PREPARED STATEMENT OF THE NATIONAL TEXTILE ASSOCIATION
AMERICAN MANUFACTURING TRADE ACTION COALITION
DECORATIVE FABRICS ASSOCIATION
ASSOCIATION OF CONTRACT TEXTILES
HOME FASHION PRODUCTS ASSOCIATION

BEFORE THE

HOUSE JUDICIARY SUBCOMMITTEE ON COURTS, THE INTERNET AND INTELLECTUAL PROPERTY
UNITED STATES HOUSE OF REPRESENTATIVE

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Chairman Berman, Ranking Member Coble and Members of the Subcommittee, thank you for the opportunity to testify on the issue of orphan works and the need to balance the interests of copyright owners and users. I come before you today to speak on behalf of the hundreds of American companies -- members of the Decorative Fabrics Association (DFA), the National Textile Association (NTA), the Association of Contract Textiles (ACT), the Home Fashion Products Association (HFPA) and the American Manufacturing Trade Coalition (AMTAC) – who will be negatively affected by an orphan works amendment to the Copyright Act, at least in the form heretofore proposed.

I am the President and General Manager of Schumacher, a Division of F. Schumacher & Co., a family-owned company headquartered in New York City. Prior to my current position, I practiced corporate and intellectual property law for 23 years, 15 of which as General Counsel of

F. Schumacher. I am also a member of the Board of Directors of the DFA. For over a century, F. Schumacher has been a leading designer and supplier of fine decorative fabrics, wallcoverings, carpets and home furnishing products to the interior design trade, including designers and decorators, architects and other design professionals. Our products are sold through a network of trade showrooms and road sales representatives. F. Schumacher currently employs approximately 400 people nationwide, with facilities and showroom locations in 18 different states, including California, Georgia, Texas, Florida, Michigan and South Carolina.

As a converter and jobber, F. Schumacher does not print or manufacture products itself, but creates original designs and then enters into arrangements with contract manufacturers in the United States and abroad who print or weave the fabric, wallpaper or rugs for us. We also purchase existing designs from these mills for exclusive distribution in certain geographical markets. F. Schumacher employs over a dozen artists and stylists in its in-house design studios, who are responsible for creating hundreds of new patterns, styles and colors every year. Additionally, F. Schumacher commissions freelance designers and artists to create exclusive artwork for the dozens of new collections of fabric, wallpaper and rugs we introduce each year. F. Schumacher spends several million dollars every year in design development and sampling cost, and currently has over 8,000 active patterns (skus) in its line.

F. Schumacher is a member of the Decorative Fabrics Association, which is comprised of approximately 60 member companies similarly engaged in the wholesale distribution of highly-styled domestic and imported decorative fabrics and other home furnishings throughout the United States. Many DFA members are much smaller than F. Schumacher, with limited

financial resources. DFA also has Allied Members, some of which are mills that are also members of the National Textile Association. The NTA is the nations' oldest and largest association of fabric-forming companies and includes many that supply the home furnishings market. Members of NTA are located throughout the United States, including Pennsylvania, Massachusetts, North Carolina and South Carolina -- historically heavy textile industry states that have been devastated by job losses and plant closures due to foreign competition and the weakened American economy. Most of NTA's member weavers are small and mid-sized businesses that are privately owned, frequently having been run by American families for multiple generations.

The Association of Contract Textiles is a not-for-profit trade association founded in 1985, whose purpose is to address a variety of issues related to the contract textiles industry and whose 80 members are textile wholesalers, furniture manufacturers and other suppliers to principal member companies. The American Manufacturing Trade Coalition represents a wide range of industrial manufacturers who support policies to stabilize the U.S. industrial base and preserve and create American manufacturing jobs. The HFPA is a national, non-profit organization dedicated to advancing the common interests of the home fashions products industry through a variety of programs and activities. The membership encompasses manufacturers and suppliers of bedding products, including sheets, pillow cases and bed coverings, window treatments, bath & bed decorative products, drapery and upholstery fabrics, kitchen textiles, table linens and related accessory classifications. Together, member companies of NTA, DFA, ACT, HFPA and AMTAC employ hundreds of thousands of Americans and help drive the U.S. economy in a meaningful way.

For the reasons enunciated below, the textile and associated home furnishings industry is deeply concerned by the proposed "orphan works" amendment to the Copyright Act, which would have the effect of creating orphans where none existed. As far as our industry is concerned, we do not believe that we have an "orphan works" problem. While we understand the needs of the cultural and educational not-for-profit institutions whose interests where at the heart of the initial orphan works proposal, we believe that, if unchanged, the "orphan works" amendment as initially drafted will create dire, unintended consequences for the textile and home furnishings industry.

The Textile and Home Furnishings Industry Does Not Have An Orphan Works Problem

At the heart of the orphan works proposal is the laudable 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. These works, it is argued, have no commercial value but have historical, cultural or educational significance and should be made available to the public. In her written testimony before the Senate Judiciary Committee on April 6, 2006, Maria Pallante[1], then Associate General Counsel and Director of Licensing for The Solomon R. Guggenheim Foundation, stated that the Copyright Office's proposal would ensure "the mission of making letters, manuscripts, photographs and ***other culturally significant*** materials available to the public" and that this proposal would "directly affect the intellectual, historical and cultural life of all Americans." [Emphasis added]

[1] Ms. Pallante is Deputy General Counsel , U.S. Copyright Office.

It is hard to conceive, under any scenario, what greater public good is served by making a particular textile design available to a commercial enterprise who cannot locate the rightful copyright owner. Under current law, outside of certain public-interest uses, such as exhibits by museums and libraries, what is the downside for those who do not know if a particular textile design is copyrighted? They would risk a potential lawsuit if they use the design, so they don't use it. How is that detrimental to the public good? There is no legitimate reason (educational, historical, cultural or otherwise) why a shower curtain company, for example, **has** to use a certain design. If they are unsure of the copyright origin of a particular pattern, instead of risking the cost of litigation and copyright infringement damages, they can just create their own design. The consuming public will not be cheated if it cannot buy a shower curtain (or rug or wallpaper or table cloth or upholstery fabric, etc.) with a particular pattern on it. If anything, selection will be enhanced because new original designs will be created.

Every design created by textile and home furnishing companies is intended for commercial exploitation. Make no mistake: while these designs are artistically beautiful, they are not intended to be art. They are created for the sole purpose of being applied to a product that can be sold and commercially exploited for the profit of their copyright owners. A design may be commercially exploited for six to ten years, then fall out of fashion and be placed in a company's archives. When a particular fashion trend or business need justifies bringing a particular design back into production, a textile company will reintroduce the design, perhaps recoloring or reinterpreting it. Or perhaps it will be licensed for application on a different product category altogether. But the design is never orphaned during the duration of its copyright term. The textile company knows exactly where it is, and did not forget or abandon it.

The orphan works problem was created in large part by the elimination of formalities that resulted from the United States' accession to the Berne Convention. Congress further exacerbated the problem by extending the term of a copyright to life of the author plus 70 years (95 years in the case of corporate owners). Textile and home furnishings companies who have thus been granted 95 years to commercially exploit their designs should not be stripped of their rights by reintroducing formalities (in violation of international treaties) or legalizing infringement through the "orphaning" of our designs.

The Copyright Office, in its orphan works proposal, stated "for authors and copyright owners, marking copies of their works with identifying information is likely the most significant step they can avoid the work falling into the orphan works category." While good advice, it is also naïve because it ignores certain market realities. Although aware that this is no longer a legal requirement, F. Schumacher -- like other NTA, DFA, ACT and HFPA member companies -- always prints a copyright notice on the selvedge of its printed fabrics. Additionally, the copyright notice appears on its fabric sample books as well as on individual sample tickets. However, it is not technologically possible to imprint a copyright notice on woven fabrics because the borders, or selvedges, are structural elements, nor on rugs or wallpapers as these products do not have a selvedge and putting the notice on the products themselves would deface the designs. Even if printed on the back of wallpaper, the ink would bleed through the other side when pasted to the wall and ruin the product. Nevertheless, a copyright notice is placed on the sample books and on the labels that are inserted under the wallpaper shrink-wrap or stapled to the rugs. Despite all these precautions, unscrupulous users can all too easily cut off a fabric

selvedge or remove a ticket, thus creating instant "orphans" out of these designs. Additionally, the selvedges are routinely cut off most fabrics during the manufacturing of upholstered furniture, so even a well-intentioned user would be unable to access the copyright information with reasonable facility.

The proposed orphan work legislation is not a solution to an "orphan works" problem. Instead, it is a blueprint for a radically new copyright law. The inability to distinguish between abandoned copyrights and those whose owners are simply hard to find (because someone else removed the copyright notice or because the Copyright Office does not have a searchable database of visual designs) is the Catch-22 of the Orphan Works project. This legislation would orphan millions of valuable copyrights that cannot otherwise be distinguished from true orphaned works – and that would open the door to commercial theft on an unprecedented scale.

Remember that these designs have extensive commercial value. A true orphaned work does not. This legislation will catch an innumerable number of valuable and well-managed copyrights in an orphan works net.

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 without gutting artists' copyrights, for example. Limited exemptions could be designed for documentary filmmakers, libraries, and archives.

At a minimum, any orphan work legislation should exclude from its reach any pictorial or

graphic work that was initially created for commercial exploitation or was at any time commercially exploited (such as textile designs), as such works are NOT orphan works. The fact that a work is embodied in a useful article (as defined in Section 101 of the Copyright Act) when first discovered by the infringer should be prima facie evidence that such work was created for commercial exploitation (or was commercially exploited) and should remove it from the ambit of the orphan work definition. So for instance, a design found on a fabric curtain (a useful article) could not be deemed "orphaned" since it was obviously created for commercial exploitation or was commercially exploited.

"Reasonable Search" is Meaningless in the Absence of a Searchable Digitized Database

Members of this Subcommittee know all too well that Asia is a major source of illegal copies. An orphan work proposal will only further embolden these copyright violators, most of whom are not subject to U.S. jurisdiction, to steal our designs, claim them to be "orphaned" and resell them to unsuspecting (or unquestioning) buyers who will rely on the infringer's claim of a "reasonable search". This scenario is not far-fetched. A buyer for a large chain of mass-market goods travels to China to buy low-priced, high-volume poly/cotton sheets. The buyer looks through the Chinese mill's inventory of designs and selects one to his liking. The buyer inquires if the Chinese mill owns the copyright in the design. The Chinese mill states that the design is "orphaned," that it did a "reasonable search" but could not locate the copyright owner. The Chinese mill presents the buyer with a document stating that it did an on-line search of the Copyright Office's text database as well as a Google word search, but could not come up with any results. The buyer is satisfied and imports a million units of the infringing sheets into the

United States. The rightful copyright owner, who may be a small business, becomes aware of the infringement but does not have the financial resources to fight a copyright infringement claim against this large chain, who offered to pay a "reasonable compensation" of $0.10 per unit, not enough to cover the copyright owner's legal fees, let alone lost profits.

For over a century now, F. Schumacher has registered hundreds of designs each year with the Copyright Office, at considerable expense. Many of these designs have since lapsed in the public domain, but many more are still protected by a copyright. Multiply our experience by the hundreds of other DFA, ACT and HFPA companies and add in the member weavers of NTA, each of whom registers over 1000 designs per year and has for decades, and the scope of the investment becomes clearer. Yet, the Copyright Office effectively hides these registrations because it has never implemented technology or created a manual index to effectively search works of visual art. It is unconscionable for Congress to try to impose millions of dollars of costs on individual companies, many of which are small businesses, insisting that each company fund and create its own electronic database, consisting of thousands of designs, which database would need to be updated on a continuous basis, when even the Copyright Office has found it too onerous to do.

It is simply not feasible for individual companies to create a searchable and indexable database containing every visual image. It would have to be an all-encompassing, comprehensive database, because – unlike other copyrighted work – visual art is not limited to a single industry or medium. For example, a textile design can be infringed when it is stolen for use on a dinner plate, on stationery, on gift wrapping paper, on a holiday card, on wallpaper,

album cover, or coffee mug. So if a rug manufacturer wanted to use a particular design, in order to diligently search, it would need to contact not just thousands of rug companies, but also companies in all related and unrelated industries where the design may have originated, e.g. wallpaper, textile, greeting cards, apparel, bedding, computer software, and so on. And to think that all these radically disparate groups will form a single trade association to catalog their designs (as if that were even technically and economically possible) is totally unrealistic.

Many home furnishings companies currently have web sites with a searchable database of their product designs. However, these designs are catalogued based on categories established by each individual company. In order to do an effective search, one needs to know the name of the pattern or the exact category in which it falls, e.g. small floral, Asian, chinoiserie, toile, geometric. Of course, each company may use different terminology, making a relevant search more difficult. For instance, a recent search of the on-line database of F. Schumacher, Kravet and Robert Allen (all decorative fabric companies) for geometric/contemporary/abstract designs revealed over 8,000 hits. A user would then have to view all 8,000 hits to determine whether the design she wanted to use belonged to one of these companies. And she could still come up empty-handed because these databases only contain active designs (those currently in the line and not archived) or the pattern in question may actually be contained in a wallpaper database, or the searcher may not have use the proper search categories. Under these scenarios, would it be determined that the user conducted a reasonable search? What if she had only searched one database or viewed only 100 images?

Moreover, image-recognition technology for complex pictorial designs, such as textiles

and rugs (which are three-dimensional engineered products because of the weaving process), does not exist. A text-based index of visual art is likewise practically impossible. Each individual member company within NTA and DFA alone probably has thousands of designs containing a stylized version of the rose. To describe the differences in each design would require a full paragraph and countless hours of a person's time for each design ("a stylized rose flower with five petals and five sepals on every other flower and four petals on the remainder, with vines interlocking each flower, and a ring of stamens surrounding the pistils, on a pansies toss background...."). Even if such a detailed description were drafted, it would be practically useless, as most people wouldn't even recognize the particular type of flower depicted on the fabric, and would just search for "flower," resulting in millions of results.

The proposed legislation is arguably an "aggressive opt in" copyright regime for visual artists, requiring them to spend millions of dollars and hours in a probably futile effort to catalog every image known to man. F. Schumacher, like other textile companies, has already spent considerable amounts of money to create a searchable database of some of its designs on its website. It costs approximately $50 to scan each design and create item master tags to ensure that the designs are catalogued and retrievable in a search. Some fabrics, due to the nature of the fiber (high sheen silks or velvets) cannot be scanned, so they must be photographed at an average cost of $100 per design. The higher the image resolution, the higher the cost. Woven textiles are particularly tricky because of the three-dimensional nature of the weaves, and even a scanned image may not make the pattern easily identifiable. The cost of digitizing and cataloguing a single company's entire archives of copyrighted images would be in the millions. Yet, this would not ensure a successful search because unless a user were able to scan the desired image

against other images in the database, the user would be confronted with millions of images to review manually. Because there is no practical way to search for visual art, the end result is that the majority of visual artwork is likely to be deemed orphaned. In other words, as far as visual art is concerned, almost any search is likely to be deemed reasonably diligent, even if that search has essentially a zero chance of actually identifying the copyright owner.

If an exclusion is not granted for pictorial or graphic work created for commercial exploitation, then, at a very minimum, the proposed orphan works legislation should put the onus on the Copyright Office to develop a comprehensive database of pictorial, graphic and sculptural works, going back to 1978, that is fully searchable through effective image-recognition technology. The Copyright Office, as the repository for visual art since the 1800's, is the natural location for and guardian of such a database, especially since it already receives (and previously received) deposits from copyright owners, and Congress can appropriate funds to that end. Any orphan works legislation should not come into effect until two years after the Copyright Office has successfully demonstrated and certified to Congress that it has implemented such searchable database.

The Legislation Contravenes Existing International Treaties

By imposing a "reasonable search" standard that includes a search of the U.S. Copyright Office, Congress is essentially signaling to copyright owners that they **must** mark their creations with a copyright notice and register their copyrights to be accorded some protection. This appears to be in direct violation of The Berne Convention and the WTO's Agreement on Trade-

Related Intellectual Property Rights with respect to marking and registration requirements and the conditions under which compulsory licenses may be granted.

"Reasonable Compensation" Is Meaningless Unless Attorneys Fees or Statutory Damages Are Awarded

The proposed legislation would require an infringer to make a good faith offer for reasonable compensation. But if a user would have to pay reasonable compensation before the infringement, and would have to pay the same amount afterward, what is the incentive to really avoid infringement in the first place? In short, none. And what is good faith and what is reasonable compensation? Design fees and royalties vary considerably depending on the industry, the intricacy of the design and the prominence of the designer. And how are you to be compensated for the damage to your image and reputation (and loss of business) if your high-end, exclusive designs end up on low-quality, mass-produced goods? Reputational damage does not figure in this "reasonable compensation" scheme. The orphan works proposal is, essentially, a mandatory licensing scheme since, in many instances, the copyright owner would not have agreed to license its design.

Moreover, by allowing anyone to use a protected work simply by failing to locate the author, the law effectively prohibits the granting of an exclusive license. Exclusive licenses in many industries, like textile design, are paramount to a company's success. Many members of NTA and DFA have several long-term, lucrative exclusive license agreements that would be jeopardized by this legislation if their licensees could not be ensured true exclusivity of designs.

This legislation would remove any meaningful remedies for infringement, which are the only means that copyright owners have of enforcing their copyrights.

Injunctive Relief

The proposed legislation (as introduced in the last Congress) does not require immediate cessation of the infringing uses. Too often a store will continue selling the infringement because it hasn't found it "convenient" to divert employees to pulling the infringements off the floors. It is never convenient, and a sharp incentive must be provided in order for the infringing use to cease expeditiously. Additionally, if the infringer incorporated a design into a new work, thus creating a derivative work, injunctive relief would not be allowed as long as the infringer agreed to pay a "reasonable compensation" and to provide the copyright owner with attribution. Again, this is tantamount to a compulsory license or legalized infringement, usurping a copyright owner's right to withhold consent to the use of its work. It is easy to imagine a beautiful fabric design being defaced and incorporated into a tasteless, mass-market derivative work, and the true owner would be powerless to stop it as long as "reasonable compensation" were offered. To add insult to injury, to avoid injunction, the infringer would simply have to give the owner attribution, thus associating its name with a product it does not approve of, and the infringer would own the copyright in this derivative work!

Conclusion

While the textile and home furnishing industry is not opposed to an orphan works solution targeted to the specific concerns of the not-for-profit institutions and specific categories

of copyrighted work, we urge members of this Subcommittee to take a tailored approach and consider the impact of any legislation on the visual art industries. We have attached sample legislative language (based on the bill that was introduced in the last Congress, known as H.R. 5439) which would exclude from the reach of orphan works certain categories of visual works, while providing the relief sought by cultural and other not-for-profit institutions.

At a time when the American economy is in a recession and the textile industry is facing increased threats from foreign competition that resulted in the bankruptcies, and resultant job losses, of the two largest American upholstery fabric weaving mills just last summer, we urge Congress not to strip the American textile and associated industries from their one competitive advantage – their intellectual property.

Mr. Chairman, Ranking Member Coble and members of the Subcommittee, I again thank you for the opportunity to bring the concerns of the textile and home furnishing industry to your attention as you attempt to balance the interests of copyright owners and users.