Comments of Artists Rights Society (ARS)

Library of Congress
U.S. Copyright Office
[Docket No. 2015-01]

Copyright Protection for Certain Visual Works

ARS is the largest American Visual Arts Copyright Management Organization (CMO), licensing the reproduction of copyrighted works of visual art. ARS currently represents more than 70,000 artist members, the majority of whom create paintings, drawings, prints, art photographs, and sculpture that are generally characterized as fine art rather than commercial art. Recently, ARS has been authorized by a large number of illustrators to act as their licensing agent as well.

The business model for most ARS members focuses on the first sale of works or limited edition copies. ARS licenses the right to make reproductions of these original works for use in periodicals, books, catalogues, posters, advertising media, audiovisual media and, increasingly, digital media of the type distributed through the Internet. Consequently, ARS and its member artists have a large stake in the subject of this Copyright Office inquiry.

Current copyright law poorly serves the interests of visual artists, and ARS welcomes the opportunity to offer its perspective on how copyright law and its administration might be improved to better provide the incentive to create contained in Article 1, Section 8 of the Constitution. ARS' concerns about legislative proposals and business practices that would harm the interests of artists are also discussed in this submission.

The Federal Register notice seeks answers to five separate questions. As described below, meaningful responses to these questions are linked to one another. The following comments will reflect this linkage.

1. **What are the most significant challenges related to monetizing and/or licensing photographs, graphic artworks, and/or illustrations?**
2. **What are the most significant enforcement challenges for photographers, graphic artists, and/or illustrators?**

Because of the inseparable link between the capacity to monetize and the ability to enforce, ARS is addressing these two questions together.

The most significant challenges are inability to participate in sales of works subsequent to the first sale and the inability to enforce the existing right of reproduction through infringement litigation.

As stated above, the primary means of monetizing visual artists' creative output is through the sale of the original physical embodiment of their work or limited edition, numbered reproductions. The other means of monetizing use of their works is exercise of the exclusive right of reproduction in copies provided in Section 106 of the Copyright Act.

Unfortunately, current U.S. law limits artists' ability to fully enjoy the benefits of either of these mechanisms for monetization.

Inability under U.S. law to exercise the right of *droit de suite* found in the Berne Convention restricts visual artists' ability to receive payment for the sale of the physical embodiment of their art to the first sale, which **frequently is the least remunerative sale of the work**. Unlike other beneficiaries of copyright law such as authors of literary and musical works, the current first sale doctrine prevents artists from participating in the continuing economic exploitation of their work.

The American Royalties Too (ART) Act, currently pending in Congress, would address the first sale limitation by allowing artists to receive a modest share of the proceeds from any resale of their copyrighted works when sold at auction. ARS sought introduction and strongly supports the ART Act. It appreciates the Copyright Office's support of the principle embodied in the legislation. Should Congress enact the ART Act ARS is fully prepared to function as a CMO under provisions of the legislation.

The second means for monetization is the exercise of the reproduction right. However, willingness of users of works to recognize that right and comply with copyright obligations determines the level of success artists will have in monetizing this exclusive right.

ARS enables its rights-holder members to maximize compliance with the reproduction right and facilitates authorized uses of their works by:

- monitoring uses of works to identify unauthorized reproduction;
- subject to review and approval of the artist, issuing authorizations and licenses for reproductions and merchandise;
- administering and collecting fees for the rights of publicity and personality on behalf of the artist;
- collecting foreign, title-specific royalties attributable to an artist in 40 other countries in which ARS has a reciprocity agreement with a national counterpart;
- offering free legal services, short of prosecution of infringement actions, on copyright and other intellectual property matters;
- agreements with museums under which prior permission must be sought and royalties paid for the production and sale of merchandise such posters, greeting cards and reproductions;
- remitting payment for licenses to the artist on a semi-annual basis and providing a report containing the name of each licensee, the title of each work reproduced, the type of use made and the fee for each use;
- requiring licensees to include attribution and copyright notice in conjunction with all reproductions and merchandise involving the artists' work;
- overseeing all licensed users of the artists' work to protect the integrity of the work and assure that the use displays the artists' name, signature and logo;
- issuing cease and desist letters for unlicensed use and issuing take down notices for online and Internet infringements;

- representing copyright ownership interests of member artists with domestic and international policy makers, including national administrations, specialized U.N. agencies and NGOs.

While ARS is successful in generating significant income for its members, it relies heavily on voluntary compliance. Enforcement against scofflaw infringers requires bringing infringement litigation. The level of licensing revenue received by ARS is not adequate to support the prosecution of infringement actions in federal courts. And, as explained in responding to the next question, registration formalities constitute an insurmountable obstacle to initiating enforcement litigation.

All of the ARS services listed above facilitate what is best described as *primary* licensing of the artist's reproduction right. They all involve the granting of permissions for identified uses on a *title-specific* basis. While authors and publishers of literary works engage in the same kind of title-specific licensing, they also monetize *secondary* use of works already published through issuance of *blanket* licenses issued by a CMO. These secondary licenses consolidate all publishers' rights and are *non-title-specific*. These blanket licenses give permission for analog and digital reprographic copying. They authorize an institutional licensee to reproduce any work in the entire catalog of a CMO. Such CMOs have long been used for blanket reprographic licensing in Europe and some other national markets. Such a system was developed in the United States only in the final decades of the 20th Century through the establishment by publishers of the Copyright Clearance Center (CCC).

The CCC offers blanket annual licenses to companies, universities and other institutions and advertises that it provides a safe harbor from infringement for all reprography beyond that permitted as fair use. However, the CCC does not share license revenues with visual artists for the visual component of publications included in the blanket license.[1]

Unlike even prolific authors of books who may produce one or two works per year, which they or their publishers register, visual artists are likely to create hundreds of works in a year, taking into account, preliminary sketches, drawings and finished works. It would be extremely costly in both time and money for artists to register all their works prior to bringing an infringement action against an illicit user.

The United States is the only country imposing this formality. This limits ARS rights holders to damages that would be little more than the modest licensing fee that would have been charged for prior consent to use the work. Thus, the costs of bringing an infringement action and seeing it through to conclusion of a trial vastly exceed the damage award that would be received as a remedy for the infringement.

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[1] The practice of CCC's counterpart reprographic rights organizations in other countries is to share a percentage of blanket license revenue appropriate to the value of image content contained in licensed publications with visual arts CMOs, such as ARS, that share the blanket license payments with its members. Like these foreign visual art CMOs ARS regularly monitors uses of member's works so that it has the capacity – similar to music rights CMOs – to distribute shares of total receipts to individual rights holders.

While ARS provides gratis legal service to its members, provided the issues concern intellectual property rights, and regularly pursues infringers on their behalf, it lacks the financial ability to bring litigation itself. In cases where the dissemination of the illicit item is international, ARS at times makes recourse to its foreign sister societies to pursue the infringer in their territories, given that the laws protecting creators, in France and Germany for example, are more stringent than those in the U.S..

With regard to the current practices of the CCC which does not distribute funds to visual artists, ARS recommends that the Copyright Office consider ways of addressing this problem that could include:

- using its good offices to bring together CCC and visual arts CMOs for the purpose of discussing the problem and mediating agreement on a solution;
- recommending to Congress the establishment of a regulatory function for the Copyright Office itself that would enable it to receive complaints and order remedies.

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

As stated above, **the formality of registration makes copyright meaningless for all but a handful of visual artists** since, overwhelmingly, artists lack the ability to register and deposit copies of their works under the existing law, much less comply with the additional burdens suggested by some commentators. Further, because few visual works are registered by artists, over time, the backlog of unregistered works increases substantially so that it is impossible to catch up, even if the artist should find the time and resources to begin registering.

It must be emphasized that nearly all artists are sole proprietors who work alone and must bear personally all of the burdens of running a business, including complying with registration formalities and payment of attendant costs. In the case of the fine arts, few visual artists are able to support themselves on the income generated by the first sale of their works much less bear the burden and cost of registration formalities. Display on the Internet, which has become a common means to market artworks for sale, immediately exposes a work to digital copying without authorization.

Artists are caught in a conflict they cannot resolve: they must produce large numbers of works and make them available to the public before sale where it is difficult to control unauthorized copying while, at the same time, they are unable to comply with the registration formalities which are necessary to enforce their copyrights.

ARS strongly urges the Copyright office to consider: **what purpose does registration and deposit of visual works serve?**

We assume that the only meaningful reason for registration is to enable those who may wish to use a work to determine whether it is in the public domain or to locate the artist/author for purposes of obtaining consent to copy.

Prior to 1978 registration played a very important role in enabling users to determine the public domain status of a work. However, the 1976 Act gave all works copyright protection from the moment first fixed in a tangible medium of expression. This continued until 50 years after the authors' death. This term was later extended under the Sonny Bono Copyright Term Extension Act to life of the author plus 70 years. As a transitional provision, the term of existing copyrights was extended in 1976 to a flat 75 years; later lengthened in 1998 to 95 years. Further, copyrights in foreign works which had fallen into the public domain because of failure to register prior to publication, were automatically restored. Therefore, today it is unnecessary for a user to search copyright office records if he knows the name and date of death of the author. The user can determine copyright status simply by knowing the age of all authors except Americans whose works were created prior to 1978. The value of registration of these works could be retained in any legislation abolishing registration though a provision that grandfathered American works created prior to 1978.

The second reason for registration is to enable a user to locate the author for purpose of obtaining permission to use a work. However, since registrations are not updated to provide the contact information of the author or assignee, this value is only theoretical. Further, searches for pre-1978 works, only relevant in the case of American authors, must be made by accessing paper records at the Copyright Office in Washington. Either the user must travel to Washington to personally conduct the search, pay the Copyright Office to conduct the search, or hire a private, professional searcher. This limits value of the registry even if it is used only to determine whether pre-1978 works of American authors have fallen into the public domain.

If a user seeks copyright information that would permit him or her to receive authorization for use, ARS is an excellent position to perform this function. ARS grants licenses for the works of more than 70,000 artists and has a very sophisticated ability to identify rights holders.

The limited practical value to users of copyright registration is in stark contrast to its negative effects on artists for whom it creates insurmountable enforcement burdens as described in the answer to question two.

If the Copyright Office wishes to strengthen copyright documentation to provide meaningful value to users it should recommend to Congress that the registration requirement for works consisting of images be either eliminated entirely or no longer required prior to infringement as a condition for receiving statutory damages. Alternatively, such registration for visual artists should be focused on the name of the artist alone and not the titles of the many thousands of works visual artists create in their lifetime. To require such registrations, would constitute an extremely unwieldy if not impossible burden on artists.

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

While it may seem counter-intuitive that a rights holders' organization like ARS would have meaningful answers to this question, ARS, in fact, is one of the most knowledgeable sources of information about user needs. That is because ARS provides services to *both* users and rights holders. Unlike registration records maintained by the Copyright Office, ARS provides up-to-date, accurate information necessary to easily license a work. Use of ARS' database is far more likely to yield documentation that can relieve users from concerns about unwitting infringement.

The rights clearance service that ARS provides to museums is listed in the answer to question two. Legitimate users of copyrighted images have no desire to engage in infringing use of works. Rather, most museums, educational institutions and editors want and need an easy way to clear rights in material they wish to use. ARS is an easy and efficient permissions mechanism for all of these users. However, ARS has developed a special service tailored to the needs of museums that routinely need to clear rights for images reproduced in catalogs, publications, reproductions, posters and merchandize of the type sold in museum stores. Through its many blanket agreements with museums and other institutions, ARS provides an easy, one-stop shop for museums to obtain copyright clearances. Through ARS, both licensors and licensees benefit.

The Copyright Office and the Congress have long struggled to deal with the fears of archivists, librarians and educators about liability for copyright infringement. This is what has led the Office to suggest possible legislation to address the orphan works problem. Of course, a work can only be an orphan if there is no way for a user to license it. As described above ARS already provides a very effective way for users to clear rights in works of visual art.

5. **What other issues or challenges should the Office be aware of regarding photographs, graphic artworks, and/or illustrations under the Copyright Act?**

ARS and its members strongly believe that the existing copyright system does not effectively serve the needs of visual arts rights holders. The root of the problem is that existing mechanisms for enforcement are either unusable or inadequate to provide the meaningful rights intended by Congress in the Copyright Act.

Because means to enforce currently are beyond the reach of artists, few efforts are made, particularly if litigation is required to compel compliance. The result is that there is little case law, and the case law that has developed reflects the disproportionate ability of deep pocket entities to hire expert legal counsel and mold the jurisprudence. Last year ARS filed briefs, as *amicus curiae* in two cases where prior decisions of the second and ninth circuits have established particularly onerous precedents for visual artists, *Kirby v. Marvel Characters, Inc.* 726 F.3d 119 (2nd Cir. 2013) and *Peary v. DC Comics.* Slip Opinion No. 12-57245 (9th Cir. 2013).

These two cases involved particularly prominent illustrators. Jack Kirby was the creator of iconic comic book characters – including Captain America, X-Men and the Incredible Hulk – that continue to generate billions of dollars of copyright revenue for Marvel and its parent company, Disney. Mark Warren Peary is the son and personal representative of the estate of Joseph Shuster, the creator of Superman, a character in graphic works published by DC Comics. In both cases the illustrators worked from home, bought their own supplies and were paid compensation

of a few dollars per page. It stretches the imagination that those circumstances could result in Jack Kirby's work considered to be made for hire. In the case of Joseph Shuster, a pension agreement with family members not specified as statutory beneficiaries of the termination right was found not to constitute "an agreement to the contrary" specifically prohibited by the statute.

In the *Kirby* case, the petition was withdrawn because the respondent agreed to settle prior to issuance of a Supreme Court order, something that happens with extreme rarity and then only if the respondent is convinced there is a high likelihood a *cert.* petition will be granted and the lower court reversed. Since the *Kirby* case involved both the work-made-for-hire doctrine and the termination right, the settlement precluded a Supreme Court decision on these important questions. Therefore, we urge the Copyright Office to advise the Congress that these are matters that require legislative review and correction.

Other issues of grave concern to ARS and other visual artist's rights organizations are the creation of a small claims court, shortening of copyright term and the imposition of new formalities. With regard to proposals for creation of a copyright small claims court, ARS believes that a better solution would be to make U.S. District Court litigation more accessible to shallow pocket plaintiffs, such as visual artists, by eliminating the requirement of registration as a pre-condition for seeking statutory damages as discussed more extensively above. With regard to a possible small claims court we would be very concerned if its creation foreclosed the ability of rights holder plaintiffs to bring infringement actions in U.S. district courts. We are open, however, to a regulatory role for the Copyright Office that could address the monopoly power of the CCC and its absolute control over the reprographic rights market.

In 2013 the Register delivered the David Nelson Memorial Keynote Address at the "Revitalizing Formalities Symposium" sponsored by the Berkley Center for Law & Technology. In the speech Register/Director Pallante suggested the possible imposition of new formalities in U.S. copyright law including re-introducing the registration requirement as a condition of copyright protection during the extended term provided by the 1998 Sonny Bono Copyright Extension Act. While the Berne Convention provides a term 20 years shorter than current U.S. and European Union law, we question whether Berne and its extended application through the TRIPS Agreement, would permit a member state such authority. The prohibition of formalities is a general rule of the Berne Convention, while the life plus fifty term is a minimum requirement. As ARS has extensive relationships with European visual arts collecting societies we can with confidence predict that there would be a significant backlash from our European trading partners and such a move would needlessly exacerbate transatlantic tensions at a time when Europe is arguably our closest ally in international trade negotiations.

It was also suggested that recordation requirements might be strengthened so as to provide better documentation of transfers of rights and current copyright ownership. As discussed earlier in this paper we strongly prefer a non-statutory system that relies on CMOs such as ARS to provide such information to copyright users. We believe that a private sector solution is preferable in that it is more likely to be able to respond efficiently and in a timely manner to changes in the technological environment, business models used by copyright-based industries, and both user and rights holder concerns.

ARS cannot list its concerns about possible changes in the Copyright Act without re-iterating its objections to possible orphan works legislation. We strongly believe that the landscape has shifted in recent years to narrow the scope of concerns of proponents of special treatment for so-called orphan works. Congressional hearings last year revealed that the academic community is now satisfied that judicial interpretation of fair use has eliminated the need for statutory change. To the extent that special circumstances – such as deterioration of media in which works have been fixed – require duplication for archival and preservation purposes, ARS does not object to carefully drafted statutory exceptions. However, such exceptions should be crafted so that they do not open the door to wider infringements. Similarly, we are sympathetic to the problems posed by unpublished works, such as photographs, long ago created that remain protected because they were subject to common law copyright prior to the 1976 Act. While it is hard to imagine how a plaintiff could gain standing to bring and infringement action in such a case, we do not object to an amendment to the Copyright Act that would provide relief in this situation.

As in the case of new formalities, ARS can assure the Office that foreign rights holders and CMOs with whom we have close contact, would be unsettled by any orphan works legislation that would go beyond the exceptions in European Union law which restricts orphan works treatment to non-commercial uses. We have taken the liberty of attaching to this submission a paper by Dr. Theodore Feder, Chief Executive Officer of ARS, that earlier was provided to the Copyright Office in response to its published orphan works report. (Please refer to Appendix A.)

In conclusion, ARS has long been concerned that the "balance" between copyright owner and copyright user interests has shifted dangerously in favor of the copyright user. Regretfully, the largest and most powerful copyright users are gigantic Silicon Valley companies with enormous market power, legal and lobbying capabilities, in comparison to which the resources of visual artists and ARS are small indeed.

Submitted on behalf of the Artists' Rights Society

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Appendix A

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ORPHAN WORKS STUDY: SUBMISSION BY ARTISTS RIGHTS SOCIETY (ARS)

Artists Rights Society (ARS) is an organization that represents more than 70,000 visual artists in the U.S. and abroad. Included among this number are some household names, such as Pablo Picasso, Henri Matisse, Marc Chagall, Jackson Pollock, Georgia O'Keeffe, Mark Rothko and Frank Stella. These however are exceptions. The vast majority of our members are not well-known, and function as small business men and women. It has been estimated that the average income of an artist in the U.S. is under $25,000 per annum. ARS also represents the visual artist repertories of all European Union countries, as well as those of Canada, Japan, Australia, Mexico and most of South America.

Adverse effect on Artists: The Disincentive to Locate The Copyright Holder

Artists would be very adversely affected by the Orphan Works bill, as it would propel many of their works into the public domain and deprive them of their right to control their own copyrights. The bill allows an infringer to reproduce a creator's work "provided he or she has performed and documented a reasonably diligent good faith search to locate the owner of the copyright." The problem here is that unless the infringer can be brought to court, at great expense to the creator, the sole decider of whether a diligent search has been made is the infringer him or herself. Alas, all too often, it will be in the interest of the infringer to *fail* to locate the copyright holder.

Contesting the Unauthorized Use

Should the copyright holder contest the infringer's unauthorized use, the only recourse is for him or her to go to court where the legislation specifically limits the financial recovery to what a reasonable buyer and a reasonable seller would have agreed to *prior* to the infringement. There is no provision for the copyright holder to *refuse* to license the work to the infringer. Nor is there any mandate for statutory damages to be applied as punishment for an illicit use. Statutory damages which can be as high as $150,000 per infringement, though rarely applied, can serve to reduce the incidence of pirated and infringing uses by the mere threat of its application. The present bill eliminates all such statutory damages.

Appendix A

Exorbitant Costs of a Court Action

The costs of bringing a court action by the artist far outweigh any benefits a successful court finding would produce, as the reward for a favorable ruling is so discouragingly low. Attorneys cost hundreds of dollars an hour and court cases may drag on interminably, nor would an attorney take such a case on a contingency basis when total damages are limited to several hundred or at most several thousand dollars. In effect, legal costs for a small business person are prohibitive, and the cost benefit analysis is such that artists would be well-advised to refrain from undertaking litigation. This of course means that the infringer is given a free hand to reproduce artistic works at will, at virtually no risk whatever. The Bill is also a very broad one. It would apply to both domestic and foreign works, both published and unpublished works and to both commercial and non-commercial uses.

There is No Business Imperative for New Legislation: If Adopted, It Would Destroy the Market for the Work of Visual Artists

ARS recognizes and honors the fair use exemptions provided by the U.S. Copyright Act. It does not impede, and in fact facilitates, the use of visual works in scholarly, press, and non-commercial educational arenas. The proposed bill, which makes no distinction between commercial and non-commercial uses, goes beyond these exemptions, as it would create a safe harbor for the most egregious exploitation of an artist's works, be it for application to coffee mugs, posters, rugs, corporate logos, advertisements, t-shirts, and boxer shorts for that matter,

without the approval of or compensation to the artist, and in spite of the damage it would do to his or her reputation. It would destroy the legitimate market for the artist's work, and nullify the protections afforded by the Copyright Act. If an infringer goes to the trouble of exploiting a work of art for commercial purposes, he or she should take the trouble and courtesy of tracking down the creator, before his or her rights are ignominiously trampled upon. In brief, visual works of art should be excluded from any orphan works bill, and in the very least commercial applications ought to be prohibited.

Violation of the U.S. Copyright Law

Section 106 of the U.S. Copyright Act clearly states the owner of a copyright alone "has the exclusive rights to do and to authorize any of the following.

(1) To reproduce the copyright works in copies or phonograms
(2) To prepare derivative works based upon the copyright works

§ 501(a) of the same law states that *"Anyone who violates any of the exclusive rights of the copyright owner as provided by section 106 is an infringer of copyright."*

Appendix A

Nowhere in the law is an infringer given the right to circumvent the copyright holder, when in the infringer's sole judgment, his "good faith search" has somewhat conveniently failed to turn up the owner.

U.S. case law makes clear that even innocent intentions are no defense to infringement. *"Intention to infringe is not essential under the (Copyright) Act." (Plymouth Music Co. v. Magnus Organ Corp., 456 F. Supp. 676 (S.D.N.Y. 1978).*

Violation of the Berne Convention

The legislation flies in the face of numerous international treaty obligations of the U.S. It violates Article 9(1) of the Berne Convention for the Protection of Literary and Artistic Works which reserves to the author the exclusive rights of authorizing the reproduction of his or her work. Our trading partners abroad would not look favorably on the negation of their artists' copyrights in the U.S. depriving foreign artists of their rights is inconsistent with U.S. treaty obligations under Berne.

Further, it fails the 3 step test of the "Certain Special Cases" exception of Berne (Article 9 (2)) since it:

1. *Does not* restrict exploitation to special cases.
2. It *does* conflict with the normal exploitation of the work.
3. It *unreasonably* prejudices the legitimate interests of the authors.
4.

The Bill's Excessive and Unlimited Scope

The bill is an extremely broad one. It makes no distinction between a commercial and non-commercial use of an infringing work and thereby places no limitation on the most blatant commercial exploitation of an artist's oeuvre. Commercial applications should imperatively be prohibited by the Act. The bill applies to foreign as well as to U.S. works, thus depriving foreign artists of their rights without due process and inviting retaliatory measures by our trading partners, which would further harm U.S. artists. Lastly, the bill makes no evident distinction between published and unpublished work, thus potentially driving one as well as the other into the public domain.

The EU Directive

The recent EU Directive on Orphan Works (dated October 25, 2012, scheduled for adoption by member states on October 25, 2014) specifically excludes the use of orphan works by commercial entities:

"Arrangements may be made, "under this Directive, to conclude agreements with commercial partners for the digitization and making available to the public of orphan works. ***Such***

agreements… should not grant the commercial partner any rights to use, or control the use of, the orphan works." (emphasis added, S.22 of the Whereas Clause)

Further, the obligations and rights of national collecting societies, which maintain addresses of their members, are deferred to and recognized.

"This Directive is without prejudice to the arrangements in the member states concerning the management of rights such as extended collective licenses, legal presumptions of representation or transfer, collective management or similar arrangements or a combination of them, including for mass digitization. (S.24 of the Whereas Clause)

Article 5 of the Directive makes this clear:

"This Directive does not interfere with any arrangements concerning the management of rights at national level."

Lastly the EU Directive does not apply to American or non EU works, unlike the proposed US Bill which draws no distinction between domestic and foreign works. The pertinent clause in the Directive is the following:

"For reasons of international comity, this Directive should apply only to works and phonograms that are first published in the territory of a member state." (§ 12 of the Whereas Clause)

Registries: Their Huge Impracticality, and the Regrettable Return of Formalities

There is much talk about establishing commercial registries of works which may then be consulted by the infringer as a part of his or her search. Any work not found on one of these registries will be assumed to be an "orphan work." This brings back the largely discredited days of U.S. copyright formalities which famously included the need to register a copyright as a condition of its protection. This provision had a particularly deleterious effect on foreign artists, who did not register their works and were thus deprived of their copyrights prior to the 1996 Restoration Provisions of the Copyright Act, designed to correct this inequity. It can be said as well that very few American artists managed to devote the time and resources to abide by these requirements. Reintroducing formalities in the form of registries would violate Berne, Article

5(2) which rejects all formalities. What artist would have the time, money, and clerical patience to fill out the forms necessary to register his or her work, let along to spend time and money digitizing then? Visual artists are not like authors of books, even prolific ones, who may produce one or two books a year. If we include sketches, preparatory studies or drawings, and finished works, an artist may accumulate hundreds or works a year and thousands of works in his or her lifetime.

It would be impossible to register all of these, and even if such an effort was to be undertaken, those works which had not yet been entered in the registry would be orphaned until such time as they were, which might take many years to accomplish, and by which time great damage would be done to their creators.

Appendix A

There is no Need for an Orphan Works Bill. Methods already Exist for the Use of Works Without the Owner's Approval

It is important to note that a would-be infringer already has three existing ways to reproduce a work without obtaining the copyright owner's approval, and that adding an orphan works regime is simply not necessary. One is the Fair Use provision of the U.S. Copyright Act which allows for reproduction in mostly educational and journalistic cases and in non-commercial settings without permission or fee.

The second occurs where an infringer in a commercial context employs a marketplace risk analysis, and decides to reproduce a work hoping the copyright holder does not come forward. If he or she does, the matter may or may not be settled for a fee or other consideration, and if the parties cannot resolve the dispute, normal court procedures are available.

Thirdly, we have seen where publishers have occasionally appended a notice to their books announcing that they have reproduced works without locating the copyright holder, but having made every effort to do so, they would be happy to make amends by inviting the owner to come forward.

All three of these methods are currently employed. They are sufficient unto themselves and certainly help to obviate the need for an orphan works bill.

Conclusions and Recommendations

In summation, the view of Artists Rights Society is the following:

1 The bill should be rejected in its entirety.

2. Failing this, we believe that works of visual art should be excluded from its scope.

3. The bill should not apply to foreign works of art.

4. The requirement for the establishment of registries (and thereby the reintroduction of formalities) should be eliminated.