July 22, 2015

I am a German artist and illustrator, and have been working as a freelance for four years mostly for clients from the games industry. I am writing this statement, because the proposed legislation will affect artists worldwide. Our livelihood depends on the unconditional and exclusive control over the copyright granted to us by the Berne convention, and our ability to enforce these rights internationally, should they be infringed.

We do not get paid for our services as such, we trade the usage rights to our work. The fee for a Total Buyout can be multiple times higher than for a limited, nonexclusive usage right, which can be sold to multiple clients. Our clients, too, benefit from the nuanced way we can do business with them, as they never have to pay for rights they do not need.

As a visual artist, I rely on multiple revenue streams. The most important is the fees I collect from clients who commission a certain piece in the first place; many, but by no means all of them, wish to purchase all exclusive rights and are billed accordingly; the others require only nonexclusive, or limited exclusive rights, which allow for a secondary revenue stream, like selling prints and merchandise, or licencing it to other clients. I rarely do traditional artwork for clients for practical reasons, and I am not represented by a gallery, so the sale of originals plays only a minor role for me.

The Next Great Copyright Act, as proposed by the US Copyright Office, does not take the situation and needs of the creators into consideration.
Instead, it will compromise the control we currently have over the usage rights to our work and threatens to undermine the business of artists worldwide.

The proposed bill would require artists to register all of their work with an agency to maintain a meaningful level of protection from infringement.
Since visual artists and photographers typically create thousands of pieces in just a few years, registering their body of work would force them to spend months or even years – keeping them away from paid work - and probably a considerable amount of money too. The precarious financial situation of many artists, and for non-english speakers the language barrier, will make this impossible for the majority of creators worldwide.
And even if I could, and would register all my work, it will be near impossible to compete with the price tag of an orphaned work if I wish to sell my existing work to clients, thus eliminating a large portion of my secondary revenue stream. It would force me to charge higher fees for illustration commissions. Clients who only need limited nonexclusive rights will be most likely unwilling or unable to pay these fees. And due to the limited liability of „Good Faith Infringers“, I can not really guarantee the exclusive use of an artwork anymore,

Since all non-registered works are likely to get awarded orphan status, they become public domain for all practical purposes, since taking legal action against a „Good Faith Infringer“ is not a viable option if the rights holder can't sue for statutory damages, attorney's fees etc. The definition of a „diligent search“ is too vague and offers too many loopholes for infringers to be an effective protection even for registered works.
The Next Great Copyright Act encourages copyright violations, because it will make it nearly risk free to infringe upon an owner's exclusive rights. It will spawn a Copyright Violation Epidemic that might be too much to handle for the small claims courts.

The report claims, that the current law inhibits uses of orphaned work, that are beneficial to society. If the creator of a visual artwork can not be identified, then most likely no contextual information about the image can be found, either. This diminishes the value of that particular work for research and education purposes, where proper citation and careful selection of sources is needed. The same applies to documentaries; using random material of unclear provenience is just sloppy research and should not be encouraged by some kind of orphan works legislation. When the work is used for decorative or purely illustrative purposes, then there is no compelling reason to use an orphaned work in any conceivable circumstance instead of finding and paying an artist who has a suitable portfolio for the project.

Therefore, society would not benefit much from an orphan works legislation regarding works of visual art and photography - on the contrary, it might have detrimental effects.
I'm afraid that the proposed legislation will inhibit the creation of future works of art, because „artist“ will be even less a financially viable career path than it is now. And I should not have to stress the ethical imperative that artists should be compensated for the commercial use of their work.

The way I see it, The Next Great Copyright Act is much more likely to create a cultural „black hole“ than the current copyright law ever could, and will damage the creative industries beyond repair.

For users, the protection granted under the current copyright law may be an inconvenience, but it is vital for the business of professional artists around the world. For a fair and balanced reform of the copyright, you need to take the creator's needs into consideration - it is a well known fact that it is difficult for creatives to make a living off their work. Please do not make this impossible.

Kind regards,
Hannah Böving