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Catherine R. Rowland
Senior Advisor to the Register of Copyrights
United States Copyright Office

via upload

Re:
Response to Notice of Inquiry

LIBRARY OF CONGRESS
U.S. Copyright Office [Docket No. 2015–01]
Copyright Protection for Certain Visual Works, Notice of Inquiry.

Orphan Works and Mass Digitization
A Report of the Register of Copyrights, June 2015

Orphan Works Legislation Discussion Draft and Section-by-Section Analysis

Dear Ms. Rowland:

My interest in the proposed legislation is primarily as a creator of copyrightable works. I have been a cartoonist for *The New Yorker* since 1998, where reprints of my cartoons are licensed through the Cartoon Bank and comprise more than half of my income from *New Yorker* sales. My cartoons have also appeared in most other the major publications that publish cartoons. I have also authored a syndicated newspaper comic strip and illustrated for books, magazines and a wide range of advertising. I have published books, both of written material and cartoon anthologies, created animated works for television and published in digital media, including online commercial publications, blogs and apps. Since the early 1980s, I have seen the tremendous changes ushered in by new technology and the new expectations of clients and users that have sorely impacted the incomes of artists.

I have also been on the hiring side of the equation, contracting with artists both in my experience at advertising agencies and from within a tech start-up company. It is from this fairly broad perspective that I have scrutinized the Report, the proposed legislation, its analysis, and related documents.

My objections to the proposed Orphan Works Act of 20__ include: the multiple incentives it offers commercial users to infringe artwork; the obstacles it creates for artist authors to police bad faith infringement; the preemption of artists' right to exercise exclusive control over their

bad faith infringement; the preemption of artists' right to exercise exclusive control over their works and the impediments that creates for them to enter into exclusive contracts; the subsequent devaluation of images used by legitimate corporate users for content and marketing; the preferential bias toward infringers in the form of limitations on remedies, no mechanism to investigate suspected bad faith infringement, injunctive relief that is inadequate to the artist, and protections favoring the copyrights of derivative works of orphan works over the copyrights of the original works themselves; the ease by which current technology allows nearly at-will abuse of the Recommended Practices for qualifying a visual work as orphan; and the eligibility of all works to be declared orphans, regardless of when they were created and regardless of the absolute certainty that they should be protected by copyright for many decades to come.

Global Treaty Compliance Requirements

The Report separately considers two related issues. One involves the infringement of individual works, the other involves the mass infringement of multiple works. I would anticipate that more leeway would be given the mass infringer, because of the vastly greater difficulties of tracing great numbers of rightsholders and because of the arguable legitimacy of purpose in archiving our culture. Surprisingly—counterintuitively—the Report much favors infringers of individual works. The sections on the proposed Orphan Works Act and on Mass Digitization appear to have been written by separate authors with radically opposing philosophies.

Both sections contemplate legislation which "would establish a new limitation or exception to the rights of copyright owners," but only the section on Mass Digitization recognizes that "Congress would need to be satisfied that it complies with the requirements of international treaties to which the United States is a party." It notes:

> The Berne Convention, the TRIPS Agreement, the WIPO Copyright Treaty, and the WIPO Performances and Phonograms Treaty all require that any limitation or exception meet a variant of the so-called "three-step test": (1) it must be confined to certain special cases that (2) do not conflict with a normal exploitation of the work and (3) do not unreasonably prejudice the legitimate interests of the rightsholder.

Subsequent paragraphs elaborate on these three steps, recommending that the "certain special cases" be confined to "non-profit educational or research purposes." The section adds in its Summary that relevant "legislation would not limit the categories of users that would be

eligible for a license, but would require that the uses be made only for nonprofit educational or research purposes and without any purpose of direct or indirect commercial advantage." Regarding the second step it clarifies: "a limitation or exception is prohibited if it 'is used to limit a commercially significant market or… to enter into competition with the copyright holder,' citing Daniel Gervais, The TRIPS Agreement: Drafting History and Analysis. The third step, it adds, "is implicated where a limitation or exception causes or has the potential to cause an unreasonable loss of income to the copyright holder," citing a World Trade Organization Copyright Panel Report on dispute resolutions.

As a result of these considerations, and others discussed in the section on Mass Digitization, I am comfortable that explorations of legislation addressing this issue will cause me only limited concerns, mainly regarding compliance and enforcement. Regarding the section contemplating a new Orphan Works Act, however, it is difficult to know where to begin with my strenuous objections, since the proposed act violates this "three-step test" with abandon.

The Orphan Works Act makes no attempt to disguise its prejudicial bias toward the infringer and its disregard for rightsholders. I would contend that this bias would result in significant conflicts with the above-mentioned treaties, as well as several potential Constitutional conflicts. The same "three-step test" therefore should be applied rigorously to any Orphan Works Act.

I will do my best to give real-world examples of how the proposed OWA fails to satisfy these three prudent steps and is thus ripe for abuse.

The very first line of the Orphan Works Act of 20__ states a purpose: "To provide a limitation on judicial remedies in copyright infringement cases involving orphan works." Two particular problems for visual artists immediately present themselves. The first is the limitation on remedies, the second is the definition and nature of orphan works. A third problem is more systemic, and that is the implied bias in favor of infringers, while there is no stated concern regarding the actual infringement, which has been illegal since the formation of this country. Since the limitation on remedies is predicated on a work being declared an orphan work, I would like to address the orphaning of a visual work first against the context of the Report.

<u>The Special Challenge of Visual Works</u>

The Report allows an allegation made before a Congressional subcommittee to assert its case, that orphan works are "perhaps the single greatest impediments to creating new work" in this country. That is, long forgotten works, with long forgotten authors, singularly stand in the way

of creators trying to create anything new. The implication is that books, movies, songs, theatrical presentations, and all other forms of art may cease to exist if we cannot legally recycle these few works where no one seems to remember or care where they came from.

This, of course, is absurd. The inability to properly license "orphan works," can in no way impede new and original work. It can only impede sublicenses of old work for reissues or derivative works. The Report is unclear on how the recycling of old works benefits the culture or furthers the "Constitutional mandate to 'promote the Progress of Science.'"

The Report defines an orphan work as one wherein "a user's ability to seek permission or to negotiate licensing terms is compromised by the fact that, despite his or her diligent efforts, the user cannot identify or locate the copyright owner."

Locating an owner, once known, is the simpler task of the two. A prospective user can find most people in the country with a quick internet search, if not by sites like WhitePages.com, then by social media or inquiries among relevant arts organizations and communities. Failing that, you can go to various online locating services or hire a professional private detective. The likelihood of incurring unreasonable costs are slim. These options are addressed by the Report and proposed OWA.

The more difficult task can be identifying the copyright owner. This is not so much of a problem with literary works. Type a sentence from the work you wish to find into Google Books, and you will almost certainly learn your source. Same with musical works and movies. Hold your phone up to capture the sound, and apps like Shazam and IntoNow will identify the source in a matter of seconds.

No such technology exists for identifying visual works.

Visual works that are not digitally reproduced typically include copyright information on copyright pages, mastheads or even the margins on prints, posters and such. Incomplete literary works, such as clippings and torn volumes, may seem impossible to identify. Similarly, digital images that have no attribution or metadata, and which have been removed from their original web publications, can be almost overwhelmingly difficult to locate. Current technology allows only keyword searches and exhaustive searches. Since few images on the internet are tagged with keyword metadata, search tools often rely on contextual cues, such as the text that surrounds an image. Given the millions and millions of images on the internet, this can present difficulty. A very specific description of an image can give you hits for thousands of images

without ever showing you the one you are looking for. I have attempted to search for my own captionless cartoons and illustrations using an exhaustive range of keywords, yet I failed to match the detailed descriptions with the images they described. I could not even locate images that have run on major platforms, such as the Wall Street Journal and WhatToExpect.com.

Technology Fails Visual Arts, Enables Accidental Orphanhood

Technology cannot yet compare two images and confirm that they are, in fact, the same image. Nascent attempts at such tools are easily fooled by changes in file format (e.g., changing JPG to PNG), changes in file size or resolution, changes in cropping, manipulations in color levels, micro-distortions undetectable to any but the most trained eye, and myriad other methods that alter the byte order. Where a human eye could identify two images as the very same (or one as a deliberately disguised version of the other), a computer sees them as utterly foreign to each other. Attempts to recognize even general subjects in an image is still rudimentary, as evidenced in recent weeks by Google's embarrassing misidentification of an African-American man and woman as gorillas. The technology is simply not sufficient to allow reliable image searches, let alone count on them for the preservation of copyrights.

Accidental orphans of visual works, therefore, can easily occur when an image is copied and "shared" around the internet by people who are not as attuned to copyright issues as working artists might be. It doesn't take too many iterations of this sort of sharing for an image to lose all connection to its original source. If any individual in the sharing chain happens to resize or reformat the image to fit a particular placement on a web page, then identifying characteristics, such as a URL or a signature, can be lost—if they were ever attached to the image in the first place. If a lot of time has passed since the "sharing" has elapsed, links in the digital chain can be lost. One or more sharers' sources can be forgotten or have expired. Unless someone who happens to see the image knows where it originally came from, any search for its origins may be fruitless.

I experimented with that premise this week when an image turned up on Facebook. It had been widely shared (this one post boasted 29,257 "likes" and 31,039 "shares"), but its source was disconnected from the image's authorized origins. The linked source for the image was a user's Facebook photo library. The image had a copyright line on it, suggesting where it had been taken from, but the JPEG format is noted for generating losses in image resolution with each copy. So the copyright attribution was unreadable.

Mercifully, the cartoon style of the image was recognizable to a fairly large number of people. To make it even easier, the image still retained the signature of a rather famous gag cartoonist (as cartoon fame goes), David Sipress, a prodigious and longtime contributor to wide range of publications from *The New Yorker* to the *Funny Times*.

I saw the cartoon (right, and used here with permission of the artist) as the post was being pointed out to Sipress by a mutual friend commenting on Facebook. Sipress himself commented, "I'm not sure what I can do about it. Like you, I can't make out the name on the 'copyright.' At least my signature is still there. I've seen it at other times over the years without the signature." He later confirmed to me this implication that the cartoon was commonly misappropriated this way.

As I had been studying the Report and the conditions for eligibility of a good faith search, I thought to use the identifying characteristics of this cartoon to conduct a Google image search. Bear in mind that it was a popular cartoon by a relatively renowned artist, and it had a caption—words—to make it more easily identifiable. I searched strings of keywords including "cartoon," "man," "dog," "guitar," "singing," and the full caption, but I did not include the signature.

Initially I mistakenly typed "Driving that train" instead of "Riding that train," overlooking that this version of the cartoon misquotes the song lyrics (other versions of the cartoon, including the one the artist presents on his own site, have corrected lyrics). My multiple searches produced no hit. I searched the hundreds of images Google showed me, until it would show me no more, but the image never appeared.

Upon noticing that this cartoon uses the wrong lyrics, I amended my search and found it posted in two places, one on Reddit and one on Pinterest, thanks to comments on the mistake in the lyrics. But neither posting provided a link or any additional clues to the cartoon's origin. What chance would I have of finding a less famous work by a less distinctive artist without the verbal cues? Say, a photograph of a man and a dog with a guitar? In fact, removing the caption from my search doomed it entirely.

Sipress himself noted that versions of the cartoon have turned up without his signature. The loss of signature would have assured its orphanhood. Most internet images—illustrations and

photographs—bear no signatures. So they can be orphaned without any conscious attempt at concealing their authorship. (Note, however, that this copy of the cartoon, clearly signed by the artist, was posted with someone else's copyright notice upon it. Even infringers seem to value copyrights. Their own, at least. Through some creative Photoshop work and a bit of trial and error, I was able to trace this to a photographer's web page (http://www.whosay.com/status/scottnathan/124583). I have not expanded my experiment to contact him to request permission to use the work.)

As there is no reliable technology to identify images or match them to their original sources, the way there is for books, music and film, visual works are vulnerable to accidental orphaning, even works by leading artists.

So the likelihood of locating an image with the tools available today is slim. The likelihood that an image could be orphaned in this manner, on the other hand, is significant. With the inclusion of for-profit categories in the Limitations on Remedies, the incentive for foul play is astronomically large. The obstacles to foul play are microscopically small. One infringement on a copyrighted image can sever it from its traceable origins. That first infringement can reasonably shield a second infringer from any penalties for infringing. The Limitation on Remedies also makes it easy for the first infringer and the second infringer to be the same person without risk of being discovered.

Gaming the System

Section 514(b)(1) sets forth six Conditions for Eligibility which must be met if the infringer is to be eligible for limitations on remedies, which would seem to be significant.

1. Prove a good faith qualifying search, comprised of four parts
    a. search online Copyright Office records, if any
    b. search reasonably available sources of author information
    c. use technology tools, print resources, and expert help
    d. search relevant databases, including online
2. File a Notice of Use with the Register of Copyrights.
3. Make an attribution—if the owner is known.
4. Include an "orphan work" symbol (TBD) denoting the use.
5. Assert eligibility for limitations on remedies.
6. State in detail the basis for eligibility.

However, as I asserted above, an infringer of a visual work stands a pretty good chance of

"discovering" an orphan work, even without unscrupulous effort. *With* such effort, he stands an excellent chance of meeting the first condition and documenting his search with thousands and thousands of irrelevant images that match his verbal descriptions. After that, the remaining conditions are largely procedural. The second condition shifts the burden of claiming the work to the artist. Arguably this gives the artist a fighting chance, but there are simple ways to make that fight uphill all the way. The third condition is on the honor system and can be easily evaded. The fourth is perhaps the most useful in identifying the owner, as it crowd sources the effort. Conditions five and six are entirely procedural and purely for the benefit of the infringer. Thus, they are hardly safeguards for the integrity of the system.

The Making of an Intentional Orphan

Given the vulnerability of visual works to accidental orphaning, and knowing how for-profit motives have driven more than a few people to illegal practices, the opportunity for harvesting "orphan" images for for-profit image banks is significant.

Before you dismiss this as alarmist, consider the variety of corrupt enterprises the internet has spawned. Trolling, for one. It is not just a nuisance, it's a business. *The New York Times* recently documented state-sponsored "troll farms" in Russia. Entire office buildings house workers, round-the-clock, who are dedicated to the singular purpose of posting comments on the internet either supporting their own government or savagely denigrating others, particularly the US. These posts have zero regard for truth and support their agendas at all costs. It's state-sponsored cyberbullying and propaganda. Workers participate in this deception because the jobs pay better than any other job available to them.

Nigeria, meanwhile, is known for its phishing operations, where organized groups flood the internet with spam messages, often directing people to spoofed web sites, all for the single-minded purpose of bilking people out of their money. They get the email addresses from various "companies" around the globe who harvest them from web sites and hacked emails in order to sell them to businesses whose sole purpose is spamming.

Piracy is another lucrative enterprise with a paying market. If you search the internet for a legitimate way to purchase any musical recording, movie or ebook, you will also be presented with a wide selection of ad supported web sites offering pirated versions of whatever content you're looking for, free of charge or for a small subscription fee.

And then there's the many faceted, global industry of hacking. North Korea, as the Sony

Corporation was sad to learn, has state-sponsored buildings full of people working full-time at hacking into corporate and government servers around the world to inflict commercial and reputational damage.

Other hacking operations, in China, India and elsewhere, collect personal and financial data, from our Social Security Numbers to our individual buying habits. Much of this data is sold to identity theft rackets who, in turn, sell credit cards for their customers to use for as long as they feel they can dodge the authorities. The porn and revenge porn industries hire armies of mostly freelance hackers to harvest images for them from private email and cloud-based accounts.

The music industry in particular has suffered from the ethos of "sharing" (stealing), an ethos which the OWA seems to embrace. As noted previously, songs, books and movies are fairly easily traceable through technologies that can analyze their streams of data. Images have no linear strings of letters or waveforms to match. The raw data of image files can be altered radically by simply switching to a different file format—or allowing a JPEG to degrade over a generation or two of copying. Filters that distort the data radically in a computer's perception can leave the image looking nearly presentable to a human viewer. Identifiers like URLs, signatures, copyright notices, and metadata can be easily scrubbed. Any image taken from the internet can be rendered unrecognizable to the most sophisticated existing image-matching technologies, and much of the work can be automated and performed on thousands of images with a couple clicks of a mouse. Even recognizable images can be retouched to confuse a human searcher.

The Business Model That Could Destroy Artists

What this means is that any people or organizations that possess no qualms about the businesses of phishing, spamming, trolling, or piracy could find a lucrative new frontier in image orphaning. Simply harvest images, spoof a few "sources" (later to be discontinued), document "good faith" searches, and routinize the remaining conditions of eligibility. Given the Office's enthusiastic encouragement of exploiting orphan works, it does not seem inclined to challenge claims of eligibility if the claimants have seemingly performed the prescribed steps.

The only remaining bulwark against these fraudulently orphaned works would be the Notice of Use registry. If I were such a criminal, I would begin my submissions to the registry with altered works that would be more difficult for rightful owners to spot in the initial mix. I would also

provide loftier sounding purposes for my proposed use of them. The Report itself gives me all the tips I'd need for this creative writing exercise. Once the registry was sufficiently flooded with images, making it excessively daunting for any but the most fanatical searchers to wade through, I would then begin to harvest and submit images more freely. I could count on plenty of help too, from my competitors in the booming new industry of image orphaning.

I would then be able to set up a content-rich stock art web business that licensed orphan art. I could call it OrphanWorks.com—except that domain name is already taken by an infringer-friendly litigator who, per his firm's web page, "has litigated a number of important Internet copyright and trademark disputes. He represents Google in the Google Book Search copyright…" He also "argued and won in the Ninth Circuit Court of Appeals on behalf of Troy Augusto, an eBay seller of promotional CDs who had been sued for copyright infringement by the world's largest record company." So maybe I'm not the only one thinking ahead about these possibilities.

This new business model would offer a natural transition for any organization that already has a good team of hackers. Or for any foreign hacking operation bent on hurting US industry, like the ones that invaded Sony. Stealing proprietary images, such as concept sketches and movie storyboards, having them digitally laundered through a network of shell web sites before being "discovered" as potential source material for derivative works could wreak no end of havoc for one of this country's most lucrative export industries. Many not-entirely-friendly countries already have strong hacker resources. They would have the capability to orphan works that have not yet been made public, let alone registered. This would not only cause us to suffer economically, it would make a mockery of our laws and the value we put on our culture.

Incentives vs. Deterrents

Other "hacktivists" who have an open source agenda will harvest images just to make a statement. But even hackers with no political agenda will embrace this business model, simply because the Copyright Office gives them an opportunity and a profit motive.

Hackers already do some pretty awful things for money. They will hack hundreds of private email accounts in the hope of finding a few naked selfies they can sell to pornographers. Many of these hackers consider themselves to be good and upright citizens in most of their lives, as one such hacker detailed for CNN.com back in April. They volunteer for charity and even go to church. For a few nights a week, however, they put in a few hours hacking for porn, often revenge porn, simply because it pays them a few extra bucks a week. Sure, they feel a little bad

about it, but they rationalize that they need the money. How much better do you think they would feel about themselves if they could harvest non-pornographic images and "clean them up" to be orphan works instead?

Their employers would tell them it was entirely legal, too, which would make such jobs desirable in places like India. I frequently receive calls from young Indian men and women from a call center buzzing with dozens of other operators chattering in the background. They try to sell me prescription drugs, without a prescription, over the phone. They claim to work for a legitimate business. To those who seem willing to listen, I have explained in detail how US law clearly prohibits such sales and asked why they work in such a place. Some have replied with poignant candor: "It's better than stealing." It's "safer"—physically safer from getting arrested or beaten. Cleaning up images of dubious provenance, under the protection of the OWA, would be safer still.

It will take aggressive orphaning for start-ups to compete with the bigger players. Established data aggregators, web portals, and social media platforms would already have the inside edge on harvesting "orphans" from the untold billions of images they have archived since the inception of the World Wide Web. Since the early 1990s, countless web sites and user accounts, both personal and organizational, have come and gone, leaving innumerable archived files with no traceable origin. Companies with access to this data, and the ability to isolate files with severed lineages, have a ripe harvest of licensable content already in their grasp.

Online platforms of every sort need content to generate profits. These profits are obviously greater if they don't have to pay as much for content. Providers of cheap content stand to gain enormous profits, too, if they can deal in large enough volume.

Any outcry from artists would likely be overcome by the clamor for cheap content. Visual artists have few celebrity spokespeople and none with the influence of a Taylor Swift, who was able to shame Apple into paying proper license fees to musical artists when it wanted to give away their works to attract new, paying customers.

The system being proposed, with so few safeguards, such as a reliable image recognition and identification technology, can be easily beaten. With the profit motive the Office overtly promotes, and the protections it puts in place for spurious assertions of eligibility, multiple criminal enterprises such as I have described will be online and operational before the ink is dry on the signed legislation. The reason no more than a thousand orphan works are listed

elsewhere in the world is that there has yet to be a profit incentive.

Ultimately, there is no financial deterrent to the infringer. To the contrary, there are protections and even incentives for infringing. For the artists and rightsholders, however, the risk of financial damage is inestimable. Artists trying to license their own work will be undersold by orphan image banks pitching the very same images.

It is incomprehensible to me that the Copyright Office would be so willing to risk of the de facto nullification of millions of copyrights to serve the desires of profiteering infringers. No conceivable benefit to society justifies such a trampling of rights.

As for purposes that are genuinely "beneficial" to the culture, such as to support the work of academics, archivists, librarians, and documentarians, solutions to those issues can readily be handled by the protections offered using the "three-step rule" detailed in the section of the Report on Mass Digitization. The "problem" of orphan works, said to be "threatening to impoverish our cultural heritage," could thus be removed. The extension of broad protections to copyright infringers who infringe to further for-profit enterprises constitutes a much bigger threat to our future culture, as it punishes artists as a class and strips them of their right to contract legitimate business.

Practical Effects of Limitations on Remedies—Undermining Contracts

"To realize the full potential of an orphan works system, commercial users… must be able to enjoy limited liability for their uses… of orphan works." This statement from the Report, and the proposed legislation embodying its intent, reject all three guiding tenets of the Berne Convention, the TRIPS Agreement, the WIPO Copyright Treaty, and the WIPO Performances and Phonograms Treaty. That is, there is no confinement to special cases, there is no regard to the conflicts it can cause for properly authorized works, and it expresses an overt bias in favor of the infringer over the legitimate rightsholder. It stands the treaties on their ear.

The Report itself couldn't be clearer in its disregard for confining itself to special cases. On the matters of conflict and bias, it might be easier to see how the Report and proposed OWA trample those with some specific examples.

Illustrators and photographers accept commissions for commercial works. These commissions are governed by contracts. Artists like to offer their own contracts, but larger corporate clients prefer the boilerplates designed by their own teams of lawyers. Artists may make

modifications, but some terms are take-or-leave.

One such take-or-leave condition is an exclusivity clause. Artists are generally more than happy to accept such a clause, because clients are willing to pay for the privilege of having an artist's distinctive style tied exclusively to their brand. Here is one such clause from a syndication contract for a comic strip I created:

> During the term of this Agreement, Producer… shall not produce the Feature or any similar work for any person, association, firm or corporation other than Syndicate unless Producer has first applied for and received Syndicate's written authorization to do so.

In book contracts, exclusivity is often woven into Author's Warranty and Indemnity clauses. Amid promises that the work has not been previously published, is not in the public domain, and does not infringe on other copyrights, it is customary to find a line to the effect of:

> Author further agrees that Author will not hereafter, for a period of five (5) years after publication of Work by Publisher, write, prepare, edit or allow Author's name to be used in connection with any Work on the same subject as the Work… which might be considered competitive with or interfere with the sales of the Work, without the written consent of the Publisher.

Advertising clients also have good cause to seek exclusivity clauses like this one:

> [Artist] warrants and represents that during the term of this Agreement (including any extensions thereof), [Artist] will not render any service of any kind for any third party within the [product] category or for any third party that is otherwise competitive or incompatible with [Company], without Company's prior written consent.

The company here had negotiated a lower per-illustration rate by guaranteeing me a minimum number of illustrations per year for two years, with possible extensions. Freelancers have few guarantees of steady income. This was a good and fair deal. I was happy to guarantee them exclusivity in return. And for the first two years, they commissioned far more than the promised minimum. Losing that contract for a perceived misstep or uncontrollable conflict would have been devastating. (Indeed, due to an overlapping period of illness, it could have been ruinous.)

All these contracts—and I have more, similar examples to offer, as do most illustrators and photographers—demand exclusivity because the companies buying the rights to use these

images are banking a large portion of their business on the exclusive contract with the artist. Their investment is many, many times what they pay the artist. Successful books frequently spawn knock-offs (like *Diary of a Wimpy Kid* spawned *The Dork Diaries*), which hope to siphon off sales. Worse than knock-offs, however, is when the talent hired by one company turns up working for a competitor. The greatest protection against that is the threat of a lawsuit.

Legal liabilities not only prevent opportunistic artists from succumbing to temptations of a richer offer and breaching their contracts, they also prevent unscrupulous competitors from modifying other works of the same artist to use in their own ads and undermining a campaign that has been trouncing them in the marketplace.

Removing those liabilities opens the door to unscrupulous players, who can find other, little known works by an artist, scrub them of any identifying marks, cover their trail for good measure, and steer them through the conditions for eligibility as orphan works. They can put them in their ads and plead they were knock-offs, at least until the works are "revealed" to be by the same artist. By the time the unscrupulous player can receive an injunction to stop, the damage is done—but only to their competitor, since they will be protected by the limitations on remedies.

In the ensuing confusion, the artist may have to defend himself from a breach of contract suit. Even if the dispute is resolved pretrial, he may suffer huge losses in legal fees as well as the loss of a lucrative client. And all he can reclaim of his losses are the "reasonable compensation" for the artwork used by whoever caused all this grief.

Original owners of copyrights can suffer terrible losses and have no hope of reclaiming them under the proposed legislation. Their rights can be stripped from them. The infringers who stripped them, however, are protected from any such losses by this law.

<u>Practical Effects of Limitations on Remedies—Derivative Works</u>

The protections conferred to derivative works of orphaned works are even more troubling. Since filmmakers are a category the Office seems to want to help with this proposed legislation, let's use a film scenario as an example.

Comic books as source material have yielded a disproportionate number of acclaimed and blockbuster films in the last decade or two, compared to other forms of literature. Some of those comic book sources have been alternative or "underground" comics (e.g., "Ghost

World"). Smaller than these underground comics are "zines," extremely small press or self-published works, often printed on photocopiers. In this phantom sliver of the market reside some truly genius work. I know of one such hidden genius, a veritable recluse due to social anxiety, with a neurotic drawing style but a staggering wit and powerful sense of irony. I can easily imagine a producer falling in love with her work and wanting to put it on the big screen.

So let's say a certain producer finds one of her comics and conducts a search for her, finds her and gets her permission to use her work. His lawyers draw up the license, and the producer starts making his film. Meanwhile, another producer comes across this quirky little zine—and has the same idea. The record shows that this second producer conducts the four-part search and is unable to identify the author. The producer then fulfills the other five conditions for eligibility and begins production on a film based on this now orphan work.

The first producer's studio, meanwhile, is preparing the publicity campaign for this surefire hit movie—only to be preempted by the second producer's independent film release of the very same story. What recourse does the first producer have? The first producer properly licensed the story from the copyright owner. But the second producer—who may have deliberately removed any identifying marks from the "found" copy of the comic, counting on the infinitesimal likelihood that anyone would be able to pinpoint which city the comic even came from, let alone who drew it—has full protection against injunctive relief sought by the first producer and the original author, and also has full copyright protection for his derivative work.

The losses to the first producer could be in the millions of dollars. Tens of millions. The losses to the author would be comparably significant. Either could try to sue, but that would only result in additional losses, since the second producer would be protected from having to pay attorney's fees, statutory damages or actual damages. All the law would require him to pay is "reasonable compensation" for licensing the comic.

<u>One Famous Example</u>

Do scenarios like this sound far-fetched? To a sane, moral person, I certainly hope they would. But people in the ad and film worlds could tell you stories. One story you probably recall from the last time the Shawn-Bentley Act was proposed was of Michiko Stehrenberger, who awoke one day to an email from a friend congratulating her on landing a big ad campaign. Camel cigarettes was using a piece that was nearly identical to a registered work Stehrenberger had sent around on her self-promotional mailer. On close inspection, it was the very same piece, except with its color, cropping and orientation digitally altered. Her copyright attribution and

web URL had also been digitally removed from the image.

The work had been willfully orphaned. It cost the artist nearly $100,000 in legal fees to prove this infringement, through expert witnesses and sworn depositions coerced through subpoenas. The high-priced expert witnesses were necessary because, as I have said, there is no technological way to prove that a seemingly identical artwork is in fact identical. It was only through this costly investment that she could prove the infringement, recover her costs, plus damages, and persevere through the constant bullying and threats of countersuit from lawyers representing R.J. Reynolds, Camel's owner.

None of this would have been possible under the protections offered by Orphan Works Act. The OWA offers nearly total protection for willful infringers. The cost of proving that the infringement was intentional would be too prohibitive for an artist to consider: the threat and harassment by corporate lawyers defending the infringement—with no legally imposed limitations on the damages *they* could extract in their vindictive vengeance—would be too daunting.

The proposed law operates almost entirely on the honor system, trusting the honor of infringers, because challenges to the infringers' assertions of good faith are prohibitive. And many corporate lawyers would not hesitate to a file defamation suit against any copyright owner who openly accused them of bad faith, because they are *not* constrained in the damages they may seek. Thieves can sue to protect their claims. Owners cannot. That's what this proposed OWA would establish as the law.

The OWA would also have enabled the Reynolds ad agency to cover their trail by channeling the image they wanted to infringe to a stock art dealer, before licensing it back as an orphan image. This would have further obscured its provenance and given Reynolds another layer of protection for having the forethought to have "laundered" the stolen property before officially taking possession of it.

The Report is eager to tout the US Constitution's mandate "to promote the Progress of Science," but seems too reticent to mention that the Constitution's designated means of achieving that purpose is allowing creators to secure "the exclusive Right" to control their original works. The proposed OWA nullifies this Constitutional guarantee. It strips artists of their rights. It usurps artists' liberty even to enter into exclusive contracts without exposing themselves to unreasonable liabilities.

Further Incentives to Infringe

In some categories of use, such as "if the infringer is a nonprofit educational institution, museum, library, archives, or public broadcaster (or employee thereof)," the artist is even denied reasonable compensation for their work. Many of these exempted institutions are state institutions. The law permits them, if they make a credible claim of good faith, to infringe at no cost, even if the infringement is discovered by the artist. How does this not constitute an unjust taking by the government?

This same section of the proposed OWA (Section 514(c)(1)) also advises the courts that an infringer who successfully claims a work to be orphaned may assert that its addition of the work to the Notice of Use registry adds value to the work—even though registration is a condition of eligibility. Still, courts are advised take this "value added to an infringed work" into consideration when computing how little the rightful owner may eventually be compensated if he is ever lucky enough to discover the work on the Notice of Use registry in the first place. In other words, if it doesn't work out that you get to use an infringed work for free, admitting that you used it without permission at least entitles you to a discount.

This is a further incentive to infringe. If a work stands a suitable chance of being untraceable, a prospective user who fears that an artist may refuse permission (a cigarette manufacturer, for instance) or charge more than the user is willing to pay, now has an avenue to obtain a compulsory license at a discounted rate, thanks to the OWA.

Locking the Stable Door After the Horse Has Been Stolen

The proposed OWA does allow for some injunctive relief, but without the prospect of damages and penalties, it still allows bad actors to achieve their ends without repercussion. One example is the advertising scenario I presented above. Another allows for damage to reputation. An impression does not have to linger for it to do its damage.

My brother and my wife are both public figures. Both are outspoken and credible on matters of social justice. For my part, I try, as a matter of practice, to publish my cartoons in only reputable magazines so as not to discredit them. If a handful of my works were stripped of their signature and perhaps even re-captioned, and then published as a spread in a pornographic magazine, that would create no little public embarrassment to my entire family. Worse, it would undermine the good work they do.

The opportunity for political dirty tricks under the cover of Orphan Works protections is just too frightening. Even with injunctive relief, an impression can be made, and damage can be done. Any juicy story in the newspaper may follow with a printed correction many days later, but few readers note or process those corrections. First impressions last.

I know of a certainty that my wife's opponents conduct deep opposition research to find any placements of my work that might embarrass her. Fortunately, they cannot find what they are looking for. In college, in the late 1970s, I drew an edgy little figure whose satirical intent was obvious on the features pages of squeaky clean, Catholic university student newspaper. But when it was stolen and reprinted in a sleazy local, alternative rag, the context gave it a mortifyingly different impression. When our editor-in-chief called the alternative paper on it, they showed their contempt by republishing the image but giving me "credit." Should that issue have survived in any database, the facts would not speak as loud as the visual impression. I shudder to think what could happen if dirty tricksters were handed a new tool to make their work easier.

I am not the only artist with family ties to prominent members of a community or business establishment who could be compromised by specious implications. Injunctive relief without the threat of additional penalties is no relief.

<u>Summary</u>

The Orphan Works Legislation Discussion Draft contemplated in the Report by the Copyright Office violates every fundamental of international rights treaties and tenets of our own Constitution.

1. Instead of confining limitations on remedies for the use of orphan works to parties who might be legitimate candidates for Fair Use or represent a compelling public interest in the genuine preservation of our culture, the Office makes visual works fair game to parties who may intentionally orphan them for profit. The Office contends that "commercial users… must be able to enjoy limited liability." With the proposed OWA, there is no question that commercial users will enjoy it. How could they not? With the unpoliced opportunity to abuse the system, it's a license to steal. Limitations on remedies make it unfeasible for victims of orphaned works to investigate abuses and impossible to punish them.
2. Instead of avoiding conflicts with authors' rights, the proposed OWA introduces new and previously unimaginable conflicts. It preempts the authors' Constitutional right to control the exploitation of their own work and intellectual property, and thereby compromises their

ability to enter into good faith contracts by assuring that exclusivity of control, which thereby devalues those contracts and the authors' livelihoods. Likewise it threatens the investments of businesses in original content for their own marketing or publication purposes. Further, in certain cases, where not even "reasonable compensation" is permitted to authors by the OWA, the legally sanctioned infringement of copyright amounts to illegal taking by the government.

3. Instead of giving preference to the legal rights of the creators of works, the OWA is openly biased in favor of infringers—people who willfully break the law. The OWA even protects the copyright privileges of infringers' derivative works while at the same time trampling the rights of legitimate creators and owners. The disregard for copyright is complete, illustrated by the OWA's refusal to limit eligible orphan works to works suitably old for its rights to be conceivably expired or abandoned. Making something published yesterday eligible for orphan status is a veritable abolishment of Copyright altogether.

The proposed Orphan Works Act is simply too easy to abuse, and the Act provides a profit incentive to abuse it. It effectively uses an honor system against skewing or manipulating a search for a visual work's origins. The Notice of Use registry, while in theory a potential safeguard, predicates its usefulness on the existence of fewer than a thousand officially orphaned works that have been registered in other countries with orphan works laws. The OWA's inclusion of a profit motive, and subjecting all works to orphan eligibility, virtually assures that the number of works on the registry will climb to several orders of magnitude beyond that one thousand, making it of too unwieldy a size for authors and artists to police it as scrupulously as they would need to in order to protect their own assets.

The Copyright Office speaks of the need to preserve our culture, but our culture only exists because of strong copyright laws. Artists only have the freedom to create if they do not have to fear predators around every turn, waiting to steal their rights. The proposed legislation feeds predators, people who wish to profit from creativity that is not theirs. If our culture becomes solely about predation and profit—and there are those who argue from the rising inequality that it is already on its way to just that—then we will have no more culture left to preserve.

President Kennedy famously reminded us, "The rights of every man are diminished when the rights of one man are threatened." The proposed Orphan Works Act does not merely threaten the rights of artists, it abolishes them.

I strenuously urge you to abandon this legislation and, if you truly must address the issue for the lofty cultural goals you claim, follow the internationally approved and Constitutionally

sound principles laid out in the Mass Digitization section of your Report. And add a few more protections for artists to police and reclaim their rights from the predators.

Sincerely,

Pat Byrnes