

Association of Independent Music Publishers (AIMP) and California Copyright Conference (CCC) Joint Position Paper on Orphan Works Legislation

INTRODUCTION

Two comparable bills which threaten to erode fundamental protections for copyright authors and owners, the Shawn Bentley Orphan Works Act of 2008 (S. 2913) and the Orphan Works Act of 2008 (H.R. 5889), were introduced on April 24, 2008 by Senator Patrick Leahy (D-VT) and Congressman Howard Berman (D-CA) respectively. The bills encourage copyright infringement and objectionable uses across the full spectrum of protected artistic works. This legislation is being introduced at a time of broad public and government awareness that creators of original works, and the copyright industries which bring their products to market, are in many instances struggling for survival against a backdrop of massive and unprecedented infringement. The bills strip authors and owners of basic legal remedies to combat copyright infringement. In particular, they limit otherwise available remedies for stemming infringement, such as recovery of attorney's fees and statutory damages, and actually offer incentives to unauthorized users by insulating them from detection and accountability. Under the proposed legislation, if an author should learn of an infringing use, he would have to undertake a time consuming and expensive determination by a court as to whether or not the infringer took sufficient steps to locate the author and whether the compensation requested for the unauthorized use was reasonable.

The "problems" which the legislation would address include helping a family make an album from Grandma's photos, helping a college professor use an obscure (but still fully protected) manuscript, or allowing a documentary film maker to use someone else's materials without consent. In the process of "helping" appropriate other people's personal property, the legislation promotes the incremental dismantling one of our nation's primary economic growth engines. The Internet, computer and consumer electronics industries utilize vast amounts of copyrighted works to attract customers to their websites, from which they derive enormous profits from advertising and subscription fees. These industries have long sought to eliminate copyright protections and to avoid paying for the content they use to lure consumers. At the same time, companies such as Google and other computer-related interests have provided more than \$150 million dollars to the Library of Congress, of which the U.S. Copyright Office (which initiated the Orphan Works legislation) is a part.

The bills' sponsors have overlooked an administrative solution within the U.S. Copyright Office, online availability of the existing Address File system of records, which could readily match proposed users with owner contact information, and obviate the need for so-called Orphan Works legislation.

The proposed legislation provides that an author or owner of an artistic work is presumed to have abandoned his property, if a member of the public claims that such owner or author cannot be identified or contacted. The U.S. Copyright Office, which maintains public records of all copyright registrations, renewals and ownership filings, has chosen to make available only a small percentage of those records in its online databases. However, under the bills, even an author or owner who holds a valid certificate of copyright registration from the U. S. Copyright Office has nevertheless “orphaned” his work by not publicizing his current ownership and contact information. The bills deprive authors and owners who have allegedly “orphaned” their works of critical deterrents to infringement, by removing the longstanding entitlement to recover statutory damages and attorney’s fees from infringers. To bypass these deterrents, all a member of the public must preliminarily do is to say in effect “I tried, but couldn’t find you.” If the unlicensed use is later discovered by the author or owner, and the infringer refuses to pay reasonable compensation for such misappropriation, the author or owner must then expend the time, energy and cost of prosecuting a lawsuit in the hope that damages, if awarded, are sufficient to recover those lost resources.

In 2004, the Copyright Office initiated a theory, with the enthusiastic support of the anti-copyright lobby, that the public was being harmed because it didn’t have enough current contact information for authors and owners. The Copyright Office then requested Orphan Works legislation without having conducted a needs assessment study, an independent audit of its registration and copyright history records, an economic impact analysis, or an evaluation on how the public, society and authors would be affected by reduced quantity and quality of art, film, television, music, video games and other copyrighted works in the future.

BEST PRACTICES

The proposed legislation limits the copyright owner’s remedies for infringement in cases where the infringer can claim that he performed a good faith search and was unable to locate the owner of the infringed work. However, it sets forth no specific criteria for such a search, merely requiring the infringer to undertake a “diligent effort,” based on a “reasonable and appropriate” search and “applicable best practices.” “Best practices” are not defined; instead the legislation leaves it up to the Copyright Office to create a statement of best practices, in effect creating an unjustified “safe harbor” for willful infringers. We are doubtful that the “best practices” would be adequate, developed in a timely manner, or would address the unique requirements for searching musical compositions. There is no single public or private database of all musical compositions in the United States, and even if all of those database resources were merged, they would not be comprehensive. More specifically and most untenably, all unpublished and published works would have to be registered with the Copyright Office regardless of the public policy prohibition against such requirement. The U S. performing rights organizations, ASCAP, BMI and SESAC maintain databases of primarily

published works by their respective members. Most unpublished musical works will not appear in a search of these databases. Likewise, the Harry Fox Agency only maintains a database of the works of its members, but much of that information is not currently available to the public under Harry Fox guidelines. Not all music publishers are members of the Harry Fox Agency and therefore their works would not appear in a search of the Harry Fox database.

“NOTICE OF USE” REQUIREMENT

The current version of the Senate legislation would eliminate the related House bill’s requirement for the Copyright Office to create and maintain an archive of “Notice of Use” filings by the users of orphan works (infringers). However, even the House bill would only make the Notice of Use filing available to the copyright owner under conditions to be specified by the Copyright Office, i.e., in the event of litigation. The Senate version has no “Notice of Use” requirement at all. The burden would be imposed on the copyright owner to somehow learn of the existence of the infringement, identify and locate the infringer, and then try to negotiate a fair license for the unauthorized use. The absence of publicly available Notice of Use filings could enable unauthorized users to conceal their infringements and avoid the related license fees indefinitely.

REASONABLE COMPENSATION

Both bills provide that once found, the missing owner should be paid “reasonable compensation” in a “reasonably timely manner” after the amount of such compensation has been agreed upon with the owner of the infringed copyright or determined by the court. These requirements are impossibly vague. While certain aspects of licensing are prescribed by statute, such as the compulsory mechanical license section of Section 115 of The Copyright Act, in many other instances terms are negotiated between the parties. The bills provide an incentive to infringers to drag out negotiations and/or offer nominal amounts of compensation, as they would no longer be subject to the traditional deterrents of statutory damages and awards of attorney’s fees for infringement. In effect, the copyright owner’s only practical recourse would be to agree to whatever the user offers to pay, or incur the prohibitive costs of litigation.

LEGAL REMEDIES FOR COPYRIGHT OWNERS

Two of the most effective means to prevent copyright infringement, the recovery of attorney’s fees and statutory damages, are severely limited in the present legislation. Once a work is subject to the definition of orphan work (for example, if an owner’s address changes or the title of the work is misspelled in one of the available databases), the copyright owner is from that point on effectively denied the remedies available to other copyright owners. The infringer could undertake a perfunctory search, and if he eventually located the copyright owner, make a lowball offer. Even if the owner would have otherwise declined to license the

work for the proposed use, he would no be longer entitled to recover attorney's fees and statutory damages. In order for a copyright owner to enforce his limited rights, he would have to incur the legal expense of taking the claim to trial, without the possibility of winning a summary judgment motion. Each case of infringement involving a so-called "orphan work" would become a factual determination requiring witness testimony and therefore not susceptible of resolution by a judge; the dispute would have to go all the way to trial. An author of a single copyright would not find it economically feasible to litigate and would be forced to negotiate a token license fee or risk not being compensated at all for the use of his work. In effect this provision deprives the copyright owner of his right to control the distribution of his work. For example, a musical composition could be used in a commercial for an industrial chemical, an article of personal hygiene or an alcoholic beverage, even though the author might strongly object to associating his song with such advertised product. This limitation on the recovery of legal fees and statutory damages is unacceptable, and particularly so for the individual author or small copyright owner. It would result in coerced licenses that do not provide the reasonable compensation which the copyright owner could otherwise expect to receive.

ALTERNATIVE REMEDIES FOR SMALL COPYRIGHT CLAIMS

The proposed legislation requires the Register of Copyrights to conduct a study on alternative remedies for infringement claims by owners seeking small amount of relief. We support this concept as an option available for authors and owners to choose between litigation or arbitration. It is prohibitively expensive for the owner of a single musical composition to file a suit for copyright infringement. As a result, many users of copyrighted musical compositions are blatantly infringing our member's works, knowing they do not have the resources or wherewithal to pursue copyright litigation.

CONFLICT WITH INTERNATIONAL TREATY OBLIGATIONS

This legislation provides another instance in which the United States copyright laws could potentially conflict with international copyright treaty obligations such as the Berne Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS") of the Uruguay Round Agreement of GATT. This creates the risk of retaliation against U. S. copyrighted works abroad, harkening back to the Fairness in Music Licensing Act of 1998, which denied songwriters their performance royalties in restaurants in the United States and resulted in the World Trade Organization levying reparation fines against the United States.

CONCLUSION

The Orphan Works bills are deeply flawed and would have serious unintended, but far reaching adverse effects. We recommend that the U.S. Copyright Office

be directed to (i) activate an online version of its Address File system of records in which authors and owners can update their records and provide full contact information and licensing submission procedures; (ii) extend its registration and histories databases to include all of its copyright records prior to 1978 to facilitate full public record searching; and (iii) make scanned images of copyright documents available on-demand to the public free of charge or on a cost recovery only basis. These administrative tools will bring proposed users and owners closer together, without resorting to harmful legislation.

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The Association of Independent Music Publishers (AIMP) was formed in 1977 and has chapters in Los Angeles and New York. Its members consist of independent music publishers, publishers affiliated with record labels, motion picture and television production companies, songwriters, music producers, artist managers and members of the legal and accounting professions. Its primary focus is to educate and inform local music publishers about the most current industry trends and practices by providing a forum for the discussion of the issues and problems confronting the music publishing industry.

The California Copyright Conference (CCC) was established in 1953 for the discussion of copyright-related areas pertaining to music and entertainment. The organization has over 300 members from all areas of the music and entertainment industry, including publishers, songwriters, attorneys, representatives from trade publications, performing rights societies, motion pictures, television, multimedia, Internet and record companies. Its mission is to encourage, foster and promote an interest in, and the study of, all materials relating to the copyrighting and other protection of intellectual and creative properties.