

## ARTISTS FOUNDATION LETTER TO ELECTED OFFICIALS

Dear-----

The Artists Foundation (AF) was founded in 1973 to foster the development of artists in all disciplines and to improve the economic and social position of artists by advocating on public policy issues that affect the artists community. The artists community and the artists advocate community have grave concerns about the current Orphan Works Legislation that have been proposed in both the House (HR 5889) and Senate (S 2913). Although we are in strong support for allowing our cultural allies and partners, the libraries, museums, archives and our documentarians to access true orphaned works of art, this legislation as it is now written does not protect artists of all disciplines (including the documentary filmmakers) from their copyright being unfairly infringed. 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.

I view this legislation as a deregulation of the copyright "market" and that it will lead to widespread copyright infringement abuse. I honestly feel 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.

In our creative economy industry, artists of all disciplines 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). 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.

I am especially concerned 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.

Also I need to point out the fact that 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.

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). No where in this orphan works legislation does it stipulate that the "infringer" must prove that they obtained the work properly and legally, 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 (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 more than likely fuel the black/stolen art market and will create a new commercial market for derivative works created from "orphaned" works.

The AF is not in favor of the proposed certified private visual databases proposed in the legislation. As you are well aware, a majority of our artists of all disciplines are low income and can not afford to officially copyright their work due the cost and/or the volume of the work they have created (the recent 2007 MN Study Artists Count gives a sobering assessment of the income of artists of all disciplines). 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. I know this first hand from working on the Massachusetts Health Care Reform law. Many of the artists in our state are having difficulty affording the co-pays (and premiums) for their subsidized health insurance. In the 1990's, I also 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](http://www.artistswithaids.org)).

Thus, I can say that 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 skills, finances, Internet or adequate Internet access, and/or technology to digitize their work.

This Orphan Works Legislation as it is now written will sadly leave our artists of all disciplines 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 cultural partners

and allies to use the true orphaned works they have in their collections for educational purposes only (as well as 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.

I respectfully ask you to kindly slow down this legislation and to create true orphan works legislation. Our community is ready to work on finding a solution to better protect artists. The artists of our country deserve this.

Thank you for your time and consideration.

Sincerely,

Kathleen Bitetti

Artist & Executive Director of the Artists Foundation