

How the Orphan Works Legislation (H.R. 5889 S. 2913) will impact individual artists, artists run small businesses, small arts businesses, and the creative economy

1. Background on the economic status of artists of all disciplines and artists run small businesses.

The vast majorities of living/contemporary artists of all disciplines-- with the exception of the few who have become "stars" -- cannot and do not earn a living from their work as artists and must have supplementary jobs to supply their income whether those jobs are teaching positions and/or jobs in fields not related to their artistic discipline. Also worth noting is that ALL artists pay out a significant amount of their gross income to their art making. The largest subsidy to the arts in this country does not come from the government or private sector but from artists from unpaid labor, underpaid labor, and from artists subsidizing their art making with their own income. One needs to keep in mind that many artists do not hold one 9-5 job, but rather have combination sources for their income (multiple part-time jobs that are semester based and not yearly based, freelance income, contract jobs, self employed income, grants etc.) and that their income not only fluctuates from year to year, but from month to month. Those artists and artists businesses owners who are earning a living from their work, like any self employed person or small business owner, usually have to work twice as hard and earn twice as much as a non self-employed person due to the expenses they incur.

Artists are the working poor of the art world. They are foundation of creative economy that everyone benefits from. Artists are resourceful and are survivors. They don't like to accept charity and also don't tend to think of themselves as poor. It must be stressed that in general, artists live on the edge economically, like how so many of our small businesses do, and any major shift or new cost could severely and negatively impact artists and by extension the arts community and the creative economy. The foundation of the creative economy is a very fragile and fluid one. This has been a key point articulated in the Artists Foundation's recent and ongoing advocacy work on the Massachusetts Health Care Reform Law implementation to ensure this new law does not negatively impact our artists and small arts organizations/businesses. Several of our State's accomplished artists generously shared their situation with our State's Health Care Policy Makers. Their testimony (oral and written) was critical in ensuring that several key regulations for the health care reform law did not negatively impact our State's artists. The AF has been involved in artists health care issues since 1973 and in 1994 co-wrote a "Artists Health Care Task Force: A Rexport to Congress" which highlights the problems that artists face economically. Sadly things have not gotten much better for the artists community.

A 2005 RAND Study entitled "A portrait of the Visual Arts: Meeting the Challenges of a New Era" confirms the fact "that vast majority of visual artists often struggle to make a living from the sale of their work and typically earn a substantial portion of their income from non-arts employment (Rand News Release, Pg 2, 8/11/05). The 2008 National Endowment for the Arts' Artists in the Workforce Study underscores these very issues: "artists are 3.5 time morally likely to be self-employed, that artists are underemployed..., and that artists generally earn less than workers with similar education levels" (NEA Press Release, 6/12/08). It is important to acknowledge that this report undercounts the number of artists because it only counts those who declare their occupation as an artists and includes only those artists who are earning a living entirely from their chosen artistic discipline (ie it misses those artists who are not earning their entire income from their artistic discipline).

Perhaps a more accurate report that depicts a better snap shot of artists and their income is the 2007 Artists Count: An Economic Impact Study of Artists in Minnesota, that surveyed 1,047 artists. The average 2005 median income (for full-time artists- ie those who earn their entire income from their artistic discipline) was \$21,841. Only 24 percent of the artists survey were full time artists, while 60 percent were part-time artists (ie had to work outside of their art to support themselves). The AF is currently in the middle of conducting a survey based on the MN study, entitled, Stand Up and Be Counted. Of the 1700 who have responded to the survey thus far- 69 percent of the artists are part-time artists while 24 percent are full time artists. 70 percent of the artists have been practicing their art form for over 10 years. Just under 29 percent of the respondents are self-employed, 49 percent have combination income (they have W-2 based income and self-employment income) and 22 percent earn W-2 income only. Our survey asked if they had a business loss, gain or broke even in tax year 2006 (ie did you pay more money to create/present your art than you earned from your art?). 51 percent had a business loss, 28 percent had a business gain, and 9 percent broke even (12 percent were not sure). Like many Americans, our artists face the issues of being in debt- however, much of that debt is incurred by studying their craft/artistic profession which is only compounded by them entering into a job market that is not high paying (Art of Financing, Metro, 6/7/06).

References: Written Testimony from MA artists; 1994 Artists Health Care Task Force: A Report to Congress; RAND News Release; 8/11/05, NEA Press Release, 6/12/08; NEA Executive Summary-Artists in the Workforce 1990-2005; Study Finds Mass. Draws Artists, Boston Globe, 6/12/08; Excerpt Artists Count- An Economic Impact Study of Artists in MN 2007; PDF of Artists Foundation's Stand Up and Be Counted 2008 Survey; Art of Financing, Metro, 6/7/06

2. How the Orphan Works legislation will impact artists and artist run businesses.

A. Market deregulation & unfair competition

This legislation will in effect be a deregulation of the copyright "market" and will cause and promote widespread copyright infringement abuse. What happened to the most vulnerable people in the home mortgage market crisis will also happen in the copyright "market" to the vast majority of artists of all disciplines primarily due to fact that this legislation allows commercial interests to legally infringe copyright. However, the AF is not in favor of allowing all non profits to use orphan works- only accredited libraries, museums, and archives. This is key. By allowing all non profits to use orphan works, it will undercut our small businesses and artists (why hire an artist to create an image when one can use an orphan work?). Our artists community and our small arts businesses are already struggling. Also not all non profits are "good actors." One only has to point to the good and needed work of Senator Grassley on non profit hospital accountability/reform that resulted in a new 990 H tax form for this sector (The AF was involved with the dialog on this issue with his office). Also the fact that the legislation allows an infringer, who has done an undefined diligent search * for the copyright owner, can make a copyright of the new work they created from the work they infringe. The infringer also is entitled to keep their copyright EVEN after the "infringed" copyright owner has surfaced. This is unacceptable and sets up unfair competition dynamic in the market place.

*(Note the amended new version of S.2318 does set a minimum search requirement but it falls short of the needed protection)

B. The Visual Artists Rights Act

This legislation, if passed as it is now written, will clearly undermine the Visual Artists Rights Act of 1990

and the needed protections under our current copyright laws. This was a key law that put our country in compliance with international law and treaties. The moral rights of an artists are just as important as the legal and economic rights.

References: Visual Artists Rights Act from Wikipedia; Waiver of Morals Rights in Visual Artworks, Executive Summary, U.S. Copyright office.

C. Work Samples

In our creative economy industry, artists of all disciplines and small businesses send out work samples (music demo tapes, film shorts, jpegs/slides of their artwork, writing samples) in their effort to secure art shows, music/literary contracts, film deals, and/or jobs. Usually those materials are not returned to those who submitted the work- even if they provided the means to return their materials. Under current copyright law the holder of these materials can not legally infringe or use the work/copyright, but under this Orphan Work proposed legislation, if the holder of those materials does an undefined "diligent" search and can not locate the copyright holder, they can legally infringe the copyright (i.e. often those work samples are kept for years). Again, not only will they be allowed to infringe the copyright, but they will also be allowed to create, copyright, and profit from a derivative work made from the work they are infringing EVEN if the "orphan" work's copyright owner surfaces.

D. Harvesting of Art Work

A key concern is that artwork will be "harvested" from student artists of all disciplines and those artists who come from underserved and low income populations (folk artists, Native American artists, artists of color, disabled artists, etc.) as the "infringer" will know that these artists will more than likely be hard to locate and that these artists will not have officially registered their work with the copyright office and/or "registered it" in the certified privately held databases/registries. They will also know that these artists, and most artists, citizens and small businesses, lack the resources to go after them. The legislation does not cover the legal fees of the victim if the "infringer" followed the yet to be established orphan works search criteria (Note the amended new version of S.2318 does set a minimum search requirement but it falls short of the needed protection). Instead it puts all the responsibility and financial burden on the artists (now if someone illegally infringes legal fees are covered for the victim and there is a fine of \$150,000 per infringement). Infringers have now been given a get out of jail free card. Also once again it needs to be pointed out that those infringers who have done a diligent search of the "orphaned work in question" are allowed to keep the copyright of the new work created from the "orphaned work" even if the orphan" work's copyright owner surfaces. The infringer has everything to gain.

E. The Structure of the Consignment of Fine Art & Craft Market

In the Consignment of Fine Art market (think commercial galleries and craft galleries), artists are not told who has purchased their work and the purchaser is not given the artist's contact information (In 2006 it became the law in MA that artists must be given the contact information on who bought their art to enable the artist to better control their copyright). The same holds true for art auctions and art sold on the secondary art market. This makes it almost next to impossible for visual and craft artists to keep track of who has their work and to be able easily track their copyright, but thankfully under current copyright law their work can not be infringed. Again this proposed Orphan Work Legislation will in effect negate this needed protection.

F. Black Markets & Theft, etc.

A key issue that folks are not understanding is that this legislation will create and fuel a new black market of so called orphaned works- much like we see in the antiquities market. There will be a harvesting of art work of all disciplines in order to create inventory for this "orphan works" market. This legislation will also make it legal to do this type of harvesting with little legal or financial consequence (now the way current copyright law is- there are heavy penalties for illegally infringing someone's copyright). NO WHERE IN THE LEGISLATION does it state that someone has to prove that they obtained the "orphan work" legally and that they have the right of provenance. Most accredited libraries, archives, and museums adhere to these standards (or at least try to - some have a better vetting process and track record than others). Of note is that the E.U. has adopted both a great orphan works "legislation" and the E.U. has also taken a much stronger position, as advocated by the archeologists community, in addressing the antiquity black market. Sadly, U.S. museums have not done so in regard to the antiquity black market (they adopted new guidelines June 08 that are not as strong as the E.U.'s) and unfortunately they are backing the current version of the orphan works legislation.

It needs to be pointed out that the Native American Congress was not consulted on this legislation, and that many Native American art and cultural works cannot be photographed or even exhibited in certain ways because they are sacred objects. Native American countries and tribes face the constant looting and miss use of their works/heritage. Also a large portion of the Native American work in collections was obtained illegally or under problematic or questionable circumstances. Currently there is much work being done to ensure that tribes can repatriate, use their cultural materials and/or have a say in how their cultural materials are kept in present accredited collections. Clearly the drafters of this legislation did not review model protocols for interacting with Native American art work/culture and art work in general.(Protocol for Native American Archival Materials-<http://www2.nau.edu/libnap-p/protocols.html>)

In this day and age identity theft is a real and growing concern for all of us. The same theft does and can happen to art work of all disciplines via people downloading images, music, text from the internet or using technology "to take art work" (i.e. scan in someone's drawing from their sketch book). AGAIN No where in this orphan works legislation does it stipulate that the "infringer" must prove that they obtained the work properly and legally, establish provenance of the material , and "that the possessor obtained the legal rights of disposition". Nor does it ask the infringer to disclose where and how they got the work ie provenance (important information for advocates and the government to track trends-ie the person bought it at a student art fair, from a person in a homeless shelter). Museums, libraries, and archives all abide by these requirements to ensure they are not acquiring counterfeit or stolen works.

This Orphan Works Legislation will create a new black/stolen orphan works art market and it will create a new commercial market for derivative works created from "orphaned" works (and/or orphaned works that are not actually true orphaned works). This will clearly negatively impact artists of all disciplines, small businesses, and existing commercial markets.

References:: Protocol for Native American Archival Materials-<http://www2.nau.edu/libnap-p/protocols.html> ; Museums Set Stricter Guidelines for Acquiring Antiquities, New York Times, 6/4/08; U.S. Museum guidelines defend ties to collectors, International Herald Tribune, 3/1/06; Possession Order. Tom Flynn 2006 -<http://msn-list.te.verweg.com/2006-April/004891.html>

G. Proposed Data Bases/ Registries

The AF is not in favor of the proposed certified private visual databases proposed in the legislation. As

made clear in Section 1, a majority of artists of all disciplines are low income and can not afford to officially copyright their work due the cost and also due to the volume of the work they have created (some artists have thousands of images/works). Nor can many artists afford to pay for their work to be in databases/ registries and many artists do not have the technology and/or the skills to digitize their work. Many of the artists in our state are having difficulty affording the co-pays (and premiums) for their subsidized health insurance, therefore it is clear they will not be able to afford to comply with the Orphan works legislation/data base component even if they wanted to.

In the 1990's, the AF worked to make sure that Massachusetts artists were included in the Virtual Collection- a project of the Estate Project for Artist with AIDS. It was established to archive the work of artists living with HIV/AIDS or artists who have died from the disease. Most of the artists we worked with could not afford to have slides/images taken of their work. The Estate Project raised the needed funds to cover materials/technology costs and fellow photographers donated their time to help archive the art work (www.artistswithaids.org).

The certified private data base component of the orphan work legislation is very problematic on many levels: 1) that they are not free to artists. 2) most artists will not be able to archive ALL of their work (visual artists and craft artists make high volumes of work and it will be next to impossible to archive all of their work digitally). 3) many artists lack the time, skills, finances, Internet or adequate Internet access, and/or technology to digitize their work. 4) private data bases do not have to be accountable to the public.

H. Cost of Compliance and Policing

It is clear that most artists and artists owned small businesses will not be able to protect themselves if this law goes into effect. Most artists usually cannot afford to officially copyright their work and nor will they be able to afford the time or money to register their works with the privately held databases. Artists will not be able to spend the time "to police" to see if their work has been deemed an orphaned work, whether they have officially filed a copyright for the work with the government or not (ie request the information from the Copyright office as required by the legislation to see if their work was infringed, etc.). Nor will most artists and small businesses be able to "hire" the legal help to do so.

3. Conclusion

This Orphan Works Legislation as it is now written will sadly leave our artists of all disciplines and artists run small businesses more vulnerable then ever before. Do we need to address the issue of true orphaned works? Yes we do. Is this legislation the way to do so? No it is not. Why not amend the fair use section of the copyright law to clearly define true orphaned works, amend it to allow our accredited cultural partners and allies to use the true orphaned works they have in their collections for educational purposes only (as well as amend it for the photo-retouching for a clearly defined personal use), and at the same time explicitly ban commercial use of orphaned work? Gone would be the need for certified private visual databases and for the paperwork/court ruling to infringe orphaned work, while at the same time it would not undermine current needed copyright protection, the moral rights of artists, and our current commercial markets.

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