Orphan Works Study: Submission by the Art Copyright Coalition

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

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

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

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

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

A cornerstone of all proposals is that a "diligent search be undertaken" before a work can be considered "Orphaned." A classic image search typically searches text surrounding an image and is basically useless in regard to a meaningful image search for an artwork with an unknown author. Even using some of the new tools, one can only search a very limited part of the internet. From a practical real life point of view, even with advances made within the last few years in Orphan Works Study: Submission by the Art Copyright Coalition
image searching, it is impossible to use these tools to track down most copyright protected artworks. Also, many images are simply not posted on the internet or they are behind password protected websites that current search tools cannot access.

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

If we view what is happening in the real world, this removal of copyright identifiers happens every day by counterfeiters (they are not at all concerned if their actions violate the DMCA). From a practical perspective, that is what would actually occur. A counterfeiter in China removes the identifying material or “finds” material with no author name on it. They then undertake a “diligent search.” A search they can document, where they will claim—they entered “Red Flower “ into a search engine and the image did not show in the results, or they put it into Tin Eye or Google Images search (or other comparable images search software) and nothing was found (see attached examples). Now we have a work which under many of the comments and proposed legislation would be deemed a statutorily protected Orphaned Work where the counterfeiter can use it with impunity, with no risk of any financial risk. The products containing the Orphan Work or in real terms a now protected counterfeit enter the U.S. market where they find their way into a hotel room or on a product in a Big Box store. What remedies would then be available to the artists? Expensive litigation to show that in China a real diligent search was not actually conducted. Not a realistic expectation. To accept a “reasonable royalty” after the fact.
if the copyright owner can in fact catch the infringer and show the art work is not in fact "orphaned". The expense of that exercise will outweigh any financial recoupment. Without attorney fees and statutory damages, there is no effective remedy for a visual artist if commercial use of Orphaned Works is permitted. A counterfeiter knowing their exposure, if caught, will be the royalty they would normally have to pay, now has every incentive to increase their counterfeiting activities without fear of any real risk. Where is the public benefit, the valid public policy concern being addressed by such a scenario?

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

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

The section is a beginning but needs to be modified in order to make it clear that the use of art works on useful articles that are excluded from the Orphan Work safe harbor would also include
all forms of wall art specifically paintings, posters, and prints and also non-scholarly, merely decorative, use in publications.

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

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

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

- TinEye is currently crawling the web and adding your image to its database slowly. It might not find your image, or may take some time to find it. You can search again in a few days.
- TinEye is not a monitor for copyrighted images. You can use TinEye to verify if an image is being illegally used.
- TinEye may not find your image if it is not high quality or if it is not the main subject of the image. You can try uploading a better quality or high resolution image.
- TinEye may not find your image if it is not available on the web. You can try uploading a URL or an image address.
- To receive notifications when TinEye finds your image, please subscribe to our TinEye Alerts channel. You can also try searching for your image in TinEye Alerts to find out if it has been found yet.

Search

Counterfeit

Original

Orphan Works Study: Submission by the Art Copyright Coalition
TinEye
Reverse Image Search

0 Results

Remember why TinEye couldn't find your image?

• TinEye is not always able to find and index every image that can be found online. It is simply to use to help you find images that can be re-used.
• TinEye is not designed to find images in a way that would be useful for art. It may be that your image is not indexed or that TinEye can't find it.
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Counterfeit

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