July 20. 2015

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

RE: Notice of inquiry, Copyright Office, Library of Congress
Copyright Protection for Certain Visual Works (docket No. 2015-01)

Dear Mrs. Pallante and the Copyright Office Staff,

I appreciate the opportunity to comment on the problems that the visual arts face in the marketplace. I am a professional illustrator whose career is still blossoming. I have been learning a lot through networking with my peers in my field, and have even been working with a few peers and clients to better the work relationships in the industry.

I am writing this letter in regards to the threat that the Orphans Work Legislation poses to myself and to others like me. Our copyrights are vital to our career and way of life as professionals because this is how we make our living. I have worked hard to put myself through college to learn how to hone my craft. I have struggled to develop my style and create a brand by which to market myself as an illustrator, so that I can put my hard earned degree to work for me and my family by striving as a working artist. I am working to help create a better relationship and community as a visual artist so that those who come after me can reap the benefits. I fear that the current changes being proposed by the orphan works lobbyists will be an end to strides forward we in the community are trying to create. I fear that the changes being proposed will make it impossible for visual artists to make a successful career for ourselves, and eradicate such professions for generations to come.

You have asked for a response to the following questions, to which I will try to answer to the best of my understanding.

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

As a professional illustrator I have faced the following issues in regard to your question:

Publishers who demand we continue on with an outdated standard that we working artists sign away our digital and secondary rights as a condition of accepting assignments, and the nature of predatory competition not just from image banks, but also outsourcing, and competitions that give away little if nothing in return for use of images submitted.

Many publishers hold with making it the standard for working artists to surrender our valuable rights to any work we create, in order to be given work assignments. For those of us who insist on maintaining and managing these rights ourselves, we are often ignored completely, and communications with such publishers often stops all together. In my negotiations with potential clients I am well aware that these standards in no way originate from the art directors who are our main source of contact with larger publishers. It is clear that such antiquated policies are set forth and enforced by attorneys who are indifferent to, or unaware of a publisher's design integrity. These are the dictations that trickle their way down the ladder and make it a rule of thumb for art directors that only those artists who are willing to sign away their rights will be given work.

As is now, copyright law enables abusive business practices such as work –for-hire contracts. These agreements are often imposed on freelance artists, and they deprive us of any authorship or control by designating the commissioning party as the creator of the work. We freelancers, therefore, become a de facto employee for the sole purpose of forfeiting copyright that would have otherwise been our right. In doing so, we receive no benefits of legal employment. We are then treated as an independent contractor in every other way. We must cover overhead; supply our own tools of our trade, workspace, training, liabilities, retirement, insurances, and other costs of business, of which the list goes on.

Work-for hire undermines the very principles of authorship as embodied in article 1, section 8 of the US Constitution. If one really had any conviction to making a progressive change for the visual arts, it would be with the US Copyright Law making an amendment to repeal work-for hire contracts imposed on freelancers, or independent contractors.

In addition to the above, professional artists such as myself must face down the obstacles that are image banks, outsourcing, and competitions that prey on the inexperienced to give away work for free with little to no reward in return.

There are a number of image banks that have persuaded artists to register their work with them in return for the reward of having access to new and better markets for them. Registrations costs and fees with these banks are not cheap, and are often on an artwork by artwork basis. Many of these artists who have registered with banks then find themselves in direct competition with those who had promised to provide a market for them. Image banks as these will lowball the stock of images registered, reaping in large commissions for themselves, and leaving the artists who provided the work with scraps, by comparison.

Such commercial registries leave little comfort in my mind that by creating a similar registry as a condition of protecting our work, there would be no stopping for-profit registries from acting in the same fashion as these image banks have.

Thanks to these image banks, our ability to navigate and negotiate in the market space has been radically altered.

And to add insult to injury, there remains a large portion of publishers who are ready and willing to pass up an opportunity to negotiate terms with professionals as myself in favor of a more economical, if unethical decision to outsource. These out of country artists are creating in the same manner as any visual artist in the US for even less than what we would be making. The same with offering large scale competitions by which publishers are free to choose and use any images submitted as they wish, without mention of, or payment to the artist who supplied the image.

What are the most significant enforcement challenges for photographers, graphic artists/illustrators?

I can think of two major challenges to the above question: The cost of legal fees in an infringement lawsuit, and the current matter of the Orphan Works policies that are now being proposed to Congress again.

Right now the only way that I would be able to afford to pursue a copyright infringer would be with a contingency free lawyer. It is my understanding that this scenario is true to a vast majority of other visual artists.

For those artists who have registered their work under a copyright, under the current copyright law, they are entitled to statutory damages as well as attorney fees. Because of this if one can find a contingency fee lawyer to take up their case, the owner of the copyright does not have to pay that lawyer. And it is also my understanding that the owner of the copyright is awarded more in settlement than they would pay in legal fees.

For those artists who have not registered their work under a copyright, under the current copyright law, they may only be awarded for actual damages. It is my understanding that it is mostly impossible to find a contingency fee lawyer to take up the case. Furthermore it would often be more expensive for the owner of the copyright to litigate such a case.

My understanding of the current Orphan Works policies would cause all cases of infringement to be treated as if there were no registry of copyright. By this understanding, it would be impossible on all accounts for an artist to afford litigation action without suffering severe financial repercussions. This would be because any infringement may turn out to be an Orphan Works infringement.

This would mean that all copyright lawyers would be imposed upon by the law to handle these types of cases as pro bono work. There would be absolutely no motivation at all for them to take any infringement case. This could mean the death of the profession not only of visual arts, but also of copyright lawyers.

The Orphan Works law would essentially be handing over decisive legal advantage to all infringers.

It would create a thriving business of infringing upon, or otherwise exploiting artists such as me under the disguise of an orphaned work, whether or not the work was orphaned. In effect, the Orphan Works

creates a window of opportunity by which any potential infringer can conclude that it is a rational business decision to continue with the unethical choice to continue to infringe upon visual artists. There would be no fear of statutory damages or attorney fees to hinder them from doing so on multiple accounts.

What are the most significant registration challenges to photographers, graphic artists/ illustrators?

Things that immediately spring to mind are volume, expense, time, and paperwork. And possibly that in requiring all work to be registered with for-profit agencies, dealing with the competition posed amongst such registries.

Let's tackle the problem presented with volume. Over the course of my career I will produce an indeterminate amount of work. In order to register these works there is an entire process I would have to undertake, piece by piece. This would include creating the work, scanning the work, color correcting the work, creating a digital file of the work, catalogue the work, store the actual work, create meta data of the work, and fill out at least two registration forms….for each separate piece of work that I create in the course of my career. All of this would take up invaluable time, time that is not producing income, and which would be eating into the time I could be using to create work that would produce income.

If this sounds far-fetched to you, as it might, I suggest you look into Picasso. Picasso died in 1973 and today in 2015 there are still teams working on cataloguing all of his work. In 2015 we still don't have an exact number of how many works he produced in the span of his career.

The way I see it as it stands, there is no happy ending here. If forced to register all the work that I would create to be protected under copyright law I would be losing income in the amount of time and money it would take for the registries. This is time and money that I simply cannot afford to lose as a working professional who is both trying to make a living and pay off my massive student debt that got me here in the first place.

My only reasonable choice would be to give up on the profession in which I have invested so much time, effort, money, and emotion into, and try to start over in another career, which would lead to even more financial trouble.

What are the most significant challenges or frustrations for those who wish to make legal use of photographs, graphic/ illustrative works?

Like most artists I often employ references by others when I create my own work. As a rule of thumb there is generally a way in which I can purchase certain rights to reference material in the form of photographs that make for legal use in images I will then create. In the case that I cannot get in touch with the owner of the copyright, I will move on to a new source that will respond to such inquiries. There is also a large amount of time required of our craft that involves sketching from life and the imagination, and when pressed for more reliable reference images when one cannot afford to hire a

model there is always the option of using yourself as one.

When I wish to make use of another person's work I follow by my rule of seeking their permission first, and only ever post once that permission is attained. Credit is always given to the artist. In return when I find my work used in similar manners, where it is for noncommercial use, as long as I am credited for the work I have no objections.

On occasion I will discover that either my work or work of someone I know is being used without credit or their permission. Cease and Desist letters are sent out to those in fault, and in almost all cases the work is taken down, or other terms are negotiated. It is these types of experience that give me every reason to believe that our current copyright law is working as it was intended.

In this case, there is no need of the Orphan Works, which would only weaken current copyright law.

What other issues or challenges should the Office be aware of regarding photographs, graphic/ illustrative works under the Copyright Act?

I would be most concerned with the claim that there is a viable visual arts registry that benefits artists.

According to the Copyright Office's report in 2015, there already exists a credible visual arts registry which functions as a hub, connecting registries in 88 countries, providing both literal and image based-searches.

My understanding of this phrasing is that such a registry actually exists, and therefore if I am reading it in this manner, so is everyone else, including those holding power in Congress.

It would be my experience in networking with other artists in my field, that the above is false. No such registry exists. These contacts are leading giants in the field of Illustration, and if anyone were to have images in such a registry, it would be any number of them. But none have, therefore I must believe that the above is false, and no such registry exists.

Entertaining the notion that the registry exists, my biggest concern would be as was stated previously in that such an entity would be striking a massive blow to small business owners, who are, the vast majority of professionals working in the field of visual arts.

As one of many professionals in the visual arts, I can tell you first hand that it is challenging enough to earn a decent living with the current state of conditions. The visuals arts are constantly facing a barrage of obstacles that devalue and discredit not just the work itself, but those who create it. Our intellectual property and our copyrights are invaluable to us, and make it possible for us to continue to make a living. It is my sincerest opinion that the ongoing Orphan Works is not only making strides in the wrong direction, but is an affront of our constitutional rights.

Sincerely ,

Katherine Guevara- Birmelin