July 17, 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 US Copyright Office,

I appreciate the opportunity to write to you to discuss why I think copyright law should remain unchanged, despite the perceived problem with orphan works. After reading the pdf of the proposed legislation I have serious concerns. The problem, as your presented it, is completely out of line with my experiences as an artist, and the proposed solutions could seriously affect artists ability to defend against infringement.

First, I want to give you a little background about myself. I've spent the last two years working as a graphic designer and doing freelance illustration and fine art on the side. My week involves 60-70 hours creating art of all kinds for clients. I also struggle to make ends meet, despite all the work hours, because of the high cost of my education combined with the low wages starting out as an artist. This has a huge impact on how I go about defending my copyright. Since I have almost no free time or money I rely completely on the fact that I can defend my copyright without registering them immediately. I also rely heavily on the current system of damages to defend my copyright. Without the ability to add legal fees to damage I would not be able to afford a lawyer.

Second, based on my personal experience orphaned works are not the large scale problem you claim they are. I am frequently required to find an illustration, photograph or design to substitute for an existing work that I can not license. For example I recently worked on a flier for a client that called for a vintage photo of a baseball player. The photo they sent me to use couldn't be licensed so I had to find something else to use. A quick Google search found a free to use photo of a player from the same team in the same pose, and the client was happy with the result. The same is true when I'm working on illustrations of my own. I was recently working on an illustration that needed some buildings painted in. Not only could I find suitable images quickly but I found thousands of possible images that I could license as a group for less than ten dollars. Orphan works cause me absolutely no problems, nor can I conceive of a situation in witch they would.

The pdf never referenced specific cases of orphan works causing a problem. I don't think the average artist will ever have an issue with them, so the argument they cant afford to defend themselves under fair use just doesn't make sense. There should be no reason they need a specific work that isn't covered by fair use. To be blunt, without a large body of publicly reviewed instances of orphan works causing harm to society or artists in general there is no reason to be even consider proposing this law. The fact that this is being proposed with no concrete evidence to support it disturbs me.

Third, the proposal to limit damages will cause far more problems than orphan works do even assuming your assertions are correct. Low income artists rely on those damages to protect their copyrights. People in a financial situation like mine can not afford a lawyer. The only way we can even hire a lawyer is by having a clear case of infringement combined with the ability to claim legal fees as damages.

A member of my art group recently ran into some copyright issues related to a book cover he worked on. When he went to find a lawyer he didn't have enough of a case to have a clear chance of winning, so the lawyer refused to take his case. The lawyer refused because he didn't think the odds of wining were high enough and the only way he could be paid was through the penalties in the case. Limiting damages removes one of the two keys to defending copyright. This doesn't just limit the amount of money an artist will receive. In practice it will actually stop many artists from claiming damages at all, even in clear cases of infringement, when the infringer has gone through registering the work as orphaned.

Fourth, the proposed limits are inevitably going to lead to abuse. After reading through the requirements for registering and orphan, it was clear that the system was going to be easy to use. Faking the search documentation needed would not be difficult. On top of that many copyrights are not registered until an artist finds a case of infringement. Searching through the copyright offices database is completely inadequate as a form of protection because of this. This will inevitably result in an unbearable burden of proof being put on an artist. Not only will we have to prove that a copyright violation occurred, but we will also have to prove that the infringer did not make a good faith effort to contact us. We wouldn't have to do this in court, we would have to do this to even take our claim to court. Many of us wont be able to afford the lawyer until we do both.

In conclusion the changes you're proposing are a very bad idea. The assumptions you've made about the problem are fundamentally flawed. The actual scope of the issue is far narrower than the document states. In addition some of the proposed solutions will cause far more damage to the art community than any problems orphan works could potentially cause.

Sincerely,
Nick Jizba