREA
Korean Architectural Perspectivists Association (KAPA)

MEXICO
Ilustracion Mexico / Mexican Society of Illustrators

THE NETHERLANDS
Association of Dutch Designers

NORWAY
KOPINOR The Reproduction Rights Organisation of Norway
Grafill

SPAIN
Federaciòn de Asociaciones de Ilustradores Profesionales
(Federation of Spanish Illustration Societies)
Madrid Professional Illustrators Association (APIM)
Catalunya Professional Illustrators Association (APIC)
Valencia Professional Illustrators Association (APIV)
Galicia Professional Illustrators Association (AGPI)
Pais Vasco Professional Illustrators Association (APIE-EIEP)

SWEDEN
Svenska Tecknare / The Association of Swedish Illustrators

UNITED KINGDOM
The Association of Illustrators (AOI)
Society of Architectural Illustrators (SAI)

THE ORPHAN WORKS ROUNDTABLE

Conducted by the Small Business Administration

August 8, 2008, Salmagundi Club, 47 Fifth Avenue, New York, NY 10003

How Will the Orphan Works Bill Economically Impact Small Entities?

Part 5: Press Articles

H.R.5889 and S.2913 Amendments

Submissions to 2005 Copyright Office Orphan Works Study

APA Position Paper to House Judiciary 2005



A R S
ARTISTS RIGHTS SOCIETY

APA

ADVERTISING
PHOTOGRAPHERS
OF AMERICA

view archived webcast: <http://videos.cmitnyc.com/asip.html>





Main basse sur les images "orphelines"

Le 6 septembre 2008 à 16h00

LE FIL ARTS ET SCÈNES -

Menace on copyright: U.S. law aims to make free use of photos, paintings or drawings that are not known to the author. Who benefits?

Simple common sense, say some. Hold-up legal, say others. Legal, as perpetrated by deputies and senators American remotely behind the scenes by the giants of the Internet. The purpose of breakout? The copyright of painters, photographers and cartoonists American, but perhaps also those of their foreign colleagues if they do not wake up. The Senate and House of Representatives poised to effect to adopt a "law on orphan works" ("orphan works bill") to facilitate the commercial use by libraries and museums in the USA, works stored in their funds is not known authors. Thanks to this law, thousands of photos and drawings that take dust could find a second life. The orphan works bill authorizes indeed anyone wishing to reproduce, market and transform a work of his choice to do so, provided it has first made - unsuccessfully - "a search of good faith and reasonably careful" to discover the author. "Take a picture of Cartier-Bresson, said Brad Holland, New York illustrator who has been leading the fight against this bill. According to the Berne Convention, signed in 1976 by many countries including the USA, the beneficiaries of the photographer are protected for seventy years after the artist's death. Protected in France! Because the USA, these pictures will, if this law passes, to be used free of rights by any beijing of Indiana. It suffices to say that has fallen over the Internet and has not regained its author despite a search "thorough". In his mind, it is therefore a work "orphan".

Everything depends of course on what is meant by "bona fide research reasonably careful." For sixty organizations mobilized against the project "orphan works", the artistic blur gives carte blanche to future offenders. For hundreds of thousands of drawings and photographs are available on the Internet without mention of title or author. Whatever, in truth, they have been posted by a teen on MySpace site or distracted by a creator on the blog of a friend: "Unlike the movies or books, works of visual art did not securities

universally recognized, said Ted Feder, president of the Artists Rights Society, representing beneficiaries of Matisse, Picasso, Chagall and many others. Thanks to the Berne Convention, these works are protected by the minute when they were created without the artist having to perform any formality. If you want to use a drawing or a photograph but do not know the author, you have to abstain. However, thanks to "orphan works", anyone can claim that it made a search "good faith" is immediately covered by the law. "

Of course, if he discovers that his work was reproduced without his consent, an artist can always drag the offender before the courts. But the law states - at least in its current version - he will forfeit any claim of damages. It even adds that the judge responsible for deciding compensation should limit the amount of the complainant who was allegedly paid "by a reasonable buyer to a seller reasonable"! "A crazy idea! "Said Ted Feder.

Not for everyone. Who benefits law, in effect? Senate Bill S-2913 is not content to open a boulevard to the transgressors. It provides for the creation of huge banks digital recording of works of art. The artists (but also you, me and anyone sharing photos on the Internet) are invited to submit proof of their past work (and then each time for those to come), thereby ensuring their protection. As for offenders, they can check, consulting these files, that the work they intend to reproduce is the "orphan".

Question of 150 000 dollars: who has now technological means, and shoulders broad enough financially to save millions of digital images? Certainly not the current U.S. Bureau of copyright, which has already disqualified. The challenge, however, does not frighten Google. The firm of Mountain View, California, is already scanning hundreds of thousands of books stored on the shelves of American libraries. Not only does the law protect the orphan works against those who accused Google (in court) to provide Internet text or images that are not free of rights, but it would provide substantial advertising revenues related to consultation of these images. And if artists refuse to register their work? This will be "at their peril! warns Brad Holland. A few months ago, I met David Carson, the U.S. Bureau of copyright, and I asked the question. He simply replied: "If you want infringers to steal your work go ahead and do not register!" "

The "invitation" made to artists to record their creations in private databases is a flagrant violation of the Berne Convention. Nobody denies. The question arises: did Google participate, from near or far, in the writing of this law? Questioned by writing, the legal department of the firm declined to comment, but the American press has widely reported the efforts of giant Internet in lobbying in recent months: new offices and hiring new staff in Washington ... including a specialist, at least, intellectual property issues. As Senator Leahy, the rapporteur of the law, he says he listened to "any person interested in this law."

Google is not the only company, by the way, to take advantage of the law orphan works. Microsoft and photo agencies Getty Images and Corbis do not hide their enthusiasm. The second possesses thousands of images "orphan" (as

Bettman Archive, bought by Bill Gates, owner of Corbis), they can market if the law is passed, without fear of being intimidated by potential beneficiaries. Above all, so the law would undermine the legal foundations of copyright that could pave the way for a renegotiation of contracts. A beautiful gift! "We are a commercial enterprise, admits Stefan Biberfeld, legal director of Corbis Europe. Our goal is to make profit. But we also want to make sure our sponsors are well paid. The balance has been found in this project, between the possibility to use all existing works - essential right of the consumer culture - and respect copyrights? We, too, it's true, we ask the question. "

This has necessitated a hair, June 5 and then on July 30 that the law works orphan is adopted by the U.S. Senate: based on the absence of a dispute in the ranks and Democrats Republicans, the rapporteurs have tried to pass through a specific procedure. The collective opposition against the law has been delaying the deadline, but a new vote is announced for next week. In France - one of the countries which have undoubtedly the most fought for the protection of copyrights - the Ministry of Culture wants to be reassuring ... and prudent: it is not in the traditions of diplomatic criticize a bill abroad as the Congress has not voted. But we take precautions: "We requested a report on these issues the Supreme Council of intellectual and artistic property," explains Olivier Henrard, legal advisor to Christine Albanel. We will be very careful to respect the balance: on the one hand the need to make more easily accessible works orphan, on the other hand defending the rights of authors. The guarantee can be found without a doubt the precise definition of research which will engage a prospective user of these works to find their creator. It may very well "lock" the text to make sure that these searches will be made in earnest. "Maybe. In the meantime, the text is on the other side of the Atlantic. On one shore to another, was not quite the same light on the culture: advantage to the investor and the consumer on the one hand, protection of the work and its author on the other. It was not quite the same weight. When asked by a source close to the ministry if the rapporteurs of the law, the USA, consulted with their partners or french Europe, the answer is also clear: "Why, it is in their habits? "

Olivier Pascal-Moussellard

Telerama n° 3060

Editorial & Commentary

The proposed new law is a nightmare for artists

1.6.08 | Issue 192

US Congress is currently debating legislation which will remove the penalty for copyright infringement if the creator of a work, after a diligent search, cannot be located. Libraries and archives are among the groups lobbying for the change to allow copying of so-called “orphan works”. The legislation would allow a rights holder who subsequently emerges to be paid the normal fee, but removes the currently costly statutory damages which rights’ holders can charge.

The term “orphan work” is used to describe situations in which an infringer of copyright decides that he cannot locate the copyright holder—usually the artist in the case of paintings and drawings. In a radical departure from existing law, the US Copyright Office has proposed that Congress grant infringers freedom to ignore the rights of the copyright holder. The proposal goes far beyond current concepts of fair use, and, as explicitly acknowledged by the Register of Copyrights in a recent congressional hearing, it is not designed to deal with the special situations of non-profit museums, libraries and archives. Rather, it would give carte blanche to infringers even if they wished to exploit an artistic work for commercial advantage. Under the proposed legislation, if a copyright holder finds out about an infringement after the fact, his only remedy would be to bring a lawsuit in federal court where a judge could order the payment of what he determines would have been paid by “a reasonable willing buyer and reasonable willing seller” before the infringement took place. This is in sharp contrast to existing law where a copyright holder may obtain a halt to the infringement, the destruction of infringing copies, and damages that may be up to \$150,000 for each work of art infringed. This would remove the deterrent that keeps piracy rates at a manageable level.

The Copyright Office presumes that the infringers it would let off the hook would be those who had made a “good faith, reasonably diligent” search for the copyright holder. Unfortunately, it is totally up to the infringer to decide if he has made a good faith search. Bad faith can be shown only if a rights holder finds out about the infringement and then goes to federal court to determine whether the infringer has failed to conduct an adequate search. Few artists can afford the costs of federal litigation: attorneys’ fees in our country vastly exceed the licencing fee for a typical painting or drawing.

The Copyright Office proposal would have a disproportionately negative, even catastrophic, impact on the ability of painters and illustrators to make a living from selling copies of their work. This is because—unlike books, songs and films—works of visual art lack universally accepted titles that permit searching by name. And, the number of works by most artists typically exceeds the output of novelists, composers or script writers. Furthermore, it is easy for an illustration, drawing or image of a painting to become separated from any publication in which it has been reproduced and which may have identified the artist, especially in the internet age.

The Copyright Office has stated that this problem will be addressed by private companies creating electronic registries of works of visual art. Using unproven technology, a copy of a work of art could be scanned digitally for comparison with the works on file with that company. There would be no limit on the number of such registries, and to protect himself effectively the artist would have to pay to digitise his work and to place it with all of them. The burden of this nightmarish bureaucracy would be overwhelming in expense and complexity for artists. I can speak from personal experience that anyone who has been painting or drawing for any length of time is likely to have thousands of works of art that he would have to pay to digitise and file with one of these companies. And, the Copyright Office has made it clear that failure to register a work with these private companies would automatically render it an orphan, available to be copied by infringers with impunity.

The Register of Copyrights acknowledged the expense and complexity of such a system when she told Congress that neither her office in the Library of Congress nor “any government agency could ever keep pace with the image technology that exists outside our doors and beyond our budget”. This is a remarkable admission from the leader of an agency that has been registering copyrights in artistic works for over 200 years and operates on a budget of over \$300m. Visual artists usually work alone. They receive no salaries, do their own marketing and have no administrative support. In short, it is a tough life. It is deeply troubling that government should be considering taking away their principal means of making ends meet—their copyrights. I can only hope that Congress will reject the Copyright Office’s ill-advised recommendations.

– Frank Stella

The writer is an artist. This piece was written with Theodore Feder, President of the Artists Rights Society, based in New York.

Link for this article: <http://www.theartnewspaper.com/article.asp?id=8580>



Artist group protests “orphan” copyright bill

Boston Herald - Boston, Mass.

By **DAVID WILDMAN**

May 22, 2008

The Orphan Works Act seems innocuous enough: a federal bill designed to help museums and libraries use works of art if the creators are unknown, something they can't do under current copyright law.

Don't believe it, says a group of Massachusetts-based artist organizations and volunteer lawyers. They claim the bill now sailing through the House and Senate will radically restructure copyright law and infringe artists' rights.

"What they are doing is, in effect, reversing the order of copyright law," said Brad Holland of the Marshfield-based Illustrators Partnership of America. "This bill shifts the presumption of ownership from the creator to the public."

The bill was originally devised to help museums, libraries and documentary filmmakers access images and artworks whose author is unknown. For example, a museum with a collection of Depression-era photos could not put it on their Web site under current copyright law without getting permission from each of the photographers, which would be nearly impossible.

The Orphan Works Act solves this problem, but goes much further. It allows any work of art to be used for free by anyone who files notice that they are conducting a "diligent search" for the creator. It also calls for the creation of a privately run database where artists must register their work or run the risk of having it declared "orphan."

"It's like killing a mosquito with a machine gun," said Jim Grace of Boston's Volunteer Lawyers for the Arts. "I think it's being driven by commercial interests."

Under this bill, artists would have to register their works for a fee to receive copyright protection that is now free. The database could be run by an Internet company such as Google (one of the bill's backers), which would stand to make a huge profit.

Bill co-sponsor Sen. Patrick Leahy (D-Vt.) declined to comment but released a statement: "We have worked to strike the right balance to protect the interests of copyright owners and potential users of orphan works."

"That's bull," said Cynthia Turner of the Illustrators Partnership. "If they really wanted to create orphan works legislation to do what (Leahy) says, they could bring in new, special, very defined uses. Latitude could be allowed in using works where the copyright owner couldn't be located or identified."

In response to the outcry against the bill, U.S. Rep. Bill Delahunt (D-Quincy) wants to give artists more of a say.

"It's been a while since we've heard from that many people from the artists community," said Mark Forest, Delahunt's chief of staff. "If they're concerned, we're concerned."



Intellectual Property Watch

7 May 2008

Support Mixed For US Orphan Works Bill As Issue Catches Global Attention

By Dugie Standeford for *Intellectual Property Watch*

In an issue that may be rising internationally, legislation pending in the United States Senate and House to free up use of “orphan works” whose copyright owners cannot be found has won strong support from the recording, webcasting and library sectors but faces challenges from visual artists and the textile industry.

The Shawn Bentley Orphan Works Act of 2008 (S 2913) [pdf] and the Orphan Works Act of 2008 (HR 5889) [pdf], introduced on 24 April, require users of such materials to search diligently for their owners, and to compensate them if they are eventually found.

But the House version is less palatable to public interest groups than the “cleaner” Senate measure, Public Knowledge Director of Policy and New Media Alex Curtis said in a 24 April blog.

Meanwhile, the World Intellectual Property Organization and some members of the European Union appear to be taking the orphan works issue into greater consideration as well.

Both pieces of US legislation seek to ensure that users make a diligent search for copyright owners before using work claimed to be orphaned, and pay them reasonable compensation if they surface, unless the use is for scholarly, charitable, religious or educational purposes. The US Copyright Office must develop search guidelines and certify private-sector registry services for visual art.

Curtis said the Senate bill requires little modifying but the House bill “resembles more of a well-decorated Christmas tree” in favour of copyright owners. It requires users to register their search efforts in a “notice of use archive” housed at the Copyright Office. It is unclear whether the depository would be “dark” - meaning its contents would be disclosed only when a user is sued - or open, raising privacy and “copyright troll” concerns, he wrote. Users who fail to deposit their search results are considered infringers.

Users will be charged a fee to register their searches in order to fund the new administrative procedures, said Emily Sheketoff, executive director of the American Library Association’s (ALA) Washington, DC office. The requirement will be “burdensome and potentially extremely costly” to libraries engaged in mass digitisation projects where millions of titles are involved, she told Intellectual Property Watch.

Despite concerns over several provisions in the House bill, Public Knowledge and the ALA said they are pleased with Congress’s efforts so far.

Libraries like the fact that the bills provide a safe harbour from statutory damages for librarians and archivists if a reasonable search is conducted, Sheketoff said. In addition, she said, the legislation does not affect fair use. The measures are the “first pro-user change to the Copyright Law in almost two decades,” Curtis wrote.

The bills are an “important step” toward meaningful consideration of the needs of users and copyright owners, Recording Industry Association of America Chairman Mitch Bainwol said in a statement. The legislation is a “good first step as we consider how innovation is impacted by our copyright system’s lack of registration requirements coupled with strict liability and statutory damages,” said Digital Media Association Executive Director Jonathan Potter.

Visual Artists, Textile Industry Opposed

Illustrators, photographers and other visual artists, however, are mobilising to challenge the proposal.

“Our chief objective to these bills is that they’ve been written so broadly their effect can’t be limited to true orphaned work,” Illustrators’ Partnership of America (IPA) founder Brad Holland told Intellectual Property Watch. Forcing anyone who creates a visual work, whether professional or personal, published or unpublished, to register it with yet-to-be-created commercial registries will cause users to rely increasingly on the companies to perform a diligent search, he said. Unregistered works could then be infringed as orphans, he said.

The proposals will disproportionately affect visual artists because paintings, drawings and photographs are often published without contact information, credit lines can be easily removed by others, and pictures can be separated from the publications in which they appear, Holland said. And because visual artists often produce many more works than the most prolific author or songwriter, it will cost them more time and money to register and maintain tens of thousands of registrations, he said.

The legislation will create a “gold mine for opportunists” as commercial archives harvest newly-created “orphans,” alter them slightly to make “derivative works,” and then register them as their own “creative works,” Holland said. In addition, coercive registration may violate the Berne Convention, which bars requiring “any formality” as a precondition to copyright protection, the IPA, Advertising Photographers of America and Artists Foundation of Massachusetts said in 30 April comments to the Senate Judiciary Committee.

At the heart of the orphan works debate is the notion that old works whose authors have abandoned their copyrights and who cannot be located should be made available for the greater good of society, Corinne Kevorkian, president and general manager of the Schumacher Division of F. Schumacher & Co. said at a 13 March hearing by the House Judiciary Subcommittee on Courts, the Internet and Intellectual Property.

Such works arguably have no commercial value but are of cultural, historical or educational significance, Kevorkian said. Textile designs for home furnishings, by contrast, are created solely for commercial exploitation and can never be considered orphaned, she said. They are “not intended to be art,” she added.

The orphan works proposal will open the door to massive commercial theft, Kevorkian said. She urged lawmakers to exclude any pictorial or graphic work initially created for commercial exploitation or that was at any time commercially exploited. Kevorkian spoke on behalf of the National Textile Association, American Manufacturing Trade Coalition, Decorative Fabrics Association, Association of Contract Textiles and Home Fashion Products Association.

[Note: The House Judiciary Intellectual Property Subcommittee approved HR 5889 on 7 May.] The bills, which so far have fewer than a handful of sponsors each, have been referred to the respective judiciary panels. The Senate version could see a Judiciary Committee mark-up and vote as early as 8 May, a Democratic committee aide said.

WIPO, EU Developments

The ALA is a member of the Library Copy Alliance, which represents US libraries at WIPO and other meetings. At the next meeting of the WIPO Standing Committee on Copyright and Related Rights, the alliance likely will be part of a group sponsoring a “side event” on orphan works. “Member nations are interested in what we have developed here [US], and hopefully can use our legislation - if it passes - as a model,” said Sheketoff. The next SCCR meeting is scheduled for 3-7 November 2008.

Meanwhile, in its 24 August 2006 recommendation on the digitisation and online accessibility of cultural content and digital preservation, the European Commission asked member states to find ways to ease the use of orphan works, a Commission spokeswoman said.

Recent status reports show that Sweden, Finland, Denmark and Hungary are dealing with orphan works via an “extended collective licensing” arrangement which allows collective management societies in certain circumstances to issue licences on behalf of rights holders it does not formally represent, the spokeswoman said. Germany, Hungary and Denmark are in the process of adopting stronger regimes, she said. The problem is still under discussion in most EU nations, often in working groups treating orphan works with other

copyright-related issues in the digital libraries arena, she said.

The Commission is supporting the work of sector-specific groups, including text, audiovisual, music/sound and visual/photography, that are trying to agree on what actions must be taken before a work is considered orphaned, she said.

Dugie Standeford may be reached at info@ip-watch.ch.

Filed under:

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- [Access to Knowledge](#)
- [Education](#)
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- [US Policy](#)
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3 Comments

1. Wow! It sounds as though the U.S. is abolishing copyright protection, except for large corporations. I am an artist and, according to this, any company could publish my work. It would be up to me to catch violators. Even then, I would be unable to prevent them from using my work, or negotiate my own terms for use, but would have to agree to what is considered “reasonable.” Who decides “reasonable?”

And the “search” requirement is a joke. For instance, if someone sees my image of an American Alligator titled “The Grin,” they might search Alligator, Reptile, etc. However, not only would these general headings bring up an excessive number of matches, none of them would retrieve the correct one!

The requirements say that each artist is responsible for registering their material, but under these terms, what’s the point? So that a corporation can’t sue the individual they stole from in the first place – when that person has the audacity to use the image she/she created?

Comment by Carol Samsel () — 12 May 2008 @ [11:35 pm](#)

2. “Both pieces of US legislation seek to ensure that users make a diligent search for copyright owners before using work claimed to be orphaned, and pay them reasonable compensation if they surface, unless the use is for scholarly, charitable, religious or educational purposes.”

This is what I do not understand. Why should works used for those purposes be exempt from reasonable compensation!!!!????? That would exempt all of the work I do - all work for textbook and publishing companies, all work for non-profits, all work for any religious organizations. Everyone else working for those organizations gets paid. Why should photographers not be compensated?

Tina Manley

Comment by [Tina Manley](#) () — 13 May 2008 @ [9:12 pm](#)

3. Absolutely horrifying. As a stock photographer this would place the burden on me to track all possible misuses of my photographs. It would be such an overwhelming task I doubt there would be much time

leftover for creating new content and making a living!

This is not the first time there have been efforts to pass this type of bill. The Orphan Works Bill needs to be defeated soundly once and for all. I urge everyone who opposes these bills to write their congressional representatives!

Comment by Lisa Young () — 24 May 2008 @ 6:49 pm



Another IP Fight in Congress

Artists's groups rebel against copyright law proposals governing orphan works.

By Abby Christopher
IP Law & Business/July 2008

Senators Orrin Hatch and Patrick Leahy, nursing their wounds from the derailment of patent reform legislation this year, are still hoping to make their mark on IP law in this session of Congress. Bipartisan copyright legislation addressing orphan works was on a fast track this spring, emerging from the Senate Judiciary Committee in mid-May with unanimous consent, and appeared to be heading straight for the floor of the full Senate in June.

But then came speed bumps. Professor Lawrence Lessig of Stanford Law School, an icon of the free culture and copyright reform movements, wrote a damning op-ed piece about the legislation in The New York Times. Lessig's criticisms exposed a rift among allies. The legislation proposed by Hatch and Leahy is strongly supported by the Electronic Frontier Foundation, where Lessig served as a director until recently, and was developed in consultation with Public Knowledge, a nonprofit that works to defend citizens' digital rights. (PK's founder, Gigi Sohn, is a friend of Lessig and was honored by EFF in 2006.)

At the same time, professional groups representing artists and designers started an impressive grassroots effort to voice their concerns. Since mid-May, representatives from Orphan Works Opposition Headquarters, Advertising Photographers of America, Illustrators Partnership, Association of American Editorial Cartoonists, and the Artists Rights Society have stormed Capitol Hill, and have spurred into action individual photographers, illustrators, cartoonists, and textile designers. Members of Congress have received more than 85,000 e-mails and calls from angry artists raising fierce objections to the bills. By contrast, the Motion Picture Association of America, the American Publishing Association and the American Society of Media Photographers support the bills.

The problem that the bills are aimed to solve was described to the subcommittee on Courts, the Internet and Intellectual Property of the House Committee on the Judiciary earlier this year by Marybeth Peters, the register of copyrights at the U.S. Copyright Office. "When a copyright owner cannot be identified or is unlocatable, potential users abandon important productive projects," Peters testified. "Publishers cannot recirculate works . . . museums are stymied in their creation of exhibitions, books, Web sites, and other educational programs." An orphan work can be an illustration, song, software, video game, letter, cartoon,

painting, photograph, textile design, book, or other original work, either old or newly created, whose creator and/or owner cannot be identified or located. These works tend to remain unseen, because potential users or licensees fear legal retribution should creators/owners surface. Several previous attempts, most recently in 2006, have tried to address the issue via new copyright law.

In this year's bills, users would be given a safe harbor if they prove that they have made a so-called good-faith, diligent effort to identify and find the creator/owner. "The Orphan Works Act does not dramatically restructure copyright law-it simply provides for a limitation on damages in limited circumstances in which, among other things, the owner is not locatable after a diligent search," according to Senators Leahy and Hatch. (The House version is sponsored by Representative Howard Berman.)

But this standard of a diligent search doesn't please Lessig at all. "The uncertain standard . . . doesn't offer any efficient opportunity for libraries or archives to make older works available, because the cost of a 'diligent effort' is not going to be cheap," Lessig wrote. "The only beneficiaries would be the new class of 'diligent effort' searchers."

Artists, for their part, believe "these bills reflect the anticopyright movement," says Theodore Feder, president of the Artists Rights Society, which represents the rights interests of over 30,000 visual artists and estates of visual artists. Removing the threat of statutory damages will be a green light to infringers, he says. "The worst that happens for the user is pay [fair compensation] now or pay later," Feder says. Alex Curtis, policy director at Public Knowledge, notes that artists can still sue for damages, but if the user can prove a diligent search, the award of damages will be much more unlikely. Feder says that very few artists have the money to go to court.

Recognizing the financial burden for small businesses and individual artists of suing alleged infringers, each of the bills calls for a "Study on Remedies for Small Copyright Claims." If the legislation passes and this section is retained, within two years of enactment the Copyright Office would have to submit a report on the subject to the House and Senate Judiciary committees. But this won't pay artists' rent or gas bills-it would just be a study.

Copyright lawyers say the legislation could force artists/owners to strike fair compensation settlements out of court. But it could also drive new needs to track and protect creative works, and will certainly spur new technology. Before the legislation can be implemented, the bills call for the establishment of at least two separate independent databases certified by the Copyright Office that allow for searches of copyrighted works, including visual works. The effective date of legislation could be January 1, 2009, but it could take up to January 2013 to establish these databases. Surely there will be more speed bumps ahead.

<http://www.ipwww.com/display.php/file=/texts/0708/orphan>



WARREN'S Washington Internet Daily

Covering Legislative, Regulatory and Judicial News Affecting Internet Business. From the Publishers of [Communications Daily](#).

MONDAY, JUNE 9, 2008

VOL. 9, NO. 111

Today's News

ORPHAN-WORKS BRAWL: Illustrators pound Hill, indie labels split with RIAA. House Small Business Committee may explore. (P. 1)

STUDIOS HANG HOPES on free 'Digital Copy' as carrot-and-stick to sustain DVD sales while reducing piracy. (P. 3)

CAPITOL HILL: Senate spyware hearing set for Wednesday... Hold hearings on ISP ad targeting, privacy groups say. (P. 4)

AGENCIES: PFF warns of content filter in Martin's free broadband plan; Martin drops item from schedule in part from filter concerns... FBI's Internet Crime Complaint Center itself spoofed... Six schools get DoD cybersecurity grant. (P. 4)

COURTS: Porn magnate convicted of obscenity by Internet, mail. (P. 5)

INTERNATIONAL: eBay owes \$30,000 to Hermes for counterfeit sales under French decision... Dutch 'topsite' server confiscated. (P. 5)

DOMAIN NAMES: .ORG proposal for domain name system security services raises numerous stability issues but registry can mitigate them, ICANN review panel says. (P. 6)

Orphan-Works Bills Scorned by Visual Arts, Indie Labels

Weeks after House and Senate bills on orphan works passed with little content industry comment, opponents are angling to kill provisions they say would cripple small businesses. The visual-arts community hit the Hill last week to protest what it portrays as a hijacking of the orphan-works issue as it was presented in a 2005 Copyright Office report. The leading group of independent labels broke with the RIAA over backing the bill, indicative of a larger split between corporate trade groups and their counterparts in sole-practitioner fields.

Legislation in both chambers debuted and passed quickly, after the issue simmered for years. After a hearing largely ignoring visual-arts critics, the House IP Subcommittee approved its bill with a "marker" for later development of best practices for "reasonably diligent" searches for copyright owners (WID May 8 p1). The Senate Judiciary Committee held no hearing on its bill, which sets a 2013 deadline for registration databases to go live and saw language removed on court interpretation of reasonable searches (WID May 16 p1). At the time, Chairman Patrick Leahy, D-Vt., touted support by major content trade groups.

The House Small Business Committee has shown "some interest" in reviewing the issue, Illustrators' Partnership of America founder Brad Holland told us. That committee, which we couldn't reach to confirm, reviewed Copyright Royalty Board Internet radio rates as they applied to small webcasters, but took no further action (WID June 29/07 p3). About 30 visual arts professionals visited Hill offices to explain that their works are largely orphans because they were posted to the Web with neither authorization nor attribution, he said. The partnership proposed amendments to House IP on use of orphan works under contractual language on indemnification and to require a "market impact" survey. The group also wants to make the law's effective date contingent on a determination that the language won't violate international agreements, Holland said. The partnership said it counts dozens of groups opposing the bills as encouraging "wide-scale infringements" while reducing IP protection.

The Copyright Office ran a bait-and-switch from its 2005 notice of intent, which focused on facilitating libraries', museums' and other nonprofits' efforts to digitize collections to improve access to them, Holland said. Artists want the issue narrowed back to that focus, scrapping commercial use, he said. Cynthia Turner, also of the partnership, noted that last week the European Union approved controversy-free orphan works legislation focused on nonprofits. Copyright Office roundtables on orphan works never addressed alternates to registries, an "untested, untried, unaccountable market system" favoring Google, Getty, Corbis and other commercial aggregators, Holland said. Turner said artists would incur high costs registering works, and they hesitate to hand over high-res, commercial versions to Google or others.

Visual artists' frustration stems largely from feeling blindsided by this year's bills, Holland said. An aide to Leahy told us the illustrators historically have participated in orphan-works discussion, dating to the Copyright Office report, and they testified at a Judiciary hearing. Holland said the 2006 hearing, the only one by the committee, was attended by only two senators. The Leahy aide said the committee's legislation went much further with "robust search criteria" than the Copyright Office recommended. "The illustrators' associations are only now ginning up the grassroots opposition to a bill they have been working on for years," the aide said.

Indie Labels: Text-Based Search Enough?

The House and Senate bills lack any limits on what an "infringer" -- the bill's term for the user of an orphan work -- can do with a work after a search, including licensing it for profit, the American Association of Independent Music said in a position paper. The legislation could rob artists under collective bargaining agreements of owed residuals, it said. Without recourse to legal fees from infringers, copyright owners likely would find it too costly to sue without "perfect evidence" of an inadequate search, the paper said. In any case, infringers need make no public notice of intent to use a work, so "how would the copyright owner ever know the infringement has occurred?" the paper said.

A music industry executive told us RIAA support came from belief that "a text-based search will do it" to find a copyright owner. "I don't think that's true," given rampant mislabeling of music on the Internet, the executive said. Few databases can search for song components like lyrics heard in airplay but otherwise unidentified, the executive said. A recent House IP invitation-only closed meeting featured the RIAA, MPAA, Google and Public Knowledge, but "I can tell you that nobody in the music business" sought the bill. The issue is three years old, but orphan works largely was overshadowed by Section 115 licensing reform and IP enforcement in a massive copyright bill last Congress, the executive said. An RIAA spokeswoman declined to comment on its reasons for backing the measure, saying only that the RIAA supports "meaningful efforts that would allow the public greater access to sound recordings," even in legislation that "may not be perfect."

The Leahy aide called it "misinformation" to say the bill requires registration to get legal protection, but the executive said the bill is "de facto... establishing a new compulsory license" by putting unregistered artists at a legal disadvantage in court. The law can't explicitly require registration or it will violate the Berne Convention, TRIPS and other treaties the U.S. has signed, the executive said. Book publishers and music executives in the U.K. think the U.S. will be in trouble, the executive said, citing a recent visit: "I can tell you there are European commissioners that are looking at this right now." -- *Greg Piper*

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Rescuing Orphans: Can Congress Balance the Public Good and the Rights of Artists?

By Jeff Ignatius
Wednesday, 28 May 2008

Copyright law is arcane enough, but a debate bubbling in Congress and among artists, libraries, and museums is important despite its obscurity.

The issue is "orphan works" - writing, photographs, paintings, and music whose copyright-holders are difficult (or impossible) to locate or contact.

Corynne McSherry, staff attorney for the Electronic Frontier Foundation, said the result is that a library or museum will not make the material available to the public because of the potential penalty of statutory damages - which have a ceiling of \$150,000 per copyrighted item.

A museum is "worried that it might get sued," McSherry said. "So the material stays locked away."

"They just sit on a shelf," said Alex Curtis, director of policy and new media for Public Knowledge. "The main reason for that is because the owners can't be found to ask their permission to use."

"There are a lot of people that have a lot works essentially locked up that they can't use or even put on display," Curtis continued. "Some of the people are libraries, archives, museums that have received donated goods. Folks might die, and their heirs might donate boxes of photographs, or pertinent things that might be historically significant. But those works can't be exploited - meaning, no library could put it online ... because they don't actually have permission from the owner. A lot of that is culturally significant. Documentary filmmakers have the same problem."

Both the Electronic Frontier Foundation and Public Knowledge support orphan-works reform. The goal is to make more material publicly available. But many groups

representing artists and other copyright-holders oppose orphan-works reform, arguing that their rights are being eroded.

The Public Good

The United States Holocaust Museum has thousands of items it doesn't consider displaying because of rights issues. Karen Coe, associate legal counsel for the museum, outlined the scope of the problem to a House of Representatives subcommittee earlier this year: "Since its establishment, the museum has acquired and currently maintains approximately 42 million pages of archival documents, 77,000 photographs, 9,000 recorded oral histories, 985 hours of historical film footage, and its library contains 72,000 items in 55 languages. The majority of these materials are foreign works, many of them are unpublished works, and many of them are orphan works."

Davenport's Putnam Museum doesn't call orphan works a problem; they're just a fact of doing business. Eunice Schlichting, chief curator at the Putnam, said items whose copyright owner is uncertain are marked for museum use only instead of display.

Amy Groskopf, associate director of resource services for the Davenport Public Library, said in an e-mail that her organization has a similar position: "If we have any questions as to whether an item we want to post on our Web site is in the public domain or something to which we have the rights, then we just don't post it."

The issue isn't limited to artifacts. Carnegie Mellon University's library system sampled its collection between 1999 and 2001 that found that it could not locate the publishers for 19 percent of what it owned. This means that because of current copyright law, the university would likely not digitize those works and make them publicly available on the Web.

"The risk is quite high," McSherry said of using orphan works. "It's just an unknown. ... Because everybody is staffed by lawyers, and us lawyers are naturally conservative in most cases, the impulse is going to be: I just want to avoid the risk. It's easier, it's less expensive"

"For people who know the law and obey the law, this is a big problem," Curtis said, "and those people are risk-averse."

On a personal level, if you have a professionally taken photograph of a relative, a photo finisher is likely to refuse to reproduce it unless you can prove that you own the copyright.

This is the situation that Congress is trying to address, to allow good-faith users to reproduce these works without fear of statutory damages. The gist of both bills is that users would be required to conduct a diligent search for the copyright owner - best practices are not prescribed in the legislation at this point - prior to reproduction and would pay a reasonable fee if the owner comes forward later.

"That owner is compensated," Curtis said. "The only difference is that the law shields good-faith users from statutory damages."

Orphan-works reform has been percolating in Congress for nearly a decade, culminating in a 2006 report by the U.S. Copyright Office. (You can download the report at <http://www.copyright.gov/orphan/>.)

In 1976, Congress rewrote copyright law, automatically granting copyright protection to words, images, or music - "original works of authorship fixed in any tangible medium of expression." People who violate that copyright must pay the owner "actual" damages - compensation for losses or injuries that result from the violation. Owners who register their copyrights with the U.S. Copyright Office are further entitled to statutory damages, which begin at \$750 per item.

The primary argument in favor of the legislation (S.2913 in the Senate, H.R. 5889 in the House) is that there's a public good to be achieved by addressing the orphan-works situation. Everyone from museums to documentary filmmakers to collage artists would be able to use material that now has much financial risk attached to it.

The Rights of Artists

It sounds simple enough until you consider the parents of those orphans. Current copyright law has a stiff penalty for anybody who violates a registered copyright, and as the law stands now, the only safe route is to get permission from the copyright-holder prior to use. Orphan-works legislation changes that landscape.

More than 40 organizations representing artists, photographers, and musicians are opposed to orphan-works legislation, claiming that "each bill permits, and even encourages, wide-scale infringements while depriving creators of protections currently available under the Copyright Act."

Brad Holland, co-founder of the Illustrators' Partnership of America and co-chair of the American Society of Illustrators Partnership, is one of those opponents. The core problem with the legislation, he wrote in an e-mail, is that it shifts the burden from the copyright infringer to the copyright holder: "Most people don't understand current copyright law. But under current law, they don't have to - the law itself protects them from not understanding it. Anything you create is considered your private property.

"But under this amendment, all citizens would be required to understand that they must now take active steps - not to actually protect their work ... but merely to preserve their right to sue an infringer in federal court"

"Any modification of copyright protection is threatening," said Todd Joyce, president of American Society of Media Photographers (ASMP). "Fundamentally, there are just real

problems with somebody using my work without my permission. ... I want to have control over my work."

There are many nuances in the issue, and you only need to look at the ASMP position on the orphan-works bills to get a sense of the convolution. The organization opposes orphan-works legislation philosophically but is presently supporting the House's version over the Senate's. Many other artist organizations oppose the orphan-works legislation in all its forms.

"We're not jumping up and down about the orphan-works bill," Joyce said. "We wish it never existed. ... I wish that the copyright law would stay the same. But the problem is: It's not" going to.

Passage of an orphan-works bill is nearly inevitable, he claimed, and ASMP feels this is its best opportunity to get a version that's friendly to artists: "When you look at what's ahead of us - meaning the people who are going to take over in the committees - they're not as friendly from a copyright standpoint as we would like them to be. ...

"I wish we could just say, 'Vote no,' because that would be the easy route. ... [But] if these both get rejected, they're going to come back next session."

Holland's organizations oppose both orphan-works bills and find the House version just as problematic as the Senate version. "It's like accepting a plea bargain when you know you're not guilty," he wrote. His groups think the House version actually encourages copyright infringement. "The House bill is so bad it's hard to see how a worse one could be worse," he wrote.

At its core, orphan-works legislation primarily affects those artists who register their copyrights by removing the threat of statutory damages in some situations. For people who don't register their work, Joyce said, the effect of orphan-works legislation would be negligible: "This law won't really hurt you. If it passes, you can seek reasonable compensation" from somebody who uses your work without permission, which is substantially similar to the current law's actual damages.

Joyce doesn't dispute that there's a chilling effect to current copyright law, noting the situation of the Holocaust museum. "There are some legitimate beefs," he said. "There's got to be some middle ground somewhere."

ASMP has sought (and thus far been rebuffed on) a commercial exclusion for orphan works. The goal would be to rectify the situations of the United States Holocaust Museum, the Carnegie Mellon libraries, and the individual who wants to preserve a family photograph - while still preventing profitable exploitation of orphan works.

In lieu of that compromise, though, the ASMP supports a House provision requiring pre-registration of uses. "An infringer who wants to use an image who essentially cannot find the author has to register it with the copyright office," Joyce explained. "They also have

to register all uses they intend to use it for. And if they deviate from those uses ... they lose all orphan-works protection."

Joyce said the concern with the Senate version of the bill is that infringers might use orphan works as a fallback defense as a way to avoid statutory damages. The current House version, with its pre-registration requirement, would prevent that abuse, he said.

McSherry conceded the potential for abuse in the Senate version, which the Electronic Frontier Foundation supports. "That's a fair concern," she said, "and it's a question of weighing costs and benefits."

Other critics of the House version think its requirements will have a chilling effect similar to the current law. Libraries and museums, faced with the pre-registration paperwork, might again opt not to use orphan works.

"We like the Senate bill best, because we're concerned about the notice-of-use requirement," McSherry said. "We're concerned that might be overly burdensome. ... It's also important that we make it easy for users, too."

McSherry further said that pitting "the good of the many" against the rights of artists is a "false dichotomy. ... Artists are going to benefit tremendously ... because now they'll have an enormous amount of resources that they don't have access to right now." Filmmakers, collage artists, and remixers will now have a wealth of material that was previously too risky to use.

Furthermore, artists might get paid more, because people might be more willing to use (and pay for the rights to use) orphan works under this legislation. Right now, she said, people might find a substitute that doesn't carry with it the risk of statutory damages. With that risk eliminated or diminished, she said, artists in general should benefit.

"Copyright is supposed to make sure that artists get paid so they'll be encouraged to create new works," McSherry said. "Ultimately, the goal was to promote the progress of science and the useful arts - to promote the growth of knowledge."

Orphan-works legislation would restore some of that ideal, she said.

WE ASKED:

Should Metro government approve May Town Center?

YOU SAID:

"No! Metro should not approve this proposal, as it shows enormous short-sightedness without sustainability."

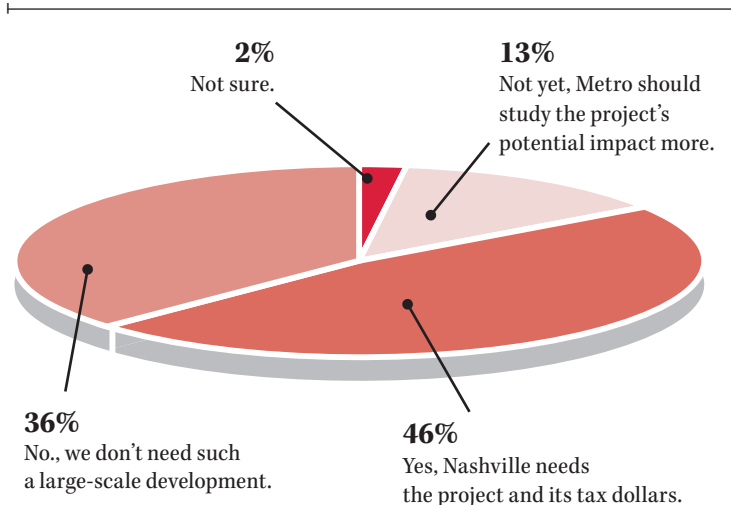
"We need projects in the downtown — North Gulch, East Bank and Metro Center — not on farmland, which lacks necessary access and utility infrastructure."

"Keep Bell's Bend Country" seems to translate to 'force the major landowners not to develop their land.' The city is growing, and it makes more sense to develop in town than to continue giving it all to the surrounding counties."

"No one wants development in their backyard, but can Nashville afford to bend to the will of only 300 existing residents when our city stands to gain so much? Smart growth can happen."

"I think the ultimate tragedy would be to approve the intense zoning only to have the 'pretty picture' disappear for lack of funding/feasibility, etc. and leave the good folks of Bells Bend saddled with a more intense zoning more suited for the type of mediocre PUD development that we see all over suburban middle

THE PULSE



Tennessee. This scenario seems so likely to unfold to me that I wonder whether it's not the real game plan anyway."

"This project will elevate Nashville to new heights. Everyone will benefit."

Absolutely! I'm happy for Franklin and Cool Springs, but I'm tired of all the attention and headlines that go that way. Until the urban core gets back on their feet which I think is still five to seven years away, Nashville needs Bells Bend and they also need to redevelop the Fairgrounds — no land swap, Nashville needs them both!"

"Isn't it about time that our com-

missioners and council members require Bells Bend to contribute to supporting the Nashville tax base as it does the rest of Nashville?"

"Nashville doesn't need a second downtown. The revenue projections are pure hype."

"It's the wrong scale in the wrong place. Development here should occur, but this scale is more appropriate for downtown, the east bank, fairgrounds and areas south of Broadway."

"Let's finish with downtown first, because we are a few years away from a project this big. Maybe find some companies to come and take Nissan's place!"

"There are a lot of great ideas incorporated in the project, but it's location is entirely inappropriate."

"Love the concept. How does this fit/compete with thoughts on the Fairgrounds? The development of both areas would benefit Nashville if done in an environmentally sensitive manner."

"In no way does Nashville need this large-scale development. I sincerely hope no tax money was spent on this thus far. Honestly, it sounds like a bunch of propaganda created by those who have money coming out of their ears. It's just a pipe dream for some group to make money in a new and different way. Just imagine the benefits if just one quarter of what was currently spent on May Town Center already went into the Nashville education system."

"Another boondoggle. How will Nashville ever get along without the continued urban sprawl? Think traffic's bad now? Do you really want to give up some of the last of our green space to yet another attempt to be an Atlanta 'mini-me'?"

"There are so many reasons this shouldn't happen, but chief on the list is the trend toward more compact and efficient (and, yes,

This week's question:

Should the Tennessee Department of Transportation subsidize the Music City Star?

To vote, go to nashville.bizjournals.com

green) urban development. Our wonderful city is replete with pockets (some rather large) of neglected areas so close to its center that should be reclaimed and developed first. It would be tragic to destroy this nearly unspoiled and priceless tract of riverfront land."

"With gas prices high and due to climb higher, with the need to focus on strengthening downtown, with the loss of a unique and incredible natural resource turned into urban sprawl — it is time to say no to the wrong kind of development and choose creative alternatives."

"When communities say no to new business, that is what they get, no new business. Ask Chattanooga and Birmingham how long it took them to recover after they turned down new business back in the middle of the 20th century. It took almost 50 years and they're still having to recover from those mistakes."

Proposed legislation could wreak havoc on ownership rights for musicians, writers

By GENE POOLE

"To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the Right to their respective Writings and Discoveries"

— U.S. Constitution

These words have stood as a testament to the artistic rights of the individual and have served as the beacon that would illuminate the dawn of free expression. The right to own one's ideas or creations were deemed so important they were built into the very fabric of the Constitution.

Two bills presently making their rather hasty path through Congress could jeopardize the livelihood of anyone who the original intent of Article 1 was meant to protect.

The Orphan Works Bill (H.R. 5889) and its Senate counterpart (S. 2913) would change the law related to the

automatic copyright protection granted to individuals that fixes that work to any medium.

The bill would permit an intended user who has conducted a "reasonably diligent search" in accordance with yet-to-be-established "best practices" to be able to use the work in any way he chooses if he cannot find that owner.

And what happens if that pesky original copyright owner was to appear and claim his work was used without his consent? Well, as long as the infringer "ceased expeditiously," then all the rightful owner would get would be a "reasonable amount" assuming "no willful intent" was established.

Mary Beth Peters of the Register of Copyright office, testified before the House earlier this year and outlined the problems when a copyright owner could not be identified or is unlocatable.

The images she outlined were of families finding old photographs in dusty attics trying in vain to have them retouched or repaired, but fearing lawsuits since they could not find the photographer to ask permission.

Or a museum or library wishing to use archival footage, but unable to do so because of frustrations associated with not being able to locate the owners of the works.

Of course, future generations should prosper and flourish with new ideas. Museums should be allowed easy access to the riches of our global culture. This exchange should be encouraged, thus a creator in any medium should be able to have that work accessed by millions of new end users.

WHAT'S YOUR TAKE?

Respond to: lawilliams@bizjournals.com

It has been suggested by the U.S. Copyright Office that new databases be established. But when the Register Of Copyrights claims that they could not certify these databases and that the private sector would be responsible, one must be concerned that industries whose only function is data mining would now be the new gatekeepers of our intellectual property.

Yes, there has to be reform. But, the songwriting community must be included and their opinions heard.

I suggest, as do The National Music Publishers Association and The Nashville Songwriters Association International, that a separate class be created to distinguish and separate museums and nonprofits from those in the professional music industry.

GENE POOLE is a music industry professional based in Nashville.



Association of Medical Illustrators Denounces 'Orphan Works' Bills Before Congress

LAWRENCE, Kan. - LAWRENCE, Kan., June 3 /PRNewswire/

-- **The Association of Medical Illustrators** (AMI) (<http://www.ami.org>), an international organization representing highly trained professional medical illustrators and animators, is slamming proposed legislation known as "The Orphan Works Act of 2008" (H.R. 5889/S. 2913), pending in the House and Senate. An "orphan work" is a creative work, visual or otherwise, whose copyright status and ownership cannot be readily found. Proponents want to use works declared "orphans" without infringement liability.

"If this bill passes, it will radically restructure copyright protections currently guaranteed to creators by making it legal for anyone to use, reproduce and change a creator's painting, illustration or photograph -- without permission, fair or appropriate compensation, or proper legal remedy," says Michael Belknap, AMI's president. Currently copyright owners are guaranteed the exclusive right to reproduce their artwork, prepare derivative images from their original creations, and control how and where their work is used. The proposed legislation would subvert copyright protection by allowing anyone to declare a work an "orphan" and use it without infringement liabilities after engaging in a presumptive "diligent" search for the copyright owner. Neither bill defines what constitutes a "diligent" search.

"These bills are a recipe for legal chaos and have numerous large companies expecting to sweep up these 'orphaned' visual materials for free or for minimal payments to the owners and creators," says Bill Westwood, an AMI past president. "The bills will excuse thieves from any significant financial liability for such infringement and even allow them to make minor modifications and copyright the original artwork in their name. This violates the exclusive rights guaranteed to the original creator under copyright law."

In these bills a safe harbor is extended to nonprofits relieving them of any monetary compensation to creators. Because medical illustrators create critically accurate visualizations for nonprofit organizations, universities and research foundations this will exert a special harm on medical education and the advancement of science. AMI believes there should be no loophole for nonprofit educational institutions, and no orphan works exemption for educational use. Fair use already generously covers scholarship. Any other use needs to be licensed according to existing copyright law that protects an artist's exclusive rights, regardless of whether the use is "commercial" or not.

If the bills are enacted, to attempt to keep their works from being declared "orphans" all visual artists must register their works in commercial visual databases or registries. The cost to register hundreds or thousands of illustrations could force many professionals into bankruptcy. Adding to the problem, there is no available visual recognition technology that can guarantee 100 percent accurate image identification. "Orphan Works" legislation would affect millions of visual imagery copyright holders worldwide, including medical illustrators, commercial illustrators, fine artists, graphic artists and photographers. AMI strongly opposes both bills.

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http://www.examiner.com/p175592-Association_of_Medical_Illustrators_Denounces_Orphan_Works_Bills_Before_Congress.html



Scrapbook Insider: Copyright law cuts both ways

Bill would make 'orphan works' easier to use, but also aid copycats

By Linda Fantin

Special to The Tribune

Article Last Updated: 06/10/2008 05:23:41 PM MDT

Have you ever wanted to use an heirloom photo in one of your scrapbooking layouts, but didn't for fear of violating copyright laws?

Me neither.

But you may want to pay attention anyway.

A bill making its way through Congress would make it easier to use so-called orphan works - books, music, records, films, photos, scrapbook designs and other copyrighted works for which the owner cannot be identified or found. The Shawn Bentley Orphan Works Act of 2008 has been passed out of the Senate Judiciary Committee and is about to go before the full Senate. The bill, sponsored by Sen. Orrin Hatch, is named for an attorney and St. George native who, as chief intellectual-property counsel to the committee, worked closely with Hatch before dying of lung cancer in October 2005.

The legal and financial consequences of using these so-called "orphan works" are apparently a big hindrance for authors, filmmakers, museums, libraries, historical societies and genealogists - not to mention Google, which is investing gobs of money to digitize the world's books and put them in a massive, searchable card catalog, and Microsoft, which owns Corbis, one of the largest stock-image suppliers.

Under current law, violators face stiff penalties (up to \$150,000) for each copyright-use violation. The new bill would reduce recoverable damages to "reasonable compensation" so long as the user makes a diligent effort to locate the original rights holder.

This represents a huge shift in copyright protection, which is currently automatic. Authors need only register their works before filing a lawsuit, and that protection extends for almost a century, whether or not the author wants or needs it or even knows about it.

With no effective and efficient way to track down copyright holders, a massive amount of history and culture is bogged down in unnecessary regulation and in danger of being forgotten. This is antithetical to the whole concept of memory preservation and scrapbooking.

And yet those who oppose the changes - professional photographers, graphic designers, illustrators and others who make a living from licensing artwork - are calling on the craft community to rise up in solidarity and write their congressional representatives.

They say the changes will create a free pass to profit from infringements and make it difficult if not impossible for some artists to stay in design-driven businesses like scrapbooking. And they have a point. Patterned paper, stamps, diecuts, rub-ons, embossing templates. These are all products that rely on the creativity of artists who license their work to manufacturers, which invest heavily in bringing the items to market. Those companies would probably pay a lot less for designs under a system that encourages - or at least lowers the barrier to - copycatting.



Brenda Pinnick, a professional illustrator and graphic designer, licenses her artwork for scrapbook design like this patterned paper. To learn more about why illustrators and designers are fighting proposed changes to copyright laws, visit www.owoh.org/.

"Artists would find jobs elsewhere to support themselves; manufacturers would go out of business or leave the scrapbook industry," says Atlanta-based illustrator Brenda Pinnick. "Who also loses? The scrapbooker."

If scrappers want to continue to enjoy using exciting new designs, they should be rallying together to protect the artists who supply them, she adds.

Still, given that the whole genre of scrapbooking is based on the concept of borrowing others' designs to create your own - we call it scraplifting - I just don't see the motivation for me or any other Suzy Scrapbooker to get involved.

Borrowing works both ways, Pinnick responded in an e-mail. "How will [a scrapbooker] feel when she posts little Johnny's adorable face, or even his art for that matter on her blog, and some company comes along and decides it would be great on their coffee mugs, canisters or even in an ad for VD or child abuse?"

Well, if she's like a lot of us - women who have no compunction about embarrassing and exploiting our children for the sake of winning contests, getting published and Workshop: Live Well by Amber Packer of Sandy. See below for more about the design. receiving message-board "toots" from fellow scrapbookers - she's probably not that concerned about her kid's mug ending up on someone else's.

On the other hand, I kind of like the idea of dozens of women toting scissors and double-sided tape surrounding Hatch, a songwriter, as he attempts to reconcile support of this legislation with past rants about destroying the computers of people who download or swap copyrighted music on the Internet.

Now that's an image worth safeguarding.

Appendix B

Directive 2012/28/EU of the
European Parliament and of the Council
of 25 October 2012

on certain permitted uses of orphan works

DIRECTIVE 2012/28/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 25 October 2012
on certain permitted uses of orphan works
(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 53(1), 62 and 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee ⁽¹⁾,

Acting in accordance with the ordinary legislative procedure ⁽²⁾,

Whereas:

- (1) Publicly accessible libraries, educational establishments and museums, as well as archives, film or audio heritage institutions and public-service broadcasting organisations, established in the Member States, are engaged in large-scale digitisation of their collections or archives in order to create European Digital Libraries. They contribute to the preservation and dissemination of European cultural heritage, which is also important for the creation of European Digital Libraries, such as Europeana. Technologies for mass digitisation of print materials and for search and indexing enhance the research value of the libraries' collections. Creating large online libraries facilitates electronic search and discovery tools which open up new sources of discovery for researchers and academics who would otherwise have to content themselves with more traditional and analogue search methods.
- (2) The need to promote free movement of knowledge and innovation in the internal market is an important component of the Europe 2020 Strategy, as set out in the Communication from the Commission entitled 'Europe 2020: A strategy for smart, sustainable and inclusive growth', which includes as one of its flagship initiatives the development of a Digital Agenda for Europe.
- (3) Creating a legal framework to facilitate the digitisation and dissemination of works and other subject-matter which are protected by copyright or related rights and for which no rightholder is identified or for which the rightholder, even if identified, is not located — so-called orphan works — is a key action of the Digital Agenda for Europe, as set out in the Communication from the

Commission entitled 'A Digital Agenda for Europe'. This Directive targets the specific problem of the legal determination of orphan work status and its consequences in terms of the permitted users and permitted uses of works or phonograms considered to be orphan works.

- (4) This Directive is without prejudice to specific solutions being developed in the Member States to address larger mass digitisation issues, such as in the case of so-called 'out-of-commerce' works. Such solutions take into account the specificities of different types of content and different users and build upon the consensus of the relevant stakeholders. This approach has also been followed in the Memorandum of Understanding on key principles on the digitisation and making available of out-of-commerce works, signed on 20 September 2011 by representatives of European libraries, authors, publishers and collecting societies and witnessed by the Commission. This Directive is without prejudice to that Memorandum of Understanding, which calls on Member States and the Commission to ensure that voluntary agreements concluded between users, rightholders and collective rights management organisations to licence the use of out-of-commerce works on the basis of the principles contained therein benefit from the requisite legal certainty in a national and cross-border context.
- (5) Copyright is the economic foundation for the creative industry, since it stimulates innovation, creation, investment and production. Mass digitisation and dissemination of works is therefore a means of protecting Europe's cultural heritage. Copyright is an important tool for ensuring that the creative sector is rewarded for its work.
- (6) The rightholders' exclusive rights of reproduction of their works and other protected subject-matter and of making them available to the public, as harmonised under Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society ⁽³⁾, necessitate the prior consent of rightholders to the digitisation and the making available to the public of a work or other protected subject-matter.
- (7) In the case of orphan works, it is not possible to obtain such prior consent to the carrying-out of acts of reproduction or of making available to the public.
- (8) Different approaches in the Member States to the recognition of orphan work status can present obstacles to the functioning of the internal market and the use of, and cross-border access to, orphan works. Such different approaches can also result in restrictions on the free

⁽¹⁾ OJ C 376, 22.12.2011, p. 66.

⁽²⁾ Position of the European Parliament of 13 September 2012 (not yet published in the Official Journal) and decision of the Council of 4 October 2012.

⁽³⁾ OJ L 167, 22.6.2001, p. 10.

movement of goods and services which incorporate cultural content. Therefore, ensuring the mutual recognition of such status is appropriate, since it will allow access to orphan works in all Member States.

to in this Directive or by other organisations. Such other organisations may charge for the service of carrying out a diligent search.

- (9) In particular, a common approach to determining the orphan work status and the permitted uses of orphan works is necessary in order to ensure legal certainty in the internal market with respect to the use of orphan works by publicly accessible libraries, educational establishments and museums, as well as by archives, film or audio heritage institutions and public-service broadcasting organisations.
- (10) Cinematographic or audiovisual works and phonograms in the archives of public-service broadcasting organisations and produced by them include orphan works. Taking into account the special position of broadcasters as producers of phonograms and audiovisual material and the need to adopt measures to limit the phenomenon of orphan works in the future, it is appropriate to set a cut-off date for the application of this Directive to works and phonograms in the archives of broadcasting organisations.
- (11) Cinematographic and audiovisual works and phonograms contained in the archives of public-service broadcasting organisations and produced by them, should for the purposes of this Directive be regarded as including cinematographic and audiovisual works and phonograms which are commissioned by such organisations for the exclusive exploitation by them or other co-producing public-service broadcasting organisations. Cinematographic and audiovisual works and phonograms contained in the archives of public-service broadcasting organisations which have not been produced or commissioned by such organisations, but which those organisations have been authorised to use under a licensing agreement, should not fall within the scope of this Directive.
- (12) For reasons of international comity, this Directive should apply only to works and phonograms that are first published in the territory of a Member State or, in the absence of publication, first broadcast in the territory of a Member State or, in the absence of publication or broadcast, made publicly accessible by the beneficiaries of this Directive with the consent of the rightholders. In the latter case, this Directive should only apply provided that it is reasonable to assume that the rightholders would not oppose the use allowed by this Directive.
- (13) Before a work or phonogram can be considered an orphan work, a diligent search for the rightholders in the work or phonogram, including rightholders in works and other protected subject-matter that are embedded or incorporated in the work or phonogram, should be carried out in good faith. Member States should be permitted to provide that such diligent search may be carried out by the organisations referred to in this Directive or by other organisations. Such other organisations may charge for the service of carrying out a diligent search.
- (14) It is appropriate to provide for a harmonised approach concerning such diligent search in order to ensure a high level of protection of copyright and related rights in the Union. A diligent search should involve the consultation of sources that supply information on the works and other protected subject-matter as determined, in accordance with this Directive, by the Member State where the diligent search has to be carried out. In so doing, Member States could refer to the diligent search guidelines agreed in the context of the High Level Working Group on Digital Libraries established as part of the i2010 digital library initiative.
- (15) In order to avoid duplication of search efforts, a diligent search should be carried out in the Member State where the work or phonogram was first published or, in cases where no publication has taken place, where it was first broadcast. The diligent search in respect of cinematographic or audiovisual works the producer of which has his headquarters or habitual residence in a Member State should be carried out in that Member State. In the case of cinematographic or audiovisual works which are co-produced by producers established in different Member States, the diligent search should be carried out in each of those Member States. With regard to works and phonograms which have neither been published nor broadcast but which have been made publicly accessible by the beneficiaries of this Directive with the consent of the rightholders, the diligent search should be carried out in the Member State where the organisation that made the work or phonogram publicly accessible with the consent of the rightholder is established. Diligent searches for the rightholders in works and other protected subject-matter that are embedded or incorporated in a work or phonogram should be carried out in the Member State where the diligent search for the work or phonogram containing the embedded or incorporated work or other protected subject-matter is carried out. Sources of information available in other countries should also be consulted if there is evidence to suggest that relevant information on rightholders is to be found in those other countries. The carrying-out of diligent searches may generate various kinds of information, such as a search record and the result of the search. The search record should be kept on file in order for the relevant organisation to be able to substantiate that the search was diligent.
- (16) Member States should ensure that the organisations concerned keep records of their diligent searches and that the results of such searches, consisting in particular of any finding that a work or phonogram is to be considered an orphan work within the meaning of this Directive, as well as information on the change of status and on the use which those organisations make of orphan works, are collected and made available to the public at large, in particular through the recording of the

relevant information in an online database. Considering in particular the pan-European dimension, and in order to avoid duplication of efforts, it is appropriate to make provision for the creation of a single online database for the Union containing such information and for making it available to the public at large in a transparent manner. This can enable both the organisations which are carrying out diligent searches and the rightholders easily to access such information. The database could also play an important role in preventing and bringing to an end possible copyright infringements, particularly in the case of changes to the orphan work status of the works and phonograms. Under Regulation (EU) No 386/2012⁽¹⁾, the Office for Harmonization in the Internal Market ('the Office') is entrusted with certain tasks and activities, financed by making use of its own budgetary means, aimed at facilitating and supporting the activities of national authorities, the private sector and the Union institutions in the fight against, including the prevention of, infringement of intellectual property rights.

In particular, pursuant to point (g) of Article 2(1) of that Regulation, those tasks include providing mechanisms which help to improve the online exchange of relevant information between the Member States' authorities concerned and fostering cooperation between those authorities. It is therefore appropriate to rely on the Office to establish and manage the European database containing information related to orphan works referred to in this Directive.

- (17) There can be several rightholders in respect of a particular work or phonogram, and works and phonograms can themselves include other works or protected subject-matter. This Directive should not affect the rights of identified and located rightholders. If at least one rightholder has been identified and located, a work or phonogram should not be considered an orphan work. The beneficiaries of this Directive should only be permitted to use a work or phonogram one or more of the rightholders in which are not identified or not located, if they are authorised to carry out the acts of reproduction and of making available to the public covered by Articles 2 and 3 respectively of Directive 2001/29/EC by those rightholders that have been identified and located, including the rightholders of works and other protected subject-matter which are embedded or incorporated in the works or phonograms. Rightholders that have been identified and located can give this authorisation only in relation to the rights that they themselves hold, either because the rights are their own rights or because the rights were transferred to them, and should not be able to authorise under this Directive any use on behalf of rightholders that have not been identified and located. Correspondingly, when

previously non-identified or non-located rightholders come forward in order to claim their rights in the work or phonogram, the lawful use of the work or phonogram by the beneficiaries can continue only if those rightholders give their authorisation to do so under Directive 2001/29/EC in relation to the rights that they hold.

- (18) Rightholders should be entitled to put an end to the orphan work status in the event that they come forward to claim their rights in the work or other protected subject-matter. Rightholders that put an end to the orphan work status of a work or other protected subject-matter should receive fair compensation for the use that has been made of their works or other protected subject-matter under this Directive, to be determined by the Member State where the organisation that uses an orphan work is established. Member States should be free to determine the circumstances under which the payment of such compensation may be organised, including the point in time at which the payment is due. For the purposes of determining the possible level of fair compensation, due account should be taken, *inter alia*, of Member States' cultural promotion objectives, of the non-commercial nature of the use made by the organisations in question in order to achieve aims related to their public-interest missions, such as promoting learning and disseminating culture, and of the possible harm to rightholders.
- (19) If a work or phonogram has been wrongly found to be an orphan work, following a search which was not diligent, the remedies for copyright infringement in Member States' legislation, provided for in accordance with the relevant national provisions and Union law, remain available.
- (20) In order to promote learning and the dissemination of culture, Member States should provide for an exception or limitation in addition to those provided for in Article 5 of Directive 2001/29/EC. That exception or limitation should permit certain organisations, as referred to in point (c) of Article 5(2) of Directive 2001/29/EC and film or audio heritage institutions which operate on a non-profit making basis, as well as public-service broadcasting organisations, to reproduce and make available to the public, within the meaning of that Directive, orphan works, provided that such use fulfils their public interest missions, in particular the preservation of, the restoration of, and the provision of cultural and educational access to, their collections, including their digital collections. Film or audio heritage institutions should, for the purposes of this Directive, cover organisations designated by Member States to collect, catalogue, preserve and restore films and other audiovisual works or phonograms forming part of their cultural heritage. Public-service broadcasters should, for the purposes of this Directive, cover broadcasters with a public-service remit as conferred, defined and organised

⁽¹⁾ Regulation (EU) No 386/2012 of the European Parliament and of the Council of 19 April 2012 on entrusting the Office for Harmonization in the Internal Market (Trade Marks and Designs) with tasks related to the enforcement of intellectual property rights, including the assembling of public and private-sector representatives as a European Observatory on Infringements of Intellectual Property Rights (OJ L 129, 16.5.2012, p. 1).

by each Member State. The exception or limitation established by this Directive to permit the use of orphan works is without prejudice to the exceptions and limitations provided for in Article 5 of Directive 2001/29/EC. It can be applied only in certain special cases which do not conflict with the normal exploitation of the work or other protected subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.

- (21) In order to incentivise digitisation, the beneficiaries of this Directive should be allowed to generate revenues in relation to their use of orphan works under this Directive in order to achieve aims related to their public-interest missions, including in the context of public-private partnership agreements.
- (22) Contractual arrangements may play a role in fostering the digitisation of European cultural heritage, it being understood that publicly accessible libraries, educational establishments and museums, as well as archives, film or audio heritage institutions and public-service broadcasting organisations, should be allowed, with a view to undertaking the uses permitted under this Directive, to conclude agreements with commercial partners for the digitisation and making available to the public of orphan works. Those agreements may include financial contributions by such partners. Such agreements should not impose any restrictions on the beneficiaries of this Directive as to their use of orphan works and should not grant the commercial partner any rights to use, or control the use of, the orphan works.
- (23) In order to foster access by the Union's citizens to Europe's cultural heritage, it is also necessary to ensure that orphan works which have been digitised and made available to the public in one Member State may also be made available to the public in other Member States. Publicly accessible libraries, educational establishments and museums, as well as archives, film or audio heritage institutions and public-service broadcasting organisations that use an orphan work in order to achieve their public-interest missions should be able to make the orphan work available to the public in other Member States.
- (24) This Directive is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licences, legal presumptions of representation or transfer, collective management or similar arrangements or a combination of them, including for mass digitisation.
- (25) Since the objective of this Directive, namely ensuring legal certainty with respect to the use of orphan works, cannot be sufficiently achieved by the Member States and can therefore, by reason of the need for uniformity of the rules governing the use of orphan works, be better achieved at Union level, the Union may adopt

measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Subject-matter and scope

1. This Directive concerns certain uses made of orphan works by publicly accessible libraries, educational establishments and museums, as well as by archives, film or audio heritage institutions and public-service broadcasting organisations, established in the Member States, in order to achieve aims related to their public-interest missions.

2. This Directive applies to:

- (a) works published in the form of books, journals, newspapers, magazines or other writings contained in the collections of publicly accessible libraries, educational establishments or museums as well as in the collections of archives or of film or audio heritage institutions;
- (b) cinematographic or audiovisual works and phonograms contained in the collections of publicly accessible libraries, educational establishments or museums as well as in the collections of archives or of film or audio heritage institutions; and
- (c) cinematographic or audiovisual works and phonograms produced by public-service broadcasting organisations up to and including 31 December 2002 and contained in their archives;

which are protected by copyright or related rights and which are first published in a Member State or, in the absence of publication, first broadcast in a Member State.

3. This Directive also applies to works and phonograms referred to in paragraph 2 which have never been published or broadcast but which have been made publicly accessible by the organisations referred to in paragraph 1 with the consent of the rightholders, provided that it is reasonable to assume that the rightholders would not oppose the uses referred to in Article 6. Member States may limit the application of this paragraph to works and phonograms which have been deposited with those organisations before 29 October 2014.

4. This Directive shall also apply to works and other protected subject-matter that are embedded or incorporated in, or constitute an integral part of, the works or phonograms referred to in paragraphs 2 and 3.

5. This Directive does not interfere with any arrangements concerning the management of rights at national level.

Article 2

Orphan works

1. A work or a phonogram shall be considered an orphan work if none of the rightholders in that work or phonogram is identified or, even if one or more of them is identified, none is located despite a diligent search for the rightholders having been carried out and recorded in accordance with Article 3.

2. Where there is more than one rightholder in a work or phonogram, and not all of them have been identified or, even if identified, located after a diligent search has been carried out and recorded in accordance with Article 3, the work or phonogram may be used in accordance with this Directive provided that the rightholders that have been identified and located have, in relation to the rights they hold, authorised the organisations referred to in Article 1(1) to carry out the acts of reproduction and making available to the public covered respectively by Articles 2 and 3 of Directive 2001/29/EC.

3. Paragraph 2 shall be without prejudice to the rights in the work or phonogram of rightholders that have been identified and located.

4. Article 5 shall apply *mutatis mutandis* to the rightholders that have not been identified and located in the works referred to in paragraph 2.

5. This Directive shall be without prejudice to national provisions on anonymous or pseudonymous works.

Article 3

Diligent search

1. For the purposes of establishing whether a work or phonogram is an orphan work, the organisations referred to in Article 1(1) shall ensure that a diligent search is carried out in good faith in respect of each work or other protected subject-matter, by consulting the appropriate sources for the category of works and other protected subject-matter in question. The diligent search shall be carried out prior to the use of the work or phonogram.

2. The sources that are appropriate for each category of works or phonogram in question shall be determined by each Member State, in consultation with rightholders and users, and shall include at least the relevant sources listed in the Annex.

3. A diligent search shall be carried out in the Member State of first publication or, in the absence of publication, first broadcast, except in the case of cinematographic or audiovisual works the producer of which has his headquarters or habitual residence in a Member State, in which case the diligent search shall be carried out in the Member State of his headquarters or habitual residence.

In the case referred to in Article 1(3), the diligent search shall be carried out in the Member State where the organisation that made the work or phonogram publicly accessible with the consent of the rightholder is established.

4. If there is evidence to suggest that relevant information on rightholders is to be found in other countries, sources of information available in those other countries shall also be consulted.

5. Member States shall ensure that the organisations referred to in Article 1(1) maintain records of their diligent searches and that those organisations provide the following information to the competent national authorities:

- (a) the results of the diligent searches that the organisations have carried out and which have led to the conclusion that a work or a phonogram is considered an orphan work;
- (b) the use that the organisations make of orphan works in accordance with this Directive;
- (c) any change, pursuant to Article 5, of the orphan work status of works and phonograms that the organisations use;
- (d) the relevant contact information of the organisation concerned.

6. Member States shall take the necessary measures to ensure that the information referred to in paragraph 5 is recorded in a single publicly accessible online database established and managed by the Office for Harmonization in the Internal Market ('the Office') in accordance with Regulation (EU) No 386/2012. To that end, they shall forward that information to the Office without delay upon receiving it from the organisations referred to in Article 1(1).

Article 4

Mutual recognition of orphan work status

A work or phonogram which is considered an orphan work according to Article 2 in a Member State shall be considered an orphan work in all Member States. That work or phonogram may be used and accessed in accordance with this Directive in all Member States. This also applies to works and phonograms referred to in Article 2(2) in so far as the rights of the non-identified or non-located rightholders are concerned.

Article 5

End of orphan work status

Member States shall ensure that a rightholder in a work or phonogram considered to be an orphan work has, at any time, the possibility of putting an end to the orphan work status in so far as his rights are concerned.

Article 6

Permitted uses of orphan works

1. Member States shall provide for an exception or limitation to the right of reproduction and the right of making available to the public provided for respectively in Articles 2 and 3 of Directive 2001/29/EC to ensure that the organisations referred to in Article 1(1) are permitted to use orphan works contained in their collections in the following ways:

(a) by making the orphan work available to the public, within the meaning of Article 3 of Directive 2001/29/EC;

(b) by acts of reproduction, within the meaning of Article 2 of Directive 2001/29/EC, for the purposes of digitisation, making available, indexing, cataloguing, preservation or restoration.

2. The organisations referred to in Article 1(1) shall use an orphan work in accordance with paragraph 1 of this Article only in order to achieve aims related to their public-interest missions, in particular the preservation of, the restoration of, and the provision of cultural and educational access to, works and phonograms contained in their collection. The organisations may generate revenues in the course of such uses, for the exclusive purpose of covering their costs of digitising orphan works and making them available to the public.

3. Member States shall ensure that the organisations referred to in Article 1(1) indicate the name of identified authors and other rightholders in any use of an orphan work.

4. This Directive is without prejudice to the freedom of contract of such organisations in the pursuit of their public-interest missions, particularly in respect of public-private partnership agreements.

5. Member States shall provide that a fair compensation is due to rightholders that put an end to the orphan work status of their works or other protected subject-matter for the use that has been made by the organisations referred to in Article 1(1) of such works and other protected subject-matter in accordance with paragraph 1 of this Article. Member States shall be free to determine the circumstances under which the payment of such compensation may be organised. The level of the compensation shall be determined, within the limits imposed by Union law, by the law of the Member State in which the organisation which uses the orphan work in question is established.

Article 7

Continued application of other legal provisions

This Directive shall be without prejudice to provisions concerning, in particular, patent rights, trade marks, design rights, utility models, the topographies of semi-conductor products, type faces, conditional access, access to cable of broadcasting services, the protection of national treasures, legal deposit requirements, laws on restrictive practices and unfair competition, trade secrets, security, confidentiality, data protection and privacy, access to public documents, the law of contract, and rules on the freedom of the press and freedom of expression in the media.

Article 8

Application in time

1. This Directive shall apply in respect of all works and phonograms referred to in Article 1 which are protected by

the Member States' legislation in the field of copyright on or after 29 October 2014.

2. This Directive shall apply without prejudice to any acts concluded and rights acquired before 29 October 2014.

Article 9

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 29 October 2014. They shall forthwith communicate to the Commission the text of those provisions.

When Member States adopt those provisions, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 10

Review clause

The Commission shall keep under constant review the development of rights information sources and shall by 29 October 2015, and at annual intervals thereafter, submit a report concerning the possible inclusion in the scope of application of this Directive of publishers and of works or other protected subject-matter not currently included in its scope, and in particular stand-alone photographs and other images.

By 29 October 2015, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Directive, in the light of the development of digital libraries.

When necessary, in particular to ensure the functioning of the internal market, the Commission shall submit proposals for amendment of this Directive.

A Member State that has valid reasons to consider that the implementation of this Directive hinders one of the national arrangements concerning the management of rights referred to in Article 1(5) may bring the matter to the attention of the Commission together with all relevant evidence. The Commission shall take such evidence into account when drawing up the report referred to in the second paragraph of this Article and when assessing whether it is necessary to submit proposals for amendment of this Directive.

Article 11

Entry into force

This Directive shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

*Article 12***Addressees**

This Directive is addressed to the Member States.

Done at Strasbourg, 25 October 2012.

For the European Parliament

The President

M. SCHULZ

For the Council

The President

A. D. MAVROYIANNIS

ANNEX

The sources referred to in Article 3(2) include the following:

- (1) for published books:
 - (a) legal deposit, library catalogues and authority files maintained by libraries and other institutions;
 - (b) the publishers' and authors' associations in the respective country;
 - (c) existing databases and registries, WATCH (Writers, Artists and their Copyright Holders), the ISBN (International Standard Book Number) and databases listing books in print;
 - (d) the databases of the relevant collecting societies, in particular reproduction rights organisations;
 - (e) sources that integrate multiple databases and registries, including VIAF (Virtual International Authority Files) and ARROW (Accessible Registries of Rights Information and Orphan Works);
 - (2) for newspapers, magazines, journals and periodicals:
 - (a) the ISSN (International Standard Serial Number) for periodical publications;
 - (b) indexes and catalogues from library holdings and collections;
 - (c) legal deposit;
 - (d) the publishers' associations and the authors' and journalists' associations in the respective country;
 - (e) the databases of relevant collecting societies including reproduction rights organisations;
 - (3) for visual works, including fine art, photography, illustration, design, architecture, sketches of the latter works and other such works that are contained in books, journals, newspapers and magazines or other works:
 - (a) the sources referred to in points (1) and (2);
 - (b) the databases of the relevant collecting societies, in particular for visual arts, and including reproduction rights organisations;
 - (c) the databases of picture agencies, where applicable;
 - (4) for audiovisual works and phonograms:
 - (a) legal deposit;
 - (b) the producers' associations in the respective country;
 - (c) databases of film or audio heritage institutions and national libraries;
 - (d) databases with relevant standards and identifiers such as ISAN (International Standard Audiovisual Number) for audiovisual material, ISWC (International Standard Music Work Code) for musical works and ISRC (International Standard Recording Code) for phonograms;
 - (e) the databases of the relevant collecting societies, in particular for authors, performers, phonogram producers and audiovisual producers;
 - (f) credits and other information appearing on the work's packaging;
 - (g) databases of other relevant associations representing a specific category of rightholders.
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Appendix C

Comment, Notice of Inquiry,
Copyright Office, Library of Congress
Remedies for Small Copyright Claims
(76 FR 66758)

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January 17, 2012

Maria Pallante
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U.S. Copyright Office
101 Independence Ave. S.E.
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RE: Notice of Inquiry, Copyright Office, Library of Congress
Remedies for Small Copyright Claims (76 FR 66758)

On March 29, 2006 the Illustrators' Partnership appeared before the House Subcommittee on Courts, the Internet and Intellectual Property regarding the issue of a copyright small claims court. Noting that the proposal was linked to the Orphan Works Act then before the same subcommittee, we testified in opposition to the measure:

“Creating a new form of legalized infringement without statutory remedies – even for registered copyrights – and offering a small claims court as a solution to the wave of infringements that will result is not a workable approach. It will only serve to legitimize the taking of our copyrights...The attempt to lessen the damage by adding the burden of a small claims court to our overloaded federal judiciary is simply not a viable approach.”

Our testimony was based on in-depth conversations with both copyright attorneys and professional artists who had weathered copyright infringement cases. The truth is few working artists have ever filed copyright lawsuits. Most have no idea of the rigorous process necessary to ascertain and document the facts necessary to bring justice to the proper parties in such disputes. On its face, the concept of a short order court of law would no doubt appeal to many artists. However, there are several fundamental problems with the idea that we continue to believe make it untenable:

1. Jurisdiction: Copyright is a federal law and a small claims court would have to be administered on a local level. That means a) it's unlikely that local judges would have the expertise to properly administer the complexities of copyright law; and b) this would inevitably lead to hundreds or thousands of contradictory rulings, all constituting different interpretations of the same federal law. How this would affect the coherence of copyright law itself is anybody's guess, but in practice it would mean dissonance, with countless actions being judged infringements in various jurisdictions while not in others.

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2. Discovery: Small claims litigation would deprive plaintiffs of discovery, expert witnesses and other tools necessary to discover hidden facts or test false claims. The relevant facts of any infringement are rarely self-evident. So unless an infringer has a Perry Mason Moment and confesses his offense, a typical small claims lawsuit would probably lead – as one lawyer advised us – to a judge simply splitting the difference between contending parties.

3. Feasibility: The feasibility of introducing a different system of litigation would ultimately be a matter for the Justice Department – not the Copyright Office – to decide. So even if the Copyright Office study were to conclude that such a system was workable, we suspect the Justice Department would have the last word. Since previously, the proposal was linked to the Orphan Works Act and was promoted solely by the parties who supported that bill, there's every reason once again to consider it in terms of that legislation. Here's the scenario that concerns us: The Copyright Office "determines" (as a result of this "study") that rightsholders "want" a copyright small claims court. Lawmakers link it to Orphan Works legislation, as they tried to do with their failed *Copyright Modernization Act of 2006*. Then they speed the new bill through Congress and turn the small claims matter over to the Justice Department. But Justice concludes that it's not feasible to administer federal law on a local level, so that proposal dies, while the Orphan Works Act becomes law. If this is the scenario that plays out, then the proposal for a copyright small claims court will have merely shoehorned into law a bill that was widely and thoroughly condemned by tens of thousands of artists, writers, photographers, songwriters and other small business owners in 2006 and 2008.

4. On the other hand, perhaps the concept of a small claims court could again be packaged with the Orphan Works Act and promoted to Congress on the premise that it would "streamline" the administration of copyright law. We'd consider this scenario equally problematic. Since Orphan Works law would make any unregistered art a potential "orphan," a small claims regime could theoretically be implemented in which plaintiffs – deprived of the tools of discovery – would see their lawsuits resolved in local courts, not on the basis of authorship, but on the fact and dates of registration. This, of course, is exactly what Congress has already done with patent law. The new "streamlined" patent system would determine patent ownership based not on who invented something, but on who was "first-to-file." It should be easy to see how this system will tend to favor large corporate interests over the lone inventors who often have to seek investment capital from – and therefore share privileged information with – those same corporations. Just as "first-to-invent" will no longer be the decisive issue in patent disputes, it's conceivable that copyright small claims litigation could become the mechanism by which authorship of creative work is determined, not by authorship, but by priority of registration.

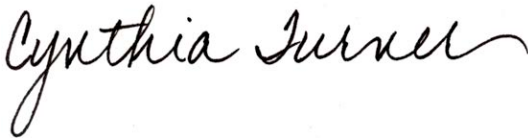
In our 2006 testimony before the House subcommittee, we gave specific examples of how such "streamlining" of the judicial process would benefit infringers under an Orphan Works

regime. A copy of that testimony is attached. We continue to believe that the “need” for a copyright small claims court could be alleviated by not passing an orphan works law that would create the “need” for one.

Respectfully submitted,



Brad Holland
Director, Illustrators' Partnership of America



Cynthia Turner
Director, Illustrators' Partnership of America

Attachment:

**Statement of Brad Holland
Founding Board Member, Illustrators' Partnership of America
before the
Subcommittee on Courts, the Internet, and Intellectual Property
Committee on the Judiciary**

U.S. House of Representatives
109th Congress, 2nd Session

March 29th, 2006

Re: Oversight Hearings on Remedies for Small Copyright Claims

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**Statement of Brad Holland
Founding Board Member
Illustrators' Partnership of America**

**Subcommittee on Courts, the Internet, and Intellectual Property
Committee on the Judiciary
U.S. House of Representatives**

March 29th, 2006

Re: Oversight Hearings on Remedies for Small Copyright Claims

Chairman Smith, Ranking Member Berman, members of the Subcommittee: My name is Brad Holland. I've been a freelance artist since I was 17 and I'm here to represent the Illustrators' Partnership of America. The IPA is the outgrowth of a grassroots movement started by artists in 2000 for the specific purpose of adapting our cottage industry to the challenges of the digital era. In that capacity, we filed a submission last year to the Orphan Works Study. It was endorsed by 42 international arts organizations, representing a broad spectrum of popular artists, fine artists, medical and architectural illustrators, cartoonists and educators who work in the U.S. and overseas. The Illustrators' Partnership is a non-profit, self-funded organization and an associate member of the International Federation of Reproduction Rights Organizations. I'm pleased to have the opportunity to say a few words about the subject of Remedies for Small Copyright Infringement Claims.

Wherever possible, artists have attempted to work on a traditional business model. Our work is commissioned by clients to whom we license initial rights for one-time usage for an agreed-upon price. Most artists retain their supplementary rights, which with the advent of the digital era, have been recognized as a potential stream of income – and therefore a contested prize – for any party that can obtain access to them.

Now comes a proposal that risks transferring a vast body of those rights into an orphan works limbo by legalizing the infringement of any work whose creator is said to be hard to find. This would harm artists and photographers disproportionately because images are often published without identifying information, signatures may be illegible and information can be removed by others. We've been told that this committee plans to pass Orphan Works legislation quickly, but will consider the creation of a small claims courts or arbitration mechanism to try to litigate the infringement cases that will follow.

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We strongly oppose the creation of such courts. The Orphan Works Report states that a “good faith reasonably diligent search” for a copyright holder will be “a very general standard” defined solely by the users themselves, many of whom may well have an interest in an unsuccessful search for the copyright holder. Absent a settlement by negotiation after the infringement has taken place, the copyright owner’s sole recourse will be to bring an action before the courts.

Copyright law is a Federal law. There are only 11 Federal Circuits in the country with 97 U.S. District Courts. Would copyright holders have to travel to one of them every time we need to file a small dollar infringement claim? If so, we wouldn’t be able to add travel and lodging expenses. And under the proposed “limitations on remedies,” the copyright owner could not obtain court costs or attorneys’ fees, not even if the work were pre-registered. The Orphan Works amendment virtually guarantees that the cost of suing an infringer would exceed whatever sum the copyright owner could recover in a successful small claims action.

By “limiting remedies,” the Orphan Works amendment will create a no-fault license to infringe. Let’s look at a hypothetical small claims action that I might be obliged to bring in the future.

In the 1990’s, I licensed a series of pictures for one-time use in a corporate annual report. In such cases, copyright notice and credits are most often omitted by art directors for annual reports, and almost always for advertisements in spite of the wishes of the artist to preserve his credit. I registered my copyright in the work as part of a group registration, the title of which was based on the annual report. I subsequently licensed some of these pictures for exclusive use in various ads in the United States, and I make it a practice never to license my work for inexpensive or distasteful products.

But let’s say an infringer finds the annual report. He likes the pictures, sees no credit and does a “good faith” search that fails to identify me as the owner of the copyright. He begins selling cheap t-shirts bearing my art. Under current copyright law, my remedies would include statutory damages, attorney’s fees, impoundment and injunction for this flagrant infringement because it’s damaged my exclusive right to license my work in high-end markets. But in small claims court my remedy would be what? Reasonable compensation for use of my work on cheap t-shirts. And even this would be limited to whatever maximum the small claims court might set and would be constructed not to deprive the infringer of the profits he made “in reliance” on his so-called failure to locate me.

Without the deterrent of statutory damages and attorneys fees - and without a permanent injunction against repeat offenses by the same t- shirt seller, this experience would now act as an incentive for the infringer to exploit other uncredited (and therefore, effectively orphaned) images by other artists. He’s discovered that infringing art is just a rational business decision. In turn, this would inspire yet other infringers.

This clearly violates the Three-step test of the Berne Convention, which states that exceptions to an author's exclusive rights should apply only to certain special cases, should not conflict with the author's normal exploitation of the work and should not prejudice the author's legitimate interests. As legal scholars Jane Ginsburg and Paul Goldstein stated in their submission to the Orphan Works Study:

“Compliance with Berne/TRIPs is required by more than punctilio; these rules embody an international consensus of national norms that in turn rest on long experience with balancing the rights of authors and their various beneficiaries, and the public. *Thus, in urging compliance with these technical-appearing rules, we are also urging compliance with longstanding practices that have passed the test of time.*” 1., p. 1, OWR0107-Ginsburg-Goldstein (emphasis added)

Creating a new form of legalized infringement without statutory remedies - even for registered copyrights - and offering a small claims court as a solution to the wave of infringements that will result is not a workable approach. It will only serve to legitimize the taking of our copyrights. For these and other reasons, we would respectfully ask this committee to consider the negative effects that OW legislation will have on free market transactions. The attempt to lessen the damage by adding the burden of a small claims court to our overloaded federal judiciary is simply not a viable approach.