

TO: U.S. House Judiciary Subcommittee on Courts, the Internet, and Intellectual Property

RE: The Orphan Works Act of 2006

DATE: April 9, 2007

Imagine a hazy and humid summer day in New York City. A family of four on their summer vacation from their small town in Missouri is walking along Fifth Avenue; the husband/father is reading from his handy Frommer's travel guide a description of the Metropolitan Museum of Art to his family. He describes to his family how this building houses some of the world's greatest pieces of art. The family makes their way into the museum as they move from room to room they notice blank spaces between some of the artworks. They notice as they move into the rooms holding the more modern works that the blank spaces increase in number. Until finally the mother asks one of the museum security guards, why are those spaces blank? He looks at her and says they used to display orphan works and the museum was afraid of costly litigation and removed them. He goes on to tell her about the thousands of beautiful and exquisite works that are now held in a temperature controlled storage facility in New Jersey where no one except a select few of the museum staff can view them. The youngest child after hearing this looks up at her mother, then looks to the blank spaces on the wall, and back to her father, she simply says "What a waste!" The J. Paul Getty Trust and our proposal for the "Orphan Works Act of 2006" is attempting to prevent the wasting of exquisite pieces of artworks whose only flaw is that its copyright owner cannot be found. The goal of the J. Paul Getty Trust in regards to orphan works is to ensure that the following can be achieved: (1) museums will be able to showcase orphan works within our public collections and (2) individuals conducting scholarly research will have access to the orphan works within a museum's collection.

The J. Paul Getty Trust encourages this committee to not include in the bill the subsection suggested by Public Knowledge found in §514(a)(2)(D). Getty objects to this proposal for several reasons. The first being the \$25 processing fee. This fee may be nominal to individuals who conduct one or two searches a year however; the art museums that are members of the trust are likely to conduct several thousand searches a year. The larger amounts of searches conducted by these museums will make the filing fee a burden on these organizations. With the limited amount of financial resources held by these organizations, the likelihood of them wanting to pay this fee for every orphan work in its collection is not likely. As a result, the works will remain in archives and away from the public and researches.

We recognize that Public Knowledge recommends that this section not be mandatory but only encouraged. This does not diminish our desire to not see it as a part of the final bill. In subsection (i) Public Knowledge proposes that the signed statement to the Copyright Office serve as prima facie evidence of a reasonable due diligent search. If an individual does not file the statement then they would not receive this protection. Furthermore, the fact that an organization did not file a statement with the Copyright Office may cast them in the light as individuals that have not conducted a reasonable due diligent search. The chance that failure to comply with a non-mandatory suggestion will cast an organization in a bad light is reason enough not to include it. Furthermore, from the standpoint of a nonprofit art museum the cost of possibly having to go into court and defend itself for not complying with a non-required suggestion because of the cost associated with it is unattractive. Once again, the fear in the art community of litigation will drive curators to not include these images in their collections.

If Congress, wishes to include this suggestion the Getty trust would recommends the following modifications. Nonprofit organizations shall be exempt from paying the \$25 filing

fee. Removing this fee will remove a barrier from in front of art museums. Second, we also recommend that in a situation where a copyright owner files suit against a nonprofit art museum that did not file a statement with the Copyright Office that the museum's prior compliance with the subsection serve as prima facie evidence of a reasonable diligent search. What we mean by this is that if a museum has a spotless or near perfect reputation for filing these statements that the absence of one not be held against the museum. With the amount of works within a museums' collections and archives chances are the paperwork was not filed with the office as recommended in this section. Evidence of routine compliance with this section should also serve as prima facie evidence of the completion of the mandated search. Routine compliance with this section indicates an institution's routine performance of these searches, and one missing statement does not indicate that the search was not completed; it most likely means the statement was not filed.

The Getty Trust also requests that Congress redact or modify the §514(b)(2)(B), proposed by the MPAA. This proposal applies only to new works. Some may not think of art museums as transforming, recasting, or adapting works, however in the digital world we currently live in museums are engaged in these types of activities. Because museums are attempting to digitize their collections and place them online for those outside the four walls of a museum allowing more people access to great art this proposal will not allow museums to achieve this noble goal. The MPAA represents the individuals that produce movies. The movie industry is very profitable and can afford to pay reasonable compensation to the owner of the infringed copyright for the use of the infringed work. This proposal makes sense for the MPAA because the inclusion of the work within a member's finished product is part of a product that will go into movie theaters with the purpose of making a profit. It makes sense to compensate individuals

who play a role in your moneymaking enterprise. However, museums are not adapting or transforming works to make a profit. These institutions, are transforming them to make them more assessable to the public for free. The museum by undertaking these transformations are simply attempting to achieve its goal of bringing art to the world. There is no monetary gain. The proposal as is serves to frustrate the goals of art museums.

The Getty Trust requests the removal of the provision from the bill as it is currently written because it will hurt museums and force them to hide orphan works from the public. With some modifications, this proposal can be structured in a way to serve the interests of all the interested parties. The subsection should contain an exemption for nonprofit organizations. These organizations may have the option if it can afford to pay the reasonable compensation to the copyright owner. However, if it cannot afford to make reasonable compensation a court will not grant an injunction in certain situations. If the copyright owner's work is currently part of a project or is currently being worked on as part of some project an injunction could not be used to remove the work from the project if the institution conducted a reasonably diligent search. However, in the unlikelihood that a search was not completed a court could have grounds to issue an injunction. This proposal will encourage museums to engage in the search recommended in the bill, it will also not punish those individuals that put in the effort to try and locate the copyright owner but could not. The Getty Trust recognizes that individuals connected to these works in some way or another and wishes to respect these individuals while allowing our institutions to function in a way that serves the public.

The Getty Trust would like to see §514(b)(3) redacted. This section proposed by Public Works does not work for nonprofits. Placing reasonable compensation at \$200 is more than most museums can afford to pay. Furthermore, because most museums are not gaining any

financial benefit from housing these works it will result in a \$200 loss per orphan work in the museum. A flat reasonable compensation rate should not be in this bill. If Congress wishes to include a way to calculate the reasonable compensation, it should fall more in line with what Kernochan suggested. Kernochan's approach to the calculation of reasonable compensation looks at several different factors. It would also make sense to make part of the reasonable compensation calculation the use of the orphan work, if it was for commercial reasons, and if so how much profit did it make the user. For example, if a Hollywood director using a piece of orphan work music as the major score in his film that goes on to make \$250 million at the box office a \$200 reasonable compensation payment is laughable. It does not reflect the significant place another's work played in his film and does not serve to compensate the owner of the copyright in any reasonable way. It serves more as a punishment for someone who did not vigilantly patrol his or her copyright. If Congress is to adopt any of the above proposals, the Getty Trust once again asks for an exemption for nonprofit institutions.

The Getty Trust was deeply hurt and saddened by the constant talk of art for money or profit. The art world is currently extremely commercial. This commercialization has become evident within the last few decades. Gone are the days when people wrote music for the simple joy of performing it, took photographs simply to capture a moment to share with others, or wrote a story just for the sake of telling a story. We now live in a world where every musician wants their songs to top the Billboard chart; they want their song to be part of a television commercial or part of a movie. Where photographers' only goal is to hold exhibits in top rated galleries and to sell prints for post cards and posters. With this desire to make money and turn a profit, the American art scene is losing part of its heart and soul. It is becoming just another avenue for people to garner fame and fortune. Placing within the Orphan Works Act of 2006 sections with

the only purpose to ensure a financial gain for the artists, the person, or the organization that presently owns the copyright, will hurt the American art community. There is more to art than money and creating exemptions for nonprofits will allow those creative individuals who created something to be shown not sold and who did not vigilantly patrol their copyrights, to achieve their wishes. Some may argue that not allowing financial gains for artists will discourages people from creating creative works. It will discourage some but it will not stop those who love their art and want the world to see their talents. It will not stop the true American artists. The actions of this committee have the power to reintroduce to America art for arts sake and not only art for profit. Taking steps to ensure that art does not become both commercialized and sanitized will ensure that American artist remain relevant in the art world and will prevent the starving artist from immigrating to Europe.

Art museums serve as places to house treasures. Their goal and mission is to safeguard national treasures and to make them available to the public. None of the museums that are part of the J. Paul Getty Trust operates to make profits. Any money taken in from admission tickets and souvenir shops go directly to the costs of running the institutions. This is one of the reasons that museums should be exempt from several of the provisions as proposed by the many interest groups. Museums cannot afford to make reasonable compensation or to pay filing fees because of our limited purses. The appearance of an orphan work in a museum collection does not serve to divert from the copyright owner any profits. In fact, it may help to build his or her reputation and allow him or her to make more profitable works in the future or open up other money streams for them. Also to burden museums with fees and costs will just serve to hurt the true American artists, those individuals that create to create and want nothing more or less than for the world just to see their creations. If the bill is enacted as it currently is, many works will

remain unseen, unanalyzed, unresearched, and wasted because of a museum's justifiable fear of litigation. Museums are an important part of our country's cultural fabric. They are important part of city life and serve as a draw for visitors. Museums help to keep American cities relevant in the art world. To burden them with restrictions and payment schemes will do nothing more than limit access to art and decrease the overall relevancy and popularity of American museums. In our current world of war and elevated terror levels museums are safe havens. A place where one can step inside for one hour or many hours to be transported away from the problems of Iraq and terrorist threats to a world of beauty and peace. Please allow people these sanctuaries of beauty and peace by not burdening museums with rules that only serve to hurt the public. Keep American art relevant and adopt the suggestions found above.

The J. Paul Getty Trust would like to thank-you for your time and consideration.