

Copyright Policy and The "Orphan Works" Act

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In 1976, Congress passed a complete overhaul of the federal copyright law. Since then, the development of the Internet and the easy digitization of images have opened the way for wide access to copyrighted material which heretofore had been relatively limited. Federal legislators, however, have been reluctant to revisit the copyright law as they did 30 years ago. Instead, lawmakers have chosen to deal with comparatively lesser issues on an individual basis. Such is the case with orphan works.

Orphan works are creative works – usually, but not always, images, designs, or musical passages – for which a copyright holder cannot be found. Publishers, visual artists, musicians, museums, filmmakers, and textile and industrial designers, to name a few, find themselves reluctant to incorporate found images into their own work, publication or exhibition when the creator (or copyright holder) is unknown. To do so would expose the user of the work, should the owner emerge, to considerable monetary damages available to the copyright owner under the law addressing copyright infringement.

In 2005, the U.S. Copyright Office held field hearings on orphan works. In 2006, congressional hearings were held and legislation addressing the issue was introduced. In 2008, bills were again introduced in Congress. The Shawn Bentley Orphan Works Act of 2008 (H.R. 5889), introduced by Rep. Howard Berman (D-CA), was approved on May 7, 2008, by the House Judiciary Subcommittee on Courts, the Internet, and Intellectual Property, which Berman chairs. On May 15, 2008, the Senate Judiciary Committee, chaired by Sen. Patrick Leahy (D-VT), approved S. 2913, the Orphan Works Act of 2008, introduced by Leahy. No further action on either bill is expected in the current session of Congress.

The orphan works legislation introduced in Congress would seek to limit the liabilities for potential copyright infringement by establishing a process permitting greater use in the public domain of orphan works depending on whether the user has made a diligent effort to search for the owner. Any nonprofit educational institution (such as a museum, library, archives, or a public broadcasting agency) would be exempt from the legislation's requirements if it can be shown that use of the orphan work was without any commercial purpose; the use was primarily educational, religious, or charitable in nature; and, after receiving a notice of claim of copyright infringement, the use of the orphan material stops.

Proponents of the legislation, which include art museums and other exhibiting institutions, argue that millions of works are currently in existence under copyright protection but for which the copyright owner cannot be easily found. These works are essentially unavailable to publishers, filmmakers, collage artists and other creative professionals who would like to use the material (and pay for the use), but do not because of the potential for penalties if the original copyright owner eventually emerges.

Photographers and illustrators are among the groups which have opposed the orphan works reform legislation, arguing that potential users of their works would fail to conduct a sufficiently diligent search. As a result, works would essentially be stolen. To limit the possibility of such a taking of copyrighted work without permission, the legislation charges the U.S. Copyright Office with identifying available databases that would facilitate a user's search for pictorial, graphic, and sculptural works that might otherwise be identified as orphan works. The bills require that a database must collect and provide a copy of the copyrighted work, searchable by text or image, and made available through the Internet by 2013. In essence, the bills would allow for establishing whether an infringer of copyright of an orphan work acted in

good faith or in bad faith, and whether damages are available to the copyright holder or the user's liability should be limited.

This issue is expected to emerge again in Congress in 2009.