

**Comments on
S. 2913
The Shawn Bentley Orphan Works Act of 2008**

**From
Illustrators' Partnership of America
Advertising Photographers of America
Artists Foundation of Massachusetts**

Respectfully submitted to

**Majority Staff
Chairman, Patrick Leahy**

and

**Minority Staff
Ranking Member Senator Arlen Specter
Subcommittee on Intellectual Property
Committee on the Judiciary
U.S. Senate**

April 30, 2008

Mr. Chairman and Members of the Subcommittee, on behalf of the Illustrators' Partnership of America, the Advertising Photographers of America, the Artists Foundation of Massachusetts and our many thousands of members nation wide, we are submitting our comments on S. 2913, the "Shawn Bentley Orphan Works Act of 2008." We respectfully request consideration of this document for inclusion in the record of the Senate Judiciary Subcommittee on Intellectual Property. While this statement is being filed by our specific organizations, it reflects a statement previously submitted to the Copyright Office by the Illustrators' Partnership and endorsed by 42 national and international organizations representing a broad spectrum of the commercial artists, fine artists and photographers who make their living from the exercise of the exclusive rights guaranteed to them by the U.S. and international copyright law and treaties.

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 be 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.
- Usage for genealogy research is probably already covered by fair use, but could rate an exemption if deemed necessary.
- Limited exemptions could be designed for documentary filmmakers.
- Libraries and archives already have generous exemptions for their missions. However, if they believe they need expanded access to work whose authors are hard to find, we'd suggest that Congress adopt a variant of the Orphan Works clearance system in use in Canada.

Canada has created a statutory licensing scheme that allows licenses for the use of published works to be issued by the Copyright Board of Canada on behalf of unlocatable copyright owners.

The license is issued by the Canadian Copyright Board. Decisions are made on a case-by-case basis through application to the Board. If the Board is satisfied by the applicant's efforts of e-mails, phone calls, written correspondence, approaches to copyright collectives, Internet searches, etc., then it may issue a non-exclusive license which is valid only in Canada, subject to any terms and conditions it sees fit.

<http://www.library.yale.edu/~llicense/ListArchives/0507/msg00096.html>

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 ask that the Senate conduct further hearings to resolve the specific problem of providing public access to true orphaned works. Our objections to S.2913 – which incorporates the proposals made by the Copyright Office – is that its effects cannot be limited to old or abandoned copyrights. Their recommendations would endanger the rights of 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 freelance artists and photographers work, as well as for the licensing and other collateral small businesses that serve, and are dependent on, creators.

Indeed, the Copyright Office proposals have been written so broadly that it will affect anyone who produces visual images of any kind, from professional paintings and photographs to family snapshots and home videos. Any published or unpublished work, including any pictures 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 will discourage individuals from publishing their works in any free or easily accessible forum. It will force us to pay protection money to middlemen to “protect” work we have created ourselves. It will drive into the court decisions that should be made in the marketplace. It represents a radical departure from existing business models and copyright law. It is one reason – if hardly the only one – why international copyright law, specifically Article 5 (2) of the Berne Convention, prohibits the requirement of “any formality” as a pre-condition to the enjoyment of full copyright.

Our objection to these bills is that they would force anyone who creates a visual work, whether the work is professional or personal, published or unpublished, to register it with as-yet-to-be-created commercial registries. This would endanger any unregistered work, because as users came 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.

These proposals would have a disproportionate impact on visual artists because paintings, drawings and photographs are often published without contact information, credit lines can be removed easily by others and the pictures themselves separated from the publications in which they appeared.

Moreover, the average visual artist produces infinitely more individual works than even the most prolific author or songwriter. The cost to the artist 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 has 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, nearly all the 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. Freelancers 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 Orphan Works Act goes far beyond current concepts of fair use. It would have the effect of forcing freelance creators to risk their own bodies of work to subsidize the start-up businesses of untested search technologies and untried business models – models which would inevitably favor the aggregation of images into corporate databases over the licensing of copyrights by the lone artists who actually create the art. This would strike a blow at the heart of art itself.

The Copyright Office has cited their 2005 study of orphan works to extrapolate a claim of widespread failure in commercial markets. But they have provided no evidence of this. Speaking at “*Orphan Works: A Search for Solutions*,” hosted by the Progress and Freedom Foundation, March 31, 2006 Jule Sigall, then Associate Register for Policy & International Affairs, U.S. Copyright Office, explained that Congress needed to “push” artists and photographers to change the ways in which their “sectors” do business (page 23 of the transcript):

[A]t this stage, in respect to the [Orphan Works] legislation...the real question we need to ask and answer is, what kinds of provisions put the *right pressure* [on photographers and illustrators] to get to that point? **Who needs to be pushed there?** I mean... I use this line a lot, photographers and illustrators like to say, “We haven’t collectivized...” **This is a problem, generally, for their marketplace. It’s hard to have a marketplace where buyers can’t find sellers.** (Emphasis added) <http://www.pff.org/events/pastevents/033106orphanworks.asp>

Nothing expresses the looking glass logic of the Copyright Office proposals better than this apparent belief by the bill’s “principal author” that an amendment legalizing the infringement of millions of commercial copyrights is necessary in order for buyers to find sellers in the field of visual arts. Even a cursory glance at our field refutes this logic:

Consider magazines such as *Vanity Fair*, *The New Yorker*, *Time* or *Vogue*. All of them and countless others are filled from cover to cover with photographs and art. How can anyone seriously argue that in the visual arts “sector” “buyers can’t find sellers”? Or 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, illustrators and photographers will be too hard for the users of images to find?

To the contrary, an entire food chain of collateral markets already exists 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 VA registrations, and create the very database described by S.2913. 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 rightsholders 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.

On January 29 2007, twenty visual arts groups met in Washington D.C. with attorneys from the Copyright Office. The attorneys stated that the Copyright Office could not and would not create the registries this bill would require because it would be “too expensive.” The following exchange took place between a representative of the Illustrators Partnership and the new Associate Register of Policy and International Affairs for the Copyright Office:

Holland: If a user can't find a registered work at the Copyright Office, hasn't the Copyright Office facilitated the creation of an orphaned work?

Carson: Copyright owners will have to register their images with private registries.

Holland: But what if I exercise my exclusive right of copyright and choose not to register?

Carson: If you want to go ahead and create an orphan work, be my guest!

- From the author's notes of the meeting

This exchange suggests that if Copyright Office proposals become law:

- 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. Compliance with Berne/TRIPs is required by more than punctilio**; these rules 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 Copyright Office proposals address the concerns of professors Goldstein and Ginsburg and would, if enacted, **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 the coercive licensing aspects of this legislation we would like to acquaint the subcommittee with **the unique characteristics of illustration and other visual works of art** that distinguish us from those who create other categories of copyrighted works such as literary works, songs and films. Unlike these other categories of works, works of visual 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 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
- 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.

Further, we have a number of unanswered questions about how the registries that are key to this legislative scheme would work, such as:

- 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 happens when the terms of service are changed?
- What happens when registration fees become prohibitive?
- What if individual artists cannot afford to maintain their immense bodies of work in competing registries?

Finally, we are concerned that, even if artists do comply with these coercive measures, they might still find their work orphaned. Let's say an artist registers tens of thousands of images with one or more commercial registries. A user searches for one of his images and makes a match. The user contacts the artist and asks to use the art for a silly or distasteful ad. Or he asks to use the art for free. Most artists already see such inquiries and we know there aren't enough hours in the day to deal with them. **Yet under this law, we 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 rightsholders to pay to register their work with U.S. registries, inviting foreign governments and business to retaliate in unpredictable ways.

Finally, 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 rightsholders 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.**

We appreciate the opportunity to submit these comments and look forward to working with the subcommittee to address our concerns.

Respectfully submitted,

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