

Testimony of

Mr. Brad Holland

April 6, 2006

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Founding Board Member
Illustrators' Partnership of America
Subcommittee on Intellectual Property
Committee on the Judiciary
U.S. Senate
Hearing on "Orphan Works: Proposals for a Legislative Solution"

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Mr. Chairman, Ranking Member Leahy, distinguished members of the Subcommittee: Last year, the Illustrators' Partnership filed a submission to the Orphan Works Study which was endorsed by 42 national and international arts organizations, representing a broad spectrum of popular artists, fine artists, medical and architectural illustrators, cartoonists and educators. On behalf of those artists, I appreciate the opportunity to address you. Our chief objection to the proposed Orphan Works amendment is that it is not an orphan works amendment.

An Orphan Works amendment would apply to old work whose authors have abandoned their copyrights. This proposal would apply to past, present and future work.

It would apply wherever an artist's work is unmarked, or a mark or signature is obscure. It would be retroactive. It would interfere with commercial markets. It would legalize the infringement of any work of art, regardless of age, country of origin, published or unpublished, where the rights holder cannot be identified or located. It would affect illustrations and photographs disproportionately because images are commonly published without identifying information, signatures may be illegible and information can be removed by others. It would expose to infringement any work that cannot be sourced by "reasonable effort," and it risks orphaning millions of valuable copyrights that cannot otherwise be distinguished from true orphaned works. For these reasons and many more, we do not believe the statutory language proposed by the Copyright Office is a solution to the orphan works problem. It is a proposal for a radically new copyright law.

The inability to distinguish between abandoned copyrights and those whose owners are simply hard to find is the Catch 22 of the Orphan Works project. Put simply, if a picture is unmarked, it's impossible to source or date it. Therefore, this proposal would orphan millions of valuable copyrights that cannot otherwise be distinguished from true orphaned works. And this would open the door to cultural theft on an unprecedented scale.

Many users who responded to the Orphan Works Study have asserted that the art under consideration has little or no commercial value. While this may be true of real orphaned work, it is not true of the numberless managed copyrights that would be caught in an orphan works net.

Non-profit organizations which assert that only work of little or no value will be affected have not documented their assertions. Since non-profits typically offer rights holders little or no compensation for the work they solicit, Congress should not infer that such charitable donations by artists to non-profits reflect the true market value of the artists' work. And since other users who wish to exploit work royalty-free have every incentive to minimize its value, Congress should not rely on their assertions as evidence either.

The use of any work without the author's permission violates the author's exclusive right to permit or deny usage. Similarly, payment for use after the fact violates a basic principal of negotiation: An author whose work has already been exploited has no leverage to negotiate for a fee higher than the user is willing to pay.

Artists have the right to maintain the value of their work by keeping it out of downscale or distasteful markets. The Orphan Works amendment would violate that right by giving users the unilateral privilege of exploiting another's property, regardless of the adverse effects it could have on the integrity and value of the rights holder's product.

Many artists in markets such as advertising and proprietary research enter into exclusive licensing arrangements with their clients. Because these artists are rarely permitted to sign and mark their work, this art would be subject to orphan status from its conception. This would destroy the artists' ability to guarantee exclusivity to a client, undermine the value of the art itself and retroactively jeopardize existing contracts of exclusivity between artists and clients.

Currently, copyright law is enforced by the threat of substantial penalties for infringement. By "limiting" these remedies, the Orphan Works amendment invites abuse of the law while removing the only mechanism rights holders have for enforcing copyright protection. Without effective remedies for infringement, a user might find it a rational business decision to infringe first and pay "reasonable compensation" only if the infringement is detected.

While the Orphan Works Report is concerned exclusively with the difficulty a user may now have in locating an author, it does not address the difficulty an author may have under Orphan Works law in locating an infringer. The Orphan Works amendment would place an impossible burden of diligence on rights holders, who will never have the resources to police infringement, which could occur anytime, anywhere in the world. We do not see how Congress can justify legislation that places an impossible burden on a property owner as a condition of protecting his property.

Because of the "limitation on remedies," artists would never have the resources to go to court - as the Orphan Works amendment would require - to establish the case-by-case definition of a user's "reasonably diligent search." This would constitute another impossible burden placed on rights holders and undermine any premise of fairness in the system.

The Orphan Works amendment would favor infringers by providing them with a nofault defense. Since the infringer would only need to show that a good faith effort had been made to identify or locate the artist of an unmarked image (an assertion that an artist's signature was illegible might be good enough), judges might be forced to uphold the majority of infringements.

Under the Orphan Works amendment, every infringement of a managed copyright would create a family tree of potential successive infringements: Samples of an infringed work would linger in the public domain even if a rights holder came forward to stop the infringement. These orphans-of-orphans would be available to other would-be users, who would be justified by Orphan Works law in re-infringing the work. In this fashion, the effect of Orphan Works law would be viral.

A "take-down" of orphaned work posted online will not be sufficient to restore its integrity. The Internet Archive, The Wayback Machine and Google Cache all provide access to defunct and removed web pages. These back-ups would allow falsely designated orphans to remain in circulation, making it impossible for a rights holder to get back the rights to work unleashed into the public domain by the actions of others.

Because it would be retroactive, the Orphan Works amendment would betray artists who for 28 years have published in the confidence that, even without formalities, their work enjoyed the basic protections guaranteed them by the 1976 Copyright Act.

Advocates of the Orphan Works amendment claim that copyright inhibits scholarship. But that was refuted by the authors of the 1976 Act:

"[I]t is important to realize that the [1976] bill would not restrain scholars from using any work as source material or from making "fair use" of it; the restrictions would extend only to the unauthorized reproduction or distribution of copies of the work, its public performance, or some other use that would actually infringe the copyright owner's exclusive rights. (Orphan Works Report, p. 44, italics added.)

The Orphan Works amendment in effect re-imposes formalities. By forcing the rights holder to rely on registries, metadata and notice as a condition of copyright protection it violates the letter and spirit of the Berne Convention.

The letter and spirit of Berne is addressed on page 2 in this submission to the i2010 Digital Libraries project by the International Federation of Reproduction Rights Organizations (IFRRO):

"[D]igitisation is an act of reproduction subject to the authorisation of the copyright holder...On the basis of Article 5(2)(c) of the Directive 2001/29, exceptions have been introduced in favour of libraries and archives that allow these institutions to reproduce works without prior consent of the rightsholders, mainly for preservation purposes. These exceptions do not cover and should not be extended to cover reproductions on a mass scale, which would clearly conflict with the normal exploitation of works and prejudice the legitimate interests of the copyright holders, and would thus not pass the three step test of the Berne Convention and Article 5.5 of the Directive 2001/29. (Spelling in the original, italics added)."

<http://www.ifrro.org/show.aspx?pageid=home>

Professors Jane Ginsburg and Paul Goldstein have also warned that the Orphan Works provision must narrowly define the scope of the orphaned works or fail to meet the three-step test of TRIPS art. 13 and Article 5(2) of the Berne Convention:

"[T]he diversity of responses highlights the fundamental importance of precisely defining the category of "orphan" works. The broader the category, or the lower the bar to making the requisite showing of due diligence, the greater the risk of inconsistency with our international obligations to uphold authors' exclusive rights under copyright. Compliance with Berne/TRIPS is required by more than punctilio; these rules embody an international consensus of national norms that in turn rest on long experience with balancing the rights of authors and their various beneficiaries, and the public. Thus, in urging compliance with these technical-appearing rules, we are also urging compliance with longstanding practices that have passed the test of time." 1., p. 1, OWR0107-Ginsburg-Goldstein (Italics added) In the Orphan Works Report, the Copyright Office states: "[W]e believe that registries are critically important, if not indispensable, to addressing the orphan works problem (p.106)." Yet they acknowledge (p.95) that the Copyright Office lacks the resources to create and administer them. If Congress cannot allocate funds to create the kind of registry that the Orphan Works amendment will make "indispensable," lawmakers should not be persuaded to impose that burden on rights holders as a condition of maintaining their copyrights.

At the Orphan Works roundtables, 7/26/05, Alexander MacGillivray of Google stated that "Google strongly believes that these orphan works are both worthwhile, useful, and extremely valuable" (p.119). Also, "we expect that [Google's] use of these orphan works will likely be in the 1 million works range...(p.166, italics added)." Since Google has already demonstrated their disregard for copyright by embarking on the Google Book Search project, there's no reason to believe that they, or similar firms, will not take advantage of the Orphan Works amendment to harvest images wherever artists and photographers can be characterized as "difficult or impossible to locate." As Jeff Sedlick of the Advertising Photographers of America has reported, "within two weeks of the issuance of the [Orphan Works Report], nearly all the domain names associated with orphan works were registered by commercial interests in preparation for the profit-taking that will result if this legislation is passed..."(The Orphan Works Dilemma p.8, Written Testimony/ House Judiciary Committee, Subcommittee on Courts, the Internet, and Intellectual Property)

On page 14 of the Orphan Works Report, the authors write: "if our recommendation resolves users' concerns in a satisfactory way, it will likely be a comprehensive solution to the orphan works situation (*italics added*).*"* With all due respect, we believe a solution cannot be "comprehensive" if it resolves users' concerns by undermining "the legitimate interests of copyright holders."

We believe the orphan works problem can be and should be handled with carefully crafted, specific limited exemptions. A limited exemption could be tailored to solve family photo restoration and reproduction issues without otherwise gutting artists' and photographers' copyrights. Usage for genealogy research is probably already covered by fair use, but could rate an exemption if necessary. Limited exemptions could be designed for documentary filmmakers as well. Libraries and archives already have generous exemptions for their missions. If their missions are changing, they should abide by commercial usage of copyrights, instead of forcing authors to subsidize their for-profit ventures.

When Congressmen wrote the 1976 Act, they considered the Orphan Works problem, but chose to leave it unresolved. They cited "the near impossibility of distinguishing between types of works in fixing a statutory term." That Congress chose to err on the side of protecting private property. Unless this Congress can devise a reliable test to single out true orphans, it will commit the greater error of encouraging opportunists to unilaterally exploit - and therefore devalue - the self-created property of countless artists, both in the U.S. and abroad. We respectfully urge this committee to consider the negative effects that this proposed statutory language would have on free market transactions. And we ask you to conduct further hearings to resolve the specific problem of providing access to true orphaned works.

Respectfully submitted,
Brad Holland

On behalf of the Board and members of the Illustrators' Partnership of America