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October 1, 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/illustrator, 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 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 degrade 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!

For the sake of guaranteeing certainty to the sub-class of 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.

Thank you again for the opportunity to express these thoughts.

Sincerely,

Keith Negley