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July 22, 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 & U.S. Copyright Office Staff:

I am writing today in regards to the proposed changes to the copyright law as written in the Orphan Works and Mass Digitization Report 2015. What is being advocated could potentially destroy the livelihood and sole income for many artisans and small businesses, and make the act of creation extremely arduous.

The copyright act of 1976 works. It does not need to be redone or reworked and it works even in today's digital media, something that no one could have dreamed about back then. Yes, clarification has needed to be made from time to time to accommodate the ever burgeoning technology, and we've done that.

There are a couple of really troubling issues within the new suggested changes that I wish to address, and I wish to do so with real world examples and analogy, coming from my experience both as a working professional artist and as a collegiate instructor at Rocky Mountain College of Art and Design. I appreciate your willingness to hear me out as I lay out these legitimate concerns.

The first is the shift in the mentality that artwork somehow does not belong to the artist until they file for copyright. Underneath the current system, the benefit of the doubt goes to the creator, and even if they haven't been able to jump through all the legal hoops necessary to get their work officially filed with the copyright office, if they can sufficiently demonstrate they are the original creator, they still can receive moderate protection.

In researching this over the past week, the argument I keep hearing proponents for the change say is that "all works belong to the communal public good and that we all should be allowed to benefit from that artist's creation." (We all, except for the artist, apparently.) This is craziness. This is an entitlement mentality and it amazes me how people seem to thing they are somehow owed the benefits of labor that they didn't participate in. It doesn't belong to the public. It's the artist who slaved over it, spent long hours, often moonlighting in lieu of working two jobs, and who fronted the expensive costs of supplies just to make the image. Just on the financial expenses alone, the artist is usually set back significantly every time he or she creates a piece of art. Often, the only way that creator can recoup these costs is to sell the usage of that art for profit, maintaining their copyright so they can license to non-competing markets.

Financial costs aside, this does not even take in consideration the non-measurable value of time. Time is not renewable, it is fiercely limited. This is why people charge hourly for their labor, whether it is the electrician or the lawyer. No matter what the profession, people understand this and get it. Yet, for some reason, we seem to think that an artist's time is not worth anything. If an artist's labor should belong to the so-called "public good," then we are essentially saying that the artist's time has no value, it is worthless.

Yes, I do know that the new change allows for works to be protected through the private registries. It is also my understanding that these works won't have protection against being "orphaned" until officially registered, and it includes all past works, sketches, comps, etc., putting the onus on the creator and not the infringer. It would be as if the police came to a house after it had been robbed, knowing exactly who the thief was, and telling the homeowner that thief will not be charged

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because the home didn't have the latest alarm system. Again, it's craziness! The thief is still guilty of stealing—he still committed the crime! And theft of intellectual property is still theft! Why are we changing the law to benefit the thief?

Even if the intent was never to benefit the thief/infringer (even though that will be the result), securing protection through the registries is going to put all sorts of added cost burdens on the already financially strapped artist, including, as I mentioned earlier, their most important asset, their time. The artist who works during the day and creates at night will suddenly find their time for creation even more limited than it is now, and will more than likely give up.

Even for those who have made it as an artist, like myself, where my sole income comes from my art, that loss in time will translate into loss of future income due to future works never created, simply because I will be spending all my time trying to comply and get all of my works and ideas registered.

This will kill the small business. This will destroy the independent art shop. This is detrimental for the stay at home artisan. Only the big corporate giants will be able to absorb these costs as they set up teams to stay compliant. It will create an even further divide between the 1% and 99%.

However, the real kicker is the Orphan Works clause. Even if I went through all of the hoops to get legitimate, once my name somehow gets stripped away from my art, and an individual cannot discover me as the author of the creation after a "diligent" search, then they can turn around and profit from it without the fear of statutory damages. This practically legalizes theft!

There are a few excuses I hear in favor of Orphan Works and they are all bunk.

The first is this: "Well, it would be such a shame for that work to not get used since the author cannot be located." My response is, too bad. We don't make law because it would be such a shame… We make law to protect right from wrong. If it isn't theirs, they do not have the right to use it. It is SO easy to hire an artist to create a unique piece of art. The problem is, there are a lot of entities that are too cheap to do so. They want to infringe without ramification. Even if there is really and truly is an orphaned work in which nobody can find an author, why should a company or individual be free to profit from this? How the heck can the working artist compete with free at that point?! It would flood the market with free art in which artists like myself will not be able to compete in the marketplace and will simply have to shut down our art business. The irony is, that it is not beyond the realm of possibility that the artist will be competing against their own free orphaned work!

This is crazy, because it seems like only in art is this mindset somehow acceptable. It would be as if I walked by and saw the finished work of a plumber. Having looked around and not finding who the plumber happened to be after a diligent search, I decided his work was orphaned, therefore I could take ownership of it, bill the client and make some money. Not the greatest analogy, but hopefully you get the point I'm trying to make. An artist needs to have their labor protected, regardless of whether or not that work gets orphaned.

And the whole idea of a diligent search is a farce as well. With social media the way it is, and with the way things can go viral in a heartbeat, works are frequently separated from their author. It seems that with the tendencies of the Internet, the push would be to offer MORE protection over artworks, not less.

The rebuttal I hear is: "Well just make sure to watermark or sign your art." While this sounds good, it isn't always practical.

First, sometimes the final application simply won't allow for it. Fabric design is a great example. Art gets printed on fabric. Nobody wants copyright information emblazoned all over their pillow, so the notification is on the label or packaging. Pillow gets photographed. Photo goes viral. Infringer copies art because they cannot determine who did it (nobody would be able to at that point). Infringer is making money on free art.

Second, and let's just get real here, it is very easy to use the clone tool in Photoshop to remove watermarks and signatures. Recirculate the image and voila! It's suddenly orphaned.

The other reasoning I hear proponents spout out regarding why orphan works is necessary is "to protect the educational

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institutions from having to be liable for using works in the scope of educating."

Again, how is the current act a problem for this? As I understand it, educational institutions can do this already, and I do not recall a single artist suing a college or school for using their artwork in a teacher's powerpoint. This is addressing a problem that doesn't exist! The issue is using that work outside the scope of educating. If an institution, including the non-profit, wishes to use an image for their marketing, they should pay for it. If they can't find the artist, hire one. They pay for all other services: energy, legal, accounting. Why is it that we think creators shouldn't be afforded that same right?

One final point, once a work of mine has become orphaned, regardless of how, anybody can use that work for any purpose, and the artist will have no say. This means, that if a Klan member wishes to use my orphaned work to promote racist activity, I will have little control or recourse over this. I wish to maintain absolute control and conscientious objection over how my creations are used and Orphan Works will eliminate this.

In conclusion, I hope I have addressed sufficiently my concerns and thoughts regarding all of this, as a working professional artist in the field. I fear for my very livelihood, should this continue forward as proposed. I live with a handicap, and the arts have allowed me to find a profession that I can excel at and support my family. I realize this is long and I really appreciate you taking the time to read this and consider my experience.

Sincerely,

Benjamin Hummel
Artist, Instructor