

PRIMARY OBJECTONS TO S. 2913-
The Shawn Bentley Orphan Works Act of 2008
FROM THOSE INVOLVED IN THE ART LICENSING INDUSTRY

- 1. It makes it virtually impossible for artists to protect their work because it basically allows anyone to use a design without the copyright holder's permission.*

Under current law, you receive basic copyright protection even if you don't register your work. **Under Orphan Works law, your work could be declared an orphan even if you *have* registered it.** Congress, in enacting the Copyright Act of 1976, provided that copyright exists in the creation of any work that is copyrightable subject matter, regardless of whether or not the owner has performed any legal formalities such as registration or copyright notices, or taken any steps to protect or defend the copyright. Since 1978 (when it was enacted), many creators have relied upon the Copyright Act of 1976 and employed business practices based upon the protections it offered. The proposed Orphan Works Acts of 2008 would have the effect of depriving creators the ability to enforce their copyrights because they did not take steps the Copyright Act of 1976 did not require them to take. In essence, **it will give infringers the legal means to use a design without the copyright holder's permission.**

- 2. It requires artists to protect their work by registering it with a digital database system (presumably for a fee, in addition to the copyright filing fee)—when no such system exists!*

The proposed legislation is predicated on the establishment of private, profit making registries that would establish databases of digital versions of artworks and provide a place for infringers to try to locate the artist, **BUT the bill will become effective whether or not these databases ever come into existence.** Since the technology for effective searching by image has yet to be developed, this will relieve the infringer of liability if he simply attempts a search, even one that cannot possibly be performed successfully. In addition, the legislation places no limit on the number of these registries or the prices they would charge. The burden of paying for digitization and depositing the digitized copy with the private registry would presumably fall entirely on the artist, and even if an image is contained in the registry, as long as the infringer "looks" without finding it, the infringement is allowed. There is no liability imposed for the failure of a database to find an image registered in that database when it is searched (even if copyright has been filed), and no requirement that all available databases be searched, thus potentially requiring multiple registrations (and multiple registration fees). There are also no safeguards to prevent any person or company from fraudulently registering work they do not own.

3. *It eliminates statutory damages wherever an infringer can successfully claim an Orphan Works defense, thus eliminating the only tool the law provides to prevent deliberate infringement.*

Current law almost certainly deters *rampant infringement* because the present remedies – damages of up to \$150,000 per infringing article-- make infringement risky. **By limiting remedies the Orphan Works amendment will effectively create a no-fault license to infringe.**

4. *It allows for an infringer to create—and copyright—a derivative work from the original design.*

Under current law, the right to create a derivative work is one of an artist's exclusive rights. (Section 103 (a)) says a user can't copyright a derivative image that he's infringed. "Protection for a work employing preexisting material in which copyright subsists *does not extend to any part of the work in which such material has been used unlawfully.*" Under the proposed new bill, since the entirety of an infringed work can be included in a derivative use, then the copyright of the derivative will amount to a copyright of the original. This would be a *de facto* capture of new, exclusive rights by the infringer. In other words, **these bills allow infringers to make and copyright derivatives—even if the copyright holder to the original work objects.**

5. *It leaves infringing works (and products incorporating them) subject to seizure in other countries under the Berne Convention for the Protection of Literary and Artistic Works (the international agreement governing copyrights to which the United States is a signatory).*

It also invites sanctions from around the world under the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), to which the United States is also a signatory, because international artists' works would be just as vulnerable to infringement within the U.S. under the terms of the Orphan Works Amendment. If this legislation passes, it would mean a return to pre-1976 U.S. Copyright Act when many artists' works fell into the public domain because they could not afford to comply with the formalities of registration as a condition of copyright protection. This violates the trust under which American artists have worked for the last 30 years and effectively nullifies our U.S. Copyright registrations.