



Statement Before the Small Business Administration Forum
How Will the Orphan Works Bill Economically Impact Small Entities?
Salmagundi Club, New York City
Friday, August 8, 2008

by
Gerard Colby
President, National Writers Union/UAW Local 1981

UAW LOCAL 1981/AFL-CIO

Gerard Colby
President

E. Jeanne Harnois
Financial Secretary/
Treasurer

ADVISORY BOARD

- Isabel Allende
- Ben Bagdikian
- Nicholson Baker
- Anne Barnays
- Mary Kay Blakely
- Rosellen Brown
- Sallie Bingham
- Susan Cheever
- Frederic Dannen
- John Dinges
- Ariel Dorfman
- Barbara Ehrenreich
- Clarissa Pinkola Estés
- Susan Faludi
- Marilyn French
- Todd Gittlin
- Erica Jong
- Barbara Kingsolver
- Maxine Kumin
- Dave Marsh
- E. Ethelbert Miller
- Gloria Naylor
- William Novak
- Grace Paley
- Marge Piercy
- Gerald Posner
- John Rechy
- Adrienne Rich
- Luis Rodriguez
- Gloria Steinem
- Piri Thomas
- Milton Viorst
- Dan Wakefield

113 University Place, 6th Floor
New York, NY 10003-4527
Tel 212.254.0279
Fax 212.254.0673
nww@nww.org
www.nww.org

I first want to express my appreciation to the organizers of this forum for this opportunity to speak as a professional writer and author since 1970, and on behalf of thousands of writers including those in my own union, the National Writers Union/UAW Local 1981. I am here as President of the National Writers Union to express our grave misgivings about the proposed Shawn Bentley Orphan Works Act. We do not believe it will be as a viable solution to the problems presented by copyright protected works whose creators and rightsholders cannot be located.

Let me start by giving my own experience as a journalist. In 1976, supported by Crown Publishers and the Fund for Investigative Journalism, I was part of a team of four journalists that traveled to Central and South America to investigate what was behind the genocide of indigenous tribes in the vast Amazon basin. This investigation required traveling through some of the remotest areas of eight countries, the majority of whom were then under military rule, and three of which had death squads in play. Two of my colleagues were forced to flee for their lives from Brazil after being shot at. That left just two of us to complete the job, requiring us to spend six months in the jungles of the Amazon. For our own safety, and those of our sources, most of that time we were required to function incommunicado to our agent, our publisher, and even our own government embassies. During that time, unauthorized use of my then-out-of-print book, *Du Pont: Behind The Nylon Curtain*, published two years before by Prentice-Hall, could not, except for fair use, occur. When no one could get in contact with me while I was pursuing my rather precarious profession, my ownership of rights to *Du Pont* was protected by copyright law, backed by the copyright clause of Article One, Section Eight of the U.S. Constitution, from copyright infringement.

If, however, the proposed Shawn Bentley Orphan Works Act had been in place then, along with the prospects of contracts for sales of an electronic version through the Internet, a search for me, even one carried out with a diligence with stronger guidelines than what we see in the proposed Orphan Works Act, would have failed and exposed me to an infringement of my copyright. Without minimum standards, I could be gone for only six weeks, never mind six months, and my copyright could be infringed. So let me state now that my and all writers' and artists' Constitutional right to copyright protection should not suffer from those who, for commercial gain, would use an act of Congress to infringe on our rights.

And what about the need of libraries to digitally preserve and make available, for no commercial gain, copyrighted works whose creators cannot be located?

Here we are talking about the digital preservation and dissemination of information and works of literary and visual art. If that is what we are concerned about, and not talking about Google's illegal copying of works for commercial gain through advertising, then it will behoove society to establish standards that protect the creator. Such standards will fulfill the obligation to long-term preservation of original content on the web in a world where "harvesting" of web content and its resulting degradation is sadly routine.

We will also need a national database containing metadata – information on the work’s rightholder and rights – so that by providing clarity and transparency the quantity of orphan works can be reduced in the future.

And we would need this database sited at a Rights Clearance Center administered, as proposed by the International Federation of Reproduction Rights Organizations (IFRRO, of which the National Writers Union is a member), by a Collective Management Organization, such as a Reproduction Rights Organization whose governing board is composed of equal percentages of representatives of creators’ organizations (such as now exists jointly in the Authors Coalition of America) and publishers, and whose functioning would be so transparent as to warrant growing trust and confidence in its mission.

Based on voluntary participation by creators directly and, in the case of orphaned works, by creators’ organizations in the relevant genre, the terms and fees for use of works would be much more tangible and predictable than IFRRO’s vague “some form of remuneration to the rightholder.” Nor should we adopt IFRRO’s suggestion that the creator who appears and withdraws an orphaned work should bear the costs of that withdrawal. Instead, a fund, administered by the Collective Management Organization, using revenues gained by the licensing of orphan works, should compensate the creator according to standards and contribute to withdrawal costs borne by the licensee as a cost of doing such business.

The devil is indeed in the details. To make this system work, we must spare the licensee who honestly does a diligent search, from exposure to punitive damages for willful infringement. The search must therefore have minimum standards as a benchmark for judging when infringement occurs. Again, here I disagree with IFRRO’s suggestion that changing information sources and search techniques require that “Any regulatory initiative should refrain from prescribing minimum search steps or information sources to be consulted.” Professional standards are always subject to improvements as a profession advances. This is a basic provision in law when deciding liability. To do otherwise, and leave standards vague, is to invite abuse. This is one of the most important reasons, among others, why the National Writers Union joins with visual artists in strongly opposing the bill that would, if allowed to pass, become the Shawn Bentley Orphan Works Act:

1. It makes it virtually impossible for writers to protect their work because it basically allows anyone to use a writer’s work without the copyright holder’s permission.

Under current law in accordance with the copyright clause of Article 1, Section 8 of the Constitution, you receive basic copyright protection even if you don’t register your work. Under the proposed Orphan Works law, your work could be declared an orphan even if you have registered it. Congress, in enacting the Copyright Act of 1976, provided that copyright exists in the creation of any work that is copyrightable subject matter. Copyright exists regardless of whether or not the owner has performed any legal formalities such as registration or copyright notices. Since 1978 (when it was enacted), many writers have relied upon the Copyright Act of 1976 and employed business practices based upon the protections it offered. The proposed Orphan Works Acts of 2008 would have the effect of depriving creators the ability to enforce their copyrights because they did not take steps the Copyright Act of 1976 did not require them to take. In essence, it will give infringers the legal means to use a writer’s work without the copyright holder’s permission.

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

The proposed legislation is predicated on the establishment of private, profit making registries that would establish databases of digital versions of writers' works and provide a place for potential infringers to try to locate the author. But the bill will become effective whether or not these databases ever come into existence. The legislation places no limit on the number of these registries or the prices they would charge. The burden of paying for digitization and depositing the digitized copy with the private registry would presumably fall entirely on the writer, and even if a writer's work is contained in the registry, as long as the infringer "looks" without finding it, the infringement is allowed. There is no liability imposed for the failure of a database to find a writer's work registered in that database when it is searched (even if copyright has been filed), and no requirement that all available databases be searched, thus potentially requiring multiple registrations (and multiple registration fees). There are also no safeguards to prevent any person or company from fraudulently registering work they do not own.

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

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

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

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

5. It leaves infringed works (whether a story, a song or software), along with products like books, musical plays, or computers that incorporate them, subject to seizure in other countries under the Berne Convention for the Protection of Literary and Artistic Works (the international agreement governing copyrights to which the United States is a signatory).

It also invites sanctions from around the world under the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), to which the United States is also a signatory, because international writers' works would be just as vulnerable to infringement within the U.S. under the terms of the Orphan Works Amendment. If this legislation passes, it would mean a return to pre-1976 U.S. Copyright Act when many writers' works fell into the public domain because they could not afford to comply with the formalities of

registration as a condition of copyright protection. This violates the trust under which American writers have worked for the last 30 years and effectively nullifies our U.S. Copyright registrations.

For these and other reasons, I ask you, on behalf of thousands of writers, to consider the harm this bill can do to visual artists, their businesses and the commerce that relies on us, and vote against it unless it is amended to precisely define an orphan work as a work whose copyright is no longer held and managed by a rightsholder.