

THE ORPHAN WORKS BILL

Revisited in 2008

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National Advocacy Committee Chairperson



A new draft of the Orphan Works Bill will be introduced this spring, according to the House Judiciary Committee, spearheaded by the subcommittee chair, Representative Howard Berman (D-CA). Rep. Berman intends to pass the bill with Senate cooperation in 2008. Throughout 2007, Megan E. Gray, lobbyist for the Graphic Artists Guild, George Little Management, and the Craft & Hobby Association together, and Victor Perlman, General Counsel and Managing Director of the American Society of Media Photographers (ASMP), have been working closely with key members of Congress, raising their awareness of our unique concerns as visual creators and our objections to the 2006 draft. Thanks to the efforts of Ms. Gray and Mr. Perlman, the 2006 draft of the Orphan Works bill did not move forward in Congress, despite strong support by proponents.

Although Rep. Berman has said he would like to resolve the concerns raised by visual artists, it remains to be seen how that will be accomplished. Rep. Berman's staff has expressed willingness to work with Ms. Gray, Mr. Perlman, and Lisa Shaftel to negotiate concerns of visual creators. There are a variety of ways in which the playing field could be leveled for visual arts in the legislation, such as:

- Copyright Office implementation of an image-searchable database, populated with visual art previously registered by the Copyright Office
- Limitation of orphan works designation to visual works created after the enactment of the legislation
- Adoption of the "Canadian model," in which an independent board approves requested uses of orphaned works.
- User-initiated publication of a Statement Prior to Use with the Copyright Office (Users would be required to publish a statement of the work they intend/want to use with the Copyright Office so that rights holders could periodically check to see if someone wants to use their work, which is presumed to be orphaned.)
- Exclusion of visual art from the scope of orphan works, since there is no easy solution to the particular issues surrounding visual works amenable to all parties.
- Limitation of orphan works to any non-commercial use as well as certain narrowly construed commercial uses (e.g., "(a) non-commercial use as well as those commercial uses that are ancillary to the non-commercial use, such as souvenir sales in connection with exhibits by libraries, educational institutions, and archives; and (b) any use in a documentary film or non-fiction publication, provided that such use is necessary to provide an accurate depiction of the events portrayed and that such use is not unduly prominent.")

- Exclusion of infringing imports from the scope of orphan works (such as knock-offs produced in other countries)
- Exclusion of “useful articles” from orphan works. (The Copyright act defines a “useful article” as an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a “useful article.” For example; a chair.)
- Limitation of orphan works to text-based works (e.g., out-of-print books, including visual art contained in such publications) and copies made for archival or preservation purposes
- Exclusion from orphan works of any potentially copyrighted work for which an effective or comprehensive search cannot be conducted

The Guild’s National Advocacy Committee has proposed and the National Board has approved contracting with the Internet advocacy portal service Capitol Advantage to provide the Guild with an Internet advocacy portal enabling visual artists to contact the right members of Congress with a message about the Orphan Works Bill in 2008. This will replace our earlier cumbersome letter-writing campaign methods. The portal will be accessible and available for free to anyone with Internet access (not just Guild members). Capitol Advantage is a popular Internet advocacy portal service with grassroots non-profit organizations. Watch for e-mail messages from the Guild alerting you to action! This service will also facilitate voter registration for the presidential election—a nice extra!

For those of you who are hearing about the orphan works issue for the first time, and for those who would like a refresher, here is a review of a *Guild News* article from two years ago.

The Definition of an Orphan Work

Just what is an “orphan work?”

An orphan work is an original work still protected within its term of copyright, but the author/creator/copyright holder cannot be located by someone who wants to use the work and is seeking to contact the copyright holder for permission (a “user”). That means that the work is not yet in the public domain; it was created after 1923 (in the U.S.) and registered before 1978, or created after 1978 (in the U.S.). The author/creator is either still alive or has died and the rights have passed to their heirs. Or, perhaps the author sold the rights to a publisher, business, or other corporate entity who then became the copyright holder, although it was not the author or creator of the original work.

Copyrighted works would be considered orphaned if:

- A. The authors, creators, or copyright holders cannot be located: they have moved, not kept their address current with the Copyright Office, are unlisted, or they have died and a user is not able to determine or locate their heirs;
- B. The rights holders are publishers, corporations, motion picture studios, or other business entities that are defunct and their copyright assets were not bought out or assigned to another person or corporation at the time the

business went under (these works are true orphans in that the rights holder no longer exists);

- C. The authors/creators are unidentified: their names and/or contact information are not on their work for any number of reasons; therefore, users can't locate the author because they don't know who he/she is.

Kinds of Works That Can Become Orphaned

What types of creative works are we talking about? Written works, musical works, film/motion pictures, 2-D and 3-D visual art/sculpture and decorative arts and crafts (illustrations, graphics, fine art, textile & surface designs, wallpaper, ceramics, jewelry, furniture, etc.), photographs, architectural designs, maps, and computer software programs, just to name a few. Some of these works obviously have the author's or rights holder's name on them. Others may not, or perhaps they exist in a state in which the rights holder's name is no longer on the piece or no longer visible, such as an item of clothing made from a printed fabric, wallpaper hung on a wall, a photographic print, or an illustration printed on packaging.

Publishers claim that a user can always seek permission from them if the author cannot be located. Writers want their rights reverted back to them if a publisher goes out of business. Sound recordings are an exception to the orphan works issue because the music industry utilizes compulsory licensing through licensing agencies such as ASCAP and BMI; the licensing agencies license all music and then distribute the royalties to rights holders. However, 2-D and 3-D visual and artistic works are the least likely to have the creator's name on them and are often unregistered, which puts them at exceptional risk of being orphaned.

How Orphan Works Became an Issue

Just where did this orphan works hoopla come from? Mostly from two different camps of people and entities that want to use copyrighted works, either for personal, educational, or archival use. Two groups, the Copyleft and its baby, Creative Commons, have been fighting U.S. Copyright Law for years, claiming that copyright protection deprives people of the freedom to use all sorts of creative works (and other people's ideas). Basically, they want to use everybody else's intellectual property/work without having to ask permission or to pay for it. And then there are what I call "The Cultural Non-Profits."

The Cultural Non-Profits include educational institutions, libraries, museums, and archives. They want to make old orphan works available to students, researchers, the general public, and for restoration/preservation purposes. Generally, these uses are already permitted under the "fair use" doctrine in copyright law, but the Cultural Non-Profits want fair use broadened, and they want indemnity [protection] from a copyright infringement lawsuit by a rights holder. The museum that wants to exhibit an old photograph or poster in an historical exhibit (without reproducing it) also wants to be able to include that work in the book about the exhibit it sells in its gift shop. The Cultural Non-Profits have had paid lobbyists working Capitol Hill on their behalf for years, promoting an orphan works bill as necessary to preserve our American heritage and broaden access to educational and research materials. And who could argue with that? Sounds good, no?

Why Artists Should Be Concerned

We're not worried about the motion picture archive that wants to preserve a deteriorating celluloid silent film or the library that wants to scan an out-of-print book to make it available for academic research. What should concern us as creators who earn income from our work are the commercial users who will produce many copies or pieces for the retail market. Everything from greeting cards, spot illustrations on packaging, textile prints, ceramic tableware, jewelry, to furniture, and so on. As the 2006 draft Orphan Works Bill was written, the same provisions that would permit non-profits to use an allegedly orphan work would also open the door for commercial, for-profit use. Why would a publisher, manufacturer, or other type of client commission one of us to create a new work for them or license one of our existing works when they could use an orphaned work for free?

Protecting Work from Becoming Orphans

The best way to prevent your works from becoming orphaned is to register your work with the U.S. Copyright Office. That's the obvious and most likely required source for users to search. If you don't register your work, you run a huge risk of being deemed unlocatable. Also, it is crucial to put your name on all your work. If possible, include metadata with your identification in your digital files; this can be done in Photoshop, or use a digital watermarking utility such as Digimarc. I've written a separate article about "Protecting Your Works from Becoming Orphans." You will find it in the Orphan Works section on the Advocacy page of the Guild's Web site, www.gag.org.