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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:

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

Supporters 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. This suggestion sounds to me like 'we want a law that lets "good faith" shoplifters to be confident they will not be subject to penalties for stealing stuff'!

Under the current law, 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. Writing a law to allow people to steal someone else's work because it's allegedly too hard to find the author or to commission a new work is both immoral and unconstitutional. If the users of any artist's content want confidence that they will not be subject to penalties, they should buy the right to use our work.

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. It would, for instance, prevent me from selling the exclusive rights to an image to a particular client, because I could not give them the certainty that the product they bought would remain theirs.

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? What benefits? The only people who would benefit are those who are unwilling to pay for the work of a skilled artist in the first place.

As I have already said, the proposed legislation would only benefit infringers in the secondary rights market. It 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.

Article 1, Section 8 of the Constitution grants artists exclusive rights to our work. It is my understanding that those rights cannot be abridged except by a Constitutional amendment. The orphan works proposals the Copyright Office has recommended to Congress would unfairly and unconstitutionally abridge those rights.

Because the proposed "orphan works" legislation would not be limited to truly 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 1, 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.

If a new law is needed, it should be a law that funds a system similar to a simple Google search to make it easier to identify the creator of a work, so no one can claim to be a "good faith infringer". That would end the uncertainty that the laws proposers say is hurting business without hurting the very people who create the images that are so valuable to modern commerce.

Thank you again for the opportunity to comment on the proposed legislation.

Sincerely,

Deirdre M. Murphy