

Comments from ArtistsUnderTheDome.org submitted by Kathleen Bitetti

These comments are submitted on behalf of ArtistsUndertheDome.org, an artist run website based in Massachusetts that launched in 2007, The site strives to inform Massachusetts artists of statewide efforts and public policy initiatives that may impact their livelihoods.

I am the co-founder of the site and I have been an advocate for artists' rights for well over 20 years. I was deeply involved in opposing the 2008 Congressional push to address the issue of Orphan Works (House H.R. 5889 & Senate S. 2913) via my role of Executive Director of the Artists Foundation. The AF, along with our State Arts Council and the Massachusetts Volunteer Lawyers for the arts, worked with many other national and international organizations to stop those two pieces of legislation from becoming law. If that legislation had passed, it would have destroyed needed copyright protection for individual artists of all disciplines and the general public. ***The language from those two bills is still unacceptable and should not be used to address the issue of Orphan Works.***

Some key areas that need to be incorporated into any law/regulation change(s) addressing the use and protection of Orphan Works:

1) Any change to current U.S. Copyright laws that sanctions the use of orphaned work would need to be clearly defined and be very narrow. For example a personal use clause that allows for individuals to retouch family photos would be acceptable. There is a need for clearly defined language for Orphan Works use by documentarians/scholars and also for clearly defined educational use of Orphan Works only for accredited libraries, archives and museums. There should be no commercial infringement privileges for Orphan Works or any use of Orphan Works for charity, promotional, advertising or fundraising uses by any entity (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).

2) Any change would need to require the "infringer" to prove they obtained the orphaned work legally or that "the possessor obtained the legal rights of disposition".

In this day and age identity theft is a real and growing concern for all of us. The same theft does and can happen to art work of all disciplines via people downloading images, music, text from the internet or using technology "to take art work" (i.e. scan in someone's drawing from their sketch book). Anything done to address the issue of Orphan Works must stipulate that the "infringer" must prove that they obtained the work properly and legally, and "that the possessor obtained the legal rights of disposition". The infringer needs to disclose where and how they got the work (important information for advocates and the government to track trends-ie the person bought it at a student art fair, from a person in a homeless shelter). Museums, libraries, and archives all abide by these requirements to ensure they are not acquiring counterfeit or stolen works. With out this protection, any Orphan Works legislation/solution will more than likely fuel the black/stolen art market and will create a new commercial market for derivative works created from "orphaned" works.

3) The amount of damages that could be retrieved by the copyright owner if they "surfaced" and find their work was deemed and used as an orphan work when in fact it was not orphaned needs to be addressed. I would strongly recommend to keep the current language in existing copyright law around infringement **as is** and to ensure that it applies to misclassified orphaned works usage (legal fees need to be covered for example).

4) Nothing proposed should undermine the Visual Artists Rights Act of 1990 and the needed protections under our current copyright laws.

5) In our creative economy industry, artists of all disciplines send out work samples (music demo tapes, film shorts, jpegs/slides of their artwork, writing samples) in their effort to secure art shows, music/literary contracts, film deals, and/or jobs. Usually those materials are not returned to those who submitted the work- even if they provided the means to return their materials. Under current copyright law the holder of these materials can not legally infringe or use the work/copyright. ***No one should be allow someone to infringe and/or use work samples - even if they are deemed Orphan Works- for commercial use or educational use for that matter. The samples should be returned or destroyed.***

6) Public or private databases/registries are unacceptable as way to address Orphan Works.

A majority of artists of all disciplines are low income and can not afford to officially copyright their work due the cost and/or the volume of the work they have created (the recent 2007 MN Study Artists Count and the 2009 study I co-authored Stand Up and Be Counted give sobering assessments of the income of artists of all disciplines). Nor can many artists afford to pay for their work to be in databases/ registries and many artists do not have the technology and/or the skills to digitize their work. I know this first hand from working on the Massachusetts Health Care Reform law. Many of the artists in our state are having difficulty affording the co-pays (and premiums) for their subsidized health insurance. In the 1990's, I also worked to make sure that Massachusetts artists were included in the Virtual Collection- a project of the Estate Project for Artist with AIDS. It was established to archive the work of artists living with HIV/AIDS or artists who have died from the disease. Most of the artists we worked with could not afford to have slides/images taken of their work. The Estate Project raised the needed funds to cover materials/technology costs and fellow photographers donated their time to help archive the art work (www.artistswithaids.org).

Thus, I can say that private or public databases/registries as component of any Orphan Works solution is very problematic on many levels: 1) most artists will not be able to archive ALL of their work (visual artists and craft artists make high volumes of work and it will be next to impossible to archive all of their work digitally). 2) many artists lack the skills, finances, Internet or adequate Internet access, and/or technology to digitize their work. 3) there would need to be legislation to protect the information in those databases/registries that mirrors our HIPAA privacy laws for medical records and other sensitive electronic records. 4) the registries/databases would need to 100 percent free with no hidden costs or fees.

7) Harvesting of Work

I am especially concerned that changing our copyright protections could cause artwork to be "harvested" from student artists of all disciplines and those artists who come from underserved and low income populations (folk artists, Native American artists, artists of color, disabled artists, etc.) as the "infringer" will know that these artists will more than likely be hard to locate and that these artists will not have officially registered their work with the Copyright Office.

8) Understanding Consignment of Fine Art Laws

In the Consignment of Fine Art Market (think commercial galleries and craft galleries), the majority of artists are not told who has purchased their work and the purchaser is not given the artist's contact information The same holds true for art auctions and art sold on the secondary art market. This makes it almost next to impossible for visual and craft artists and their heirs to keep track of who has their work and to be able to easily track their copyright, but thankfully under current copyright law their work can not be infringed.

(In 2006 it became the law in MA that artists must be given the contact information of who bought their art from galleries/art dealers to enable the artist to better control their copyright.

Massachusetts is the only state to require this. Of note is that art auctions are exempt from our state law).

9) Any change to current copyright law should require or mandate that the Copyright Office to conduct a national educational outreach campaign to alert the US public of this law change and of existing copyright law. There also needs to be federal funding allocated to do this needed outreach.

10) There needs to be a formal way for artists and advocates to easily work on a regular basis with the Copyright Office to monitor the current copyright law, ANY change in copyright law, and its impact on artists and the market. In other words the Copyright Office would be mandated to have regular meetings with artists advocates and small businesses advocates on their policies and regulations etc. It also needs to be mandated by the law and it needs to ensure transparency and accountability. (Note this occurs in health care policy on many levels).

Conclusion

Deregulation of the copyright "market" (or drastically changing our current copyright law and its protections) has the real potential to lead to widespread copyright infringement abuse. I honestly feel what happened to the most vulnerable people in the home mortgage market crisis will also happen in the copyright "market" to the vast majority of artists of all disciplines if we allow commercial interests to legally infringe copyright via "Orphan Works" umbrella.

Any change in our laws to address the so called problem of Orphan Works should be to considered to the **fair use section of the copyright law** and it should to clearly define true Orphaned Works. Amend it to allow our cultural partners and allies to use the true Orphaned Works they have in their collections for educational purposes only (as well as for the photo-retouching for a clearly defined personal use), and at the same time explicitly ban commercial use of orphaned work. Gone would be the need for databases/registries, while at the same time it would not undermine current needed copyright protection.

Thank you for your time and consideration.

Sincerely,

Kathleen Bitetti
Artist and Co-founder of ArtistsUnderTheDome.org

Key Sources:

2009 Stand Up and Be Counted Report on Massachusetts Artists
http://www.artistsunderthedome.org/MA_ArtistsReport2009.pdf

Orphan Works links

http://www.kathleenbitetti.com/Pages/AF_OW_paper.html

<http://www.kathleenbitetti.com/Pages/orphanworks.html>