

From:
To: FN-OMB-IntellectualProperty
Cc: info@copyrightalliance.org
Subject: Protect the rights of Creative Americans - NO TO ORPHAN WORKS LEGISLATION
Date: Wednesday, March 24, 2010 3:06:28 PM

Dear Ms. Espinel:

The Copyright Alliance has informed me of this welcome invitation from the Obama Administration to share my thoughts on my rights as a creator.

The unauthorized copying, sale, and distribution of artists' intellectual property directly impacts our ability as artists and creators to control the use of our own creativity, not to mention our ability to receive income we have earned from our labor. This impacts U.S. employment and the economy, and our ability to globally compete.

Current copyright laws should be strengthened to protect creators; the proposed Orphan Works Act does just the opposite. It is a radical departure from current copyright law, and grants infringers freedom to ignore the rights of creators. It substantially limits our ability to protect our work or recover the financial damages of infringement. This legislation is a free pass for infringers. It is in violation of the Berne Convention for the Protection of Literary and Artistic Works. I have attached a piece from the American Society of Illustrators outlining why this legislation would be devastating for creators, the creative backbone of America.

Creators and their ingenuity are the seeds of American growth- please help us protect our rights to our own work! Our ability to continue creating depends on this!

Margaret McCarthy
New York, NY
Photographer/Author



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Congressional Legislation

The Orphan Works Act of 2008

Bill # H.R.5889

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About This Legislation:

How the Orphan Works Bills Affects Visual Artists

H.R. 5889, **The Orphan Works Act of 2008**, was introduced on April 24, 2008 by House Judiciary Committee Intellectual Property Subcommittee Chairman Berman of California, full Judiciary Committee Ranking Member Lamar Smith of Texas, and

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Intellectual Property Subcommittee Ranking Member Howard Coble of North Carolina. It limits the remedies in a civil action brought for infringement of copyright in an orphan work. It amends Chapter 5 of title 17, United States Code, (Copyright law) by adding "§ 514. Limitation on remedies in cases involving orphan works."

Section 514 is the new limitation on remedies which the Orphan Works Act will impose on any copyrighted work wherever the infringer can successfully claim an orphan works defense, whether legitimate or adjudicated by courts to be conclusive.

Overview

- The Orphan Works Act defines an "orphan work" as any copyrighted work whose author any infringer says he is unable to locate with what the infringer himself decides has been a "reasonably diligent search." In a radical departure from existing copyright law and business practice, the U.S. Copyright Office has proposed that Congress grant such infringers freedom to ignore the rights of the author and use the work for any purpose, including commercial usage. In the case of visual art, the word "author" means "artist."

- This proposal goes far beyond current concepts of fair use. As acknowledged by the Register of Copyrights it is not designed to deal with the special situations of non profit museums, libraries and archives. It is written so broadly that it will expose new works to infringement, even where the author is alive, in business, and licensing the work.

- The bill would substantially limit the copyright holder's ability to recover financially or protect the work, even if the work was registered with the U.S. Copyright Office prior to infringement.

- The bill has a disproportionate impact on visual artists because it is common for an artist's work to be published without credit lines or because credit lines can be removed by others for feckless or unscrupulous reasons. This is especially true of art published in the Internet Age.

Coerced Registration

- The Orphan Works Act would force artists to risk their lives' work to subsidize the start-up ventures of private, profit making registries, using untested image recognition technology and untried business models. These models would inevitably favor the aggregation of images into corporate databases over the licensing of copyrights by the lone artists who create the art.

- The most common scenario of orphaning in visual art is the unmarked image. There is only one way to identify the artist belonging to an unmarked image. That would be to match the art against an image-recognition database where the art resides with intact authorship information.

- These databases would become one-stop shopping centers for infringers to search for royalty-free art. Any images not found in the registries could be considered orphans.

- There is no limit to the number of these registries nor the prices they would charge artists for the coerced registration of their work.

- The artist would bear the financial burden of paying for digitizing and depositing the digitized copy with the commercial registries.
- Almost all visual artists such as painters, illustrators and photographers are self employed. The number of works created by the average visual artist far exceeds the volume of the most prolific creators of literary, musical and cinematographic works. The cost and time-consumption to individual artists of registering tens of thousands of visual works, at even a low fee, would be prohibitive; therefore countless working artists would find countless existing works orphaned from the moment they create them.
- The Copyright Office has stated explicitly that failure of the artist to meet this nightmarish bureaucratic burden would result in his work automatically becoming an "orphan" and subject to legal infringement.

International Impact

- Because an unmarked picture cannot be sourced or dated, works by artists outside the U.S. will be as vulnerable to infringement in the U.S. as work by domestic artists.
- Presumably the Copyright Office and Congress expect non U.S. artists to register all their past and future art with the new hypothetical U.S. databases, or see their work exposed to commercial infringement under U.S. law.
- It is a violation of the Berne Convention for the Protection of Literary and Artistic Works for any country to impose registration on a rights holder as a condition of protecting his copyright. See Article 5(2) "The enjoyment and the exercise of these rights shall not be subject to any formality (emphasis added)."
- The U. S. is also a member country of the Agreement on Trade-Related Aspects of Intellectual Property (The TRIPs Agreement). Article 13 of this copyright-related treaty specifies a Three-Step Test for exceptions to an artist's exclusive right of copyright:

Limitation and Exceptions to Exclusive Rights Member [countries] shall confine limitations and exceptions to exclusive rights to:

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

The Orphan Works Bill of 2008 violates the Berne Copyright Convention and fails the Three-Step Test of TRIPs.

How Section 514 Will Work

The Orphan Works Act will "solve the Orphan Works problem" by classing as an orphan any work whose author any infringer can successfully define as one. This will result in orphan status being assigned to any work, despite its age, even where the artist is alive, working and easily locatable by others. To repeat: even if 10 users (or 100) can find a given artist, this bill will allow a single infringer who can defend in court his failure to find the artist, to establish that the artist's work was an orphan for legal purposes.

This would include any works, from professional paintings to vacation photos, including any pictures that reside or have ever resided on the internet.

- Infringers of these works will be required to file a notice of use with a new infringement database to be maintained by the Copyright Office. The notice will include only a text description of the visual image. The infringer will not be required to file a copy of the image itself. The notice must also include a summary of the search the infringer conducted, all information found during the search, the name of the artist if known, and a description of the intended infringements. However:

- The infringer will not be required to reveal this search documentation unless the artist undertakes a civil action, therefore:

- The artist will not be able to know that the infringement is being contemplated (and therefore cannot ask for this documentation) until after the infringement has already occurred and in the event (perhaps unlikely) that the artist has discovered the infringement.

- The infringer must provide attribution that is "reasonable" under the circumstances, and include a symbol or other notice to identify an orphan work in a manner described by the Copyright Office.

- When the artist discovers an infringement and if the artist can identify the infringer, the artist is required to file a notice of claim for infringement, including the artist's name, all known titles of the infringed work, the artist's contact information, and proof from which a reasonable person could conclude that the artist's ownership and infringements claims are valid.

- If the infringer fails to negotiate reasonable compensation in good faith, or fails to pay in a reasonably timely manner, the infringer may lose the limitations on remedies, provided the infringer's reasonable search is adjudicated by courts to be insufficient.

- The Orphan Works Act results in unrecoverable payment for use. Infringements can occur anytime anywhere in the world. However if the artist discovers an infringement he will have to bear all expenses to discover, identify, and pursue the infringer. This will include attorneys' fees and court costs. The artist will not have the right to receive actual or statutory damages from the infringer. The artist can receive only what a court determines to be "reasonable compensation." Many artists will not be able to afford the expense of recovering payments for the unwelcome uses of their work.

- A high risk is placed on every infringed artist who tries to recover work from orphan status. While the artist is always limited to "reasonable compensation" for recovery, there is no limitation on the dollar amount of damages or attorneys' fees the infringers can obtain from the artist in a countersuit.

- Because the outcome of any litigation will depend on the court's interpretation of ambiguous terms such as "reasonably diligent search," "reasonable compensation," "reasonable seller" and "reasonable buyer," etc., (as well as the other uncertainties inherent in any legal proceeding,) a single copyrighted work could be accorded orphan status in one legal proceeding, but not in

another.

- The infringer can copyright a derivative work: Under current law, the right to create a derivative work is one of an artist's exclusive rights. Section 103(a) currently prohibits a user from copyrighting a derivative image that he's infringed. By contrast, the Orphan Works Bill will permit the infringer to copyright the derivative of the artist's work.

- Prohibition on injunctive relief: unrecoverable permanent orphaning in the case of derivatives. Under this legislation the artist will be prohibited from stopping the use of the derivative work infringed from his own. All the infringer must do is manipulate the image enough to meet the minimum threshold for defining a derivative work. This provision invites abuse: it will allow infringers to exploit the originals of countless artists, then use these derivatives to compete in the marketplace with the artists whose work they have manipulated. For example:

- Stockhouses and commercial archives could harvest newly-created "orphans," then crop or alter them slightly to make them "derivative works" and register them as their own "creative" works. Freelancers would then be forced to compete against their own lost art - and that of their colleagues, while willful infringers would have the competitive advantage of merely assimilating and transforming the work of others.

- Unfair competition, involuntary compulsory license, and a taking. In the cases where the court denies the artist injunctive relief for derivatives, the infringer will have to pay the artist nothing more than whatever a court determines to be "reasonable compensation." Meanwhile, the infringer can continue the infringing work. This means the artist will lose the exclusive right to his work, while being forced to accept a fee that is not based on his reputation, skill and standing in the market.

Effect on Visual Art Market

- Publishers and other art licensees will be less likely to commission new work from artists if they can surf the net for free images that have become separated from identifying information. An artist's pre-existing paintings and drawings - orphaned through no fault of his own - would be competing against him for the new commissions he needs to make a living.

- Loss of the right to exclude. An artist's exclusive right of creative control and ownership is critical to protecting his work. Under this bill, an artist will be powerless to stop the unauthorized uses of his art, even in cases where the artist would never, or could never, permit those uses. Besides seeing his work used in objectionable or defamatory ways, this will void existing contracts already in force between an artist and his clients. Example:

- Exclusive rights can no longer be guaranteed in the marketplace. Let's say you've contracted with a client to give that client exclusive rights. Those rights can now be legally infringed by others through no fault of your own, and even without your knowledge. Your right to license or sell your exclusive right of copyright to your clients will now go out the window. This fact alone will wreak havoc on licensing markets, because

- It will devalue your entire inventory of work. In current commercial markets, your ability to sell exclusive rights to a client

triples the value of a license for one-time usage. Since you will never again be able to guarantee a client that someone somewhere has not - or will not - infringe your work without your knowledge, you can never again guarantee that client an exclusive license to use your past or future work. This means that if this bill passes your entire inventory, as well as all your future work, will be devalued by at least 2/3 from the moment it becomes law.

Effective Date & Retroactive Application

- Limitation and/or elimination of remedies takes effect on infringing uses that start on or after the effect date of the earlier of

1. The date on which the Copyright Office certifies at least 2 visual art registry databases that are available to the public, or

2. Jan. 1, 2013, regardless of whether the databases exist or are certified.

The bill has a retroactive application that extends to any works, not just those created after the effective date. This means that all work created during the term of the 1976 Copyright Act will be in play as potential orphans. This even includes work you've registered with the Copyright Office - it appears you'll have to register it again, this time with one or more commercial registries. This will penalize artists who have produced work over the last 30 years for not registering that work with commercial registries which did not exist at the time (and which in fact haven't yet been created).

Calls For a Study on Small Copyright Claims Court

The Orphan Works Act/Sec 6 (a) says that the Copyright Office will be directed to study the feasibility of creating alternate means of resolving disputes. However this study will only commence after the bill has been passed. The fact that the CO concedes that it might require an entirely new branch of the Federal judiciary system to deal with the fallout from the bill should be a red flag. But besides the issue of jurisdiction, here are some other critical questions:

- There seems little justification for legislation that would drive artists' business transactions into the courts.
- But if Congress is determined to replace these voluntary transactions with litigation, shouldn't the means of resolving this litigation be proved feasible before a law is passed to make it necessary?
- How can a Small Claims Court - or its "alternative" - determine the facts of a contentious infringement case without the tools of discovery, deposition, cross-examination, expert witnesses, etc.? They can't, so abuses will likely become commonplace.

[Detailed](#), up-to-date bill status information on H.R.5889.

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