July 20, 2015

Maria Pallante
Register of Copyrights
U.S. Copyright Office
101Independence 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 comment on the problems visual arts face in the marketplace. I am a professional artist and grew up in an age when the internet made it possible to not only share your art, but to gain representation and profit from sharing. Because I was able to share my work with a much broader, wider audience, I was able to garner an audience and clients as a result, allowing me to support myself. As a result, I believe I have a valuable real-life perspective on how copyright law actually works in the business world, as opposed to how some legal scholars seem to think it works or how corporate lawyers and lobbyists would like it to work for the benefit of their clients.

I'm writing to stress that for me, and for artists like me, copyright law is not an abstract legal issue. Our copyrights are our assets. Licensing them is how we make our livings. Unfortunately, I fear that many of the changes now being proposed by orphan works lobbyists would end that kind of success for me and foreclose it to younger artists.
I'll try to respond to the questions you've posed as directly as possible.

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

Two major challenges: a.) Publishers who demand that artists sign away their digital and other secondary rights as a condition of accepting assignments; and b.) Predatory competition from giant image banks.

a.) Over the last three decades, many publishers have increasingly forced artists to surrender valuable digital rights to their work by refusing to give assignments to illustrators who insist on maintaining and managing those rights themselves.
b.) As a rule, these demands do not originate from art directors who may want to use a particular illustrator, but from policies enforced by company attorneys who are indifferent to a publication's design integrity and dictate to art directors that they may only use artists who agree to sign their rights away.

Existing copyright law has opened the door to these abusive business practices by permitting work-for-hire contracts. When these agreements are imposed on freelance artists, they deprive the artist of authorship and designate the commissioning party as the art's creator. The artist becomes a de facto “employee" *for the sole purpose of forfeiting copyright,* but receives none of the benefits of "legal" employment. The artist is treated as an independent contractor in every other way: covering overhead, supplying his or her own tools of the trade, workspace, training, and covering his or her own liabilities, retirement, insurances and other costs of business. Work-for-hire undermines the very principles of authorship embodied in Article 1, Section 8 of the Constitution.

An expert on copyright law tells me that many foreign countries do not recognize work- for-hire agreements. I believe it would be a step forward for American artists if the US Copyright law was amended to repeal work-for-hire imposed on independent contractors.

b.) During the same three decades, giant image banks have persuaded many artists to register their work with them on the promise that they would open new markets for them. The registration fees for artists were not cheap. As a rule, they had to pay the image bank more than $150 per image to accept the work, but even where registration was free, the house ate into royalties with processing fees, maintenance fees and other costs.

Yet instead of opening new markets for artists, as promised, the image banks invaded artists' existing markets, lowballing prices and selling in volume to exploit their competitive advantage. Having gotten the work free, they can sell it for anything and still profit. Even the artists who had entrusted them with work have not been spared from having to compete with them. In addition to making artists compete with lowball prices for their own clients, I'm told that image banks retain commissions that range from 50% to 90%. This means stockhouse artists are often left with nothing more than a small fraction of a low fee to replace the full commissions that had once given all of us so much opportunity to do original work.

In less than a decade these commercial registries have radically undermined the markets for creative artists and there is every reason to believe that if registration is reintroduced as a condition of protecting our work that the new for-profit registries would act in the same ruthless way.

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

The two major challenges to copyright enforcement are a.) the high cost of legal fees in an infringement lawsuit; and b.) the orphan works policies now being proposed again to Congress.
a.) Currently, the only way most illustrators can afford to sue an infringer is to find a contingency fee lawyer. I asked a full-time copyright litigator to explain the

changes that would result from orphan works legislation. Here's how she explained the situation:

"Scenario One**:** Under current law, a copyright owner who has registered his copyright can get statutory damages and attorneys fees. As a result, it is possible to find a contingency fee lawyer to take these cases (i.e., copyright owner doesn't have to pay lawyer). In addition, the copyright owner usually finds that he gets more in settlement than he pays in legal fees.

"Scenario Two: If a copyright owner has NOT registered his copyright, he can only get actual damages. It is usually impossible to find a contingency fee lawyer for these cases. Moreover, it is often not wise for the copyright owner to litigate these cases anyway, because the settlement value is so small.
"Under the orphan works legislation, ALL infringement scenarios would be, as a practical matter, Scenario Two."

That's because under an orphan works scenario, ANY infringement might turn out to be an orphan works infringement. So unless all copyright attorneys were forced by law to handle such cases pro bono, they would have no incentive whatsoever to take ANY infringement case. In effect, orphan works law would be delivering a decisive legal advantage to all infringers, including bad actors.
b.) I asked another attorney to explain how a copyright small claims court would work: "By limiting remedies, the orphan works proposals would create a no- fault license to infringe. So let's look at a hypothetical small claims action that I might be obliged to bring in the future. In the 1990's, I licensed a series of pictures for one-time use for a corporate annual report. Copyright notice and credit are almost always omitted by art directors for annual reports and almost always for advertisements, in spite of the wishes of the artist to preserve his credit. Now, let's say I registered my copyright in the work as part of a group registration, the title of which was based on the annual report. I subsequently licensed some of these pictures for exclusive use in various ads in the United States and I make it a practice never to license my work for inexpensive or distasteful products.
"But let's say an infringer finds the annual report. He likes the pictures, sees no credit, and does a good faith search that fails to identify me as the owner of the copyright. He begins selling cheap products bearing my art. Under current copyright law, my remedies would include statutory damages, attorneys' fees, impoundment, and injunction for this flagrant infringement because it's damaged my exclusive right to license my work in high-end markets.

"But in small claims court, my remedy would be what? Reasonable compensation for use of my work on cheap items, and even this would be limited by whatever maximum the small claims court might set, and it would be constructed not to deprive the infringer of the profits he made in reliance on a so-called failure to locate me.

"Without the deterrent of statutory damages and attorneys' fees, and without a permanent injunction against repeat offenses by the same infringer, this

experience would now act as an incentive for the infringer to exploit other uncredited, and therefore effectively orphaned, images by other artists. In effect, he has discovered that infringing artists is a rational business decision, and this would be the same for other infringers."

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

In four words: volume, expense, paperwork and time – and if the US returns to the bad old days of registration, ruthless competition from the registries themselves.

According to biography.com, Isaac Asimov was one of the most prolific authors of all time. Yet even he wrote fewer than 500 books. That is an extraordinary volume of work for one writer, but many graphic artists produce that many images (including published and unpublished works) in a year. For example, Picasso died in 1973 and yet 42 years later, the teams cataloging his works have still not even enumerated his output. Over the course of a career, a moderately prolific artist will produce thousands, or tens of thousands of works. To register those images, the artist would have to locate them, unframe them if necessary, scan them, spot them, color correct them, keyword and catalog them, return them to their files or frames, add metadata and fill out registration forms for each one for at least two registries. All of that would take thousands of hours. And all this non–income-producing time would have to be stolen from time that the artist would otherwise be using to create new work.

In my own case, I've been a professional artist for over 10 years. Most of my work was done under the existing copyright law, which did not require me to register anything. To comply with the kind of provisions proposed in the Shawn Bentley Act, I would estimate – based on my own experience digitizing work – that it would cost me over a quarter million dollars and take me at least a decade to comply with the law. There is no way I can afford that expense, and at my age, the thousands of hours I would have to commit to the effort would effectively end my creative life. Worse, it would make me the unpaid employee of the registries. They would not only be getting my art for free. The law would force me to spend my time and money processing it for them. Then they would charge me maintenance fees and commissions for clearing my rights for clients – clients, who at the moment are still mine but would in time become theirs. *There is no way I would comply with a system like that even if I could afford to.*

I realize that by refusing to comply with a law that could end my career I might be ending my career anyway. Under the Shawn Bentley provisions, there would be no way I could stop infringers from harvesting my "orphans" and Photoshopping them into cheap "derivatives." I and every other artist in the world would then have to compete at a disadvantage against commercial infringers licensing ghosts of our own works.

The 1976 Act was a definite improvement for artists. Although it is hardly perfect, I could not have had the career I've had without it. The new proposals would be worse for us than the pre-76 law. The new technologies available to infringers would make it worse. And so if these proposals are ever enacted into law, when young artists in the future ask me for career advice, in all good conscience, I would have to tell them to consider another career.
The best solution for artists would NOT be to re-introduce registration, but to do away with it entirely, as has been done with copyright registration in the rest of the world.

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?
Like most artists, I sometimes use photographs and works by other artists as reference or inspiration. But as a rule I rely on my own sketchbooks, photos I take myself and imagination. My published work has always been the work of my own hands. I do not do collages for publication and I don't sample or mashup other people's work in my own.

My only public use of other people's material is the fair use I make of it on a blog. On it, I occasionally write about the work of some artist I admire, pay tribute to the work of a colleague who has died, or write about the place of graphic art in the long history of art in general. In those cases where I include images, I credit the sources and provide links where available. If I can't credit some work that I'd like to use, I use a work I can credit.

In a similar vein, I'm aware of multiple blogs where other people have used my work in similar non-commercial postings. In every such instance of which I'm aware, the authors of these blogs have credited me, and I have never objected to such uses. So, based on this experience, I would suggest that where the current copyright law is working, it is working as intended, compelling a certain rigor regarding the use of work that I fear will be lost entirely if the laws currently being proposed are liberalized to permit massive commercial infringement.

Libraries and museums, of course, would probably require more latitude than I should be given, for archival and preservation purposes. But it is my understanding that in their most recent filings with the Copyright Office, they believe that recent legal decisions expanding fair use exceptions are all they need for their purposes. If that's the case, then the original justification for orphan works legislation has vanished and the cause stands exposed as simply a drive to permit the commercial infringement of copyrighted art by working artists. And since there can be no just excuse for that, I, like most of my colleagues, believe that the orphan works crusade should be dropped and copyright law strengthened to "promote the useful arts."

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

There are many, but let's cite only two here: a.) the claim that there is already a viable visual arts registry that would benefit artists; and b.) the black hole that is reprographic and other secondary rights licensing in the US.

a.) I was concerned to read the claim in the Copyright Office's 2015 Report that there is already a "credible" visual arts registry that "functions as a 'hub' connecting registries in eighty-eight countries, and provides both literal and image-based searches."

Stated this way, it might suggest to Congress that such a registry actually exists, that it is stocked with artists' images, and is ready and able to start licensing those images to the world. If this is what you've been told, I'm afraid you have been misinformed. There is no such thing.

I have no doubt that one or more of the wannabe-registries could swell its inventory overnight by making sweetheart deals with giant image banks to locate their images there: these corporations have the money and resources to do it. It could then present itself to the world as a "credible" registry, and works not found in the registry declared orphaned. But if this should be permitted, it would only serve to sharpen the competitive edge these corporations already have over freelance artists. Yet corporations don't create. Individuals do. And if Congress chooses to certify a couple of visual art supermarkets that only corporate image banks could afford to patronize, the US government itself would be striking another blow against the small business owners who actually create new art. And in doing so, it would strike a blow against art itself, and with it, the public interest.

b.) Most artists are unaware – or only vaguely aware – of the massive secondary licensing already taking place in the reprographic rights markets. We have learned that in the US this licensing has been going on for over 30 years, with combined revenues of roughly $300,000,000 annually. In other countries where royalties are distributed to artists, surveys by the International Federation of Reproduction Rights Organizations show that visual arts royalties average at least 15% of total collective fees. Yet in the US, neither I nor any of my colleagues were ever informed about this potential revenue stream by anyone involved in that licensing, nor by a couple of rogue organizations who have subsequently claimed the royalties as their own "found money."

Moreover, once we learned about this growing source of income – and we had to learn about it on our own – we were informed – in writing– that artists have no standing to know anything about how these royalties – derived from the work of artists – are being collected and spent.

Because this has been going on under the radar for so long, the groups now taking artists' royalties may insist that settled expectations in the marketplace should be institutionalized into the new copyright law. This would be wrong because it would reward those who withheld financial information from rights holders by allowing them to claim the "orphaned" funds for their organizations, not once or twice, but for good. With the growth of digital licensing, royalties derived from these secondary licenses are growing dramatically. So unless something is first done to correct the current system, we fear that the creation of an extended collective licensing program will only serve to lock artists out of their secondary rights income forever.

Instead, I support Congressman Jerrold Nadler’s American Royalties Too (ART) Act of 2015. It may not be a perfect solution to the current black hole that is reprographic licensing in the US, but it contains a provision that would create an honest visual arts collecting society that would begin returning lost royalties to artists. This would at least start to bring transparency, accountability and justice to artists' secondary licensing rights, and I thank the Copyright Office for recommending this bill to Congress.

Sincerely,

Zoë Moss K.-R.
www.brainfarto.com