

APA Position on the Orphan Works Act of 2008

From the onset, APA has been actively engaged in the effort to help solve the orphan works dilemma. We made public our support for the crafting of an amendment that would permit use of verified, i.e. true, orphaned works for certain uses, by way of procedures that are clearly defined in the statute or regulations, while retaining remedies for use by copyright owners in the event of abuse.

APA, in seeking to represent the best interests of its members, takes the position that the legislation offered in both bills -- S.2913 and H.R.5889 -- does not achieve the goal as we believe was originally intended, and instead provides a distinct road map for the infringement of contemporary works by living artists worldwide. If left unchanged, this legislation has the potential to destroy the businesses and livelihoods of thousands of photographers, other visual artists, as well as the collateral small businesses that serve the industry, and are dependent on, creators.

Therefore, APA is asking its members and all concerned individuals to take action by writing your members of Congress to voice your concerns. **PLEASE** go to this [resource page on Orphan Works](#) for sample letters (scroll down for the photographers' letters) and the ability to automatically contact your specific members of Congress. Great thanks to the Illustrators' Partnership for making this site available.

Solutions are Needed, but for REAL Orphan Works

Libraries, museums, educational institutions, scholars and researchers provide invaluable service to our society and culture, and face tremendous challenges in preserving deteriorating works, duplicating works for educational purposes and in making works easily accessible to the public. Without a doubt, these groups stand to benefit tremendously from an orphan works amendment, and rightfully so.

Likewise, creators endorse the concept of an orphan works solution that would be give libraries and museums access to work whose authors have died or otherwise abandoned their copyrights. Many artists use older works in one way or another and most would welcome any clarity that the law can provide regarding the use of true orphaned work.

We believe the orphan works problem can and should be solved with carefully crafted, specific, limited exemptions. For example:

- An exemption could be tailored to solve family photo restoration and reproduction issues.
- If not already covered by fair use, genealogy research could be given an exemption.
- Limited exemptions could be designed for documentary filmmakers.
- Beyond the exemptions that libraries and archives already have, a clearance system could be created such as the system already in use in Canada.

Canada has created a statutory licensing system that allows licenses for the use of published works to be issued by the Copyright Board of Canada on behalf of copyright owners who cannot be located.
<http://www.library.yale.edu/~llicense/ListArchives/0507/msg00096.html>

The development of a system such as this would serve potential users of orphaned work by allowing them to clear rights in an orderly, verified way. Therefore we respectfully requested that the Senate conduct further hearings to resolve the specific problem of providing public access to true orphaned works.

Our primary objection to this legislation is that its effects cannot be limited to old or abandoned copyrights. It will endanger the rights of photographers and other visual artists who are alive, working and managing their copyrights. Although the Senate and House bills differ slightly, the effect of either would be devastating to commercial markets in which photographers and image-makers work, as well as for the licensing and other collateral small businesses that serve, and are dependent on, creators.

Indeed, the language in both versions of the bill has been written so broadly that it will affect anyone who produces visual images of any kind, from professional photographs to family snapshots, to paintings and home videos. Any published or unpublished work, including images that reside or have ever resided on the web, will become potential orphans if this bill becomes law. **This unprecedented expansion of the public domain makes this legislation much more than an issue of copyright infringement. Its unintended consequences would amount to a violation of private property and potentially, of privacy itself.**

It represents a radical departure from existing business models and copyright law. It is one reason why international copyright law, specifically Article 5 (2) of the Berne Convention, prohibits the requirement of “any formality” as a precondition to the enjoyment of full copyright.

All works, professional or personal, published or unpublished, will have to be registered with as-yet-to-be-created private, commercial registries. As users come to rely on registries to conduct a “reasonably diligent search” for rights holders, any works not found in the registries could be infringed as orphans.

There are billions of photographs in existence, many of which have not been digitized, and millions of which have been published without attribution. As such, this legislation would have a disproportionate impact on photographers. **Photographers create works at such a pace that one or more full time employees would be required just to upload works to the registry.** It is unreasonable to expect that artists will dedicate precious limited resources to sift through huge numbers of inquiries on orphan works in an attempt to identify their works and to reply before their works are exploited by third parties.

Even if the cost of registration were minimal, the costs in terms of preparation and registration would bankrupt most artists. Visual artists and photographers, in particular, produce infinitely more individual works than even the most prolific author or songwriter. The cost in time and money of registering and maintaining thousands or tens of thousands of registrations will inevitably result in countless managed copyrighted works falling through the cracks and into the royalty-free market.

Yet the Copyright Office stated explicitly that failure of the artist to meet this nightmarish bureaucratic burden would signal to infringers that these works had been orphaned and were subject to legal infringement.

The consequences of this blanket stripping of copyright protection will be a gold mine for opportunists. Within two weeks of the issuance of the Orphan Works Report in 2006, countless domain names associated with orphan works were registered by commercial interests in preparation for the profit-taking that will result if this legislation is passed. **This bill will allow stock agencies and commercial archives to harvest these newly created “orphans,” alter them slightly to make them “derivative works,” then copyright these derivatives as their own “creative” works.** Artists could then be forced to compete against their own lost art – and that of their colleagues – for the new commissions they need to make a living.

The issue of “reasonable compensation” as specified in the legislation is very misleading, as the determination as to what is “reasonable” will be left to the user, given that the rights holder has no real ability to enforce its rights and even if I have registered my work with the U.S. copyright office far in advance of the usage.

The notion of a small claims court for copyright infringement will be a disaster if implemented. The discovery process and expert testimony are perhaps the most critical elements of pursuing any copyright infringement claim. Small claims court has no discovery process, other than an unsupervised exchange of paperwork, with no means of enforcement of compliance with any demands for disclosure.

By opening the floodgates to unauthorized use of protected works, the proposed legislation could result in a tidal wave of litigation as the result of rampant and widespread violation of the rights of publicity and rights of privacy of persons pictured in the orphan works. A photographer’s right to

exploit copyright in a photograph (and to grant licensed rights to others) is effectively limited by the right of any person appearing in the photograph to control or otherwise limit the use of his or her likeness.

Photographers will be sued by models for allowing the works to “go orphan.” This wave of litigation between models, photographers and the users of orphan works over publicity and privacy rights will be a particularly disastrous consequence of the proposed legislation. **We therefore propose that the legislation be revised so as to expressly limit the use of any orphan work bearing the likeness of a person or persons to personal, non-commercial use only, and to exclude the right to distribute, perform or create derivatives of such works, unless express written permission is obtained from the pictured subjects in advance.**

Objectionable Use: A photographer whose grandfather is a holocaust survivor might discover that his photographs were used under the orphan works amendment by the Aryan Nation to promote hatred of Jews. A mother's photograph of her infant daughter might be used under the orphan works amendment on an abortion website promoting pro-life or pro-choice, in opposition of the mother's views. **The orphan works amendment has no provision preventing the use of orphan works in a manner that might be held to be reprehensible by the owner.** Thus, the orphan works amendment conflicts with the owner's enjoyment of his exclusive rights in his property -- a violation of TRIPS.

Mandatory Attribution: The Copyright Office has suggested that authors must bear the burden of including attribution in their works, so as to prevent their works from being orphaned. Setting Berne and current copyright law aside, if Congress is to amend copyright law in such a way as to create the expectation or requirement that artists must provide attribution on their works so as to avoid such works being orphaned, then it follows that to ensure the integrity of that attribution, **Congress must also amend copyright law so as to require all users of all works (not just orphan works) to reproduce that attribution wherever works are copied, published, distributed, displayed, transformed or performed.**

We encourage Congress to provide artists with the remedies of statutory damages actual damages, profits, and attorney's fees in the event that a work is used without attribution. If Congress elects not to create such a burden on the users of works, then Congress cannot in good conscience pass the orphan works amendment, which leaves artists works completely exposed to being orphaned when works are used without attribution. We believe that the time has come to memorialize the right of attribution in this nation, not just for limited edition works made for exhibition, but for all works.

How can anyone seriously argue that in the visual arts “sector” “buyers can't find sellers”? All one needs to do is look at the countless images published in newspapers, trade publications, medical journals, ads, annual reports, posters, brochures, catalogues, postcards, greeting cards, surface and fabric design. How can anyone be surrounded by this sea of images and still argue that the intellectual rights of the creators must be jeopardized in order to “pressure” them to rely on private, for-profit registries – on the premise that unless this is done, photographers and illustrators will be too hard for the users of images to find?

To the contrary, collateral markets already exist to facilitate the process by which image buyers successfully find image sellers: Agents, commercial directories, trade shows, ads in trade publications, direct mail, web sites and e-mail solicitations all attest to the fact that hundreds of thousands of creators are engaged daily in the robust business of making themselves accessible to potential users.

All of these businesses will be hurt by a bill that legalizes the infringement of the work they trade in. None will be helped by placing on them the onerous and costly burden of registering and maintaining tens of thousands of individual copyright registrations, not to mention the impossible burden of trying to monitor infringements of their work, which can occur anytime, anywhere in the world. The Library of Congress already holds millions of visual deposits of registered visual works. These registrations can only be searched by text description.

As part of the Library of Congress' digitizing initiative to create digital access to its collections, it should begin with the Copyright Office records of Visual Artists' registrations, and create the very database described by this new legislation. The database should not expose the works to public view online where they could be stolen. Instead, it should allow searchers to upload an orphan image to be matched against the collection via image-recognition technology, and return the rights holders name and contact information to the searcher.

Any government-mandated image registry should not be in the private sector. If Copyright law requires registration for full copyright protection, and Copyright law is to now be amended to require an image registry to maintain full copyright protection of visual works, then the Copyright Office should first provide a searchable image recognition database of registered works, and bring its collections into compliance to honor the registrations it has issued for decades.

Unregistered work will be considered a potential orphan from the moment an artist creates it. In the U.S., copyright will no longer be the exclusive right of the copyright holder.

We believe strongly that this legislation as now written violates the obligations and commitments of the United States under Article 5 (2) of the Berne Convention on Literary and Artistic Rights which states: **"The enjoyment and the exercise of these rights shall not be subject to any formality."** (Emphasis added.)

This Berne Convention principle has been incorporated into the Universal Copyright Convention and Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). These agreements acknowledge narrow limitations and exceptions to the exclusive right of copyright – so long as the exceptions don't exceed the constraints of the TRIPS **Three-Step Test**:

"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."

Legal scholars Jane Ginsburg and Paul Goldstein have warned that Orphan Works legislation must precisely define the scope of its mandate or fail to meet the three-step test. As they wrote in their submission to the Orphan Works Study:

"[T]he diversity of [orphan works] responses highlights the fundamental importance of precisely defining the category of "orphan" works. The broader the category, or the lower the bar to making the requisite showing of due diligence, the greater the risk of inconsistency with our international obligations to uphold authors' exclusive rights under copyright.

Berne/TRIPs embody an international consensus of national norms that in turn rest on long experience with balancing the rights of authors and their various beneficiaries, and the public. **Thus, in urging compliance with these technical-appearing rules, we are also urging compliance with longstanding practices that have passed the test of time."** 1. p. 1, OWR0107-Ginsburg Goldstein (Emphasis added).

We do not believe the Orphan Works legislation addresses these concerns and if enacted, will likely subject the United States to complaints of treaty non-compliance at the World Trade Organization. And we would expect the international reprographic and artists rights societies which endorsed our submissions to the U.S. Copyright Office would be able successfully to encourage their governments to bring such complaints.

As the world's leading creator and exporter of copyrighted works, the credibility of efforts of the United States to secure effective international enforcement of copyright would be materially weakened by the enactment of this proposed legislation. Certainly any law that prevents effective

remedies or imposes arbitrary burdens on the right to bring infringement actions – much less provide for compensation for *de minimis* uses – would be seized upon by those in other countries who wish to defend piracy of U.S. works.

In addition to our concerns about burdensome licensing aspects of this legislation, Congress needs to be acquainted and/or reminded of **the unique characteristics of photography and other visual works of art** as distinguishable from other categories of copyrighted works such as literary works, songs and films. Unlike these other categories, visual works of art lack universally accepted titles that would allow users to search for them by name. **Therefore the role of image recognition technology is critical.**

This technology is still in its infancy, is untested, and its use raises a number of very practical concerns. Among these concerns:

- The number of works created by photographers and other visual artists 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
- Every artist would see thousands of his creations potentially orphaned from the moment of creation.
- No registry would be meaningful until billions of pre-existing works (both published and unpublished) from artists (both living and dead) have been digitized; but
- Few, if any, living artists could afford the time and expense of digitizing and registering a backlog of tens of thousands of their own works; therefore
- Countless working artists would find countless existing works orphaned from the moment they create them.

We also have a number of unanswered questions about how the registries, as mandated in this legislation, would work:

- Who is to be trusted with this [these] valuable database(s)?
- Why should any professional creator be forced to entrust his or her entire creative inventory to the control of other commercial entities?
- What happens when a registry is hacked?
- What happens when it's acquired?
- The contents of these image registries will be more valuable than secure banking information. What would prevent the terms of service to be changed?
- What happens when registration fees become prohibitive?
- What if individual artists cannot afford to maintain their immense bodies of work in competing registries?

We are concerned that even if visual artists are able to comply with these measures, they might still find their work orphaned. Or, for example, let's say a photographer registers tens of thousands of images with one or more commercial registries. A user searches for one of the images and makes a match. The user contacts the photographer and asks to use the image for a silly or distasteful ad. Or he asks to use it for free. Artists already see such inquiries and know there aren't enough hours in the day to deal with them.

Yet under this law, artists would be obligated to respond to every irresponsible request. All this uncertainty would drive ordinary business transactions into the courts where uncertainties would multiply: judges unfamiliar with commercial markets would routinely have to render decisions regarding countless disputes in fields in which they lacked expertise. **The imposition of coerced registration in the U.S.** could force foreign rights holders to pay to register their work with U.S. registries, inviting foreign governments and business to retaliate in unpredictable ways.

Many of the images to be affected by these proposals will be works created since 1976, when the current copyright act was passed. That law promised artists that their art would be protected even if it was not marked and registered. Yet if the Copyright Office proposals become law, any unmarked picture created in compliance with the 1976 law will become an instant orphan. **Countless rights holders will**

be penalized for not having registered their work with commercial registries that did not exist at the time and do not yet exist, even now.

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