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Faithful readers of our column (Hi, Mom!) know that we usually manage to find interesting legal topics in the art world to discuss and distort. This month, however, we ran out of story ideas. Rather than disappoint our editors, we decided to share with you an unusual letter we recently received from a **Mr. Philip Pirrip** (not his real name), who has a rather Dickensian occupation: running an institution for the criminally insane in the Midwest.

Dear Brothers in Law,

The following tale might be of interest to you:

A few years ago, the institution received a mysterious bequest of a suite of charcoal drawings depicting a pair of very playful kittens. The images were so compelling that I and the board wanted to reproduce them on tote bags to raise money for our facility's archives, but unfortunately we could not determine who the artist was. He or she was identified to us only as Provis.

From your past columns, I knew that owning the drawings didn't mean that we owned their copyright, so we set out to find Provis and to seek his or her approval for our tote-bag idea. But months of research got us nowhere, and as we learned the hard way, clearing copyright rights has become much more challenging since the **Copyright Act of 1976**.

Before, as you well know, artists had to register their copyrights and affix copyright notices. But since passage of the 1976 act, they no longer need to comply with such formalities to obtain copyright protection; instead, artists' works are automatically copyrighted the moment they exist in tangible form. We found that with no requirement to register or affix notices to their copyrights, artists can be difficult — or impossible — to locate.

Even when images are registered with the **U.S. Copyright Office**, looking for their copyright holders in the online registry can be an exercise in futility since the registry doesn't allow image searches. In our case, we looked for the phrase *drawings of kittens*

but could not search the actual images.

To complicate matters, the term of copyright has gotten longer over the years, so fewer works can be used freely. The Copyright Act of 1909 established a 28-year term that could be renewed once for another 28 years. The Copyright Act of 1976 changed the term to the life of the creator plus 50 years. In 1998 this was extended to life plus 70 years. Moreover, finding copyright owners becomes harder as time goes by since the trail of authorship fades with each passing year.

After months of fruitless searching for Provis, I enlisted the help of Mr. Jaggers, an attorney on the board. I told him that Provis would probably never appear, and even if he did, he would approve of our use of his images. Jaggers, however, was skeptical. "Take nothing on its looks; take everything on evidence," he advised. "There's no better rule."

Jaggers and I discussed the possibility of reproducing the works without permission under the fair-use exception to copyright protection. As you know, a fair-use analysis involves balancing four main factors: the purpose and character of the use, such as whether it is commercial or not for profit; the nature of the copyrighted work, such as whether it is published; the amount and substantiality of the work taken (using more or "the heart" of a work may make fair use less likely); and the effect of the use on the work's potential market. Jaggers was doubtful that we would be protected by fair use, particularly since we planned to use the images on commercial merchandise.

When I suggested that Provis might not be the artist's real name, Jaggers replied that a copyright holder is fully protected even when using a pseudonym. The lawyer further warned that if we reproduced the illustrations without permission — even after a good-faith effort to find the artist — we could be liable for copyright infringement. Apparently, a copyright holder in an infringement case can sue under the Copyright Act of 1976 for either actual damages (which are often difficult to quantify) or statutory damages. Jaggers said copyright holders usually choose the latter, since statutory damages run from $750 to $150,000 per infringement, plus attorneys' fees. The cost of litigation — not to mention damages if we lost — would ruin our small institution.

Shortly after that we had an unexpected stroke of good luck: We found a Web-hosting address for Provis in deepest Australia! We e-mailed the artist repeatedly but got no response. We thought of sending a certified letter saying that we would interpret lack of response as tacit agreement to use the images, but Jaggers cautioned that under copyright law, silence does not equal approval. Then, just last year, I learned about proposed legislation relating to so-called "orphan" works, meaning creations whose owners cannot be located. The Senate passed the bill in 2008 with little opposition, and another version was introduced in the House. Although our friends on Capitol Hill assured us last June that passage of orphan-works legislation was imminent, it was

blocked in the House. Many commentators believe that it is just a matter of time before the bill is revived — and enacted.

Under the proposed law, if users of copyrighted works made diligent efforts to find the owners and those owners later appeared and claimed copyright infringement, the users would enjoy the benefits of a statutory safe harbor and pay only a reasonable license fee instead of the onerous statutory damages provided for under current law.

I gather that some artists, particularly photographers and illustrators, oppose the legislation, viewing it as a worldwide copyright threat. They fear that if users, such as big businesses that might want the images for unsavory purposes, went through the motions of carrying out a "reasonably diligent search" (a vague standard not defined under the proposed statute) to clear the works, they could actually steal them for commercial gain.

These artists consider themselves vulnerable for a number of reasons. For instance, they typically don't put their contact information on their works. Moreover, today's technology encourages a culture of sharing and appropriation in which images are distributed freely. Finally, many object to the fact that, under the bill, if the copyright owner appears after an unsuccessful search, the user needn't withdraw the work from circulation but must merely pay "reasonable compensation" — which remains an undefined term. Some artists, however, are persuaded that the law's purpose is laudable: to make use of works so they are not lost.

Just when I had given up hope of using Provis's images, we had another lucky break. The artist emerged, but under an entirely different name — Magwitch — and not only let us use the illustrations but even offered to donate his share of the royalties to the archives. Although I was delighted to locate this new benefactor, I was taken aback by yet another surprise. While we had hoped that Magwitch would be a professional artist, he turned out to be just a reformed criminal who had drawn the pair of kittens while behind bars. So much for our great expectations!

To conclude this tale of two kitties, I would ask: Might you be interested in buying a few tote bags from our institution?

Sincerely, P. Pirrip

"A Tale of Two Kitties" originally appeared in the February 2010 issue of Art+Auction.