

## Don't Let Congress Orphan Your Work: Oppose the Orphan Works Acts



**Congress is trying to pass legislation that will do great harm to artists. The Orphan Works Act has the potential to orphan millions of protected copyrights.** Last year hundreds of thousands of artists, photographers, songwriters and musicians worldwide rose to condemn this controversial attack on copyright law. **The Illustrators Partnership of America opposes both the House and Senate versions of this bill.**

### **Q What is the Orphan Works Act?**

A: A proposed amendment to copyright law that would impose a radically new business model on the licensing of copyrighted work.

### **Q: How would it do that?**

A: It would force all creators to digitize their life's work and hand it over to privately-owned commercial databases or see it exposed to widespread infringement by anyone, for any purpose, however commercial or distasteful.

### **Q: How would it hurt me if I didn't register my work?**

A: The bill would let infringers rely on for-profit registries to search for your work. If your work is not in the registries, legally it would be a potential "orphan."

### **Q: What about my unpublished work?**

A: The bill would apply to *any* work, from professional paintings to family snapshots, home videos, etc., including published and unpublished work and any work ever placed on the Internet.

### **Q: How would these registries work?**

A: No one has yet unveiled a business plan, but we suspect they'd operate like stock houses, promoting themselves as one-stop shopping centers for licensing art. If you've registered your work with them, they'll charge you maintenance fees and commissions for clearing your work. If you're a publisher or art director, they'll charge you search fees. If you're an infringer, they'll charge you a search fee and issue orphan certificates for any unregistered work you'd like to infringe.

### **Q: How will the bill affect the market for commissioned work?**

A: It will be a gold mine for opportunists, favoring giant image banks over working artists. Some companies will sell access to orphans as royalty-free work (as Google does now) -- or they'll harvest orphans and bundle them for sale as clip art. Other companies (stock houses, for example) will harvest orphans, alter them slightly to make "derivative works" and register the derivatives as their own copyrighted product. Freelancers would 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.

### **Q: But the bill's sponsors say the bill is just a small adjustment to copyright law.**

A: No, it's actually a *reversal* of copyright law. It presumes that the public is entitled to use your work as a *primary right* and that it's your legal obligation to make your work available through these registries.

### **Q: But isn't the House bill an improvement over the Senate version?**

A: Only for those who intend to operate commercial registries. These registries will exist to make money. To make money, they'll have to do a lively business in clearing work for infringements. That means promoting infringement of orphans and making their databases infringer-friendly.

### **Q: But isn't the House bill better because it requires an infringer to file a Notice of intent to infringe?**

A: The House bill creates a very low threshold for infringers to meet. They'd only have to file a *text*

*description* (not the image itself) of the work they want to infringe, plus information about their search and any ownership information they've found.

**Q: But won't that let artists consult the archive to see if their work has been infringed?**

A: No, As currently written, the Infringer's Archive is a dark archive, which means you won't have access to it. If someone infringes your work and has filed a Notice of Use, you wouldn't know about it.

**Q: Then how would I know if my work is in the Dark Archive?**

A: You wouldn't, unless a.) you discover you've been infringed; b.) you sue the infringer in federal court; c.) the infringer asserts an Orphan Works defense. Then you can file a request to see if your work is in the archive.

**Q: Then what good does it do me for the infringer to file a Notice of Use?**

A: It's of no probative value to you at all, unless you go to court. And if you do, you'd better be sure of winning because otherwise, without the possibility of statutory damages and attorneys' fees, it will be too expensive for you to sue. If the Notice of Use helps anyone, it actually helps the infringer: it lets him prove in court that he followed the prescribed protocol to "legally" infringe your work.

**Q: Then shouldn't we ask Congress to change the Dark Archive to an open one?**

A: This would still place an impossible burden on you. Can you imagine routinely slogging through a "lost and found" containing millions of text descriptions of works to see if something in the archive *sounds like* one of the hundreds or thousands of illustrations you may have done?

**Q: So should the infringement archive be changed to display images rather than text descriptions?**

A: If you did, you'd have a *come-and-get-it archive* for new infringers to exploit works that have already been orphaned by previous infringers.

**Q: The bill's sponsors say the House version includes specific instructions on the requirements for diligent searches.**

A: No. The bills, as they've been written, are full of ambiguous terms that can only be decided by courts on a case-by-case basis. It will take a decade of expensive lawsuits and appeals before we learn how the law will ultimately define these irresponsibly vague terms.

**Q: Then what can we do to improve this bill?**

A: There is no patching up this legislation to mitigate its harm to creators. The Orphan Works matter should be solved with carefully defined expansions of fair use to permit reproduction by libraries and archives, or for family photo restoration and duplication. Narrow exceptions like these would also meet the needs of other orphan works usage without violating artists' rights as defined by the 1976 Copyright Act, The Berne Convention and Article 13 of the TRIPs Agreement. These copyright-related international trade treaties are not just a matter of law. They codify longstanding business practices that have passed the test of time

**Q: Who's responsible for drafting this bill?**

A: It was drafted in closed-door meetings with lobbyists from Google, Getty, Corbis, and other corporate interests. The House held only one brief open hearing this session and the Senate none. A bill with such far-reaching ramifications should be conducted in open and transparent public hearings. Artists and anyone speaking on behalf of artists should demand nothing less.

**Q: What can we do to oppose this legislation?**

A: So far the Orphan Works bill has not been reintroduced into this session of Congress. The Illustrators' Partnership has set up a blog where you can read more about it. Eighty five organizations have joined us in opposing this bill, representing hundreds of thousands of photographers, fine artists, songwriters and musicians, and countless art licensing firms, both in the US and abroad.

– Brad Holland and Cynthia Turner, for the Board of the Illustrators' Partnership

To visit the IPA Orphan Works blog, go to: <http://ipaorphanworks.blogspot.com/>