

September 28, 2015

Maria Pallante, Register of Copyrights
US 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 and Copyright Office Staff:

Note: I am using some of the text provided by Brad Holland and the Illustrators' Partnership of American with additional comments of my own.

Thank you for the opportunity to reply to the initial comments generated by the Visual Arts Notice of Inquiry. As a working artist/illustrator, and a writer, I support the comments submitted by the Illustrators' Partnership regarding the Constitutional issues raised by the proposed orphan works legislation.

Your executive summary indicates you are taking your cues, now, from recent judgments by the Supreme Court. These judgments are not without their consequences and critics:

According to the Court in *Eldred*, this language—and that of the Copyright Clause as a whole—“empowers Congress to determine the intellectual property regimes that, overall, in that body’s judgment, will serve the ends of the Clause.” It does not, however, specially favor the creation of new works, according to the Court.

But that cannot be right. The Court treats the Clause as if it were some kind of dry administrative scheme, and not an engine for creativity and the progress and enlightenment that creativity brings. Any fair reading of the Copyright and Patent Clause ought to give creators—scientific, artistic, and writerly—a special place. It is they, after all, who fulfill the preface’s hope and intent of furthering social progress.

Yet the majority is wrongly dismissive of creators’ role, acknowledging that “[t]he provision of incentives for the creation of new works is surely an essential means to advance the spread of knowledge and learning,” but adding that the provision of such incentives “is not the sole means Congress may use”

This is a massive understatement, at best. Without creators, in the arts (and original thinkers in the sciences), there would be little progress at

all. Thus, giving creators incentives is not just “an essential” means, it is the means, by which progress is accomplished. (Emphasis is mine.)

Finally, the First Amendment dimensions of the Copyright and Patent Clause make the argument based on the Clause’s prefatory language even stronger: Let’s assume for purposes of argument that the Clause’s preface can plausibly be read to focus more sharply not on creators, but rather on disseminators—as the Court bizarrely contends. Once the First Amendment, too, is brought into the mix, surely creators ought to come to the fore.

After all, the First Amendment is all about protecting speakers, writers, and all those who seek to express themselves without government interference...Such interests will surely speak much louder than, say, the school orchestras for which Breyer is concerned—and that’s one reason why he was right to speak up for such small and comparatively poor interests. I only wish that Breyer—and others on the Court—had also spoken up more loudly for creators generally, and for the central role they play—a role that the First Amendment and Copyright and Patent Clause clearly recognize, but that the Court somehow does not. (Julie Hilden, “The Supreme Court’s Decision in *Golan v. Holder*: Can the U.S. Government Constitutionally Pull Works Out of the Public Domain?”

<https://verdict.justia.com/2012/01/23/the-supreme-courts-decision-in-golan-v-holder>)

If I understand properly, part of your premise is that mass digitization ought to be easy because it’s too hard to gain permission of many works and the benefit to society outweighs the potential damage to the creator. In other words: someone else’s research or convenience is more important than my ability to make a living and have the dignity of a profession in the 21st century. This is outrageous for many reasons.

- Illustrator income varies greatly. Many do well with a combination of books, original art and prints, teaching, school visits, etc. Notice, however, that it takes a great deal of time and energy to market yourself, book those appointments, travel, prepare materials, etc.—and you have to keep all those income streams going, or you won’t make enough to survive. Of those income streams, for many, books make the least amount. They may be the biggest source of pride and the smallest source of means. They don’t even earn out their advance.
- Many writers are below the poverty line. Anything weakening copyright will make their situation that much worse.
(<http://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/68008-new-guild-survey-reveals-majority-of-authors-earn-below-poverty-line.html>).

- Most children's book authors I know are not raking it in and living in luxury: quite the opposite. In an industry dominated by women, speaking engagements and awards still tend to benefit white males over everyone else, although I hope that is finally beginning to change. Only a small percentage of authors made a living on royalties alone and even that is hard work.

[Article 1, Section 8](#) of the Constitution grants artists the exclusive rights to our work. It is my understanding that those rights cannot be abridged except by a Constitutional amendment. Yet the orphan works proposals the Copyright Office has recommended to Congress *would* abridge those rights. I could never again enjoy the exclusive right to any work I create if anybody anywhere is allowed to exploit it at any time, for any reason (except fair use), without my knowledge or consent. Because "orphan works" legislation would not be limited to true orphaned work, it would convert every artist's exclusive right to a non-exclusive right. That would be a fundamental change to a Constitutional provision and I do not think Congress can legally alter the Constitution by means of a statute law.

[The Fifth Amendment](#) to the Constitution creates another serious conflict. It states that no citizen's private property "shall" be taken by the government for public use without "just compensation." The work I create is my private property: Article I, Section 8 has established that. So if government lacks the right to confiscate it without just compensation, I do not see how it can grant that right en masse to the public.

The logic behind the Constitution's Copyright Clause should be self-evident: no individual can enter into any agreement to sell or license property - or dispose of it in any other fashion - unless he or she owns the property. To make the public part owner of every citizen's intellectual property - which is effectively what the proposed legislation would do - would make all contracts regarding the disposition of that property essentially meaningless. Orphan works infringements would therefore nullify millions of private business contracts between artists and the clients they've licensed work to.

When individuals knowingly interfere with the contracts or business affairs of others, it's called [tortious interference](#) and under the law there's a remedy for that. But here the interfering party would be the US government. Legislative immunity would, of course, exempt lawmakers from lawsuits for tortious interference. But by what right can they permit members of the public to interfere en masse with the contractual business affairs of each other on the slender premise that certain infringers may be ignorant of the economic or personal harm they're causing to strangers?

Proponents of the proposed legislation have stated that "good faith" infringers must be given "certainty" that if their infringements are detected, they will not be subject to penalties. And I agree that certainty in the markets is essential to the promotion

of "Science and useful arts." Yet it is the current copyright system that provides certainty. Where creators exercise exclusive control over their rights and enter into voluntary agreements with known clients there is certainty all around. All parties understand the terms they've agreed to and with whom; and all parties are in a position to monitor mutual compliance.

By contrast, any legislation that voids an author's exclusive right would make it impossible for either creators or their clients to know who, where or on what terms any particular work is, has been or will be used by others. This would inflict total chaos in commercial markets. It would not only cause economic harm to creators, but to their clients across a broad swath of the economy.

On pages 50-51 of its 2015 Report on [Orphan Works and Mass Digitization](#), the Copyright Office states that it "takes [such] concerns seriously, but does not believe that they outweigh the benefits of comprehensive orphan works legislation..."

Benefits? Benefits for whom? Not benefits for artists, who would lose their rights, but for infringers who would gain them! You are, in essence, forcing artists to pay to be data entry clerks on behalf of entities with more money, prestige, and power—who are searching for free images and text, not an artist or writer to hire. While you claim we can opt out, I noticed we can be penalized in a legal dispute if we do not comply—a judge can use our non-compliance against us in rendering a judgment. So opting out carries a very heavy risk and a price that most artists cannot afford to pay either at the beginning—to register everything—or at the end, if a legal dispute goes against them.

Mass digitization should be hard. Why?

We know what happens when creative content becomes free and available. People stop paying for it, as many fans have with music. Subscription services, sales of singles, and streaming have diminished the income of many singers and musicians, who are at least able to recoup some income with live performances. Writers and artists cannot do that. No one is going to fork over \$120 to watch me "perform" and buy a bunch of t-shirts (heaven forbid).

For many people, music is just "out there," available for listening, and they don't pay for it because they don't have to (and may not be able to afford to). The younger generation is saddled with unprecedented student debt that is probably changing buying habits for the foreseeable future. They will not be consumers in the same way older generations were and will cut expenses where they can.

If my book or artwork is scanned and uploaded, once it's on the Web, I cannot put that genie back in the bottle; it's probably been duplicated before I am aware of it. I cannot quantify lost income. I can surmise that, once people realize the book they want is probably free somewhere, they'll go after it, and that pattern becomes a

habit. Once businesses can find decent artwork for free, they will not make a budget to hire an artist. Why bother?

This change in purchasing habits may not come to pass, although I'd argue that once subscription services devalue individual book titles (or authors are compensated per read page), it's a small leap to taking and reading books for free if found online. Will it happen? No idea. But you cannot know, either. I can tell you, anecdotally, that published authors who track themselves by Google alerts are finding more searches for "Author Last Names' Book Title download free." Some readers are already beginning to bypass libraries and go right to the Web for free content that is very much under copyright. It's a theft no one sees.

One of the main reasons I still pay top dollar for audiobooks is that I cannot get my library's audiobook system to work consistently and I've given up for now, purely out of frustration. I may stop buying audiobooks for a while if self-published titles keep popping up in my search results and these titles are in no way related to my search terms (this means I am sick of seeing "erotica" no matter what I am actually trying to find—because in this case, those authors are gaming the metadata. They are deliberately manipulating the system so their books display on all sorts of searches).

The point? Technology affects our buying habits and mass digitization could hurt authors and artists if their copyrighted works are available for free download. Not only might some readers cease to pay: an individual could take that file, upload it to a distributor, set a price, and pretend to be selling the work as the author, who can ask for it to be taken down till she's blue in the face. The service provider is making money. They are not typically in a hurry to cater to authors who are not big names. Google is notorious for ignoring people too poor to sue them or too inconsequential to make a stink.

Google Play and E-book Piracy: http://www.nytimes.com/2015/08/30/your-money/roosting-the-book-pirates-from-google.html?_r=3

Do I need to spend time and money, and expose my work, in order to make it obvious that my work should not be stolen? Here, perhaps, we are at the crux of the matter. There are gray areas where we don't know the ownership of other books or artwork. While I am sympathetic—**it's not my problem and you are making it my problem.**

The *burden of the solution* should be on the people who *will benefit from the solution*. In other words, instead of making artists pay to register their copyright, perhaps you should pay artists to add work to your repository. We do, after all, own the asset you want access to.

Writing and illustrating for children is a calling, a craft, a business, and a responsibility. It takes enormous commitment and energy, and whether you know it or not, some of the best prose and art is being done in children's books today.

We are trying to right our wrongs.

Children's literature has been too white for too long. Today, the majority of our children are children of color. Many of us are dedicated to diversity in literature in all respects: race, religion, gender, ethnicity, disability, etc. It will take time, effort, and investment to correct this problem. Kids deserve the best we can give them, and that means making sure their authors and illustrators are duly protected and compensated.

As we hone this craft, writers and artists suffer rejection and failure: part of this industry is routinely getting your soul stepped on. That's the easy part. Most of us are terrible at marketing, yet it's a necessity. Many of us give up. Some of us go broke. Others join the ranks of self-publishing, which might work out for writers for adults, but has many dangerous and expensive pitfalls for the writer and artist for children (see the COPPA guidelines and penalties for infractions).

Books are, perhaps, one of the last places where we have a little sanity left because you cannot speed it up. For music, sanity comes in the collective experience of the concert. For readers, it is the contract of the book between author, story, and reader. I've been working on my novel for about ten years. I don't deserve fame, money, praise, readers, or even publication. I deserve to own it, and any related illustrations I make, without reservation, registration, or justification. I don't serve "society." I serve the story. Digitizing it and tossing it into the Internet winds could, eventually, sink my ability to keep faith with my calling. **You talk about the importance of protection religious and educational efforts, yet you do not recognize that is the lifeblood of the artist, especially the artist for children.**

What we do is ancient, and strange, and even spiritual. If you think that's ludicrous, or airy-fairy, you don't understand the fragile thing you are tampering with. You used to be stewards of the story, too, and protected it for the artist and writer. Now you are sticking up for people who have actual salaries with benefits. Wouldn't that be nice. Until quite recently, the National Football League was a non-profit. Do you really want to give such organizations carte blanche to use our work? Are you in favor giving them the leverage in a legal dispute?

The Sexism and Racism of This Proposed Approach

Globally, protecting art and artists has never been more important. How will thousands, perhaps millions of female artists and artisans pull themselves out of poverty if they have few ways to protect their intellectual and creative property? Are you truly prepared to take the position that the inconvenience of orphan works outweighs their survival? The Web is global, not based in the United States.

What recourse would an international artisan have if someone takes her design, manufactures it for less, and puts her out of business? Is she supposed to register with your database, too? How would she do that either financially or technologically? What is “reasonable” compensation for her loss and who has the power to decide that?

Hundreds of thousands of people in the developing world, largely women, participate in the artisan sector. For many, their livelihood depends on income earned from their artisan activities. Behind agriculture, **artisan activity is the second largest employer in the developing world**. Yet, artisan enterprise is not generally considered a key driver of economic growth, nor looked to as a major component of development assistance efforts.

The depth of the economic impact of **artisan enterprise is often not fully appreciated**. The artisan sector generates income, creates jobs, fosters community development, sustains ancient techniques, and safeguards culture and meaning that is an essential component of healthy and sustainable development--development that is grounded in the uniqueness of people and place. In conflict regions, economic community through artisan work can promote reconciliation, healing, and empowerment.

Better integrating artisans into global commerce would increase the incomes and standard of living of many individuals and their families in the developing world, yielding micro-economic benefits that, properly scaled, could collectively transform the economic landscape of certain nations as a whole. **The untapped economic development potential of the artisan sector makes a powerful case for establishing the Alliance for Artisan Enterprise**--a group of key individuals, institutions, corporations, and non profit organizations that work together to support, elevate, and expand the artisan sector, with encouragement from the U.S. Department of State's Office of Global Women's Issues.

(<http://www.allianceforartisanenterprise.org/opportunity/>)

To my knowledge, while galleries and critics primarily laud white male artists, the majority of U.S. art students are female. You are compromising copyright at exactly the time when art schools will be graduating more women with more debt. Women run the majority of small art businesses on sites like Etsy. Women are the future of art and craft.

You don't get to ignore this reality. Copyright is global whether we like it or not. The last illustration job I bid (which I lost), I was up against another American artist and a firm in Indian, who came in at the lowest bid, lower than minimum wage if I'd calculated my time that way. I could not compete with their price even if I'd wanted

to. Justice Breyer has written a book on this problem. If you want to sink your intellects into something, then please tackle that problem:
<http://www.npr.org/2015/09/14/439514086/law-beyond-our-borders-justice-breyer-is-on-a-mission>.

For the sake of guaranteeing certainty to infringers in the secondary rights market, the proposed legislation would create perpetual uncertainty for creators and their clients in the country's primary markets. This would be a total reversal of the principle of copyright as expressed in Article 1, Section 8 of the Constitution; and with all due respect, a Constitutional provision cannot be reversed legally except by means of a Constitutional amendment.

The people who put this proposal together like and value art, but seem to consider artists to be an annoying impediment to someone else's full use and enjoyment of art. You don't understand, or don't care, how long it takes to be good (or even decent) at making images and writing fiction. It's hard. It's often disheartening. The one thing I can count on is that my intellectual property is mine. You take that away, and I am nothing as an artist and writer, because I control nothing.

Please stop kicking the puppies.

Kate Barsotti

516A Gillis
Kansas City MO 64106
artist@katebarsotti.com