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COMMENTS IN RESPONSE TO COPYRIGHT OFFICE NOTICE OF INQUIRY
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Introduction.

The following general observations on the current state of copyright as it applies to visual artists are submitted in response to the comments submitted to the Copyright Office on July 23, 2015. They are based upon 24 years of legal practice on behalf of independent authors—primarily visual artists—and the commenter's prior 20-odd years working as a self-employed visual artist.

My original comments, submitted on July 23, 2015, addressed the lack of copyright information among not only among the general population, but within the visual arts community. This was overwhelmingly borne out by the comments which artists submitted in the original round of comments; the artists seemed largely unaware of both the need for registration and of the registration mechanics by which they could register the bulk of their work at relatively low cost.

The artist statements in the earlier round of comments were also largely aimed at what appears to be a chimera. While it is true that the various proponents of unnecessary solutions to the nonexistent problem of "orphan works" routinely and repetitively propose action on this fabricated matter, there does not appear to be any actual bill or proposal to this effect before the Congress at present. Accordingly, this reply comment will merely amplify, briefly, upon my earlier comments:

A. Enforcement.

1. Registration. The need for registration as a prerequisite to enforcement needs to be stressed among creators in the visual arts community. Too many visual artists still do not

take advantage of registration, leaving themselves without recourse in the event of infringement.

2. Litigation. Thus far, copyright litigation—that is, the structure of private enforcement that has existed since the 1909 copyright law, and has continued under the revised copyright law of 1976—has worked relatively adequately to address issues of infringement. The Internet was created while the 1976 law was in force, and has flourished and grown under that law. There has been no wholesale quashing of innovation in the digital world; no diminution of works in film, or music, or theatre, or the visual arts. There has been no dearth of commentary, of fair use, of new works created with or without the aid of licensed material.

There are, and remain, issues of usage and infringement, but such issues will always be with us—and the fact that new cases and controversies continue arise is no reason to embark upon any massive effort of re-drafting or reconfiguring the law itself, especially as such issues as the Internet presents are still of recent vintage. The arising of new cases and controversies is itself a constant, and no reason in itself to essay a revision of the law. The law, instead, should be left in place to do the job it has done adequately up to now. Indeed, to the extent increased registration may bring about a rise in copyright litigation, this is to be applauded and encouraged, for this process will ensure that the law will be adapted and updated, by the natural process of addressing genuine issues.

3. Digital Millennium Copyright Act. This provision of the copyright law remains the bête noire of the opponents of the current copyright law, both because it criminalizes the processes of infringement and because it permits authors to enforce their copyrights without going to full litigation. The DMCA is not by any means perfect—but it offers an interim solution to the problem of infringement. A permanent takedown provision, rather than the temporary takedown for which the DMCA currently provides, would give too much power to potentially malicious complainants—but the temporary takedown currently in place offers rightsholders an opportunity for redress without the expense of litigation. The DMCA provisions should remain in place.

B) Orphan Works.

1) A Non-Existent Problem. It cannot be too strongly re-stressed that the "orphan works" problem is not a problem of copyright law, but of corporate policies which seek easy usage without the need for due diligence. Nobody had heard of "orphan works" until the anti-copyright bar invented the term some ten-plus years ago; users of copyrighted works were perfectly capable, under both the old law and the current law, of managing usage and rights without a statutory solution.

In other words, when the uncertainty of whether or not a copyright holder had renewed a copyright term was most acute—at a time when the term was shorter and renewal was required to gain a full term, when people were much more difficult to trace, and it was therefore more difficult to find rights transferees and successors at interest—"orphan works" were not an issue. It is only now that **no** uncertainty exists regarding the length of the copyright term, only now that it is **easier than ever** to trace people by means of the Internet, that Americans are being asked to believe "orphan works" present a copyright problem.

The "orphan works" concept rests on two utterly contradictory propositions, advanced simultaneously by its advocates: that an "orphan work" is ***so valueless*** that the legitimate copyright holder has no interest in it, yet ***so valuable*** to everyone **except** the copyright holder that the copyright holder must be legally compelled to grant others free use of it.

2) An Unnecessary Solution. "Orphan works" advocates propose to solve the nonexistent problems they have posited by truncating, pruning back, or otherwise drastically reducing the copyright term. The orphan works advocates and anti-copyright campaigners never tire in coming up with new and ingenious ways to shorten the copyright term or to make it onerous for authors and copyright holder to retain their rights in their own creations—all the while attempting to make it seem as though the authors of creative works **owe** their creations to those who would use them for free. Such proposals, wholly antithetical not only to the current copyright law, but to its authorizing

language in Article I, Section 8 of the Constitution, and to fundamental common sense, are the stock in trade of the "orphan works" proponents.

Conclusion. There is much room for improvement in the current status of copyright education, copyright recordation and registration, and copyright database searchability. All of these things can, and should, be accomplished without changing the nature, or the term, of copyright protection itself; without introducing the concept of "orphan works" into the law, and without removing the protections for authors, including the protections of the DMCA, which are already there. It is to be hoped that the Internet companies, whose formidable search engine and database abilities have been so intimately involved with creating the current confusion in protection and enforcement, will be willing to partner with the government to assist in undoing some of the chaos their technological innovations have wrought.

Respectfully submitted,

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