

Artists Foundation's Talking Points

Orphan Works 2008

House H.R. 5889 & Senate S. 2913

The proposed legislation, if it passes as it is now written, will change US copyright law. Such a change, as it is now written, will negatively impact artists of all disciplines (literary, visual, music, etc.), as well as every US citizen. House H.R. 5889 and Senate S. 2913 differ from each other BUT both bills are highly problematic and should not pass as they are now written.

Currently under US copyright- the only legal way to use someone's work (whether one has officially filed for copyright with the US copyright office or not) is to find the copyright owner and negotiate for the use. If you can't find the copyright owner you can NOT legally use the work. If the proposed current legislation passes as it is now written, that will change. Under these proposed pieces of legislation, if the copyright owner or artist cannot be found, anyone will be legally allowed to use or infringe the works (artwork, music, family photos, films, poems, etc.). One does not lose their copyright, but their work if deemed orphaned, will be able to be legally infringed upon.

We are deeply concerned that the orphan works legislation will negatively impact the Visual Artists Rights Act of 1990.

The legislation seems to be moving very quickly and we would like to ask for there to be a hold on it/slow it down to allow more input from the artists community and the artists advocate community. There needs to be direct dialog with the artists advocates and small business advocates on this legislation.

WHAT IS PROBLEMATIC ABOUT THE LEGISLATION AS IT IS NOW WRITTEN (Our top 10):

- 1) The vast majority of artists of any discipline (or US citizen for that matter) do not copyright their work for many reasons- mainly due to it being cost prohibitive and impossible in some cases due to the volume of work they create.
- 2) The legislation is too broad and does not adequately protect from commercial use/infringement- or "infringers" being able to profit from their infringement- this will clearly negatively impact all artists of every discipline and will enable infringement abuse to occur.
- 3) The use of orphaned work needs to be clearly defined and narrowed (personal use that is clearly defined, use for documentarians, use educational use only for accredited libraries, archives and museums) with NO commercial infringement privileges or uses of orphan works for charity or fundraising. (in some cases the "infringer" would be able to save money by using the orphaned work instead of hiring/commissioning an artist to create an art work)
- 4) The legislation allows for someone (a person or a business) who has done a "search" and can not find the copyright owner to infringe/use the copyright, but the legislation does not clearly spelled out how long and what the search will need to entail (note the amended/passed version of S. 2913 does set a minimum search requirement but it falls far short of the needed protection).

- 5) The legislation does not require the "infringer" to prove they obtained the orphaned work legally or that "the possessor obtained the legal rights of disposition".
- 6) The pieces of legislation call for on-line databases or what would be also called registries to be certified by the Copyright office for visual artists for to register their work with. No where in the legislation does it say they are to be free of charge to artists and although the law does not mandate visual artists to register their work with these databases/registries- it is clear that these databases/registries will be a key tool for those to use searching for the copyright owners and a way for them to justify they did a search. Nor does legislation protect the artists from the private data base companies for using/selling their artwork/information, etc. The best answer would be to set up a free public archive for artists of all disciplines, but again it should be voluntary and NOT required. There will need to be a free program to help artists be able to put their work into the archive.
- 7) The amount of damages that can be retrieved by the copyright owner if they "surface" and find their work was deemed and used as an orphan work (when in fact it was not orphaned) are unacceptable (legal fees need to be covered).
- 8) There needs to be a formal way for artists and advocates to easily work on a regular basis with the Copyright Office to monitor the current copyright law, ANY change in copyright law, and its impact on artists and the market. In other words the Copyright Office would be mandated to have regular meetings with artists advocates and small businesses advocates on their policies and regulations etc..It also needs to be mandated by the law and it needs to ensure transparency and accountability. (Note this occurs in health care policy on many levels).
- 9) The legislation does not require or mandate the Copyright office to conduct a national educational outreach campaign to alert the US public of this law change and of existing copyright law. There also needs to be federal funding allocated to do this needed outreach.
- 10) Most importantly the very real problem that works will be classified as orphaned works when in fact they are not orphaned.

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