

BACKGROUND INFORMATION ON THE ART LICENSING INDUSTRY

The following statistics have been provided by LIMA (the Licensing International Merchandiser's Association). Licensing is *big* business; it accounts for **\$175 billion** in retail sales of licensed merchandise worldwide, and **over \$105 billion in the United States**. In 2006, the \$3.3 billion in retail sales of products featuring a licensed piece of art brought licensors—artists and designers—royalty revenues of \$182 million. Sales came from a wide range of American manufacturers: 36% gifts and novelties; 15% home décor; 15% housewares; 10% paper products; 7% accessories; 5% apparel; 4% publishing; 3% food and beverage; 3% health and beauty; and 2% infant products.

HOW THE ART LICENSING INDUSTRY WORKS

Whoever owns the rights to a 2-or 3-dimensional design or image (usually the artist/creator of the design) is the LICENSOR and whoever wants to acquire the rights to reproduce that design or image is the LICENSEE. Artists/LICENSORS make money by licensing (essentially “renting”) the right to reproduce their design or image to different manufacturers (LICENSEES) to use on different sorts of products. For example, a sailboat image can be licensed to Company A for a mug; Company B for a coaster, and Company C for an art print. Licensing is an interesting and complex business, and it is a successful and profitable business because our current copyright law protects the creator's rights and safeguards their ability to profit from their intellectual property. When a manufacturer wants to feature an artist's work on one or more of their products, it is important to them that they are the only company who has the right to reproduce that design on that particular product. If other manufacturers are able to put the same design on the same product, then it hurts the licensee, especially if the licensee has to factor the artist's royalty into their price structure. Meanwhile, the infringing manufacturer does not and can therefore bring the product to market at a lower price point. In fact, one of the great incentives NOT to infringe on an artist's copyright, is that currently there is a stiff penalty—up to \$150,000 for each instance that infringement is proven. The proposed Orphan Works bills removes the penalty for infringement, which will make it easy for unscrupulous companies to infringe on someone's copyright and receive nothing more than a ‘hand-slap’ as punishment.

HOW ORPHAN WORKS LEGISLATION COULD AFFECT THE LICENSING INDUSTRY

Here's an example of how the Orphan Works issue could play out in the real world: a local librarian sees a charming illustration and decides to use this image on a poster that advertises an annual poetry contest in her community, without any authorization from the artist. A few months later, another individual sees the old poster stapled to a bulletin board. He tries to find the creator but isn't able to after a “reasonable search,” and decides to use the artwork in a collection of t-shirts that his employer, a t-shirt manufacturer, produces and sells to major retail store chains. The t-shirt sales bring the manufacturer a \$200,000 profit. The illustrator (and copyright holder) discovers his art has been used when he sees a t-shirt in a store, and contacts the manufacturer about it. Under current law (the 1976 Copyright Act), since the artist had registered the design with the copyright office, he would be entitled to statutory damages of up to \$150,000 in addition to

attorney's fees and court costs. The Orphan Works legislation eliminates all these; if it passes, all the artist would be entitled to is a "reasonable royalty," which could be a nominal sum (for example, \$100). Since the amount the artist might receive would be less than court costs, it would not be practical or affordable for the artist to sue the manufacturer.

This could also affect the artist's relationship with his existing licensees. A high-end company which was featuring this artist's work may decide to drop his images from their line one they see the same design on cheap t-shirts. They may also decide to sue the artist for breach of contract, since the contract guaranteed them the exclusive right to use that design, as well as for damages for the loss they take due to sharply reduced sales of products they have produced with a design that is no longer fashionable.