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July 23, 2015

Maria Pallante
Register of Copyrights
U.S. Copyright Office
101 Independence Ave. S.E.
Washington, DC 20559-6000

RE: Notice of Inquiry, Copyright Office, Library of Congress

Copyright Protection for Certain Visual Works (Docket No. 2015-01)

Dear Ms. Pallante and the Copyright Office Staff:

Thank you for the opportunity to reply to this call for comments. I am a visual Author/Creator/Artist who makes a living off of my copyrights. I do NOT make a living by selling physical artworks and designs, but off of the licensing of the copyrights that I am granted under the current laws and protected by the registration of these original works.

Most of my work is finished in a digital format, and for the most part, there is only value in the reproduction copyrights of my work that I license to both non-profit and for-profit entities. These are my greatest assets; being able to monetize my intellectual property is what allows me to create freely and stay in business. Because I currently control how they are used, not only can they provide my family an income, but they also can be shared literally around the world in print publications, on products, and online because I know they are protected by America's currently strong copyright laws. To me this is extremely beneficial to society because they can enjoy my works in a manner designed by me the original Author/Creator/Artist, on the specific uses that I authorize.

I am an adjunct instructor at Rocky Mountain College of Art & Design in Lakewood Colorado, and have also been a guest presenter at several other colleges and universities in America. Since 2008, I have been honored to teach art, illustration, design, marketing, and business to hundreds of art students. One of the things I cover in my classes is how to make a living off of one's original work though the licensing of copyrights. Art licensing is one of my passions! That is one of the reasons I founded an international group on LinkedIn called the "*Art of Licensing*", which currently has more than 13,000+ members, most of which are visual Author/Creator/Artists who license their art. Something we are all concerned about is that copyright infringement, even under current law, has gotten out of control and is extremely difficult to fight on our own soil and abroad. Many Author/Creator/Artists, including myself, no longer feel safe to post works on public websites, so they are hiding them in private password protected portfolios. This has made it very difficult for potential licensees to find works and use them. To address this concern, our art licensing community has banded together and recently launched a private and centralized online site that will allow licensees to search and find the work they want to use. The ability for these Author/Creator/Artists to maintain complete control of their works is

what makes their businesses possible and it is also critical to the businesses of their agents and the manufacturers who license designs.

I have read the entire *2015 Orphan Works and Mass Digitization Report* and it's my belief that passing legislation based on this report would effectively make it easy for others to use and profit from my copyrights and intellectual property without my permission if they couldn't find me… and that there would not be a serious deterrent to utilizing my art, because even if I objected, the user would not have to pay statutory damages. Right now, statutory damages provide an extremely effective deterrent against willful infringement. If new copyright law is enacted as proposed, it would be extremely difficult for me to protect my assets (which are my copyrights), I would struggle to support my family. This legislation and its logical ramifications would put me out of business due to the sheer time and money it would take to upload my art (past, present and future) to the unknown new registries. It would also make it impossible to share my artwork and photos online or exclusively license it to legitimate licensees due to the obscene time and money it would take to register a career's worth of tens of thousands of photos, sketches and finished artworks. Like many artists, I am quite prolific, easily creating thousands of designs, photographs and sketches every year.

If the proposed copyright alterations as the Office has suggested in the 2015 *Orphan Works and Mass Digitization Report* ever becomes reality, I predict that it would logically lead to less people sharing with society, not more sharing. Creativity and innovation will gradually be eroded and extinguished, it will not flourish under these new proposed guidelines. If art is good for the society, then it is better off in the control of the Author/Creator/Artist of that work. If Author/Creator/Artists are worried that their art and even their personal photos uploaded to social media sites and blogs may fall into the hands of FOR-PROFIT entities who will be protected as orphan works infringers, then they will stop posting and we will have a very bleak online culture indeed.

Is this the future we want to see happen? As an Author/Creator/Artist, how can I ever show another living soul my art if my own government won't help me protect it? How can I possibly license my work exclusively to a legitimate licensee if I can't be sure that in some other corner of the world someone hasn't filed it as "orphaned" without my knowledge? Why should other for-profit entities get to use art without directly paying the Author/Creator/Artists, especially when they have the means to legitimately hire, select or license work from the tens of thousands of Author/Creator/Artists that can easily be found though hundreds of online sites and like the one our group has set up at ArtLicensingShow.com?

Also, I don't think it's fair to give non-profit organizations a pass on this as well, they do have income from donors and other means and they do have pay their other vendors for services, equipment, rent etc. Why should any Author/Creator/Artist's work be used without being compensated by them when it clearly will benefit their bottom line and build their assets, their story and their mission? What if they chose an "orphaned" piece of art from an artist who doesn't agree with their mission? Shouldn't this be taken into consideration? Even if their only intent is to archive history, they should always have PERMISSION from the Author/Creator/Artist to do so. If they can't get the permission, then they should just file the work until a later date, for when it is in the PUBLIC domain anyway! What's the hurry? They

have thousands of years of history to work on, please encourage them to leave the works of the living artists ALONE.

Because most of the people who may read this letter may not be Author/Creator/Artists, please let me emphasize, that is takes a considerable amount of time, talent, courage, and innovation to create original art. This is not something we play at, this is our job, and coming up with truly original designs is no easy task. It also takes a tremendous amount of resources and art materials as well which are increasingly expensive whether they be a $20-$50 painting brush or a $5,000 computer system with thousands of dollars of software that we pay for the license to use. Also, our art (and the copyrights that are attached to that art) is a part of our personal story, it's our blood, sweat and tears; it's a part of the very fabric of our soul. Even if we choose to use it commercially to feed our families, it is VALUABLE to the Author/Creator/Artists on a personal level as well.

Orphan Works legislation is NOT NECESSARY and only makes it more difficult for Author/Creator/Artists to create and eke out a living. If this proposal becomes reality, we will have a world with LESS ORIGINAL ART because Author/Creator/Artists will be spending all their time uploading to registries instead of creating, if in fact they could afford to do this. Many would be put out of business due to these costs alone. Creative output could potentially be drastically reduced if there is a cost associated with every single piece of art that an Author/Creator/Artist wants to create and protect. Also, if an Author/Creator/Artist isn't spending enough time creating art, then there is less art to sell which means it would be even more difficult to stay in business. A world with less innovative art… is this the world you want us to want to live in?

In response to the raised questions:

1. What are the most significant challenges related to monetizing and/or licensing photographs, graphic artworks, and/or illustrations?

Our culture is beginning to treat art as a commodity. But, just because it's easy to come by online, doesn't reduce it's value to the Author/Creator/Artist and it certainly should not be free to use and make derivatives of, whether or not the work is "orphaned."

Currently, there is a lot of infringement happening and there are big companies/manufacturers/retailers in the U.S. that tend to infringe on a repeated basis, since they know that the very small, single Author/Creator/Artist businesses can't even afford to file a lawsuit. Therefore, they get away with the art, make tons of money, and the Author/Creator/Artist never sees a dime. If they settle out of court and make the Author/Creator/Artist sign a gag-order, most of the money received will go to legal fees, and the productivity time lost in creating new work is lost forever. Again, big companies know this and apparently feel safe infringing upon Author/Creator/Artist's works as they know we don't have the means to go after them. If they do get caught their reasoning is that is it cheaper to 'settle" than to pay legitimate licensing fees. If the Office wants to help us, they should make it less prohibitive for Author/Creator/Artists to get paid for their work in these clear infringement

cases where the work is properly registered with the U.S. Copyright Office. If companies are found to do this repeatedly, they should be punished accordingly and the percentage of their fees paid to the artist should increase with every subsequent infringement case in which they are found guilty!

Sadly, the other issue is there are still foreign countries that have zero regard for our copyrights. They are often getting our work online or through legitimate means of production and then reselling that work without our knowledge or remuneration both abroad and most disturbingly to other American companies as stock or "factory provided" art. This art then returns to the U.S. and is sold side-by-side with legitimately licensed work for less money, which further harms the Author/Creator/Artist and the licensee who played by the rules in the first place. I have seen many Author/Creator/Artist colleagues in the fabric-by-the yard industry burned by such infringement and it seems there is little that can be done as the consumers can't tell the difference. Again, if the U.S. Copyright Office wants to help make it feasible and possible to go after these types of infringement cases, there are many thousands of Author/Creator/Artists who would feel grateful for the protection.

2. What are the most significant enforcement challenges for photographers, graphic Author/Creator/Artists, and/or illustrators?

To me, one of the biggest challenges is how the way our work is commercially used requires removing the Author/Creator/Artist's name and the copyright information. Most manufacturers think that a visible credit line and copyright symbol will have a negative impact on product sales, and for this reason refuse to allow it. To many it is unsightly to see this copyright information on the art itself. Even though as a copyright holder we press for it to be included, it's just not practical. Thus, depending on the application, many published pieces never include the artist's credit. Most importantly, under the Copyright Act of 1976 it is not necessary to attach a copyright notification to a work to have inherent copyright protection. For example, I have designed art that goes on fabric designs, apparel, accessories, and none of these applications show my name. When printed on the packaging, it is easily separated from the work itself. I also do a lot of work for the craft industry designing embellishments for scrapbooking and craft-making, like stickers, stamps, stencils, ribbons, decorative tape. I own the rights to the art I license to these companies, but since these applications are designed for consumers to use on their own creations, it is again unsightly to have my copyright notice attached in every square inch on their finished personal projects.

Thus, my challenge with the Orphan Works proposal is that anyone could come upon my work, not ever be able to find out that it was me that did the original design, and think that that work is then "orphaned." If I understand it properly, the proposed legislation would then allow them to file to use it for their own purposes as a derivative work, both for non-profit and for-profit applications. I believe even the most diligent search for most art would come up empty. I have extensive experience creating websites (for which I also design and license my art) and as our modern technology is, I don't see this technology being anywhere near sophisticated enough to find the owner of a specific abstract pattern or a nameless graphic design piece. Most of the searches I do to test this on my art that I know is floating around the Internet, comes up with false-positives. Many in my field do work that would fit into these categories, and yet, to us the creators, this work has tremendous value and can provide us the

means to feed our little Author/Creator/Artist families. For some reason, people are thinking that art has no value to us after it is created. I am here to tell you, that it is after the work has been first created is exactly the time when its value greatly increases, not decreases! Those rights should be protected by Copyright Law, and never undermined by any future Orphan Works legislation. Furthermore, the burden of "being found" should never be put upon an Author/Creator/Artist especially when it advantages the infringer of the "orphan" work if they can't find the Author/Creator/Artist with their "diligent search."

I feel that is it unnecessary to create any Orphan Works legislation. If the rights-owner to a work can't be found it is extremely easy to find a suitable substitute. If it is not in the public domain yet, then archivers shouldn't be concerned about archiving it. Period. If the owners can't be found, then perhaps they don't want their work being digitized or used without their permission. I certainly wouldn't. Under the protection of the Constitution they should have the right to choose this for themselves. As long as they are still under copyright, then copyright should PROTECT them from Orphan Works infringers too!

3. What are the most significant registration challenges for photographers, graphic artists, and/or illustrators?

Even at the current rates, it is still VERY expensive for most Author/Creator/Artists to register everything they create (there are many cases where we are not paid for the work, or the amount of the registration fees takes such a huge chunk out of our income that many don't bother with it at all and opt to use that money to pay for rent or buy groceries). For me, in order to create one piece of art or a small collection of art, I will make dozens of sketches and take up to a thousand photographs that I don't have the funds to copyright, even though each one is a unique expression of my creativity and commercially valuable in its own right. The result is, we don't register everything under the current system as it is far too much of a hassle and expense. However, we are comforted to know that we would still have moderate copyright protection under the Copyright Act of 1976, even on the things we can't afford to register since they are indeed our original creations. This gives us courage to share them internally with clients during a project and know that they have to honor the value of these items (and not infringe upon them) even though they are pre-publication.

Also, we typically have to register many things in a sets which makes it difficult to track particular pieces. If it were a simpler process and we could register one image at a time for a much lower fee with the U.S. Copyright Office, that would be welcome (NOT a third-party, private registrar!) I am not a fan of third-party registrars, since this would greatly shift the power of controlling our assets to private companies, which may or may not have good intentions for using the art. This is one place where a centralized government registration process is a helpful idea and necessary to help visually track registration information. Having other companies involved in this process spells disaster and is one of the HUGE reasons I opposed both the 2006 and 2008 versions of Orphan Works legislation.

4. What are the most significant challenges or frustrations for those who wish to make legal use of photographs, graphic art works, and/or illustrations?

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If I ever had doubts about using or not using another creator's work the frustrations would lie in not being able to understand the licensing agreement or the unknown fees. I think educating people about licensing is a good first step in resolving these fears. Unfortunately, licensing is so complex because it's based on circumstances surrounding a particular use, no one can fairly boil it down to a simple chart that would work for all circumstances.

Most Author/Creator/Artists are reasonable when it comes to licensing work, there is an entire culture built around educating them on how to proceed in granting these rights in the Art of Licensing LinkedIn group. I would encourage those who are frustrated with the process of licensing to get professional legal help to guide them through the process.

5. What other issues or challenges should the Office be aware of regarding photographs, graphic artworks, and/or illustrations under the Copyright Act?
Please refer to my above statements.

6. What are the most significant challenges Author/Creator/Artists would face if these new copyright proposals become law?
Please refer to my above statements.

I would like to thank you for your time in reviewing my letter. I know that the Office carries a heavy burden to find a resolution for these matters. Above all we are grateful for you to uphold the spirit of the Constitution that allows Author/Creator/Artists the rights to exclusively protect the tangible expressions of our creativity and original intellectual property.

Respectfully,

Cherish Flieder
Illustrator, Designer, Educator, Art Licensor at Cherished Solutions, llc
Founder of ArtLicensingShow.com and the 13K+ Art of Licensing group on LinkedIn