

From: [REDACTED]
Sent: Wednesday, March 24, 2010 4:22 PM
To: FN-OMB-IntellectualProperty
Subject: Feedback on Intellectual Property and Risks to the Public
Attachments: MALC-IP-White House final.pdf; ATT167437.htm

Follow Up Flag: Follow up
Flag Status: Flagged

(also attached as a pdf)

March 24, 2010

Victoria Espinel
U.S. Intellectual Property Enforcement Coordinator
Washington D.C.

Dear Victoria Espinel,

These comments are from the Massachusetts Artists Leaders Coalition (MALC). We would like to commend the White House for creating this new position and for requesting feedback from the American public. Intellectual property protection is key for not only our technology sectors and large entertainment companies, but it is key for small businesses, entrepreneurs of all kinds and artists of all disciplines (music/sound, dance, visual, craft, literary, moving image, etc.). We strongly urge this office to work not only on national and international levels, but on state and local levels to protect intellectual property from infringement.

MALC was founded in 2008 and our meetings, and connected working groups are designed to bring together artists leaders of all disciplines (visual, craft, performing, literary, etc.) and artist(s) run organizations, initiatives, and businesses around key issues facing Massachusetts artists working in all disciplines. Membership for MALC is free and open to Massachusetts individual artists of all disciplines and to Massachusetts artist(s) run organizations/businesses/initiatives. One of the key areas MALC focuses on is the protection of artists' rights. We proudly serve as the artists working group for our state's Creative Economy Council. It is the only council of its kind in the country.

Artists of all disciplines are the key foundation of our nation's cultural and creative economy sector. An artist's key asset is our creative work. The protection of our intellectual property, of our namesake, and of our copyrights are critical both on moral and financial grounds.

Please make it the standard that practicing artists are at the policy making table as we have valuable and needed input. Our state's artists community has been at the policy making table for the Massachusetts health care reform implementation and it has proven to be tremendously beneficial for both our community and for our state's policy makers.

We hope the information included in this document is useful and informative. It is broken down into several sections for convenience sake.

Thank you for your time and consideration. We look forward to working with you and your office.

Sincerely,

MALC
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malc@artsistsunderthedome.org
617-784-4652

Massachusetts Artists Leaders Coalition's Recommendations

1. Key Information About Artists of All Disciplines:

We would like to call your attention to an important forum that was facilitated by the National Endowment for the Arts devoted to Artists & Cultural workers:

National Endowment for the Arts Presents Live Webcast of its Cultural Workforce Forum on Friday, November 20, 2009

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Also we would like to call your attention to a fall 2009 report, *Stand Up and Be Counted*, that focused on Massachusetts artists of all disciplines. It is, however, national in its applications. The study was funded by the Blue Cross Blue Shield Foundation of Massachusetts and it gives a sobering socioeconomic picture of artists of all disciplines:

<http://www.artistsunderthedome.org/census.html>

2. Socioeconomic Status of Artists and Why it is Important:

The vast majority of artists of all disciplines must have supplementary jobs or other non art derived sources of income in order to survive. It is very difficult to earn a living solely from one's art making practice in this country. Even with these supplementary jobs, artists are still in the lower income brackets. (Note: total income is the measurer to use and not gross income because all artists have to pay out money to create their art form). Those who do earn their income entirely from their art making practice are also not usually high income earners, but are clustered on the lower end of the income brackets. This was clearly evident in the 2006 economic data from *Stand Up and Be Counted* study (2006 data was collected on purpose to show artists' income before the recession hit).

It needs to be acknowledged and understood that most individual artists of all disciplines will not have the funds needed to hire a lawyer to help protect their intellectual property (copyright, trademarks or patents). All efforts need to take this into account. Current copyright law does take this fact into account and it should not be altered or lessened in anyway. Any new laws, treaties or regulations also need to take this into account. The same will hold true for most small businesses and entrepreneurs, and individual inventors as the majority of them will have limited funds/money.

3. Labor Law and its Impact on Intellectual Property Rights:

Artists of all disciplines and others who create intellectual property must have the choice to be classified as independent contractors. Once someone is classified as an employee they lose all rights to the use of their intellectual property. Being classified as an employee is devastating to those who make their income as freelancers.

Again it is key to understand if you are "employee" you do not control the use of the intellectual property you create as an employee- your employer does. The employer owns the right to sell and use the intellectual property as they see fit (not the employee or creator of the intellectual property).

4. Important Lessons from Massachusetts' 2004 Independent Contractor Law Change:

In 2004, the state law governing independent contractors in Massachusetts was changed. Sadly, no one in the freelancers community or in the artists/arts/creative economy communities were consulted or even told about this law change. Unfortunately, there are real unintended consequences from this law change. It is having a negative and exploitative impact on our community, as once someone is classified as an employee they lose all rights (moral, financial control/ownership) to the intellectual property they generate. The law change is also destroying needed income streams for artists of all disciplines, freelancers of all kinds and the self employed. For example, the entire publishing industry will no longer hire Massachusetts freelancers due to this law change.

It is important to note that what was done in Massachusetts was attempted on a federal level. The Illustrators Partnership of America was one of the groups that successfully fought the federal push. It seems that after this defeat, proponents of this kind of policy change are now trying to do this change on a state by state basis (ie the legislative language in MA has been replicated in other states).

Presently, President Obama and Vice President Biden are also pushing for changes in the IRS tax code on independent contractors. Senator Kerry has also filed a bill on this issue.

Our nation must protect artists' intellectual property, their legacy from being unfairly exploited and protect also their needed income streams, while also making sure those who are purposely misclassifying workers as independent contractors are stopped. It is critical, however, that the artists, the arts and the creative economy communities all be at the policy table to stop any unintended consequences that will devastate our communities.

Massachusetts got it wrong and is now struggling to fix it. We can't get it wrong on a national level.

Links to documents on the issue:

General information on MA Independent Contractor law change:

http://www.artistsunderthedome.org/MAindependent_contractor.html

Short paper on the law change and how it impacts artists of all disciplines:

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6. The Right to Publicity:

All types of intellectual property need to be protected, and even more so in this digital age. This is especially true as it manifests in the need to protect our personality, our image, our namesake or what is now also called "our brand" from being exploited in advertising and in other commercial arenas. There needs to be national legislation to protect an artist's legacy and their "brand" they have worked hard to create and to manage.

Please craft and pass legislation that will provide protection for the commercial use of an individual's identity during the individual's lifetime, and also after the date of the individual's death.

The Right of Publicity has been recognized as the law of 28 states, either under common law or statute, including Massachusetts. Thirteen states have a transferable right of publicity that survives death. The duration of the transferred or inherited right ranges from ten (10) to one hundred (100) years. We suggest that the inherited right is the same as the time allotted for copyright inherited right.

We would suggest that the definition of "Commercial Use" exempts use of an individual's identity for, among other uses, news reports, commentary, artistic or expressive works, a live performance, works of art theatrical work, musical work, film, television, radio, or the like, except where the use is directly connected with advertising or another commercial use. We believe this statute strikes the appropriate balance between artists' right of publicity and filmmakers' freedom of expression.

From an estate planning perspective, this would clarify the existence of the right of publicity which can be transferred upon death and therefore allows for effective estate planning for an individual whose right may be a substantial estate asset.

7. The Need of National Educational Campaigns:

a) First we would like to commend the U.S. Copyright Office for its useful website. We would like added to it social networking platforms, blog and email listserv capabilities. This will better enable the Office to do low cost outreach work, send out alerts, and to notify the American public on new additions to the site. These tools will be instrumental in helping with any national education campaign.

b) There is a clear need for national level educational campaigns to educate the general public on what "fair use" is and of our laws pertaining to copyright, patent law, trademarks and the like. The so called "Free Cultural Movement" does not understand that culture is not free. Artists of all disciplines and our arts organizations of all kinds struggle to exist even in the best of times. In this digital age it has become very easy to take intellectual property of all kinds. "Just because you can does not mean you should"

c) Although there are useful school based educational materials on the U.S. Copyright Office's website, we think it is imperative that as part of any national education reform, students are taught at an early age and as teenagers, about U.S. laws governing intellectual property. It needs to be required learning.

d) The U.S. Copyright Office should be mandated to work across sectors with such agencies as the National Endowment for the Arts, the National Endowment for the Humanities, the FCC and with key Secretaries (Education, Labor, etc.) on any national awareness campaign. Artists advocacy groups need to be included on every level.

e) Create a downloadable certificate that art dealers and auction houses could include with art sales that informs the buyer of copyright law and that the artist(s)/their heirs retain the copyright to their work after it is purchased.*

* In the Consignment of Fine Art market (think commercial galleries and craft galleries), artists are not told who has purchased their work and the purchaser is not given the artists contact information (In 2006 it became the law in MA that artists must be given the contact information on who bought their art to enable the artist to better control their copyright). The same holds true for art auctions and art sold on the secondary art market. This makes it almost next to impossible for visual and craft artists and their heirs to keep track of who has their work and to be able easily track their copyright, but thankfully under current copyright law their work can not be legally infringed.

8. Please make it easier for artists of all disciplines to register/copyright their work by mandating the Copyright Office to do the following:

- i) Expand the use of form for photographers (Form GR/PPh/CON) to other disciplines such as but not limited to cartoonists, illustrators, graphic designers, visual artists, writers etc.
- ii) Change the current requirement of needing the specific date of publication. Instead change it to the year of the publication (many artists who create freelance work are not always told or can keep track of the exact date when their work is "published").
- iii) Create a hardship waiver for artists who can not afford the \$35 dollar fee to register their work for copyright. As indicated in sections 1 & 2, a large majority of our community are financial challenged/poor.

9. Investigate ways to better protect our craftspeople and designers of all kinds (fashion, jewelry, furniture, etc.) from having their work stolen/pirated:

The creative work of our nation's craftspeople and designers are not adequately protected under current US law. This needs to be changed. In Massachusetts, several of our craftspeople on Cape Cod had their designs "stolen" by the Christmas Tree Shop. The Christmas Tree Shop had the designs fabricated in China, flooded the Cape Cod market with these lower priced products and as a result drastically harmed the craftspeople's businesses. The same happens to many of our unknown and famous clothing designers. Please craft and support legislation, regulations or treaties that create better protection for this sector of artists.

Info on the MA craftspeople case:

<http://www.npr.org/templates/story/story.php?storyId=4772832>

10. Work on state and local levels to educate artists of all disciplines about their intellectual property rights and how to better protect themselves:

Every state has an arts council and these agencies would prove to be wonderful allies and partners for this Office and the Copyright Office to work together to educate artists of all disciplines on their rights and how to protect their intellectual property. The public library system could also be part of this effort.

11. Needed Public Service Warnings:

Require or strongly suggest that news/research websites & blogs, search engines, etc. use standard warning language that is easy to read and find (on their front page) in regard to copyright. This office should craft the acceptable language and also mandate a font and font size.

i.) Wikipedia "language" is one model to look at:

"This image (or other media file) is in the public domain because its copyright has expired.

This applies to the United States, Australia, the European Union and those countries with a copyright term of life of the author plus 70 years.

Note that a few countries have copyright terms longer than 70 years: Mexico has 100 years, Colombia has 80 years, and Guatemala and Samoa have 75 years. This image may not be in the public domain in these countries, which moreover do not implement the rule of the shorter term. Côte d'Ivoire has a general copyright term of 99 years and Honduras has 75 years, but they do implement the rule of the shorter term."

ii) Google, for example, does have language on its Google images area (ie not the front page but on the second page when an image search is conducted), but it is not prominent enough and does not explain what copyright is. Below is the language used by Google:

"Image may be subject to copyright."

12. Consumer Protection Issues/User Beware Language:

Many individuals are not aware that when they use free sites/programs such as myspace, facebook, that they lose their intellectual property rights entirely or have to "share" their intellectual property that is housed/uploaded on these sites/programs with the host company. Often the language that states this fact is buried in company's terms of agreement in hard to read/understand language.

These entities should be required on the front page of their sites to state this fact. It is our opinion that this Office should also craft the acceptable language and should mandate a font and font size.

13. Stop Temp-Tracking

This was an issue brought up by a MALC member who is a concert pianist. "Temp-tracking," is when a music studio engineer uses unlicensed music to create derivative works for commercial purposes. It is a serious issue that is both diverting compensation away

from local, relatively unknown musicians, and contemporaneously subverting their constitutionally protected rights. Please address this issue as soon as possible.

14. The Office of the U.S. Intellectual Property Enforcement Coordinator, the U.S. Copyright Office and Advocates

There needs to be a formal way for artists and advocates to easily work on a regular basis with this Office and the Copyright Office in the effort to monitor the current copyright law, ANY change in copyright law, and its impact on artists and the market. In other words this Office and the Copyright Office should be mandated to have regular meetings with artists advocates and small businesses advocates. These meetings would need also have conference calling capabilities (ie use free phone conferencing service). (Note this occurs in health care policy on many levels)

15. The Orphan Works Issue:

Important background information:

An "Orphan Work" occurs when the copyright owner(s) can not be found. Any approach to address the issue of orphan works must be handled very carefully. The vast majority of artists of any discipline (or US citizens for that matter) do not copyright their work for many reasons- mainly due to it being cost prohibitive and impossible in some cases due to the volume of work they create. This leaves them vulnerable on many levels to having their work unfairly deemed orphan works.

The past pieces of proposed 2008 federal legislation in the House (H.R. 5889) and Senate (S. 2913) had too many problems and would have destroyed needed copyright protection. Under no circumstance should these pieces of legislation and the language from them be reintroduced. Provided is a breakdown of the issues with the 2008 legislation.

We urge you to take the time to learn in depth of this issue and to work with artists advocacy groups like MALC, the Illustrators Partnership of America, the chapters of Volunteer Lawyers for the Arts on solving it. Please take the time to review the Artists Foundation's 2008 paper on Orphan Works:

http://www.artistsfoundation.org/AF_OW_paper.html

The problem and suggested solution:

We acknowledge that libraries and other educational institutions have works in their collections that they would like to use the copyright for educational purposes and presently they can not find the copyright owners in question. Individuals want to be able to retouch old family photographs and they too can't find the copyright owner of the photographs. Documentary filmmakers are also in need to have access to images and work that they can not find the copyright owners of. These are clearly very important issues that need to be dealt with.

Although we are in strong support for allowing our cultural allies and partners, the libraries, museums, archives and our documentarians to access true orphaned works of art, any legislation must protect artists of all disciplines (including the documentary filmmakers) from their copyright being unfairly infringed. The best way to address this issue would be to carefully amend the fair use section of the copyright law to clearly define true orphaned works, amend it to allow our cultural partners and allies to use the true orphaned works they have in their collections for clearly defined educational purposes only, amend it for a clearly defined personal use for the purposes of photo-retouching, and finally amend it for documentary film makers while at the same time explicitly banning all commercial use of orphaned work or uses of orphan works for charity or fundraising. (In many cases the "infringer" would be able to save money by using the orphaned work instead of hiring/commissioning an artist to create new art work).

Ten Specifics on the 2008 Orphan Works Legislation:

1) Under the 2008 proposed pieces of legislation, if the copyright owner or artist could not be found, anyone would have been legally allowed to use or infringe the works (artwork, music, family photos, films, poems, etc.) and to create a derivative work from the "Orphan Work". The infringer would be allowed to keep the rights to their derivative work **even if** the copyright owner surfaced. One did not lose their copyright, but their work, if deemed orphaned, would have been able to be legally infringed. The infringer would have also been able use their derivative work to compete in the market place against the original copyright owner. (think stock photography agency versus an individual photographer). This is unacceptable.

2) The 2008 Orphan Works Legislation allowed for anyone to "infringe" who had done a search and the 2008 legislation and made no distinction from educational institution vs. commercial institution. (i.e. an advertising company could use the orphaned work under this proposed legislation if they searched and could not find the copyright holder). Although there was some effort to minimize someone using the orphaned work for commercial purposes in the 2008 legislation, both pieces of legislation did not offer enough protection for artists of all disciplines or individuals for that matter.

3) Although the legislation allowed for someone (a person or a business) to legally infringe an orphan work, the legislation did not clearly spell out how long and what the search needed to entail (note the amended/passed version of S. 2913 did set a minimum search requirement but it fell far short of the needed protection).

4) The legislation did not require the "infringer" to prove they obtained the orphaned work legally or that "the possessor obtained the legal rights of disposition". This is critical.

5) The legislation would have negatively impact the Visual Artists Rights Act of 1990.

6) The pieces of legislation called for on-line databases or what would be also called registries to be certified by the Copyright Office for visual artists for to register their work with.

i) No where in the legislation did it say the databases/registries were to be free of charge to artists.

ii) Although the legislation did not mandate visual artists to register their work with these databases/registries- it was clear that these databases/registries would be a key tool for those to use searching for copyright owners and a way for them to justify they did a search.

iii) Nor did legislation protect the artists from the private data base/registry companies from using/selling their artwork/information, etc. (there was a clear need for HIPAA-like protection that is found in the health care sector for an individual's medical information)

iv) Several of the so called artists advocacy group supporting the legislation were gearing up to create certified private data bases for their members and for industry sectors (ie it was going to be a money generator for them).

The best answer would be to not have ANY databases/registries. The second best answer would be to set up a free public archive for artists of all disciplines, but again it should be voluntary and NOT required. There will need to be a free program to help artists put their work into the archive.

7) The amount of damages that could be retrieved by the copyright owner if they "surfaced" and found their work was deemed and used as an orphan work (when in fact it was not orphaned) were unacceptable (all legal fees need to be covered as well as compensation for infringement).

8) The legislation would have essentially forced musicians, writers, visual artists, and others who wanted to protect their creative work to officially copyright their work. This will be too costly for most individuals and small businesses.

9) The legislation did not require or mandate the Copyright Office to conduct a national educational outreach campaign to alert the U.S. public of this law change and of existing copyright law. There would need to be federal funding allocated to do this important outreach. Also there should have been a reasonable time period before the changes to the copyright law went into effect. (At least a year or two after the date the legislation actually passed)

10) Most importantly the very real problem that works would have been classified as orphaned works when in fact they were not orphaned under these two pieces of legislation.**

**In our creative economy industry, artists of all disciplines send out work samples (music demo tapes, film shorts, jpegs/slides of their artwork, writing samples) in their effort to secure art shows, music/literary contracts, film deals, and/or jobs. Usually those materials are not returned to those who submitted the work-even if they provided the means to return their materials. Under current copyright law the holder of these materials can not legally infringe or use the work/copyright, but under this 2008 Orphan Work proposed legislation, if the holder of those materials did an undefined "diligent" search and could not locate the copyright holder, they could legally infringe the copyright (i.e. often those work samples are kept for years). Not only will they be allowed to infringe the copyright, but they will also be allowed to create, copyright, and profit from a derivative work made from the work they are infringing EVEN if the "orphan" work's copyright owner surfaces.

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iii) Create a hardship waiver for artists who can not afford the \$35 dollar fee to register their work for copyright. As indicated in sections 1 & 2, a large majority of our community are financial challenged/poor.

9. Investigate ways to better protect our craftspeople and designers of all kinds (fashion, jewelry, furniture, etc.) from having their work stolen/pirated:

The creative work of our nation's craftspeople and designers are not adequately protected under current US law. This needs to be changed. In Massachusetts, several of our craftspeople on Cape Cod had their designs "stolen" by the Christmas Tree Shop. The Christmas Tree Shop had the designs fabricated in China, flooded the Cape Cod market with these lower priced products and as a result drastically harmed the craftspeople's businesses. The same happens to many of our unknown and famous clothing designers. Please craft and support legislation, regulations or treaties that create better protection for this sector of artists.

Info on the MA craftspeople case:

<http://www.npr.org/templates/story/story.php?storyId=4772832>

10. Work on state and local levels to educate artists of all disciplines about their intellectual property rights and how to better protect themselves:

Every state has an arts council and these agencies would prove to be wonderful allies and partners for this Office and the Copyright Office to work together to educate artists of all disciplines on their rights and how to protect their intellectual property. The public library system could also be part of this effort.

11. Needed Public Service Warnings:

Require or strongly suggest that news/research websites & blogs, search engines, etc. use standard warning language that is easy to read and find (on their front page) in regard to copyright. This office should craft the acceptable language and also mandate a font and font size.

i.) Wikipedia "language" is one model to look at:

"This image (or other media file) is in the public domain because its copyright has expired.

This applies to the United States, Australia, the European Union and those countries with a copyright term of life of the author plus 70 years.

Note that a few countries have copyright terms longer than 70 years: Mexico has 100 years, Colombia has 80 years, and Guatemala and Samoa have 75 years. This image may not be in the public domain in these countries, which moreover do not implement the rule of the shorter term. Côte d'Ivoire has a general copyright term of 99 years and Honduras has 75 years, but they do implement the rule of the shorter term."

ii) Google, for example, does have language on its Google images area (ie not the front page but on the second page when an image search is conducted), but it is not prominent enough and does not explain what copyright is. Below is the language used by Google:

"Image may be subject to copyright."

12. Consumer Protection Issues/User Beware Language:

Many individuals are not aware that when they use free sites/programs such as myspace, facebook, that they lose their intellectual property rights entirely or have to "share" their intellectual property that is housed/uploaded on these sites/programs with the host company. Often the language that states this fact is buried in company's terms of agreement in hard to read/understand language.

These entities should be required on the front page of their sites to state this fact. It is our opinion that this Office should also craft the acceptable language and should mandate a font and font size.

13. Stop Temp-Tracking

This was an issue brought up by a MALC member who is a concert pianist. "Temp-tracking," is when a music studio engineer uses unlicensed music to create derivative works for commercial purposes. It is a serious issue that is both diverting compensation away from local, relatively unknown musicians, and contemporaneously subverting their constitutionally protected rights. Please address this issue as soon as possible.

14. The Office of the U.S. Intellectual Property Enforcement Coordinator, the U.S. Copyright Office and Advocates

There needs to be a formal way for artists and advocates to easily work on a regular basis with this Office and the Copyright Office in the effort to monitor the current copyright law, ANY change in copyright law, and its impact on artists and the market. In other words this Office and the Copyright Office should be mandated to have regular meetings with artists advocates and small businesses advocates. These meetings would need also have conference calling capabilities (ie use free phone conferencing service). (Note this occurs in health care policy on many levels)

15. The Orphan Works Issue:

Important background information:

An "Orphan Work" occurs when the copyright owner(s) can not be found. Any approach to address the issue of orphan works must be handled very carefully. The vast majority of artists of any discipline (or US citizens for that matter) do not copyright their work for many reasons- mainly due to it being cost prohibitive and impossible in some cases due to the volume of work they create. This leaves them vulnerable on many levels to having their work unfairly deemed orphan works.

The past pieces of proposed 2008 federal legislation in the House (H.R. 5889) and Senate (S. 2913) had too many problems and would have destroyed needed copyright protection. Under no circumstance should these pieces of legislation and the language from them be reintroduced. Provided is a breakdown of the issues with the 2008 legislation.

We urge you to take the time to learn in depth of this issue and to work with artists advocacy groups like MALC, the Illustrators Partnership of America, the chapters of Volunteer Lawyers for the Arts on solving it. Please take the time to review the Artists Foundation's 2008 paper on Orphan Works:

http://www.artistsfoundation.org/AF_OW_paper.html

The problem and suggested solution:

We acknowledge that libraries and other educational institutions have works in their collections that they would like to use the copyright for educational purposes and presently they can not find the copyright owners in question. Individuals want to be able to retouch old family photographs and they too can't find the copyright owner of the photographs. Documentary filmmakers are also in need to have access to images and work that they can not find the copyright owners of. These are clearly very important issues that need to be dealt with.

Although we are in strong support for allowing our cultural allies and partners, the libraries, museums, archives and our documentarians to access true orphaned works of art, any legislation must protect artists of all disciplines (including the documentary filmmakers) from their copyright

being unfairly infringed. The best way to address this issue would be to carefully amend the fair use section of the copyright law to clearly define true orphaned works, amend it to allow our cultural partners and allies to use the true orphaned works they have in their collections for clearly defined educational purposes only, amend it for a clearly defined personal use for the purposes of photo-retouching, and finally amend it for documentary film makers while at the same time explicitly banning all commercial use of orphaned work or uses of orphan works for charity or fundraising. (In many cases the "infringer" would be able to save money by using the orphaned work instead of hiring/commissioning an artist to create new art work).

Ten Specifics on the 2008 Orphan Works Legislation:

1) Under the 2008 proposed pieces of legislation, if the copyright owner or artist could not be found, anyone would have been legally allowed to use or infringe the works (artwork, music, family photos, films, poems, etc.) and to create a derivative work from the "Orphan Work". The infringer would be allowed to keep the rights to their derivative work **even if** the copyright owner surfaced. One did not lose their copyright, but their work, if deemed orphaned, would have been able to be legally infringed. The infringer would have also been able use their derivative work to compete in the market place against the original copyright owner. (think stock photography agency versus an individual photographer). This is unacceptable.

2) The 2008 Orphan Works Legislation allowed for anyone to "infringe" who had done a search and the 2008 legislation and made no distinction from educational institution vs. commercial institution. (i.e. an advertising company could use the orphaned work under this proposed legislation if they searched and could not find the copyright holder). Although there was some effort to minimize someone using the orphaned work for commercial purposes in the 2008 legislation, both pieces of legislation did not offer enough protection for artists of all disciplines or individuals for that matter.

3) Although the legislation allowed for someone (a person or a business) to legally infringe an orphan work, the legislation did not clearly spell out how long and what the search needed to entail (note the amended/ passed version of S. 2913 did set a minimum search requirement but it fell far short of the needed protection).

4) The legislation did not require the "infringer" to prove they obtained the orphaned work legally or that "the possessor obtained the legal rights of disposition". This is critical.

5) The legislation would have negatively impact the Visual Artists Rights Act of 1990.

6) The pieces of legislation called for on-line databases or what would be also called registries to be certified by the Copyright Office for visual artists for to register their work with.

i) No where in the legislation did it say the databases/registries were to be free of charge to artists.

ii) Although the legislation did not mandate visual artists to register their work with these databases/registries- it was clear that these databases/registries would be a key tool for those to use searching for copyright owners and a way for them to justify they did a search.

iii) Nor did legislation protect the artists from the private data base/registry companies from using/selling their artwork/information, etc. (there was a clear need for HIPAA-like protection that is found in the health care sector for an individual's medical information)

iv) Several of the so called artists advocacy group supporting the legislation were gearing up to create certified private data bases for their members and for industry sectors (ie it was going to be a money generator for them).

The best answer would be to not have ANY databases/registries. The second best answer would be to set up a free public archive for artists of all disciplines, but again it should be voluntary and NOT required. There will need to be a free program to help artists put their work into the archive.

7) The amount of damages that could be retrieved by the copyright owner if they "surfaced" and found their work was deemed and used as an orphan work (when in fact it was not orphaned) were unacceptable (all legal fees need to be covered as well as compensation for infringement).

8) The legislation would have essentially forced musicians, writers, visual artists, and others who wanted to protect their creative work to officially copyright their work. This will be too costly for most individuals and small businesses.

9) The legislation did not require or mandate the Copyright Office to conduct a national educational outreach campaign to alert the U.S. public of this law change and of existing copyright law. There would need to be federal funding allocated to do this important outreach. Also there should have been a reasonable time period before the changes to the copyright law went into effect. (At least a year or two after the date the legislation actually passed)

10) Most importantly the very real problem that works would have been classified as orphaned works when in fact they were not orphaned under these two pieces of legislation.**

**In our creative economy industry, artists of all disciplines send out work samples (music demo tapes, film shorts, jpegs/slides of their artwork, writing samples) in their effort to secure art shows, music/literary contracts, film deals, and/or jobs. Usually those materials are not returned to those who submitted the work- even if they provided the means to return their materials. Under current copyright law the holder of these materials can not legally infringe or use the work/ copyright, but under this 2008 Orphan Work proposed legislation, if the holder of those materials did an undefined "diligent" search and could not locate the copyright holder, they could legally infringe the copyright (i.e. often those work samples are kept for years). Not only will they be allowed to infringe the copyright, but they will also be allowed to create, copyright, and profit from a derivative work made from the work they are infringing EVEN if the "orphan" work's copyright owner surfaces.