



MCDERMOTT MEDICAL ILLUSTRATION
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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 and US Copyright Office Staff:

I appreciate the opportunity to convey to you my feelings of why it is so important to retain the US Copyright Laws as they currently exist and not to change them. I sincerely hope you have on file a letter I wrote to you about Remedies for Small Copyright Claims (76 FR 66758) dated January 17, 2012, as well as the letter I wrote on July 14, 2015.

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

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 in future, or have created in the past, 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 works, 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 cannot believe that 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 1, Section 8 has established that. Therefore, if government lacks the right to confiscate it without just compensation, to me, 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 have licensed work to throughout the course of their careers.

When individuals knowingly interfere with the contracts or business affairs of others, it is called **tortious interference** and under the law, there's a remedy for that. But in this case, 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 others?

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. 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. When 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 rights 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 also to their clients across a broad spectrum of the economy.

On pages 50 – 51 of its 2015 Report on Orphan Works and Mass Digitization, the U.S. 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 to **whom**? This would mean total chaos for artists, like myself. We would all lose the rights to our creative works, that we have struggled so hard to create and retain rights to. The only benefits would be to infringers who would be able to find our works and use them, for free, because the U.S. Government decided it was OK!

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 this country's primary markets. This would be a total reversal of the principle of copyright as expressed in Article 1, Section 8 of the U.S. Constitution. With all due respect, it is my belief that a Constitutional provision cannot be reversed legally except by means of a Constitutional amendment.

Thank you again for the opportunity to express my thoughts about this matter that is so incredibly important to me as an artist, and to all my artist, illustrator, and other creative colleagues.

Respectfully submitted,



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Association of Medical Illustrators

