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May 21, 2014

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Associate Register of Copyrights
Director of Policy and International Affairs
U.S. Copyright Office
101 Independence Ave. S.E.
Washington, D.C. 20559-6000

RE: Notice of Inquiry, U.S. Copyright Office, Library of Congress
Orphan Works and Mass Digitization (79 FR 7706)

Comments of the American Society of Illustrators Partnership

An Overview of the American Society of Illustrators Partnership
The American Society of Illustrators Partnership (ASIP) is a grassroots coalition of twelve visual artists organizations, founded and funded entirely by working artists. ASIP was founded in 2007, as an initiative of the Illustrators' Partnership of America (IPA), although many of our member organizations have distinguished histories dating back more than 50 years.

Together we make up a broad spectrum of creative artists, ranging from the nation's editorial cartoonists to medical illustrators, architectural and science illustrators, aviation artists, magazine, book and advertising illustrators. Combined, we create much of the visual material in American contemporary culture.

Our 13-person board includes a Pulitzer Prize winner, a muralist for the Smithsonian's Air and Space Museum and two members of the Illustrators Hall of Fame; as well as artists who have received the top awards for achievement in their respective fields. We are fortunate to count the Honorable Bruce A. Lehman, former Assistant Secretary of Commerce and Commissioner of the US Office of Patents and Trademarks among our closest advisors.

We, and most of the thousands of artists we represent, are freelance creators or small business owners and all of us make our livings licensing the copyrighted work we create. We therefore have a compelling interest in the continued effectiveness of copyright law in the field of visual art. We believe we have unique insights and unparalleled experience in how art is created, licensed and managed by the people who actually create it, as well as what it is like to live and work under the US Copyright Act and related international treaties.

Therefore, writing on behalf of the organizations we represent, we wish to endorse and commend to Congress the comments by Mr. Lehman submitted on behalf of our colleagues at the Association of Medical Illustrators (AMI). These comments go directly and succinctly to the heart of the issues that concern all working artists and in speaking for our AMI colleagues, Mr. Lehman is expressing our opinions exactly.

The Need for Legislation

As Mr. Lehman notes, the case for orphan works legislation has always been based on the premise that libraries and museums needed it in order to digitize their collections. But as Lehman observes, the libraries themselves now believe (in their own words) that "changes in the copyright landscape over the past eight years" mean they "no longer need legislative reform in order to make appropriate uses of orphan works." That means the case for radically changing copyright law for the rest of us now vanishes.

As the Illustrators' Partnership documented in its February 3, 2013 comments to the Copyright Office, there has never been any credible evidence of a "market failure" in commercial markets to justify the expansive scope of the legislation proposed in 2006 and 2008. So, to us, there seems to be no justification for including graphic artists in any orphan works legislation being considered at this time; and we join with Mr. Lehman and the AMI in urging the Copyright Office "to advise Congress accordingly."

Defining a Good Faith "Reasonably Diligent Search" Standard

In past legislative efforts, the quest to define this elusive standard inevitably boiled down to the conclusion that it must be left for the courts to decide on a case-by-case basis. But as we've said before, any legislation that turns voluntary business transactions into lawsuits is bad for business and bad for the legal system. Therefore, we agree with Mr. Lehman's observation that since "the concerns that gave rise to Congressional concern over so-called orphan works no longer exist, there is no need for a statutory 'reasonably diligent search' standard."

Instead we would cite our own comments at the March 10, 2014 Orphan Works and Mass Digitization Roundtables: "The marketplace will create business models. It can move faster than Congress. It can move faster than the Copyright Office, can move faster than lobbyists and legal scholars. If an artist comes up with a better means of being discovered, other artists are going to find out about it and they'll copy the same technique. Leave this to the marketplace. This is the best laboratory for creating the business models." [1]

The Role for Public and Private Registries

"[T]he concept of creating an inclusive, cost-effective database for imagery is impossible," wrote Alexis Scott in a paper submitted to the Small Business Administration's Orphan

[1] Comments by Brad Holland, American Society of Illustrators Partnership, Transcript of the Orphan Works and Mass Digitization Roundtables, March 10, 2014, page 82. http://www.copyright.gov/orphan/transcript/0310LOC.pdf

Works Roundtable in 2008.[2] For three decades Ms. Scott was publisher of The Workbook and workbook.com, one of the two most respected and utilized directories in the graphic arts field. "I represented 400,000 images [she wrote], had 500 portfolios of artists online, verified listings of 50,000 graphic artists, and I know the time and cost for creating databases. Not possible. Not feasible. Not cost effective. And if there were multiple, smaller databases, not workable."

Unlike those theorists currently demanding a return to the days of registration, Ms. Scott was writing from experience, a deep knowledge of the graphic arts field and a genuine concern for the rights of artists. And as if to bear out her warning, six years later, as Mr. Lehman points out, there is still "no functioning registry of digital images" in existence; while those in development "will take years if not decades to become viable…[or] may never be viable."

Therefore, we believe it would be imprudent and irresponsible of Congress to pass legislation requiring the mass transfer of the nation's copyright wealth from individuals to the control of a few select corporations based on promises, hypotheses and guesswork about what those corporations might do with the private property they would be entrusted with or how they might skew the marketplace once they controlled access to that property.

Moreover, the reluctance of artists to submit their work to for-profit databases run by middlemen is not grounded in abstractions, but is based on negative experience with existing commercial stock houses. These mis-named "agencies" have been successful and profitable for their owners, but since the late 1990s their business practices have led most illustrators to shun them. We believe artists should be left free to choose whether or not to patronize such databases and we should not be legally compelled by fear of seeing our work orphaned to make business decisions we have already concluded would harm our own interests.

Types of Works Subject to Orphan Works Legislation, Including Photographs

The great expense (in both time and money) of digitizing and cataloging tens of thousands of visual works for the purpose of registering them with commercial registries would make compliance with orphan works legislation impossible for all but the richest visual artists. This is a simple economic fact and we think it is impossible to over-stress its importance. Indeed, we think the practical inability of artists to comply with the kind of orphan works legislation previously drafted by Congress outweighs decisively any possible arguments for its passage.

Copyright law is fundamentally a law protecting private property, the most personal form of private property that exists: the work individuals create themselves, the work they use to make a living, the work they use to express their short time on earth. For any government to impose an impossible financial burden on those individuals as a condition of protecting their property from the unauthorized use and monetization by others would be to effectively

[2] Alexis Scott, "Orphan Works Compliance: An Impossible Burden for Small Businesses," Small Business Administration Roundtable: How Will the Orphan Works Bill Economically Impact Small Entities? August 8, 2008. Appendix A, page 63, http://www.copyright.gov/orphan/comments/noi_10222012/Illustrators-Partnership-America.pdf

penalize creators for creating. Surely this is not the intent of those calling for such legislation, but it would be its practical effect.

Types of Users and Uses Subject to Orphan Works Legislation
We believe that orphan works legislation should be limited to *true orphaned work* and exceptions confined to "certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author." [3] Our objection to past orphan works legislation arose from the fact that it would have made *de facto* orphans of any unregistered work.

In its March 6, 2013 Reply Comments to the Copyright Office, the Illustrators' Partnership noted that according to the Copyright Office's own figures, there were no more than 215 anecdotal letters to its Orphan Works Study that could even be "construed" by the authors of the study as involving "an orphan works situation." [4] Far from proving that there is an orphan works "problem," this small number suggests that the US licensing system generally is working efficiently and that orphan works exceptions could be solved satisfactorily by adopting a Canadian-style system. Resolving orphan works uses on a case-by-case basis would allow prospective users to apply for a specific license for their intended uses with fees paid to the Copyright Office and held in trust for rightsholders should they surface. Surely this would make more sense than orphaning millions of copyright-managed works on the grounds that *some* of them *might* be orphans.

Mass Digitization Generally
With the statement by libraries that they no longer believe they need orphan works legislation, the case for mass digitization must stand on it own; and those who have pursued it behind the stalking horse of orphan works legislation are now left with the far less compelling argument that mass digitization is a necessity because it is a possibility. That, of course, is an argument that would benefit those who hope to cut themselves in on the vast licensing market currently being served by artists and small businesses. But as Mr. Lehman stresses, the exclusive right of authorship "lies at the heart of copyright law," and "if copyright is to be preserved as a meaningful mechanism to incent and reward creativity mass digitization technologies can only be employed with the consent of rights holders." We wholeheartedly agree.

Extended Collective Licensing
This is an entirely new issue for artists and we doubt that even the few who may have heard the term could identify or define it. As we understand it, extended collective licensing is a

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[3] Berne Convention for the Protection of Literary and Artistic Works. Article 9 (2) "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."
http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P140_25350

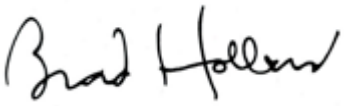
[4] Report on Orphan Works, A Report of the Register of Copyrights, January 2006 United States Copyright Office, pp. 17-21. http://www.copyright.gov/orphan/orphan-report.pdf (Note: download is 133 pages.)

blanket licensing system unique to the Nordic countries and as Mr. Lehman points out "a true extended collective license binds authors who have not specifically given prior consent to the license or affiliated with a collecting society."

We believe that before any such system is imposed on American illustrators currently licensing their own work, the US must first resolve certain issues involving the blanket licensing operations by the American-based Copyright Clearance Center and the artists' royalties currently being collected by other countries for the work of American illustrators being licensed abroad. We won't try to duplicate here Mr. Lehman's analysis of the problem, except to note his warning that "foreign licensing revenue collected for American illustrations has been collected for many years and misdirected to U.S. based organizations with no authorization to represent the rights holders." And we emphatically agree that "any new system of extended collective licensing must be designed to return royalties collected to actual rights holders. This suggests careful vetting of authorized collective management organizations and close supervision by a regulatory authority such as the Copyright Royalty Board which oversees existing statutory licenses in the United States."

We again want to thank Mr. Lehman and our colleagues at the Association of Medical Illustrators for their thorough and lucid comments on the issues that face all of us as working artists; and we urge the Copyright Office and Congress to give their paper the most serious consideration.

Respectfully submitted,



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