

A2IM Position on the Current Orphan Works Legislation in the United States

Senator Patrick Leahy (D-VT) introduced the Shawn Bentley Orphan Works Act of 2008 (S. 2913) in the Senate (authored by Senator Leahy and Senator Orrin Hatch (R-UT), and named after the former Senate Judiciary Committee staff counsel. Congressman Howard Berman (D-CA) introduced the Orphan Works Act of 2008 (H.R. 5889) in the House, authored by Congressman Berman and Congressman Lamar Smith (R-TX). Both bills were introduced on April 24, 2008. This document outlines A2IM's position on these important bills.

What is an "Orphan Work"?

Most of our members have encountered in their business what are now called "orphan works". They have typically found a way around the problem that respected copyright without need of legislation.

Under the Orphan Works Legislation, an "orphan work" is defined in the negative—a work is "orphaned" when an "infringer" can't find the copyright owner after a "good faith" and "reasonably diligent" search for same in accordance with "best practices" that have yet to be established for this law. ("Infringer" is what the new user is called in the bills.)

If the infringer conducts that search but cannot find the owner, the infringer is free to use *any* work in *any* manner for *any* purpose. Under the Senate bill, the infringer doesn't have to notify anyone that they have used the infringed work. The House bill does have a notice requirement—but *the notice goes to a non-public archive in the Copyright Office that only has to be disclosed to the copyright owner if the copyright owner sues the infringer*. We get the decided impression that even that is likely to come out of the bill in the coming days or weeks.

The infringer is free to use *any* work—without regard to nationality of the copyright owner, or whether a comparable use in the copyright owner's country would violate that country's laws.

The infringer is free to use any work in *any* manner—there are no restrictions on how a particular work may be used. One of our members recordings could end up in a motion picture—of any rating—a political advertisement or other commercial, or in a mashup that will alter the sound quality and characteristics of the original recording beyond recognition.

The infringer is free to use *any* work in *any* manner for *any* purpose—the infringer could use a recording in a way that would violate marketing restrictions in the copyright owners recording, license or distribution agreement with the artist, giving the infringer even greater rights than the copyright owner herself could have. So even if the copyright owner found the infringer, approving the use might put the copyright owner in breach of their own rights agreement with the artist depending on what use was made by the infringer.

And if the original recording was made under a collective bargaining agreement—such as the Phonograph Record Labor Agreement of the American Federation of Musicians or the Sound Recordings Code of the American Federation of Radio and Television Artists, there may well be residual payments owed and trust fund payments almost certainly owed as well as pension, health and welfare contributions. None of these would be paid by the infringer—unless they are found.

The record company will very likely still have the obligation to make these payments under the union agreement—even if a court were to determine that the residuals were not “reasonable compensation”.

But since the Congress does not require the infringer to notify anyone of the infringement, even though the infringer has relief from statutory damages and payment of legal fees if they did the search in a “good faith” and “reasonably diligent” manner, *how would the copyright owner ever know the infringement has occurred?*

The current orphan works controversy began officially in 2005 when the U.S. Copyright Office began preparing the Orphan Works Report. Before its introduction a few weeks ago, the concept of the legislation had been largely messaged as a change in the U.S. Copyright Act designed to assist museums and libraries to better utilize their archives—a *noncommercial* emphasis. Since its introduction, the interests involved have taken a decidedly *commercial* turn, which has caused A2IM to reconsider the effect of the Orphan Works Legislation on our members.

The Orphan Works Legislation is also moving at “light speed” through the Congress. It has passed both the Subcommittee on the Courts, the Internet and Intellectual Property of the House of Representatives as well as the Senate Judiciary Committee—all in less than a month.

“Reasonable Compensation”

If the infringer begins exploiting the orphaned work and the copyright owner finds the infringer, the copyright owner can try negotiating with the infringer, but if no deal can be made, the copyright owner has no choice but to sue the infringer.

However, the only time that the copyright owner can get back the remedy of statutory damages is if the copyright owner sues the infringer and can prove in the lawsuit that the infringer did not conduct a good faith reasonable search in accordance with best practices.

The copyright owner will have the right to sue for “reasonable compensation” as determined in the lawsuit, and the court is supposed to take into account comparable licenses when determining reasonable compensation. Even so, nothing in the statute requires the infringer to pay the copyright owner’s legal fees, so it seems predictable that the infringing use will have to be significantly in excess of the anticipated legal fees or there must be almost perfect evidence that the infringer did not conduct a proper search in order to get an attorney to take the case on a contingency. Since it is nearly impossible to determine how the search was conducted or if one was even made without filing a lawsuit,

the statute creates perverse incentives.

“Best Practices”

The Orphan Works Legislation requires that copyright owners in each sector of the creative community come together to determine what the “best practices” should be for a “reasonably diligent search”.

This includes not only record companies and music publishers, but also illustrators, motion pictures, television, visual art, choreography, graphic arts just to name a few. All these groups are supposed to decide what “best practices” should be in their industry, and then deliver these standards to the Copyright Office who is supposed to make them available online. No timetable or process for this determination is in the statute. Perhaps more importantly—no funding for the time involved in setting these standards is in the bills either.

And of course within each sector there are competing interests—we would not want RIAA making our decisions and in fairness RIAA would not want A2IM making theirs. Setting these “best practices” is a tremendous productivity loss for A2IM. We would have to stop dealing with our business and the business of our members to help to develop standards for a statute we did not want, do not need, and have not budgeted the resources to address.

It is important to note that there is nothing in the Orphan Works Legislation that limits who can make these important decisions regarding best practices. We could find ourselves at the table in a government mandated standard setting process with corporations and other organizations that are not in our industry and do not understand our business—and worse yet, may actually be interested in the outcome of these processes because these corporations and organizations either want to use orphan works themselves or want to develop a search capability to profit from the proposed law. If A2IM does not appear at these meetings, our members bear the significant risk of having these important standards set without them.

It is also important to realize that the House bill as currently drafted has the law potentially going into effect on January 1, 2009 regardless of whether the “best practices” have been agreed to by then.

A2IM’s Positions on Orphan Works

The positions that A2IM has taken on the Orphan Works Legislation come down to simple fairness in a statute clearly designed to benefit online companies, museums, libraries and some users.

Noncommercial Uses

If a museum, which is a 501 (c) (3) not-for-profit or a library want to use works for which they cannot find the copyright owner after putting their organization’s reputation on the

line by claiming to have searched hard for that owner, then A2IM has no problem encouraging noncommercial and largely cultural or archival activities by these known entities. If the Guggenheim Museum, for example, wants to offer a retrospective on world music, we understand. If the for-profit Corporation X Museum that was started last week and only exists online suddenly has the need for featuring “orphan” works that others may link to, we would not support that kind of activity.

Commercial Copy

We believe that anyone seeking to take advantage of the Orphan Works Legislation and its safe harbor from statutory damages should be required to begin their search with a “commercial copy” of the work—the actual physical copy authorized by the copyright owner for sale, not a copy found on an Internet P2P site. This is to prevent infringers from downloading illegal copies of our members’ sound recordings and trying to create something legal from something that is illegal.

Most importantly, however, is that the commercial copy of the work is likely to contain some references to the copyright owner, the artist, the songwriter, the music publisher, the performance rights society affiliation—some hard data that at some point was gathered and created for release to the public in commerce by the copyright owner.

If the Congress required an infringer to start with a commercial copy of the sound recording, there would be a much greater level of transparency and many fewer “false negatives” in search results.

Mandatory Use of Existing Identification Systems

Any orphan works statute should mandate that infringers be subject to minimum search requirements such as utilizing systems already in place in an industry that the industry uses for the identification of works.

In our business this would involve searching for the title of the work and the names of the artist, songwriter, music publisher and PRO via all available information sources. This would include Copyright Office registrations, UPC codes, International Standard Recording Codes, ASCAP, BMI, and SESAC databases, record company catalogs and catalog numbers, distributor names, etc. Very often in the independent business legal lines may give the impression that a distributor or distributing label is the copyright owner, but the actual copyright owner is outside the US or has been acquired and is not out of business.

Excluded Uses

Most artists do not want their work associated with certain kinds of uses—political advertising, tobacco or alcohol products, pharmaceuticals, personal hygiene products, motion pictures with a rating indicating there may be objectionable material in the film, games with a violent theme. We all know the list because these are marketing restrictions that are frequently agreed by record companies so that our artists feel that their work and sensibilities are respected.

Plus, independent labels frequently distribute or license content from copyright owners outside of the United States. This provides the livelihood for a number of our members. Those agreements will customarily prohibit anything even remotely like an orphan work permission.

It should be very easy for the Congress to agree that some uses of orphan works would be restricted because the Congress has refused to require infringers to include artists in the standard of “reasonably diligent search”. If an artist search cannot be included in the search for the copyright owner, then the artist should at least be afforded some base line level of restriction on how their performances can be used.

Legal Fees for Copyright Owners:

As smaller independent labels will likely need to engage counsel as they typically do not have in-house counsel the denying of a recovery of legal fees is unduly harsh and will preclude smaller copyright owners from enforcing their rights.

Notice of Infringing Use

A2IM believes that it is only common fairness that an infringer is required to file a notice of use with the Copyright Office and that the filing be made public. The Copyright Office maintains a database where transfers of copyright and other documents are filed that are *not* copyright registrations, but just *relate* to copyrights regardless of whether the works are actually registered for copyright. The Copyright Office is required by law to maintain this database and has done so for decades. It would be very simple to require the infringer to file a notice of use in this database. While there would be a cost to file for the user of the copyright, the user would be paying no copyright cost, if a valid search was done, so there should be a more than offsetting savings. This would give the copyright owner a location to search for infringements on their copyrights.

However, the Congress has consistently rejected any obligation on the part of the infringer to require this simple notice. A2IM believes that failing to require notice of the infringement is at odds with the stated purpose of the Orphan Works Legislation—helping owners and users connect.