

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:

In reply:

As an artists agent, I support the comments submitted by the Illustrators Partnership regarding the Constitutional issues raised by the proposed orphan works legislation.

Article 1, Section 8 of the Constitution grants artists the exclusive rights to their work.

I understand those rights cannot be abridged except by an amendment to the Constitution. Yet the orphan works proposals the Copyright Office has recommended to Congress *would* abridge those rights. Our artists could never again enjoy the exclusive right to any of the work they create if it is allowed to be exploited at any time and for any reason.

"Orphan works" legislation would not be limited to true orphaned work, it would convert every artist's exclusive right to a non-exclusive right. It would be a fundamental change to a Constitutional provision and Congress cannot legally alter the Constitution by means of a statute law.

The Fifth Amendment to the Constitution creates another serious conflict.

No citizen's private property "shall" be taken by the government for public use without "just compensation."

The work our artists create is their private property per Article I, Section 8. So, if government lacks the right to confiscate it without just compensation, it therefore cannot 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 unless 'they own' 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.

Individual interference with the contracts or business affairs of others, is called *tortious interference*. In essence, here the interfering party would be the US government.

Legislative immunity would exempt lawmakers from lawsuits for tortious interference. What right permits members of the public to interfere with the contractual business affairs on the slender premise that certain infringers may be ignorant of the economic or personal harm they're causing?

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 a creator'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 the spectrum of the economy.

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

Not the benefits to the artists legally entitled to the bundle of rights, but to infringers who would undeservedly gain them!

For the sake of guaranteeing certainty to infringers, the proposed legislation would create perpetual uncertainty for creators and their clients in the country's primary markets.

This is nothing less than a total reversal of the principle of copyright as expressed in Article 1, Section 8 of the Constitution. With all due respect, a Constitutional provision cannot and must not be reversed legally, except by means of a Constitutional amendment.

Thank you for the opportunity to express my opinion.

Sincerely,

Will Sumpter
Agent and Gallery Owner