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THE KIDNAPPING OF ORPHANS AND THE IMPLICATIONS FOR VISUAL ARTS

REAL WORLD APPLICATIONS

- Millions of American employers and employees will be affected by this legislation. Core US commerce is fundamentally based on copyrighted designs and visual artwork. For example, companies creating textiles, apparel, wallpaper, computer graphics, carpets, purses, greeting cards, postcards, stationery, jewelry, needlework, posters, record jacket artwork, holiday cards, shower curtains, ceramics, figurines, stained glass designs, architectural blueprints, lace designs, floor tile, board games, etc.

Example: The textile and apparel industry is a multi-billion-dollar segment of the US economy. The popularity and success of these products is inextricably tied to their creative design.

- “Orphan Works” legislation should be directed toward publicly beneficial uses of abandoned copyrights. But this legislation cuts such a wide swath, it applies to all commercial uses of any kind.

Example: When a discount store sells swimsuits with knock-off designs, this legislation will protect the infringer, not the copyright owner. There is no justifiable reason why a bathing suit company, for example, has to or should use a certain design. It can just hire a design company or independent artist to create its own design, which will stimulate the economy, not depress it. Yet, this legislation gives incentives to use infringements rather than create new designs.

- This legislation applies to all knock-offs, regardless of whether they are innocently created domestically or intentionally created overseas. As a result, the legislation will result a huge competitive advantage to pirates, bringing a flood of Asian knock-offs into the US market, bankrupting thousands of American businesses.

Example: Unscrupulous overseas companies remove the © notice from manufactured goods, fraudulently market them as “orphaned” designs, and import them into the United States, garnering massive profits from American design excellence.

- No technology currently exists that would permit the vast majority of visual art to be digitized and searched. Even the Copyright Office itself has no mechanism to collect, index, or search visual artwork. The proposed legislation is arguably an “aggressive opt in” copyright regime for visual artists, requiring them to spend millions of dollars and hours in a probably futile effort to catalog every image known to man – it turns the basic exercise of rights of copyright on its head.

Example: Textile design is manually created on oversize and bulky drafting board and then physically molded and cut into screens during the manufacturing process. It cannot be scanned into a computer and a photograph is not searchable.

- “Reasonable compensation” is a mirage in world of knock-offs, fickle customers, and exorbitant legal expenses. The legislation permits an infringer to keep all its net profits, requiring the copyright owner to spend massive attorneys fees in order to recover a pittance, and never to recover its customers, thus irrevocably damaging the core business.

Example: Apparel company and its textile manufacturer create exclusive, eclectic, and trendy clothing with cool designs. However, relying on an overseas vendor, a national convenience store copies that design on shoddy discount t-shirts and sells them to every Tom, Dick, and Harry. The sophisticated customers refuse to buy the original apparel any longer, believing the design is now too common, without any special cache, or that the apparel company “sold out.” Further, the exclusive contract between the textile company and apparel company is destroyed. Protected by “orphan works” legislation, the national convenience store gets to keep all its net profits from the infringement, and offers to pay 3% royalty on the infringing shirts, resulting in only a \$10,000 payment, notwithstanding permanent and massive loss of customer base and profit of two companies. Copyright owner’s only choice is to take the pittance or invest huge sums in a lawsuit to get a slightly greater pittance. (average cost of a copyright infringement lawsuit in the US is \$350,000).

- A true orphaned work has no commercial value. This legislation will catch an innumerable number of valuable and well-managed copyrights in an orphan works net. Notwithstanding a copyright owner’s use of the © notice on every copy ever authorized, and notwithstanding a copyright owner’s registration of all its designs, this legislation deems all that artwork to be abandoned if a single knock-off is ever found, in any medium.

Example: On a buying trip to Bangkok, company sees a pretty shower curtain (unsurprisingly, a knock-off) and asks various Thai shower curtain companies if it is their design, but no one recognizes it. That is because the design was created by a textile company in New York. The shower curtain company makes \$100,000,000 on the curtain, offering to pay the textile company a mere \$10,000 as “reasonable compensation,” notwithstanding that the textile company always placed © on its items, had registered the design with the Copyright Office a decade earlier, had an long-standing exclusive license for this print, and would have never agreed to license its use on plastic shower curtains.