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Summary -- “Orphan Works” Legislation

Federal legislation will soon be introduced that could have a dire impact on anyone who makes a living in the craft, gift, stationery, jewelry, or textile industries.

In the briefest summary, the Orphan Works legislation gives everyone the right to use a copyrighted artistic creation so long as they (allegedly) tried and failed to contact the copyright owner. If the copyright owner catches them, it might only be entitled to a trivial monetary payment.

Currently, under the Copyright Act, if someone copies a design, that designer is entitled to that copier’s net profits from the infringement. And, if the designer registered the design prior to the infringement, the designer is entitled to statutory damages (as high as \$150,000) and recovery of his attorneys fees (which can be massive). These monetary penalties are intentionally high in order to provide a solid disincentive to infringers and a serious incentive to original designers. For years, the guiding principle in the design world has been “if you didn’t create it, don’t use it.” With this new legislation, that principle will be turned on its head.

Under the “Orphan Works” proposal, if someone copies a design, if that person didn’t know that the design belonged to Mr. X (for example, if Wal-Mart orders a million puzzles with a design from a Chinese manufacturer who fraudulently showed the design as part of its open line), then all the designer could ever get is “reasonable compensation.” This could very well be peanuts, notwithstanding that the infringer made a massive profit on the shoddy items bearing unauthorized copies of the designer’s original creation. And the designer will never recover his attorneys fees or have the option of statutory damages, not even if he went to the trouble of registering his copyright years ago, and regardless of whether he has always placed the © notice on his product. And, keep in mind, any promises of exclusivity to a particular creation that the designer gives to a customer will be a sham.

Museums and libraries crafted the “Orphan Works” legislation so that they could create exhibits and souvenirs with photographs, music, books, etc., whose copyright owners could not be identified. Their fear was that, notwithstanding their effort to find the copyright owner, that person would suddenly crawl out of the woodwork and demand high monetary damages based on the infringing exhibits/souvenirs. There isn’t any fundamental objection to providing protection against that situation. But the legislation is so broadly drafted, it isn’t limited to that scenario – the legislation applies to all copyrighted works, all commercial uses, and all users/infringers.

Proponents of the legislation say that visual art companies can protect their copyrights by making it easy for anyone to know that a particular creation is theirs. But if someone finds a piece of visual art and the name is missing (either because a customer took it off, or it fell off, or it wasn’t possible to have that on the creation, or it is a copycat), then there is simply no way to trace the creation back to the copyright owner. After all, you can’t take a digital photo of a piece of jewelry and scan it into Google and *presto* identify the copyright owner! In other words, under Orphan Works, almost all visual art and crafts will be considered orphans.