

# Orphan Works Legislation – A Bad Deal for Artists

Bruce Lehman, Esq.

---

*On January 23, 2006 the U.S. Copyright Office issued their Orphan Works Report, outlining their recommendations to Congress for changes to the 1976 U.S. Copyright Act. In its current form, Orphan Works legislation, now in Committee within the U.S. Congress, has the potential to reverse the 30-year history of copyright protection enjoyed by artists and authors in the United States. Moreover, if the legislation should become law, it will subject creative visuals (sketches, drawings, diagrams, illustrations, photographs, etc.) to possible infringement, unless they are individually registered in yet-to-be established registries within the private sector.*

---

## Introduction

In Congressional testimony in 2008, the U.S. Register of Copyrights observed that during the last 30 years the United States has made it easier to obtain copyright protection without meeting cumbersome bureaucratic requirements. Indeed, these changes were seen as necessary in order to harmonize U.S. law with long-standing international copyright standards, thereby enabling American movie, publishing, music, and software companies to more effectively protect and enforce their creative rights in a globalized economy. Mindful of the creative industries' importance to the U.S. economy, Congress, in 1998, acted to extend the term of copyright by 20 years in keeping with European law. More recently, Congress has responded to the pleas of corporate copyright interests to increase criminal penalties for copyright piracy.

These changes to strengthen copyright have greatly benefited big companies in places like Hollywood and the Silicon Valley. Moreover, we have no quarrel with the right of large corporations to protect themselves in a market full of pirates. However, it is odd that the U.S. Congress on the recommendation of the Copyright Office continues to consider drastic changes in U.S. Copyright law; changes that would take away from visual artists the same rights to copyright enforcement enjoyed by big corporate interests.

## Orphan Works Introduced

In September 2009, the Register of Copyrights recommended that Congress limit penalties for copyright infringement to “reasonable compensation” in cases where the infringer does not know the identity of the author or artist, and has not been successful in an attempt to locate them. While at first glance, this may sound reasonable, it represents a huge change from existing copyright law. Currently, when an artist or author finds out that his or her work has been stolen, he or she is entitled to have the infringement cease, and becomes eligible to receive damages of up to \$150,000 per infringement.

The Register of Copyright has attached the label “orphan works” to creations such as paintings, drawings, and illustrations that have become separated from any identifying information, such as a signature, even though that information may have been lost through no fault of the artist. The Register apparently feels that anyone wishing to infringe such works should be given a free ride. Yet, who are the creators of these likely “orphans?” They certainly are not the big Hollywood Studios, big media, or Microsoft. It is hard to imagine someone being unable to find the title or producer of a blockbuster film. In addition, how many users of a computer would be unaware of the copyright owner of Microsoft’s Office Suite®?

The creator of a so-called “orphan work” is much more likely to be an illustrator laboring alone to meet a magazine’s deadline, or a painter sending out prints to gallery owners and museum directors begging for a chance to sell or display his or her work.

Proponents of the Copyright Office recommendations point to the fact that in order to take advantage of the proposed safe harbor, an infringer would have to have made unsuccessful but reasonably diligent attempts to locate the actual copyright owner. However, the recommendations do not define a “reasonably diligent search.” The recommendations do seem to suggest that the courts would apply some general standard in determining the requirements for the thoroughness of the search. The problem with this scenario is that it unfairly discriminates against works of visual art and their creators. Unlike books, songs, or films, an artist’s painting or an illustration may lack a universally accepted title that would allow users to search for information about them by name. Once a work of visual art is first reproduced, copyright notices and artists’ signatures are routinely lost due to cropping or even retouching.

To prevent their creations from becoming orphaned, the Copyright Office has suggested that artists digitize and file their illustrations with yet-to-be-created private registries, run by profit-making companies. These companies would presumably use scanning technology to compare an illustration or graphic supplied by a user with an image of the original artwork that would have been placed on file by the artist. As numerous private registries may ultimately be formed due to this legislation, an artist may find it necessary to have works registered in a majority of them to insure access by a future user. Unlike the current system of registration with the U.S. Copyright Office, which of course is a government agency, these registry companies would be able to charge whatever fee they wish. Since the numbers of works created by the average painter or illustrator may far exceed the volume of even the most prolific creators of music, books, and films, the amount of time, the expense and the administrative burden of filing illustrations with these registries would be prohibitive.

Even assuming that these registries could work, they will reverse a 30-year history of taking bureaucracy out of the copyright system, and impose new burdens and expenses on those least able to comply. Furthermore, while the Copyright Office proposal immediately and unfairly prejudices the little guys in the creative economy, it sets a long-term precedent that eventually could come back to haunt even those with deeper pockets — like Hollywood and Silicon Valley — to defend themselves in an infringement case.

It is the deterrent effect of injunctions and large damage awards that keep copyright infringement and piracy under control in the United States. This proposed Orphan Works legislation would limit relief for an unauthorized use to “reasonable compensation” for the copies made, even after the great expense of suing in a U.S. Federal court. Currently, the possibility of receiving large damage awards under the current copyright law not only serves as a deterrent against infringement, but it provides the artist with the ability — if he wins the case — to pay the attorneys fees and other costs of bringing expensive lawsuits in Federal court. The limitations on potential damages awards proposed by the Copyright Office under the Orphan Works legislation would make the right to sue for infringement virtually meaningless to artists. If passed, the resulting law would become an open invitation to steal creative work. Under the proposed orphan works legislation, the typical artist would be denied effective justice and possibly become bankrupt by this process. In addition, even deep-pocket publishers, film producers, and software developers could find the costs too much to bear, when this shift in the burden of copyright enforcement spreads to other uses of copyrighted works.

## **Conclusion**

By requiring that artists go to Federal court to resolve any orphan works disputes, but then limiting an illustrator’s recovery for an infringement, the U.S. Copyright Office is denying artists the protection they have enjoyed for over 30 years. This proposed

legislation offers no deterrent against infringements, and in fact, the legislation will effectively encourage the unauthorized use of illustrations. If the Orphan Works Bill should become law, it will rewrite existing U.S. copyright law. Congress should summarily reject the current proposals regarding Orphan Works legislation.

## **Author**

Bruce A. Lehman currently practices law and also serves as the chairman of the International Intellectual Property Institute (IIPi), a nonpartisan, nonprofit organization, based in Washington, D.C. The Institute promotes the creation of modern intellectual property systems and the use of intellectual property rights as a mechanism for investment, technology transfer, and the creation of wealth in all countries of the world.

Mr. Lehman is also currently serving as legislative and policy advisor to the Visual Artists’ Rights Coalition — a coalition consisting of four visual arts reprographic licensing societies. On February 7, 2006, Mr. Lehman was honored as one of 23 initial inductees to the newly created International IP Hall of fame, a project sponsored by the London-based, Intellectual Property Asset Management magazine. He is one of ten living members of the Hall of Fame, which includes historic figures such as Thomas Jefferson and Victor Hugo.

From August 1993 through December 1998, Lehman served as Assistant Secretary of Commerce and U.S. Commissioner of Patents and Trademarks. At the request of the President, he served concurrently in the fall of 1997 as acting chairman of the National Endowment for the Humanities, which fosters and recognizes the work of America’s artistic and creative community. In 1994 the National Law Journal named Mr. Lehman its “Lawyer of the Year.”

In 1997 public-policy magazine National Journal named him as one of the 100 most influential men and women in Washington, noting, “In today’s Information Age, the issue of intellectual property rights is no longer an arcane concern, but a vital part of U.S. trade policy. Since taking over his current posts in 1993, Lehman has been the Clinton Administration’s outspoken voice on such matters here and abroad.”

Prior to entering private practice, Mr. Lehman worked for nine years in the U.S. House of Representatives as counsel to the Committee on the Judiciary and chief counsel to the Subcommittee on Courts, Civil Liberties, and the Administration of Justice. He was the Committee’s principal legal adviser in the drafting of the 1976 Copyright Act, the 1980 Computer Software Amendments and the 1982 Amendments to the Patent Laws. Mr. Lehman holds both a B.S. and a J.D. degree from the University of Wisconsin, Madison. Mr. Lehman can be reached at [blehman@iipi.org](mailto:blehman@iipi.org).

## Appendix: Some Definitions

### *United States Copyright Office*

The U.S. Copyright Office is a part of the Library of Congress. This Office is the official U.S. government institution that maintains records of copyright registration in the United States. Copyright searchers, who are attempting to clear or obtain a chain of title for copyrighted works, frequently use the Copyright Office. The head of the Copyright Office is called the Register of Copyrights. The current Register is Marybeth Peters, who has held the office since 1994. The Copyright Office is housed in the James Madison Memorial Building of the Library of Congress, at 101 Independence Avenue, SE, in Washington, DC.

### *Current U.S. Copyright Law*

Copyright is a form of protection provided by the laws of the United States (title 17, U. S. Code) to the authors of “original works of authorship,” including literary, dramatic, musical, artistic, and certain other intellectual works. This protection is available to both published and even unpublished works. Section 106 of the 1976 Copyright Act generally gives the owner of copyright the exclusive rights to reproduce the work, make a derivative work, distribute, display, and publish the work. The Copyright law exists and protects all visually creative work, including doodles, sketches, illustrations, photographs, snapshots, home videos, etc. This passive copyright protection exists from the moment a visual work is produced, whether it is registered or not.

### *Excerpts from the 2006 Report on Orphan Works*

“Our recommendation follows this suggestion by limiting the possible monetary relief in these cases to only ‘reasonable compensation’ which is intended to represent the amount the user would have paid to the owner had they engaged in negotiations before the infringing use commenced.” (p. 12, *2006 Report on Orphan Works*)

“[W]e believe that registries are critically important, *if not indispensable*, to addressing the orphan works problem, as we explain above. It is our view that such registries are better developed in the private sector, and organically become part of the reasonable search by users by creating incentives for authors and owners to ensure that their information is included in the relevant databases.” (p. 106, *2006 Report on Orphan Works*, with emphasis added)

### *Proposed Orphan Works Legislation*

This term is really a misnomer, as the concept would not just apply to old, unidentifiable work in libraries and museums, whose creator may have passed away years ago. Should this Bill in its present state become law, it would apply to any and all creative work, once any of the work became intentionally or accidentally unidentifiable (following the removal of the artist’s name and copyright symbol) unidentifiable or unlocatable, regardless of the age of the work. The recommendation extends to both published and unpublished works, and includes both

U.S. and foreign works. Under this new legislation, nothing that a creative artist or photographer creates would be fully protected, unless that artist/creator actually registers the work with some yet-to-exist commercial registry.

### *Authors of the Orphan Works concept*

The proposal was originally written by eight law students at American University’s Washington College of Law, under the direction of Law Professor Peter Jaszi. The proposal reflects a post-modern ideology about creativity, ownership, and individual authorship.

### *Commercial Registry*

A term for yet-to-exist registry companies located within the private sector, whose sole purpose is to register digital images. Passage of the Orphan Works legislation would require an infringer to perform what is termed a “reasonably diligent search” at perhaps a minimum of one to five private image registries. If no artist/author can be found following this search, the infringer could be free to use the “orphaned” work of art for any purpose.

### *Reasonable Compensation*

An amount to be paid to the artist-owner by an infringer once the artist determines that he or she has been infringed. The artist has the responsibility for first observing the infringement, and then locating the infringer to obtain proper remuneration for use of the work. The creator must do so within the U.S. Federal Court system.

### *Secondary Rights*

Creative rights attributed to those additional or second uses of a work of visual art. These rights allow an artist to receive payment for a second or subsequent use of an illustration, drawing, etc.

## Additional Reading

For more information about orphan works legislation: <http://ipaorphanworks.blogspot.com/2008/08/80808-sba-hearing-on-orphan-works.html>

For more information about the Illustrators’ Partnership of America, visit the IPA Website at <http://www.illustratorpartnership.org/>

**For additional information about protecting your copyrights:**

<http://www.copyright.com/>

<http://www.ifrro.org/>

<http://www.copyright.gov/>