Trojan Horse: Orphan Works and the War on Authors

Brad Holland

Orphan Works legislation would summarily reverse the automatic copyright protection currently afforded to authors by the United States Copyright Act of 1976. This Orphan Works Amendment would effectively remove penalties for an infringement if the infringer had made what is termed a "reasonably diligent search" for the creator within yet-to-be-created commercial databases. In this article the author argues that the bill's sponsors have not produced evidence that such a change to the law is either necessary or desirable.

Introduction

In 2004, lawyers at the US Copyright Office adopted a premise of the anti-copyright lobby that the public is being harmed because some people lack sufficient access to other people's copyrighted works. In 2006 they released the results of a year-long study, announcing that they had documented evidence of a "market failure" so serious that Congress should amend existing copyright law to spare the world the loss of valuable cultural works.

The changes they proposed would effectively redefine each and every creative work as a potential "orphan," unless the author takes steps to register it with new commercial registries yet to be created in the private sector. This would reverse the automatic protection currently guaranteed by the 1976 Copyright Act. Yet this radical change to a law protecting private property was to be enacted not by a transparent Congressional debate over new legislation, but through the Trojan Horse of an *Orphan Works Amendment* that would serve to emasculate the penalties for infringement whenever an infringer believed that he or she had made a "reasonably diligent" but unsuccessful effort to find the rightsholder.

Twice (in 2006 and 2008) the bill's sponsors have tried to ram this legislation through the US Congress. The last time they nearly succeeded by means of backroom deals. Both times the legislation was stopped by an aggressive opposition campaign led by artists and photographers. Although the legislation's stated purpose has been to let libraries and museums digitize their archives of old work, the bill would actually permit the widespread commercial infringement of work created by contemporary artists and ordinary citizens. While supporters say the bill would help users find artists so that artists can be paid, the provisions would undermine every artist's exclusive rights, devalue works in derivative markets, breach contracts past and present, and expose every citizen's intellectual property to unwanted changes and uses.

When spelled out like this, it's hard to see why anyone would want such legislation. But if we go to the heart of the matter, we'll see why some special interest groups have invested so much time and money in the effort.

Harvesting Orphans

The Internet has made it possible for entrepreneurs to create financial empires by supplying the public with access to copyrighted material. The problem for these enterprises is how to cheaply acquire the legal right to license other people's intellectual property. By redefining millions of copyrighted works as orphans on the premise that some might be, this legislation would allow Internet content providers to profit by harvesting the works this law would orphan, providing their online databases with marketable content they could never afford to create themselves nor license from authors.

To justify this mass transfer of intellectual property from individuals to corporations, scholars of the anti-copyright lobby have whitewashed it as a long-overdue public service. Taking a page from postmodern literary criticism, they argue that individual authorship is a "romantic myth," suggesting that all creativity comes from the masses and that a change in the law is therefore necessary to give the masses access to their communal property. In this theory then, big Internet corporations would merely be sharing the property of ordinary citizens with other citizens for the greater good of the public.

The idea of a left-wing literary theory employed in the service of a potential corporate rights grab may strike some as incongruous. Yet the fight over this bill is merely one battle in a gathering war on authors that has united opportunists of the right and left. Surprisingly, this effort was launched by a government agency long thought by many to be author-friendly. So to understand the symbiotic relationship that has made left-wing theorists the

Remoras of big business, we need to look closely at the document that's routinely used to justify the amendment: the US Copyright Office's 2006 *Report on Orphan Works*.

The Myth of the Big Chill

Public Knowledge is a Washington-based "advocacy group" with a Six Point Plan to "reform" copyright law.[1] On May 29, 2008, its President and co-founder Gigi Sohn, addressed the 8th Annual Intellectual Property Symposium at the Center for Intellectual Property at the University of Maryland University College. In her speech she presented the official account of how the Orphan Works bill had risen out of the foamy sea of copyright chaos.

> "At the urging of libraries, museums, academics like American University Law Professor Peter Jaszi, and advocacy groups like Public Knowledge, the Copyright Office sought public input on the orphan works problem and suggestions for how to deal with it. After receiving some 850 comments from a wide variety of stakeholders, the Copyright Office in 2006 issued a detailed report that showed that there was *ample evidence that users were chilled from using works under copyright* when they could not find the holder, and that as a result, millions of works were not being used. The Copyright Office proposed a framework for solving this problem that has, for the most part, become the basis of the current legislation." (Italics added.) [2]

This official line has become the standard talking point supplied by the Copyright Office to Congressional lawmakers and by lawmakers to their constituents. If you're one of the tens of thousands of copyright holders who've already written Congress to protest this bill, you've probably received a version of the talking point in your Congressman's reply: Congress will do what's best for all parties and rely for guidance on the detailed Orphan Works Study conducted by the Copyright Office.

But what if this "detailed study," with its inference of millions of "chilled" copyright users, was based on no more "evidence" than 215 anecdotal letters? What if its legislative "framework" was written not *after* the year-long study, but *before* it? Here are the facts. In 2005 the Copyright Office published a *Notice of Inquiry*[3] requesting comments from interested parties on *the specific subject of orphaned work*. It did not inquire about the workings of commercial markets, and there is no evidence in its subsequent report that business clients have any substantial difficulty finding the authors they wish to work with. While it may seem heretical to suggest that the Copyright Office report contains no evidence to justify its sweeping recommendations, the fact is it doesn't. How it came to be accepted as an important study requiring the overturning of existing copyright law is quite a story.

A "Paucity of Data"

In its 2006 *Report on Orphan Works*, the Copyright Office reported "an overwhelming response" to its "year-long study." The Register of Copyrights testified to Congress that it "documents the nature of the orphan works problem, as synthesized from the more than 850 written comments we received."[4] In a nation of more than 300 million people, 850 letters might not seem like an "overwhelming response." Yet read the Report itself, and we learn that at least 600 of those letters had to be discounted as irrelevant. Here's how the Copyright Office itself characterized the results:

> Page 17: "The [Copyright] Office received an overwhelming response (by comparison to past studies), receiving 721 initial comments, and 146 reply comments [for a total of 867]."
>
> Page 21: "A large portion of the comments (about 40%) did not identify a specific instance where a copyright owner could not be identified or located.
>
> "Another portion (10%) presented enough specific information for us to conclude that the problem presented was not in fact an orphan works situation.
>
> "Still, approximately 50% of comments did contain information that could fairly be construed as presenting an orphan works situation, and a significant number of those comments (about 45%, *or about 24% of all comments*) provided enough information about a specific situation for us to conclude that it presented an orphan works situation." (Italics added.)[5]

Twenty four percent of 867 letters equals 215. This means that *even by counting "reply comments," there were no more than 215 letters to the Orphan Works study that could even "be construed" as relevant to the subject*. While the President of Public Knowledge has said these comments came from "a wide variety of stakeholders," it appears they overlooked the stakeholders with the greatest stake of all: authors. Instead, most of the comments appear to have been generated by appeals such as this one, from the *College Art Association* to its members:

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1. Gigi B. Sohn: "The Orphan Works Act of 2008: Copyright Reform Takes Its First Steps," Presented to the Center for Intellectual Property 8th Annual Intellectual Property Symposium, University of Maryland University College May 29, 2008 http://www.publicknowledge.org/node/1594
2. *ibid*
3. United States Copyright Office, Library of Congress, Notice of Inquiry on Orphan Works, [Federal Register: January 26, 2005 (Volume 70, Number 16)] [Notices] [Page 3739-3743] http://www.copyright.gov/fedreg/2005/70fr3739.html
4. Register's testimony on the "Orphan Works Problem and Proposed Legislation" before the Subcommittee on Courts, the Internet, and Intellectual Property; Committee on the Judiciary; United States House of Representatives March 13, 2008 http://www.copyright.gov/video/testimony-3-13-08.html
5. *Report on Orphan Works, A Report of the Register of Copyrights*, January 2006 United States Copyright Office http://www.copyright.gov/orphan/orphan-report.pdf (Note: download is 133 pages.)

> "As you may already know, the U.S. Copyright Office is soliciting formal comments from the public on the problem of 'orphan' works... If successful, this initiative could significantly help artists, scholars, and others who use copyrighted images and texts in their creations and writings... In order to make a strong case to the Copyright Office, we need anecdotes - as many as you can think of - about specific instances where scholars or artists have had difficulty using copyrighted materials because the copyright holder cannot be located." (Emphasis added.)[6]

By telling artists, scholars, and others that they would "significantly help" creators by flooding the Copyright Office with such anecdotes, what artist, scholar, etc. would not want to help by responding? One wonders though, how accurate is the implication that a scholar's "inability to locate a copyright holder" could lead to legal peril. In fact, it appears to be at odds with the truth. As the drafters of the 1976 US Copyright Act made clear:

> "[I]t is important to realize that the [1976] bill would not restrain scholars from using any work as source material or from making "fair use" of it; the restrictions would extend only to the unauthorized reproduction or distribution of copies of the work, its public performance, or some other use that would actually infringe the copyright owner's exclusive rights." (Emphasis added.) U.S. Code, House Historical and Revision Notes Report No. 94-1476, at 136 (1976)[7]

We can't know how many of the 215 "relevant" letters were generated by appeals from such groups as the College Art Association, or how many were based on misinformation regarding the latitude of "fair use" available to copyright users. Yet even if every single letter of the 215 represented a legitimate "orphan works situation," it would hardly qualify as "ample evidence" that "millions" of potential users are being "chilled from using works under copyright." In fact, as David Rhodes, President of New York's School of Visual Arts has observed:

> "[I]n its report the Copyright Office provides little or no evidence that there is in fact a problem. There is no systematic review of the various markets to see if they are in fact dysfunctional. All of the supposed examples of the harm caused by orphan works are clearly anecdotal and in a country of 300,000,000 fall far short of the threshold for serious consideration. The Copyright Office's own paucity of data should lead one to conclude that 'Orphan Works' are not a problem at all."[8]

Of course, that's not what the Copyright Office concluded.

Claims Without Evidence

While academics, college professors, and students may have submitted anecdotes to the Copyright Office study, the weightiest contributions appear to have come from big Internet concerns whose business models depend on providing free or cheap access to other people's intellectual property. These groups invariably submitted statements claiming that creative works once published have virtually no commercial value. A typical example is the joint statement submitted by NetCoalition.com, whose members "include Bloomberg, CNET, Google and Yahoo, as well as a number of smaller state and local ISP associations." The coalition congratulated the Copyright Office for identifying "a significant issue that requires expeditious resolution." Then it stated:

> "The vast majority of copyrighted works have little or no economic value soon after their creation or publication."[9]

This blatant assertion was offered with no evidence of any kind, nor was it even propped up by argument. Indeed, the letter went further (again without evidence) to state that "[a]uthors of such works typically are willing to permit others to reproduce, distribute, perform, or display their works at *no charge* because the authors still benefit in tangible and intangible ways from their uses." (Italics added.)[10]

It should be self-evident that such unsupported conclusions are self-serving. Many Internet content providers are dependent on business practices that have invited major lawsuits for infringement. In March 2007, for example, Google filed a mandatory 10-Q Filing with the US Securities and Exchange Commission in which it acknowledged "copyright claims filed against us [by copyright owners] alleging that features of certain of our products and services, including Google Web Search, Google News, Google Video, Google Image Search, Google Book Search and YouTube, infringe their rights." Google admitted that "[a]dverse results in these lawsuits may include awards of substantial monetary damages, *costly royalty or licensing agreements* or orders preventing us from offering certain functionalities, and may also result in a change in our business practices, which could result in a loss of revenue for us or otherwise harm our business." (Italics added.) [11]

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6. College Art Association. This website appeal is available at: http://web.archive.org/web/20050319091445/www.collegeart.org/orphan-works/ and the emailed appeal to members can be accessed as a re-post at: http://h-net.msu.edu/cgi-bin/logbrowse.pl?trx=vx&list=H-New-Jersey&month=0503&week=a&msg=+ByJSt4DOW0FQI+t+wMbZg&user=&pw
7. U.S. Code, House Historical and Revision Notes Report No. 94-1476, at 136 (1976) http://www.law.cornell.edu/uscode/html/uscode17/usc_sec_17_00000302----000-notes.html
8. David Rhodes, President, School of Visual Arts, U.S. Small Business Administration Roundtable on Orphan Works Legislation, August 8, 2008 http://ipaorphanworks.blogspot.com/2008/08/orphan-works-statement-by-david-rhodes.html
9. Letter from NetCoalition.com to Jule Sigall, Associate Register for Policy & International Affairs, United States Copyright Office, March 25, 2005 Re: Orphan Works Notice of Inquiry http://www.copyright.gov/orphan/comments/OW0655-NetCoalition.pdf
10. *ibid*
11. United States Securities and Exchange Commission Form 10-Q/A, Amendment No. 1 Quarterly Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 For the quarterly period ended March 31, 2007, Page 36, http://investor.google.com/documents/20070331_10-Q.html

Having acknowledged their exposure to costly infringement litigation, one can easily understand why such companies might seek to denigrate the value of the work they've been charged with infringing. What's not clear, however, is why the US Copyright Office should urge Congress to undermine the intellectual property rights of citizens based on such claims.

Google Sees Value in Orphan Works

Despite having joined its NetCoalition partners in asserting that orphaned works "have little or no economic value," Google sang a different tune at the Orphan Works Roundtables on July 26, 2005 in Washington. There, the company's attorney, Alexander MacGillivray, made it clear that his firm actually believed the work under consideration was worthless only when it still belonged to the people who created it:

> "The thing that I would encourage the Copyright Office to consider is not just the very, very small scale – the one user who wants to make use of the [orphaned] work – but also the very, very large scale – and talking in the millions of works."[12]
>
> "Google strongly believes that these orphan works are both worthwhile, useful, and *extremely valuable*. In fact, I think that's why most of us are here. We do think there is a lot of value in these works."[13]
>
> "[W]e expect that [Google's] use of these orphan works will likely be in the 1 million works range...we know that many of them will be in the public domain, that most of their authors won't care. *But there are a few that really will care and they will come forward [to ask for payment] and it will be extremely inefficient for us [to have to pay them]*." (All italics added.)[14]

Four months later, in November 2005, at the same time as the Copyright Office was concluding its Orphan Works study and preparing its final report to Congress, Google made a surprising $3 million contribution to the Library of Congress for its "World Digital Library" project. The Library of Congress oversees Copyright Office activities. While the Library of Congress acknowledged that the World Digital Library project would be supported by public and private partnerships, it appears that Google was the project's first, largest, and perhaps only private sector contributor.[15]

Turning a Legal Fiction into Reality

It's not a compelling argument for a large global corporation to say it should be allowed to infringe your intellectual property based on its own assurance that your property is worthless. But while Internet powerhouses such as Google can only make such assertions, a more devious strategy has emerged from the small but dedicated core of copyright "reform" attorneys smitten by the romance of mass digitization. Their idea was not simply to claim that small rightsholders' work is worthless, but to propose a legal metamorphosis that would make it so.

Of particular interest is the 106 page paper "Reform(alizing) Copyright" submitted to the Copyright Office by the advocacy group Creative Commons. In it, attorney Christopher Sprigman proposed a scheme that would effectively roll back the 1976 Copyright Act by requiring artists, writers and others to mark and register every single work they create or find the work deemed (page 491) "commercially valueless":[16]

> "[T]his Article proposes a system of formalities that, although nominally voluntary, are *de facto* mandatory for any rightsholder whose work may have commercial value. Non-compliance with the newstyle formalities would subject works to a perpetual and irrevocable 'default license' with royalties set at a very low level, thus effectively moving works into the public domain." (Emphasis added.) (Pages 490-491)[17]

The logic behind this proposal is as cynical as it is clearly stated. Since authors, particularly visual artists, would lack the time and resources to mark and register every drawing, painting, photograph or sketch they create, then track and renew these tens of thousands of registrations over a period of decades, billions of copyrighted works by working authors would inevitably fall through the cracks and into the public domain. This would happen not because the authors have actually abandoned their works (which would be the legal presumption), but merely because the law had swamped them with paperwork. In effect, this proposal would turn a legal fiction – that "most copyrighted work has little or no value soon after its creation or publication" – into reality.

The problem with this proposal is that any government that required rightsholders to register their work as a condition of its protection would violate international copyright law. Article 5.2 of the Berne Convention is explicit: "The enjoyment and the exercise of these rights shall not be subject to any formality."[18]

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12. United States Copyright Office Transcript of Orphan Works Roundtable, July 26, 2005, Page 21 http://www.copyright.gov/orphan/transcript/0726LOC.PDF
13. United States Copyright Office Transcript of Orphan Works Roundtable, July 26, 2005, Page 119 http://www.copyright.gov/orphan/transcript/0726LOC.PDF
14. United States Copyright Office Transcript of Orphan Works Roundtable, July 26, 2005, Page 166 http://www.copyright.gov/orphan/transcript/0726LOC.PDF
15. "Library of Congress Launches Effort to Create World Digital Library," *News From the Library of Congress*, November 22, 2005 http://www.loc.gov/today/pr/2005/05-250.html
16. Christopher Sprigman, "Reform(alizing) Copyright," Stanford Law Review Vol.57:485 November 2004, Comment to Copyright Office Orphan Works Study, Page 491 http://www.copyright.gov/orphan/comments/OW0643-STM-CreativeCommons.pdf
17. Christopher Sprigman, "Reform(alizing) Copyright," Stanford Law Review Vol.57:485 November 2004, Pages 490-491, Comment to Copyright Office Orphan Works Study http://www.copyright.gov/orphan/comments/OW0643-STM-CreativeCommons.pdf
18. Article 5.2 Berne Convention for the Protection of Literary and Artistic Works http://www.law.cornell.edu/treaties/berne/5.html

So, the question for advocates of registration became how to skirt the letter of the law in pursuit of its violation. The answer turned out to be simple: amend existing copyright law to "limit" the remedies for infringement wherever an infringer can successfully assert an orphan works defense; then promise rights holders that they can sill protect their exposed work, but only by registering it with for-profit databases to be created in the private sector. Then let the marketplace take care of the rest. Once infringers came to rely on these databases as one-stop shopping centers for rights clearance, any work not available from the databases would become a *de facto* orphan. This would avoid an explicit violation of international copyright law because it would not legally *require* you to register your work. It would merely redefine your work as an orphan if you didn't.

According to the official account, this proposal was the *result* of the Copyright Office's year-long study. The facts, however, don't bear this out.

"The Legislative Blueprint"

The essential language of the Orphan Works legislation was written at least a year before the release of the 2006 Copyright Office Report. It was drafted, ostensibly by law students, as a classroom project at the Glushko-Samuelson Intellectual Property Law Clinic under the guidance of its Director, Peter Jaszi and was submitted to the Copyright Office March 24, 2005. In a few simple words, the Glushko-Samuelson *Copyright Clearance Initiative* (CCI) spelled out the operative feature of the Copyright Office recommendations that were released nearly one year later. From the CCI, Section III (page 5):

> *"Remedies and Liability*
>
> "Under no circumstances will Sec. 504 statutory damages, attorneys fees, damages based on the user's profits or injunctive relief relating to the challenged use be available against a qualified user.
>
> - If infringement by a qualified user is proved, damages would be limited to the lesser of
> - Actual damages or
> - An award of $100 per work used, up to a maximum of $500 for any group of works claimed by a single owner and subject to a single use."[19]

This "limitation on remedies" was rationalized (page 6) as necessary to guarantee "certainty" to good faith infringers. Supposedly this would protect the "innocent" infringer from ruinous fees or penalties in the event the owner of an infringed orphan "came forward." It was said this would encourage worthy users to make older works of cultural or historical significance available to the public. If so, it was never explained why the bill would throw the doors wide open to infringement by commercial users. Since the emasculation of penalties would apply throughout the entire world of publishing, it would create a haystack of "legal" infringements in which bad faith infringers could hide like needles.

To pass such a law would pull the only teeth that current copyright law possesses. There's no other mechanism for copyright enforcement; no Copyright Bureau of Investigation, no Copyright Office Police Force. All copyright owners are responsible for policing their own copyrights, and the existing penalties for infringement are the only mechanism the law gives us to do it with. Provide infringers with certainty and you create massive uncertainty in commercial markets as well as in the lives of all small copyright owners.

This was one of the key objections to the Glushko-Samuelson proposal that medical illustrator Cynthia Turner and I raised on May 9, 2005, when we submitted a critique of the Glushko-Samuelson proposal to the Copyright Office study.[20] We faulted it for granting benefits to scholars, consumers, the public – and infringers – at the expense of authors' rights:

> "The Glushko-Samuelson plan proposes a 'minimalist approach' to amending Title 17 USC. But what it actually portends is an expansion of fair use by weakening authors' rights. It would empower users to annul copyrights based on the user's own definition of due diligence.
>
> "Glushko-Samuelson defines an orphan work (p. 3) 'as a work for which the copyright owner cannot be reasonably located.' But it allows the would-be user to define what constitutes a reasonable effort, then it defines 'reasonable effort' as 'a flexible definition that applies to a variety of situations . . .' It adds: 'In the rare instances where there is disagreement about whether a search was adequate, the courts are open to make the required determination.'" [21]

"But while sending authors to court to seek relief from abuses," we concluded (page 5) that the plan "would restrict an author's ability to seek redress." In effect this would undermine copyright protections for all but large corporations, which in most cases would have the resources to staff up and register work, then hire sophisticated search technology to police and protect the copyrights they acquire.[22]

The full text of our critique can be read on the Copyright Office website, where it's been sitting for the last five years. These excerpts should be enough to demonstrate that it reads like an analysis of the final Orphan Works bill; yet we wrote it 10

19. Glushko-Samuelson Intellectual Property Law Clinic Response to Notice of Inquiry on the Issue of "Orphan Works," Submitted to the United States Copyright Office, Library of Congress March 24, 2005, Page 5 http://www.copyright.gov/orphan/comments/OW0595-Glushko-Samuelson.pdf
20. Brad Holland and Cynthia Turner, Reply Comment to Copyright Office Orphan Works Study (70FR3739) May 9, 2005 http://www.copyright.gov/orphan/comments/reply/OWR0139-IPA.pdf
21. Brad Holland and Cynthia Turner, Reply Comment to Copyright Office Orphan Works Study (70FR3739) May 9, 2005, Page 3, http://www.copyright.gov/orphan/comments/reply/OWR0139-IPA.pdf
22. Brad Holland and Cynthia Turner, Reply Comment to Copyright Office Orphan Works Study (70FR3739) May 9, 2005, Page 5 http://www.copyright.gov/orphan/comments/reply/OWR0139-IPA.pdf

months before the Copyright Office report was released and more than a year before the House Judiciary Subcommittee unveiled its first legislative draft. *Clearly we could not have condemned the Orphan Works plan a year before it was written if the plan itself had not been written sometime before we condemned it.*

A One Day Symposium

If the Glushko-Samuelson Law Clinic conceived the "legislative blueprint" *before* the Copyright Office commenced its study, what kind of research did the Law Clinic undertake to inform its proposals? Here, in their own words, is how the authors of the plan described it:

> "Since 2001, the Glushko-Samuelson Intellectual Property Law Clinic...has provided student attorneys with the opportunity...to work on important public policy projects related to important issues in the field. Clearly, the problem of 'orphan works' is one such issue.
>
> "On April 11, 2003, the Clinic held a symposium with scholars, academics and other interested parties to discuss this issue. Since then, the work of CCI has focused its efforts on devising the blueprint for a legislative solution to the 'orphan works' problem (hereafter the CCI proposal) and has been in close contact with various non-profit organizations, intellectual practitioners and academics..."[23]

A footnote on page 2 identifies the eight "clinic students" who allegedly conceived this plan. It also names three organizations whose "representatives...made significant contributions to the proposal."[24] These include two of the groups we've already encountered: *Public Knowledge*, whose president later praised the Copyright Office for proposing the plan; and the *College Art Association*, which two years later asked its members to flood the Copyright Office with anecdotes about orphan works "difficulties." Of course, we shouldn't be surprised that groups which helped draft the amendment would fully support it. But how plausibly can they argue that the "framework" they helped write between 2003 and 2005 was actually conceived by the Copyright Office only in response to a study the Copyright Office didn't launch until 2005?

There's nothing in the Glushko-Samuelson proposal that explains how eight law students had gained any knowledge of the dynamic $187 billion dollar licensing markets their recommendations would affect. Nor does it explain how a one day symposium attended by "non-profit organizations, intellectual practitioners and academics" could shed any serious light on the matter. Yet the Glushko-Samuelson proposal was adopted by the Copyright Office and passed on to Congress with only slight modifications: where the law students had proposed capping infringement fees at $100, the Copyright Office report changed that to the ambiguous and undefined "reasonable fee."

Based on this evidence it appears that the Orphan Works bill was cobbled together by marrying the "limitation on remedies" proposed by the Glushko-Samuelson Clinic to the Creative Commons proposal that compulsory registration be imposed on rightsholders in such a way as to appear voluntary. As Creative Commons predicted, this would "move works [probably in the millions of works] into the public domain."

These works would act effectively as start-up capital to benefit two classes of opportunists: Internet businesses, which could harvest newly-created orphans as their own property to license to others; and entrepreneurs who wish to start new commercial rights-clearance registries, clearing the rights to copyrights that have been registered with them and certifying unregistered works as orphans available for legally-sanctioned infringement. Both types of business would operate essentially as stock houses do now, channeling client contact away from creators and into their own hands.

The Myth of Market Failure

Officially, the goal of forcing copyright holders to rely on private registries was expressed benignly on page 106 of the Copyright Office Report:

> "[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...* " (Italics added.)[25]

But subsequently, in defending their proposal from unexpected opposition, the Report's principal author began stating the case for registration in more coercive terms. Speaking at "*Orphan Works: A Search for Solutions*," hosted by the Progress and Freedom Foundation, March 31, 2006, Jule Sigall, the Copyright Office's Associate Register for Policy & International Affairs, explained why they had proposed stripping artists of the automatic protection afforded under current copyright law. He said it was necessary to "push" us into handing our work over to the private registries the bill would create. Artists, he said, are like cats who can't be herded, and:

> "*You can't herd cats, but you can move their food*...It's really what kind of incentives, what kind of pressure and how you put on the right pressure." (Italics added.)[26]

He justified such coercive measures by blaming visual artists for having failed to create such registries themselves:

> "I use this line a lot, photographers and illustrators

23. Glushko-Samuelson Intellectual Property Law Clinic, Response to Notice of Inquiry on the Issue of "Orphan Works," Submitted to the United States Copyright Office, Library of Congress March 24, 2005, Page 2 http://www.copyright.gov/orphan/comments/OW0595-Glushko-Samuelson.pdf
24. *ibid*
25. *Report on Orphan Works*, A Report of the Register of Copyrights, January 2006 United States Copyright Office, Page 106 http://www.copyright.gov/orphan/orphan-report.pdf
26. Jule L. Sigall, "*Orphan Works: A Search for Solutions*," hosted by the Progress and Freedom Foundation, March 31, 2006. http://www.archive.org/details/PffSeminar-OrphanWorksASearchForSolutions

like to say, 'We haven't collectivized.' This is a problem, generally, for their marketplace. *It's hard to have a marketplace where buyers can't find sellers.*" (Italics added.)[27]

Nothing expresses the looking glass logic of the Copyright Office proposals better than this apparent belief by the bill's principal author that an amendment legalizing the infringement of millions of commercial copyrights is necessary so that art directors can find artists. Even a quick glance at a newsstand should dispose of that argument. There are thousands of magazines and daily newspapers filled from cover to cover with photographs and art. There are billions of images published in trade publications, medical journals, ads, annual reports, posters, brochures, catalogues, postcards, greeting cards, surface and fabric designs. How can anyone be surrounded by this sea of pictures and seriously argue that the trade in images is being impeded because clients can't find artists who have failed to collectivize?

Artists were not the only ones to notice that the Copyright Office lacked any substantial supporting evidence for its Orphan Works recommendations. The Association of Independent Music Publishers and the California Copyright Conference made the same observation in a joint paper published July 15, 2008.

> "The Copyright Office," they wrote, "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 of 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."[28]

The Runaway Scope of the Orphan Works Bill

The assertion of market failure, though entirely unsupported by evidence, took on the authority of fact when presented to Congress with the imprimatur of the Copyright Office. By the time Howard Berman, Chairman of the House Judiciary *Subcommittee on Courts, the Internet and Intellectual Property*, opened his single hearing on the Orphan Works Act of 2008, he simply cited the premise to decree an end to an author's exclusive right to control the uses of his or her own intellectual property.

"[W]e should correct a misnomer" [he began]. "The works we're talking about are not orphans...The more accurate description... is probably an unlocatable copyright owner...this situation better describes the orphan works construct, which is to correct the *market failure* when a potential user can't find the copyright owner. But for the sake of ease we'll keep talking about them as if they're orphans." (Italics added.)[29]

With this breezy introduction, the Chairman casually brushed aside Article 9.2 of the Berne International Copyright Convention, which states that "[m]ember [countries] shall confine limitations and exceptions to [an author's] exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rightsholder." (Emphasis added.)[30]

Clearly, by redefining an "abandoned" work as *any* work by *any author* that *anybody* finds sufficiently hard to find, the Orphan Works bill would not limit exceptions to "certain special cases." Since *every*body can be hard for *some*body to find, this definition would void every rightsholder's exclusive right to his or her own property. It would create the public's right to use private property as a new default position – and creating a new default position for copyright was exactly the deceptive strategy proposed by Creative Commons for "moving works into the public domain."

The Subcommittee's hearing lasted less than an hour and a half. No one asked why a bill that was not about orphaned work should be called an Orphan Works bill, even "for the sake of ease." There were no further hearings on the Orphan Works Act of 2008. The terms of the bill had been decided over the previous two years during closed-door negotiations with special interest groups; and so, with almost casual indifference to facts (or the lack of them), the Orphan Works Act was introduced in March 2008 and placed on the "Rocket Docket" for swift passage by early summer. Despite its "paucity of data," lawmakers had accepted the Copyright Office report as "a detailed study" of a crisis in commercial markets. The Trojan Horse had done its job.

Deconstructing Authorship

Peter Jaszi is a distinguished legal scholar at the Washington College of Law at American University. Along with Professor Lawrence Lessig, founder of Creative Commons, Jaszi is one of the most influential of a zealous group of legal scholars who believe that laws respecting intellectual property are based on "outdated" concepts of individualism and should be radically changed to favor common "sharing" by the public. As Director of the Glushko-Samuelson Law Clinic, Professor Jaszi could plausibly be characterized as the true Godfather of the Orphan Works bill.

In 1994, the professor co-edited *The Construction of Authorship*, a book of essays by various contributors subtitled *Textual Appropriation in Law and Literature*, in which "Appropriation" is clearly intended to mean unauthorized use. In his introduction, Jaszi spelled out his belief that in the new "information environment" created by the Internet, authors,

27. *ibid*
28. Association of Independent Music Publishers (AIMP) and California Copyright Conference (CCC) *Joint Position Paper on Orphan Works Legislation*, July 15, 2008, Page 2 http://www.brandaideblog.com/pdf/Position_Statement.pdf
29. Rep. Howard Berman (D-CA), Chairman, Subcommittee on Courts, the Internet, and Intellectual Property; Committee on the Judiciary; United States House of Representatives, Opening Statement: "Orphan Works Problem and Proposed Legislation," March 13, 2008 Video Testimony of Chairman Berman's opening comments (requires RealAudio plug-in): http://www.copyright.gov/video/testimony-3-13-08.html
30. Article 9.2 Berne Convention for the Protection of Literary and Artistic Works http://www.law.cornell.edu/treaties/berne/9.html

artists and others "may require some kind of legal security [for the work they create] as an incentive to participate [in the creative process, but] they may not need the long, intense protection afforded by conventional copyright -- *no matter how much they would like to have it*." (Italics added.)[31] The punitive tone of the comment is striking.

Copyright, Jaszi argued, is rooted in outdated concepts of "possessive individualism."[32] He dismisses authorship as a "Romantic paradigm,"[33] a vestige of the 18th and 19th centuries "in which entrepreneurial publishers...[and] entrepreneurial writers...played out their shared conviction that the 'individual [is] essentially the proprietor of his own person or capacities' -- and thus of whatever can be made of them."[34] Most writing today," he argues, "in business, government, industry, the law, the sciences and social sciences -- is collaborative." Therefore he objects to the fact that authorship is still being taught and treated by the law "as if it were a solitary, originary [sic] activity."[35]

The professor has criticized the US for joining the international Berne Copyright Convention, calling it "an international agreement grounded in thoroughly Romantic assumptions about creativity."[36]

> "The first Act of this preeminent 'authors' rights' treaty in 1886 represented the culmination of a process which got underway in the mid-nineteenth-century with Victor Hugo's vigorous campaign for the rights of European writers and artists. Other famous 'authors' rallied to the cause: Gerhard Joseph suggests that the manic energy with which Charles Dickens championed international copyright stemmed from the novelist's private insecurities about his own 'originality.'"[37]

Note the disparaging quotes around "authors" and "originality." Professor Jaszi appears to subscribe to the postmodern cliché that all creativity derives from the "transformative" uses of the work of others, and therefore such concepts as authorship and originality are merely covers for one writer's "vigor" or another's "insecurities." There may or may not be any merit to such an argument, but if you're a working author you might simply guess that Dickens and Hugo campaigned for copyright laws because they wanted to protect the books they wrote.

In *The Construction of Authorship* Professor Jaszi cites the "critique of authorship" by postmodern literary critics and complains that their theories have "gone unheard by intellectual property lawyers."

> "However enthusiastically legal scholars may have thrown themselves into "deconstructing" other bodies of legal doctrine, copyright has remained untouched by the implications of the Derridean proposition that the inherent instability of meaning derives not from authorial subjectivity but from intertextuality. Above all, the questions posed by Michel Foucault in 'What Is an Author?' about the causes and consequences of the persistent, over-determined power of the author construct — with their immediate significance for law — have gone largely unattended by theorists of copyright law, to say nothing of practitioners or, most critically, judges and legislators." (Emphasis added.)[38]

Or to put it into plain English, why hasn't Congress written some debatable literary theories into US statute law? In a Content Agenda interview entitled "10 Pushy Questions," the professor offered his own answer to that question:

> "This is a society built around protection of private property and they've [the content industry] been very effective in persuading people that all property is the same. And if you take someone else's property, that's theft. But all property is not the same; there are differences." (Emphasis added.)[39]

These differences, of course, refer to intellectual property, and the concept that theft of intellectual property may not be theft can indeed be traced to the French literary critics Professor Jaszi cites as his source of revealed wisdom. In *What is an Author?* Michel Foucault asserts that authorship is a false concept of ownership arising from a "privileged moment of individualism,"[40] a by-

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31. Peter Jaszi, *The Construction of Authorship: Textual Appropriation in Law and Literature*, Page 12
Edited by Martha Woodmansee and Peter Jaszi, Duke University Press, 1994
http://books.google.com/books?id=dpRKltgJYYwC&printsec=frontcover&dq=Peter+Jaszi,+The+Construction+of+authorship&hl=en&ei=1UXsS6aJFsH68AaF4NzBCA&sa=X&oi=book_result&ct=result&resnum=1&ved=0CCwQ6AEwAA#v=onepage&q&f=false
32. Peter Jaszi, *The Construction of Authorship: Textual Appropriation in Law and Literature*, Page 6
Edited by Martha Woodmansee and Peter Jaszi, Duke University Press, 1994
33. Peter Jaszi, *The Construction of Authorship: Textual Appropriation in Law and Literature*, Page 9
Edited by Martha Woodmansee and Peter Jaszi, Duke University Press, 1994
34. Peter Jaszi, *The Construction of Authorship: Textual Appropriation in Law and Literature*, Page 6
Edited by Martha Woodmansee and Peter Jaszi, Duke University Press, 1994
35. Peter Jaszi, *The Construction of Authorship: Textual Appropriation in Law and Literature*, Page 9
Edited by Martha Woodmansee and Peter Jaszi, Duke University Press, 1994
36. Peter Jaszi, *The Construction of Authorship: Textual Appropriation in Law and Literature*, Page 10
Edited by Martha Woodmansee and Peter Jaszi, Duke University Press, 1994
37. Peter Jaszi, *The Construction of Authorship: Textual Appropriation in Law and Literature*, Page 9-10
Edited by Martha Woodmansee and Peter Jaszi, Duke University Press, 1994
38. Peter Jaszi, *The Construction of Authorship: Textual Appropriation in Law and Literature*, Page 8-9
Edited by Martha Woodmansee and Peter Jaszi, Duke University Press, 1994
39. Peter Jaszi, "10 Pushy Questions for Peter Jaszi and Patricia Aufderheide" This interview is no longer online, but was once available at *http://www.contentagenda.com/info/CA6434467.html*, *(This URL no longer exists)*

product of nineteenth century capitalism. He objectifies creative works as mere "texts," a pseudo-scientific classification that can include anything from Shakespeare's plays to "a laundry list;"[41] then he challenges the right of any legal system to treat these texts as "objects of appropriation" by anyone, including the author.[42] Citing the "disappearance of the author function,"[43] he predicts a future in which "[a]ll discourses...would then develop in the anonymity of a murmur,"[44] and the questions one would ask about any creative work would not be "who created it?" or "whose property is it?" but

> "What are the modes of existence of this discourse? Where has it been used, how can it circulate, and who can appropriate it for himself?" (Emphasis added.)[45]

Foucault asserts that authors are no longer any more important to the "texts" they create than are their readers, and less important than the enlightened critic who deconstructs the text by means of post-Marxian analysis. In an interview published in *L'Express* July 6-12, 1984, just before his death, Foucault explained what he had tried to accomplish in his work:

"What did Marx do when in his analysis of capital he came across the problem of the workers' misery? He refused the customary explanation, which regarded this misery as the effect of a naturally rare cause of a concerted theft. And he said substantially: given what capitalist production is, in its fundamental laws, it cannot help but cause misery. Capitalism's raison d'etre is not to starve the workers but it cannot develop without starving them. Marx replaced the denunciation of theft by the analysis of production. Other things being equal, that is approximately what I wanted to say." (Emphasis added.)[46]

Jacques Derrida, whose "propositions" Professor Jaszi also suggested should be used to inform US statute law, likewise derived his inspiration from Marx. In his book *Specters of Marx*, he argued that with the falling-away of state-sponsored Marxism, it's the duty of modern intellectuals to create a "New [stateless] International"[47] to translate Marxist thought into political action:

> "Upon rereading the *Manifesto* and a few other great works of Marx, I said to myself that I know of few texts in the philosophical tradition, perhaps none, whose lesson seemed more urgent *today*...It will always be a fault not to...go beyond scholarly 'reading' or 'discussion.' It will be more and more a fault, a failing of theoretical, philosophical political responsibility. When the dogma machine and the 'Marxist' ideological apparatuses (States, parties, cells, unions, and other places of doctrinal production) are in the process of disappearing, we no longer have any excuse, only alibis, for turning away from this responsibility. There will be no future without this. Not without Marx, no future without Marx, of his genius, of at least one of his spirits." (Italics in the original, underlines added.)[48]

Since we now know that the legislative blueprint for the Orphan Works bill was drafted before, not after, the Copyright Office study; and since we know it was drafted by (or under the direction of) Professor Jaszi; and since there's no reason to doubt the professor's sincerity in his belief that the laws governing intellectual property should be altered to reflect the opinions of Derrida and Foucault, is there any reason to doubt that the legislative" blueprint" his Law Clinic drafted between 2003 and 2005 reflects this ideological agenda rather than the underwhelming "evidence" of 215 letters submitted in 2005 to the Copyright Office study?

The Gospel of the Commons

The premise that intellectual property should not be treated as real property is the gospel of the anti-copyright movement. Its chief apostle has been Lawrence Lessig, currently a Harvard Law School professor, formerly of Stanford and founder of Stanford's Center for Internet and Society. Lessig also co-founded Creative Commons. Gigi Sohn of Public Knowledge has called Lessig "the first populist copyright reformer," adding he "made the existence of organizations like Public Knowledge possible."[49]

In books such as *Free Culture* and *Remix*, Lessig has argued that copyright law is a tool of the corporate power structure, enabling large media corporations to "lock down culture" and thwart the creativity of ordinary citizens by suspending the sword

40. Michel Foucault, *What is an Author?* Text of a lecture presented to the Societé Francais de philosophie, February 22, 1969, Translation by Josue V. Harar, Page 1, http://www.scribd.com/doc/11397906/What-is-an-AuthorFoucault
41. Michel Foucault, *What is an Author?* Page 3
42. Michel Foucault, *What is an Author?* Page 6
43. Michel Foucault, *What is an Author?* Page 14
44. *ibid*
45. *ibid*
46. Michel Foucault, Interview by Pierre Boncenne, Page 113, *Politics, philosophy, culture: interviews and other writings*, 1977-1984 by Michel Foucault, Lawrence D. Kritzman, Alan Sheridan, Routledge, Chapman & Hall, Inc. 1988.
http://books.google.it/books?id=HfWNHGCw55EC&pg=PA113&lpg=PA113&dq=michel+foucault+%22+What+did+Marx+do+when+in+his+analysis+of+capital+he+came+across+the+problem+of+the+workers'+misery&source=bl&ots=mQRxyxhm3s&sig=Tnlz6of6aN-V_ak1vosmlpwH-MQ&hl=it&ei=dj_XS8qBE82PsAa84OScAw&sa=X&oi=book_result&ct=result&resnum=1&ved=0CAYQ6AEwAA#v=onepage&q&f=false
47. Jacques Derrida, *Specters of Marx: the state of the debt, the Work of Mourning, & the New International*, Translated by Peggy Kamuf, Routledge 1994, Page 13
http://books.google.it/books?id=sEENbAP5FZsC&dq=derrida++specters+of+marx&printsec=frontcover&source=bn&hl=it&ei=ncXYS6z1OoXdsAbur92FAw&sa=X&oi=book_result&ct=result&resnum=4&ved=0CBsQ6AEwAw#v=onepage&q&f=false
48. *ibid*
49. Gigi B. Sohn, "Searching for the Possible in the Orphan Works Debate," May 20, 2008
http://www.publicknowledge.org/node/1584

of infringement litigation over the heads of anyone who wants to "incorporate existing material" into their own creations. Creative Commons routinely celebrates music remixers, collage makers, and film and print publishers who seek to profit by republishing with impunity the copyrighted works of others. Implying that all creativity is a *remix* of the work of others, Lessig argues that the principle of ownership embodied in current copyright law compels ordinary citizens to create only at their own peril: "Under the existing system of copyright law," he writes, "there's no easy way to be a legal creator."[50]

Contributors to Lessig's wiki have spelled out why they believe the unauthorized use of others' intellectual property should not necessarily be regarded as theft:

> "The owner of physical property can clearly be deprived of the use of their [sic] property by the act of confiscation. But no such deprivation occurs when a work enters the public domain. The previous copyright holder can still publish their [sic] works, or market them more effectively..."[51]

This of course is nonsense. One can hardly market one's work effectively – or perhaps even market it at all – if potential clients can access the same work for nothing from the public domain. Lessig has said he wants to create a culture of "[u]ser-generated content, spreading in businesses in extraordinarily valuable ways...celebrating amateur culture. By which I don't mean amateurish culture, I mean culture where people produce for the love of what they're doing and not for the money."[52]

Money, however, appears to come in handy when you're a "populist copyright reformer" crusading for a change in the law. In November 2006, for example, Lessig was pleased to accept a pledge of $2 million from Google to his Center for Internet and Society at Stanford University. According to the *Online Wall Street Journal*, "[t]he money will help fund a project at the center dedicated to help preserve the public's legal right to 'fair use' of copyrighted material. It also intends to pursue legal cases relating to the topic."[53]

> "Aine Donovan, executive director of the Ethics Institute at Dartmouth College, says Stanford shouldn't have accepted the Google gift because it is too narrowly tailored to benefit Google's corporate interests. 'It might as well be the Google Center,' she says."[54]

Lessig, of course, assured the *Journal* that the gift wouldn't affect his scholarship, adding that his views on copyright "don't always agree with Google's," and anyway, "there was no 'quid pro quo.'"[55]

Lessig's Gospel of the Commons is merely the fin that breaks the surface of the Free Culture/Orphan Works debate. Beneath the waterline lurks a gathering body of hostile dogma that copyrights are a "public resource" given as "subsidies" or "bribes" to feckless artists in order for work "to be gotten out of them." Contributors to Lessig's blog have routinely called copyrights restrictive "monopolies," impositions on the freedom of others to create, and "a burden which the public ends up shouldering." One acolyte writes that "[a]uthors should simply not have that much control over their published works," while another says "the majority of [authors] would probably be better off with the welfare checks." [56]

It would be hard to call such expressions scholarly opinions. Prejudice would be a better word. Yet these are merely examples of the reckless bias Lessig has ginned up throughout the world with his evangelical insistence that all creativity comes from the "Commons" and is everywhere being "strangled" by the outdated concept that individual creators have proprietary rights to the work they create.[57]

In 2008, Lessig demurred from endorsing the Orphan Works bill, arguing instead that the length of copyright should be reduced to 14 years across the board.[58] This was a proposal he had spelled out two years earlier, March 6, 2006 in a nine-page letter to Congresswoman Zoe Lofgren of the House Judiciary Subcommittee. His logic was yet another undocumented assertion that works of art are generally of no lasting value to their creators:

> "A presumptive 14 year term far exceeds the time during which the vast majority of work earns any commercial return at all... Thus, under this rule, any work less than 15 years old would be governed by the existing copyright rules...In the fifteenth year after a domestic work has been published and for every ten years afterwards, the copyright owner must take steps to maintain the copyright." (Emphasis added.)[59]

Those steps would include the re-registering, every ten years, of each and every individual work with privately managed

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50. Interview with Lawrence Lessig by David Kushner, "Uncommon Law: Lawrence Lessig has pioneered a new approach to copyright," March 2006, ieee spectrum, http://spectrum.ieee.org/at-work/innovation/uncommon-law
51. Lawrence Lessig's Wiki, Article: Against perpetual copyright, 6. Deprivation
http://wiki.lessig.org/index.php?title=Against_perpetual_copyright
52. Lawrence Lessig, "Larry Lessig says the law is strangling creativity," Lecture March 2007,
video: http://www.ted.com/talks/larry_lessig_says_the_law_is_strangling_creativity.html
transcript: http://dotsub.com/view/d3509948-261f-4fbb-9b7c-c63110f13451/viewTranscript/eng
53. John Hechinger and Rebecca Buckman, "The Golden Touch of Stanford's President," *Wall Street Journal* February 24, 2007 http://www.signallake.com/innovation/Hennessy022407.pdf
54. John Hechinger and Rebecca Buckman, "The Golden Touch of Stanford's President," *Wall Street Journal* February 24, 2007
55. *ibid*
56. Lawrence Lessig's Blog http://web.archive.org/web/20080501230937/http://lessig.org/blog/2006/03/orphans.html
57. Lawrence Lessig, "Larry Lessig says the law is strangling creativity," Lecture March 2007,
video: http://www.ted.com/talks/larry_lessig_says_the_law_is_strangling_creativity.html
Transcript: http://dotsub.com/view/d3509948-261f-4fbb-9b7c-c63110f13451/viewTranscript/eng
58. Lawrence Lessig, "Little Orphan Artworks," Op-ed, New York Times, May 20, 2008 http://www.nytimes.com/2008/05/20/opinion/20lessig.html

registries. All other works would fall automatically into the public domain, just as Creative Commons had recommended to the Copyright Office in its proposal "Reform(alizing) Copyright."

Orphan Works: "Half a Loaf"

It's hard to imagine how a panel of legal scholars could successfully convince lawmakers to re-write copyright law by lecturing them on "Derridean propositions" of "intertextuality" and "the inherent instability of meaning." It's even less likely they'd succeed by insisting that US law be re-written to reflect a post-Marxist analysis of private property. In Supreme Court cases such as *Eldred v. Ashcroft*,[60] Lessig and others have failed to bring about a judicial reinterpretation of existing law. Presumably this is why the authors of the Orphan Works Act chose to concoct and promote the myth of a market failure so pervasive that only the transfer of the world's copyright wealth into the hands of a few corporate databases could correct it. In May of 2008, it looked as if that strategy would soon pan out for them.

Anticipating the imminent passage of the Orphan Works Act, Free Culture advocates had already begun to celebrate their achievement when as James V. DeLong of the Convergence Law Institute reminded them, there was still much work to be done. Calling the Orphan Works bill just "half a loaf," he hinted at the new legislation the "Copy Left" would have to tackle next:

> "These possibly-orphan, sort-of-orphan, and gray literature works simply cannot be made available if the digitizers are required to make one-by-one judgments and seek permission before copying. If they are to be retrieved in useful form, then sooner or later Google, Amazon, Microsoft, and some others must be permitted to digitize on a massive scale."[61]

While Mr. DeLong acknowledged that the new reverse copyright law should not deprive intellectual property owners of their "legitimate rights,"[62] he reaffirmed the Copy Left's fundamental premise that intellectual property owners should not be allowed to *have* legitimate rights except in situations where they've registered their works with commercial databases:

> "At some point, some kind of grand grandfathering proceeding will probably be required, a window in which holders of existing rights must reaffirm them or lose them." (Emphasis added)[63]

These admonitions however, like predictions of the bill's imminent passage, were premature.

A *Public Knowledge* Postmortem

> "Orphan works relief was vigorously opposed by visual artists...And while we have thought some of their concerns misguided, they did a fine job of organizing and getting their voices heard." [64]

That was the rueful analysis from Gigi Sohn of Public Knowledge October 6, 2008 as she conducted a postmortem on her blog to explain how the Orphan Works bill had ultimately failed to pass. Throughout the summer of 2008 the bill, which in the spring had appeared to be a slam dunk, had become one of the 10 most controversial pieces of legislation facing Congress. Congressional observers still predicted that its passage was inevitable. Yet by September, with only a month left to go before adjournment, the Senate was reduced to passing its version of the bill only by using the controversial practice of "hotlining" it.[65] Hotlining is a legislative end-run that allows a bill's sponsors to pass it without subjecting it to testimony, debate or a vote. This inspired Public Knowledge to lobby for similar tactics to be used in the House:

> "The best option [Sohn wrote] was to put it on the 'suspension calendar,' which is the place largely non-controversial legislation gets put so that it will get passed quickly. There can be no amendments to bills placed on the suspension calendar."[67]

Until the very last minute, Sohn acknowledged, she and others "were on the phone imploring the [House leadership] to move the bill" in this underhanded fashion. Yet in the end, "it was to no avail." On October 3, 2008 Congress adjourned without passing the Orphan Works Act. "Time had run out."[68]

Surveying the wreckage, Sohn nonetheless found a bright spot. Some "positive things," she said, had "come out of the process."[69] Ignoring the fact that 85 creators organizations had joined the

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59. Lawrence Lessig, Letter to Representative Zoe Lofgren (D-CA) March 6, 2006, Page 4, Paragraph 3 http://www.yellowdocuments.com/4998410-march-6-2006-the-honorable-zoe
60. http://www.oyez.org/cases/2000-2009/2002/2002_01_618
61. James V. DeLong, "Orphan Works: Half a loaf," Coop's Corner, May 20, 2008, http://news.cnet.com/8301-10787_3-9948731-60.html
62. *ibid*
63. *ibid*
64. Gigi B. Sohn, "The Orphan Works Bill: Wait 'Till Next Year," October 6, 2008, Public Knowledge http://www.publicknowledge.org/node/1783
65. Brad Holland and Cynthia Turner, "Orphan Works: The Devil's Own Day: Never Too Busy to Pass Special Interest Legislation," September 28, 2008, Illustrators' Partnership Orphan Works Blog, http://ipaorphanworks.blogspot.com/2008/09/orphan-works-devils-own-day.html
66. Critics of hotlining say "that lawmakers are essentially signing off on legislation neither they nor their staff have ever read."
"In order for a bill to be hotlined, the Senate Majority Leader and Minority Leader must agree to pass it by unanimous consent, *without a roll-call vote*. The two leaders then inform Members of this agreement using special hotlines installed in each office and give Members a specified amount of time to object – *in some cases as little as 15 minutes. If no objection is registered, the bill is passed*." (Italics added.)- Roll Call, Sept 17, 2007

In other words, a Senate bill can pass by "unanimous consent" even if some Senators don't know about it., http://tinyurl.com/3p8x2u
67. Gigi B. Sohn, "The Orphan Works Bill: Wait 'Till Next Year," October 6, 2008, Public Knowledge http://www.publicknowledge.org/node/1783
68. *ibid*

Illustrators' Partnership in opposing the bill;[70] ignoring the more than 167,000 opposition letters that had been sent to lawmakers from the Illustrators' Partnership website;[71] and ignoring the adverse testimony of freelance creators at a Small Business Administration Roundtable two months earlier (see below), Ms. Sohn chose instead to praise the one graphic arts group[72] that had supported the House version of the bill and had spent $200,000 lobbying for its passage.[73]

Calling officers of the Graphic Artists Guild "enlightened," Sohn vowed that the Orphan Works Act would be back "next year," and inexplicably, she tried to portray GAG's support for it as proof that the world's artists had finally learned their lesson:

> "[V]isual artists, graphic designers and textile manufacturers who opposed orphan works relief now understand that they must change their business models." (Emphasis added.)[74]

And with that backhanded praise for GAG, Public Knowledge finally laid its cards on the table.

Beware of Lawyers Bearing Gifts

In the beginning, the sponsors of the Orphan Works Act had all argued that the amendment was merely a minor adjustment to copyright law to let libraries and museums digitize their collections of old works. In 2006, during the bill's first incarnation, its sponsors were so certain of swift passage that Public Knowledge even argued against imposing a "reasonable fee" on infringers. "That approach," Ms. Sohn wrote, "keeps the orphans in the orphanage."[75]

Yet by May 2008, realizing that artists were waging a persuasive fight to protect their rights, Public Knowledge adopted a different public relations strategy. Casting her new argument in terms that suggested infringement is the normal means by which clients procure work from contributors, Ms. Sohn portrayed the bill as a boon to artists: "The purpose of the legislation [she wrote] is to match users with copyright holders and get the latter paid":

> "If a copyright holder reappears after a user has done a diligent search, then the copyright holder is entitled to reasonable compensation. *This is compensation that the copyright holder would likely never have obtained without orphan works relief, because the user would not have risked paying the huge damages provided by copyright law.*" (Italics added.)[76]

Of course, infringement would only become an everyday means of doing business if this legislation were to pass. Yet watching it fail for the second time in three years, PK's President dropped the pose of benefactor to artists, admitting petulantly that the real purpose of the law was to force artists to change their business models. In doing so, she merely echoed Professor Jaszi's 1994 declaration that creators of the future "may not need the long, intense protection afforded by conventional copyright – *no matter how much they would like to have it.*"

The War on Authors

The first – indeed the only – effort to assess the economic impact the Orphan Works bill would have on real-life business affairs came August 8, 2008 when the Office of Advocacy of the US Small Business Administration conducted an Orphan Works Roundtable at the Salmagundi Club in New York City.[77] The participants included artists, writers, photographers, songwriters,

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69. *ibid*

70. "85 Creators' Organizations Opposed the U.S. Orphan Works Bills," Illustrators' Partnership CapWiz Website http://www.illustratorspartnership.org/01_topics/article.php?searchterm=00273

71. Groups Opposing the House and Senate Orphan Works Acts, Illustrators' Partnership Orphan Works Blog http://www.illustratorspartnership.org/01_topics/article.php?searchterm=00273

72. Posting by Graphic Artists Guild, October 1, 2008, 4:18 pm: "URGENT: Contact your Representative to oppose [Senate Bill] S. 2913 Either the House version of Orphan Works legislation, H.R. 5889, or the Senate version will become law. There are no other possible outcomes. The Guild continues to support Rep. Berman's House bill. The Graphic Artists Guild is urging all members and other artists to support H.R. 5889" (Emphasis added.) http://allthingscopyright.com/?p=54 (formerly Orphan Works News - http://orphanworksnews.com/)
Posting by Graphic Artists Guild, September 9th. 2008, 7:40 am "A Message from the President" "The artistic community just has to get real about this Orphan Works scare… The Guild has promoted the 'Notice of Use' provision… and that's why the Guild can and does support the House version of the bill…" http://allthingscopyright.com/?p=44#more-44

73. Mandatory filings with the United States government indicate that the Graphic Artist Guild spent nearly $200,000 in lobbying fees: Office of the Clerk, United States House of Representatives, Public Disclosure Search: Lobbying Disclosure Filing Search: Graphic Artists Guild, Issue Data: Orphan Works

2006 Q4	http://disclosures.house.gov/ld/pdfform.aspx?id=200044500
2007 Q1,2	http://disclosures.house.gov/ld/pdfform.aspx?id=200044508
2007 Q3,4	http://disclosures.house.gov/ld/pdfform.aspx?id=300006705
2008 Q1	http://disclosures.house.gov/ld/pdfform.aspx?id=300052584
2008 Q2	http://disclosures.house.gov/ld/pdfform.aspx?id=300066272
2008 Q3	http://disclosures.house.gov/ld/pdfform.aspx?id=300100998
2008 Q4	http://disclosures.house.gov/ld/pdfform.aspx?id=300117685
2009 Q1	http://disclosures.house.gov/ld/pdfform.aspx?id=300160662
2009 Q3	http://disclosures.house.gov/ld/pdfform.aspx?id=300192823
2009 Q4	http://disclosures.house.gov/ld/pdfform.aspx?id=300216372

74. Gigi B. Sohn, "The Orphan Works Bill: Wait 'Till Next Year," October 6, 2008, Public Knowledge http://www.publicknowledge.org/node/1783

75. Art Brodsky, "Public Knowledge Praises Orphan Works Report, Wants More Certainty," Public Knowledge, February 1, 2006, Quoted at "Orphan Works Legislation: Responses to Proposal," *Source Watch*, Page last modified July 1, 2008 at 21:04 http://www.sourcewatch.org/index.php?%20title=Orphan_works_legislation

76. Gigi B. Sohn, "Searching for the Possible in the Orphan Works Debate," May 20, 2008, http://www.publicknowledge.org/node/1584

musicians, performers, and small business owners. All of us stressed that the Orphan Works Act would harm our businesses in two major ways: first, by acting as a compulsory license on business transactions that properly should be conducted as voluntary agreements; and second, by acting as an unfunded mandate requiring small business owners to bear a cost in time and money that would make compliance virtually impossible, while at the same time forcing us to subsidize the business models of large Internet enterprises. As David Rhodes, President of the School of Visual Arts said:

> "[S]ince the expense of registering works [with commercial databases] will be born by the creative community, the expense of copyright protection will be socialized while the profit of creative endeavors will be privatized."[78]

The individuals who participated in this Roundtable represented hundreds of years of professional experience in all aspects of the creative arts. Yet to Public Knowledge, we were simply a fringe group motivated by irrational fears. In her May 29 speech, PK's President had condemned visual artists for the "FUD - fear, uncertainty and doubt," that she said we were spreading about the bill. Portraying us as feckless demagogues, perversely determined to keep our work from the public, even at the expense of being paid "reasonable" fees for its use, she suggested our real goal was to lurk under the bridge of copyright law like trolls and pounce on hapless infringers to extract the maximum financial penalties from them in infringement lawsuits:

> "By preferring to lock down culture, even if it means getting paid, these small copyright holders are no less copyright maximalists than the large corporate copyright holders that Public Knowledge has been battling for the past six years."[79]

The acknowledgement that advocates of the Orphan Works bill had been trying to defeat "small copyright holders" was – at long last – at least a breakthrough in transparency.

The "populist reformers" of the Copy Left (their own name for themselves) have long tried to brand themselves champions of the People bravely battling the copyright Goliaths of Big Business to unlock the treasury of the Commons and usher in a New Age of collective creativity among the masses. Having established this as their premise, it was no doubt inconvenient to be seen waging a public war against an entire class of small rights holders whose work they had hoped to present as a generous gift to the public. Yet the fact that they did begs the key question of the Orphan Works story: Who exactly are the "large corporate copyright holders" Ms. Sohn says they've had to fight?

- Not publishers; they supported the Orphan Works bill;[80] in fact some have acknowledged that its passage would justify their demands that authors sign all-rights contracts.[81]
- Not large stock houses; they supported the bill too; it would allow them to harvest "orphans," "transform" them into "derivative works" and copyright the "derivatives" as their own commercial product.
- Not Google and Microsoft; they too supported the bill and Google said it planned to use millions of the works the bill would orphan.
- And not corporations such as the Copyright Clearance Center; it lobbied for the House version of the bill and was promoted [by the Graphic Artists Guild] as the commercial "Dark Archive" with which infringers could register their intent to infringe work.[82]

So if it wasn't large corporate interests that opposed the bill, who is it that the "reformers" were actually battling? The evidence of the Orphan Works fight has made that clear: authors.

A Seismic Shift

The War on Authors isn't new. Dickens, Victor Hugo and others were vilified for promoting copyright law more than a hundred years ago. What's new is a technology that tips the scales against authors. As attorney Bruce Lehman, former Commissioner of the US Patent Office told the Association of Medical Illustrators at the Mayo Clinic in 2000:

> "[W]e are on the verge of a seismic shift – comparable to radio in the 1920's – that is the Internet. The Internet has the capacity to seize images and send them around the world in digital form so they can be produced

77. Small Business Administration Orphan Works Roundtable Webcast Stream, August 13, 2008, Illustrators' Partnership Orphan Works Blog http://ipaorphanworks.blogspot.com/2008/08/sba-roundtable-webcast-stream.html

78. David Rhodes, Quoted at "Orphan Works: Risking our Nation's Copyright Wealth," by Brad Holland and Cynthia Turner, September 23, 2008, Illustrators' Partnership Orphan Works Blog, http://ipaorphanworks.blogspot.com/2008/09/meltdown-on-wall-street-warning-for.html

79. Gigi B. Sohn: "The Orphan Works Act of 2008: Copyright Reform Takes Its First Steps," Presented to the Center for Intellectual Property 8th Annual Intellectual Property Symposium, University of Maryland University College, May 29, 2008 http://www.publicknowledge.org/node/1594

80. The Illustrators' Partnership Orphan Works Blog, March 29, 2006: "Allan R. Adler, a lawyer and lobbyist for the Association of American Publishers, said the Copyright Office's recommendation regarding compensation to copyright owners is precisely what his group wanted." Quoted from the Chronicle of Higher Education, February 2, 2006 http://ipaorphanworks.blogspot.com/2006_03_01_archive.html

81. Paul Sleven, Holtzbrinck Publishers, U.S. Copyright Office Transcript of Orphan Works Roundtable, July 27, 2005 at page 88: "I think whatever else the harm that may come to artists from inequitable bargaining power with large publishers, if the artist has signed the rights away to a Conde Nast or a Time-Warner...it is much, much less likely to be an orphaned work...because everyone knows where to find Conde Nast and Time." http://www.copyright.gov/orphan/transcript/0727LOC.PDF

82. Unpublished letter from Graphic Artist Guild lobbyist Megan E. Gray to Shanna Winters, Chief Counsel, Office of Representative Howard Berman, Chairman, Subcommittee on Courts, the Internet, and Intellectual Property; Committee on the Judiciary; United States House of Representatives May 21, 2008: In the letter, Ms. Gray proposes (page 3) that the Copyright Clearance Center would be an appropriate repository for "Notice of Use" filings by infringers, noting that such filings need not be burdensome on infringers, requiring them to submit merely their names and addresses and allowing them to attach multiple visual works of art to a single notice of intent to infringe.

> with original quality. Now, that is a scary thing if you can't control your rights. But if you can, it may be an opportunity."[83]

Visual artists opposed the Orphan Works Act because it would impose a radically new business model on the licensing of our property. It would let giant image banks access our commercial inventory and metadata and enter our commercial markets as clearinghouses to compete with us for our own clients. I can think of no other field where small business owners can be pressured by the government to supply potential competitors with their content, business data and client contact information – all at their own expense.

Google and other large database, advertising and search engine companies clearly have a major financial stake in the weakening of copyright law through new legislation. The Orphan Works Act, if it should ever be enacted, would solve the problem that has vexed so many start-up Internet companies: how to make money by giving away free content. By opening the door to potentially billions of "permitted" infringements of protected copyrights, this legislation would allow big Internet companies to create entirely new business models by licensing content they don't have to pay for — through the digitizing, archiving and monetizing of the intellectual property of ordinary citizens. If this legislation were to pass, its consequences would be far-reaching, long lasting, perhaps irreversible, and would strike at the heart of art itself.

Legislation By Misdirection

Reviewing the evidence, it seems compelling to conclude that the orphan works legislation presented to Congress was not what it was purported to be, but was intended rather to deliver commercial opportunities to large Internet interests while furthering the ideological agenda of legal scholars committed to expanding the public domain by stripping creators, small businesses and ordinary citizens of their intellectual property rights.

This raises fundamental questions not only about this legislation, but also about the process that spawned it and saw it nearly passed by misdirection and backroom deals. In light of the world's ongoing financial crisis, is it wise for Congress to concentrate our nation's copyright wealth in the hands of a few corporate databases? The contents of these databases would be more valuable than secure banking information; so why should small business owners and ordinary citizens be compelled to subsidize their start-ups? Why should we place our own assets at risk in the event of corporate failure, mismanagement or corruption? Under copyright law, no author can be compelled to publish his or her work; so by what right of eminent domain can Congress give strangers the right to publish our work without our knowledge, consent or payment? By what mandate do legal scholars, lobbyists, and civil servants presume the right to require small business owners to change their business models? Last but not least: why should Congress pass legislation that has been presented to it as something other than what it is?

"The Plural of Anecdote is Not Data"

From the beginning of the Orphan Works crusade, lawyers, lobbyists and big Internet firms have all sought to justify the rights grab that would follow by asserting that creative work has little or no meaningful value to its owners. Yet what's striking about these assertions is that *they've never been backed up by evidence*.

The legal case for Orphan Works "reform" has been based solely on anecdotal assertions by lawyers, CEOs and legal scholars, *the very people whose disciplines ordinarily require them to substantiate claims with evidence*. Yet rather than document their own assertions, they've tried instead to burden rightsholders with the task of proving that our work isn't worthless.

In 2006, for example, Rebecca Tushnet, a lawyer and professor of law at Georgetown University Law Center, denigrated our testimony that the work in an artist's inventory has residual value. She called such claims "anecdotal," and commented "the plural of anecdote is not data."[84] Indeed it's not, as we've pointed out about the self-serving statements of orphan works advocates.

But in fact artists do have data to document the value of our work: tax returns, contracts, invoices to clients. All these prove that our work is an ongoing source of income for us. Under current copyright law, we're not required to document the day-to-day value of each and every picture in our inventory – nor should we ever have to. This is just common sense. As we all know, the value of any particular work of art is never static. Like gold, John Lennon's guitars or Teddy Bears once owned by Elvis, the value of any property, especially non-essential property, fluctuates. One day a drawing may be worth nothing because there's no client who wants to use it. The next it may be worth thousands of dollars to a client who does.

Contrary to the claim that "[t]he vast majority of copyrighted works have little or no economic value soon after their creation or publication," some works may in fact have little or no value until years *after* their creation. Just ask the estate of Vincent Van Gogh.

Against a Culture of Appropriation

On March 24, 2005 Cynthia Turner and I authored a four-page paper to the Copyright Office's Orphan Works study. In it, we argued that artists' work once published retains residual value and may even increase in value with the rise of an artists' reputation. We explained why "free speech is not restricted by protecting

83. Bruce Lehman, Esq. "Protecting Your Rights Collectively," July 2000, Excerpted from a speech given to the Association of Medical Illustrators, Mayo Clinic, Rochester, Minnesota http://illustratorspartnership.org/01_topics/article.php?searchterm=00027

84. Rebecca Tushnet's 43(B)log, March 7, 2006 "Orphan Works, Panel 2, part 1: Brad Holland, Illustrators' Partnership" http://tushnet.blogspot.com/2006/03/orphan-works-panel-2-part-1.html

orphaned works," why "archival preservation is not hampered by copyright protections," and why stripping "orphaned" works of protection would both threaten an author's integrity and favor the business interests of corporate giants over that of individual creators.

Our paper, submitted on behalf of the Illustrators' Partnership, was endorsed by 42 national and international arts organizations and signed by nearly 2,000 individual working artists from across the spectrum of the graphic arts. Yet despite this testament from working artists, speaking with one voice about their own business experience and the value of their work, our statement was never once referenced in the 127 pages of the Orphan Works study. Instead the authors of the study, citing their 215 letters, asserted that our business models had to be changed because there was no way for users to find us.

Our letter can still be read on the Copyright Office website.[85] In our summation, we cited our reasons for opposing this particular vision of copyright "reform."

> "**The 'Free Culture' argument is at odds with the principle of tangible expression, which is the only aspect of the creative process protected by copyright law**. By arguing that creative work is only a 'remix' of the work of others, the critics of copyright ignore the factors of experience, personal development and individual vision that are embodied in any author's tangible expression of an idea. The computer and internet, as well as Photoshop, stock and royalty-free content have all made it possible for many people to become content providers by 'sampling' the work of others. But the demands of this 'new modality' for free and easy access to usable work should not induce lawmakers to legislate as if creativity can be adequately defined by the 'remix' model. There is a difference between the alchemy of new creation and the assembling of 'found work.' Legal protections for this difference have been built up over centuries and once eroded, would be painful and costly to recover.
>
> "**The Internet has created a culture of appropriation;** and immediate global access to artistic works has facilitated piracy, unintentional infringement and plagiary. But instant and unrestricted access to work should not be construed as a *necessity* just because technology has made it a *possibility*. That an artist's work now can be instantly transmitted around the world without the artist's permission or control does not justify a user's 'right' to take the work. And if inability to trace a work to its author becomes the justification for creating such a 'right,' who and what will define the inability to trace the work?
>
> "The 'orphaned' works currently under consideration by the Copyright Office include the work of many artists now in the prime of their careers. To remove copyright protection from this work has the potential to undermine the important public policy behind copyright: To promote the creation and dissemination of culture by rewarding incentive. Rescinding guaranteed protection from copyrighted works will do more harm than good to the creative community and by extension, to the public good."[86]

Afterward:

Following the failure of the first Orphan Works bill to pass in 2006, but at a time when experts still predicted its swift passage in the 110th Congress, two of the bill's key authors left public service to enter the employ of corporations that had supported the bill or which hoped to profit from its passage.

In January 2007, Jule L. Sigall, principal author of the Copyright Office's *Report on Orphan Works* – who later stated that artists, like cats, needed to have their food moved – left the Copyright Office to become Associate General Counsel for Copyright in the Legal & Corporate Affairs department of Microsoft.[87] Nine months earlier, on April 6, 2006 Thomas C. Rubin, Associate General Counsel for Microsoft had testified on his company's behalf in favor of the Orphan Works Act.[88] Mr. Sigall had been at the Copyright Office for three years,[89] and like Professor Peter Jaszi, taught law (in his case as an Adjunct Professor) at the George Washington University Law School.[90]

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85. Brad Holland and Cynthia Turner, Comments on Orphan Works Notice of Inquiry http://www.copyright.gov/orphan/comments/OW0660-Holland-Turner.pdf (Note: 126 pages)

86. The Holland-Turner paper was cited as a source in one of the most authoritative scholarly articles published on this subject. On August 30, 2008, just days before Congress reconvened for its final legislative session, prominent legal scholar Jane Ginsburg of the Columbia Law School published *Recent Developments in US Copyright Law: Part I – "Orphan" Works*.
In her paper, Professor Ginsburg raised many critical questions about the merits of the Orphan Works Act. Among these, she noted that certain provisions might violate Article 9.2 of the Berne Convention, which prohibits prejudicial exceptions to an author's exclusive right of copyright. She also stated that the preclusion of injunctive relief with respect to derivative works would appear to force authors to tolerate "even derivative uses they find offensive or that distort their works." She added that this "has economic consequences as well," depriving the author of the right "to grant exclusive derivative work rights to a third party. The bill thus potentially devalues the derivative work right." (Page 10)
On page 5, Professor Ginsburg noted: "The 'progress of knowledge' to which US copyright aspires is achieved not only by putting works into circulation, but also by fostering conditions conducive to creativity." http://lsr.nellco.org/cgi/viewcontent.cgi?article=1044&context=columbia_pllt

87. "Jule Sigall Joins Microsoft," Tech Law Journal Daily E-Mail Alert, December 27, 2006, http://www.techlawjournal.com/alert/2006/12/27.asp

88. "Orphan Works: Proposals for a Legislative Solution," United States Senate Committee on the Judiciary, Official Hearing April 6, 2006
Video: http://www.archive.org/details/senate_hearing_on_orphan_works

89. "Register of Copyrights Announces Appointment of Associate Register for Policy and International Affairs," *News from the Library of Congress*, January 29, 2003, http://www.loc.gov/today/pr/2003/03-017.html

Also in 2006, another key player in the Orphan Works story left government service. Since 2005, attorney Joe Keeley had served as Intellectual Property Counsel to the House Subcommittee that wrote the bill. In his own words, he "was the lead staffer on the orphan works issue responsible for drafting the language and arranging the hearings."[91] At the end of 2006, he left that position and after a year in the Office of General Counsel of the US Copyright Office, he joined the law firm of Arent Fox, where he became a registered lobbyist for the Copyright Clearance Center.[92] The Copyright Clearance Center (CCC) is the organization which in 2008 the Graphic Artists Guild recommended as a trusted entity to serve as the Dark Archive at which infringers could register their intent to infringe copyrighted work. CCC is a Salem, Massachusetts-based corporation that issues licenses for the reprographic republication of books and articles in print. In 2009, CCC's revenues exceeded $200 million.[93] CCC is unique among the world's Reprographic Rights Organizations in that it has consistently failed or refused to recognize visual artists as authors who deserve to be paid for the republication of their contributions to the collective works CCC licenses.

Author

Brad Holland is a self taught artist and writer whose work has appeared in *Time, Vanity Fair, The New Yorker, Playboy, Rolling Stone,* the *New York Times* and many other national and international publications. His paintings have been exhibited in museums around the world, including one-man exhibitions at the Musée des Beaux-Arts, Clermont-Ferrand, France; the Museum of American Illustration, New York City and the Torino Atrium, Turin, Italy. His satire of the art business, "Express Yourself, It's Later Than You Think," first published in *The Atlantic Monthly,* has been widely republished, both in print and on the Internet. In 2005 he was elected to the Society of Illustrators Hall of Fame.

"During a career that has stretched over three decades," wrote Steven Heller in *Print* Magazine, October 2002, "Brad Holland has changed the way illustration is perceived and practiced. By the late '60s he had helped transform a profession of renderers into one of conceivers, challenging editors and art directors to let him create images that complemented rather than mimicked texts." In 2000, the editors of the artists' directory RSVP voted Holland "the one artist, who in our opinion, has had the single greatest impact on the illustration field during the last twenty five years." Holland has won more awards presented by the New York Society of Illustrators than any other artist in its long history. The American illustrator Mark English has called him "the most important illustrator in America today."

In the last decade, Holland has become an outspoken advocate for artists' rights and is a founder of the Illustrators' Partnership of America. In 2005, he represented artists at the Orphan Works Roundtables held by the US Copyright Office; in 2006, he testified before the Intellectual Property Subcommittees of both the US House and Senate, and in 2008 he and medical illustrator Cynthia Turner led the opposition to the Orphan Works Act of 2008. It was through their lobbying efforts that the US Small Business Administration acted to conduct its own Orphan Works Roundtable at the Salmagundi Club in New York City, August 8, 2008.

Holland is featured in the documentary, "Citizen 3.0 Copyright, Creativity and Contemporary Culture," available at www.kinobserver.com and his article, "First Things About Secondary Rights," published by *The Columbia Journal of Law and the Arts* is available at weblog.ipcentral.info/holland_ColumbiaLaw.pdf

Holland's blog, *Poor Bradford's Almanac*, can be accessed at http://www.drawger.com/holland/?article_id=9022

90. http://www.law.berkeley.edu/institutes/bclt/statuteofanne/imgs/Jule-Sigall.pdf
91. "Following the Progress of Orphan Works Legislation" Orphan Works.net This is a website created by Mr. Keeley following his departure from government service and his employment as a lobbyist for the Copyright Clearance Center. http://www.orphanworks.net/
92. "Joe Keeley. Federal Lobbying activities for 2008," impluCorporation, http://www.implu.com/lobbyist/49749/2008
93. Information page for Copyright Clearance Center, Inc., International Federation of Reproduction Rights Organizations http://www.ifrro.org/show.aspx?pageid=members/rrodetails&memberid=8