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July 17, 2015

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 the Copyright Office Staff:

Thank you for this special Notice of Inquiry. We deeply appreciate the opportunity you've afforded all artists to respond individually to the challenges we face as working professionals. In the interest of brevity, we'll confine these comments to your question #5. We trust that our previous comments have already covered questions 1- 4, and as those comments are posted on the Copyright Office website, we'll simply add links to them at the end of this letter.

5. What other issues or challenges should the Office be aware of regarding photographs, graphic artworks, and/or illustrations under the Copyright Act?

Because **Article 1, Section 8** of the Constitution grants authors the exclusive rights to their work, it is our understanding that those rights cannot be abridged without a constitutional amendment. While we're sure that the orphan works proposals the

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Copyright Office has recommended to Congress are well-meaning, in the rough and tumble business world where we work, they would effectively abridge those rights. That's because no author (or citizen, for that matter) could ever again enjoy the exclusive right to any work he or she creates if any other US citizen anywhere is allowed to exploit those same works at any time, for any reason (except fair use), without the authors' knowledge or consent. The orphan works proposals under consideration would redefine millions of copyrighted works as orphans on the premise that *some might* be. Yet difficulty on the part of some user to find some author should be insufficient grounds for abridging the Constitutional rights of any US citizen.

In addition to being a Constitutional right, copyright law is a business law. This is self-evident from the language of the Three-Step Test. As you know, **Article 9.2** of the Berne Convention places strict limits on the scope and reach of a member country's exceptions to an author's exclusive right. Those exceptions must be limited to certain special cases where the reproduction does not conflict with the author's normal exploitation of the work and does not unreasonably prejudice the author's legitimate interests. Orphan works infringements would nullify millions of private business contracts between authors and the clients they've licensed work to. This would not only cause economic harm to the authors, but to their clients as well. How many private parties will end up suing each other for breach of contract in hopes of making the other party pay for their loss simply because the government itself had passed a private property law breaching their contracts?

When individuals knowingly interfere with the contracts or business affairs of others, it's called tortious interference. "Tortious interference is a common law tort allowing a claim for damages against a defendant who wrongfully interferes with the plaintiff's contractual or business relationships."¹ So in effect, the government would appear to

¹ The Legal Information Institute of the Cornell University Law School
https://www.law.cornell.edu/wex/tortious_interference

be proposing a grant of blanket amnesty in advance to any infringer who interferes with the contractual or business relationships of millions of authors, small business owners and private parties, so long as the infringer believes he or she is acting in “good faith.” Legislative immunity may 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?

The work any citizen creates is that citizen’s private property. Article 1, Section 8 has established that. And the **Fifth Amendment** to the Constitution states that a citizen’s private property “shall” not be taken by the government without “just compensation.” Legal theories aside, it makes little difference in the real world that orphan works recommendations would permit infringed authors to “come forward” after the fact in an effort to locate their infringers, track them down and either ask for payment or file a lawsuit. Once a work has been infringed, no author can successfully bargain for more money than the infringer is willing or able to pay. This moots the entire issue of “just compensation.” But if government lacks the right to confiscate an individual’s property without just compensation, by what mandate can it grant that right en masse to the public?

The Copyright Office says that for purposes of orphan works infringement, “there should be no distinction as to whether a work is currently being exploited [by the author], or whether it was created decades ago.” No difference, perhaps, except to those working artists who rely on the licensing of their work – past *and* present – to make a living. Furthermore, since 1978, all authors (and citizens) have relied on the protections afforded them by the 1976 Copyright Act. That law provided each author automatic copyright protection for his or her work from the moment the work was created. **Article 1, Section 9** of the Constitution states that “No Bill of Attainder or ex post facto Law shall be passed” by Congress. Therefore any ex post facto legislation that permits the

infringement of work created since 1978 would seem to be abridging yet another Constitutional right.

The Copyright Office has proposed that corporate interests be permitted to mass digitize the world's copyrighted work, so long as it is limited to "non-profit educational or research purposes." On its face, this would appear to be a charitable exception to Article 1, Section 8. But what provision in the Constitution permits the government to make the public a gift of certain citizens' private property, even for charitable purposes? If this would not actually be a Bill of Attainder it would have the same effect. In addition, there is no guarantee that if mass digitization is permitted even on such narrow grounds, that certain special interests might not soon begin to lobby for a redefinition of what constitutes "education" and "research." Nor does it account for the likelihood that various commercial entities will re-organize themselves as legal non-profits for the specific purpose of infringing. Claiming that you are only supplying content for educational or research purposes could be a vast umbrella for sheltering a multitude of abuses.

In addition to these risks, mass digitization risks harm to the authors whose work would be its target. Many of these artists have had to acquire specialized education and develop specialized skills through years of dedicated study and work. Medical, architectural, historical and general science illustrators, aviation artists and others are all required to produce work that not only meets high artistic standards, but is technically accurate as well. To make their work free to others on the premise that it serves educational or non-profit interests would rob them of the return on their investment of time, money, education and experience. And by permitting others to make use of their work as "derivatives," government risks having the technical aspects of that work distorted, and with it, the true educational purposes it would purport to further.

Yet slippery-slope issues aside, in the real world we all know that many of the non-profit educational and research organizations are among the best-endowed and most profitable institutions in the world. A college education is not free. The heads and staffs of these institutions rarely work pro bono. Nor are their independent suppliers legally obligated to supply their goods and services at their own expense. So why should the creators of intellectual property, many of whom are independent contractors with no other source of income, be targeted as exceptions? As with the broader aspects of the orphan works proposals, we're afraid that mass digitization, even on these narrow grounds, would abridge the basic Constitutional protections cited here and would work against the mandate in Article 1, Section 8 for government to "promote [the] useful arts."

Mass digitization would violate every step of the Three-Step Test. By definition it would NOT limit exceptions to "certain special cases." The Copyright Office has already acknowledged that. But by violating the first step, it would, by extension, violate the other two. There is simply no conceivable way to mass digitize even a narrow segment of the world's intellectual property without prejudicing the economic and legitimate interests of at least some rightsholders. Are we to assume, then, that a law has passed muster if it only harms *some* innocent parties and not others? And finally, "[t]he three-step test may prove to be extremely important if any nations attempt to reduce the scope of copyright law, because unless the [World Trade Organization] decides that their modifications comply with the test, such states are likely to face trade sanctions."²

The possibility of trade sanctions by foreign governments would be particularly acute in this case because the US proposals would permit the infringement of foreign work by American infringers. This would not only oblige non-US artists to file their entire lives'

² Entertainment Law Outline, Prof. John Kettle, Rutgers University, Newark, p.11
<http://www.outlinedepot.com/schooloutlines.aspx?schoolid=182>

work with American for-profit registries or see it potentially orphaned in the US; it would compel them to file lawsuits in American courts over infringements that would not be legal anywhere else in the world.

We doubt that many foreign artists will be any more able to comply with the registration and enforcement provisions proposed for this legislation than would most American artists. And it's unlikely that many of our country's WTO trading partners would look the other way as their citizens are challenged to comply with a law unique to the US; especially if that law harms their economic interests in contradiction of Berne. These countries would be much more likely to retaliate.

If this were to happen, it is not US lawmakers who would suffer the loss of money and rights, nor the corporate lawyers and legal scholars who have lobbied for these changes in the law. The victims would be the authors and private citizens whose creative work, both professional and private, would have slipped beyond their control and into the public domain where it could circulate in various permutations, perhaps forever, with an American orphaned work symbol still attached to it.

A decade ago, when orphan works legislation was first proposed, we were told that it was necessary so that libraries and museums could digitize their collections of old work by unknown authors. We were told this was needed for archival and preservation purposes. But last year, at the Copyright Office Roundtables, attorneys for these institutions said that recent court decisions expanding the scope of fair use had virtually obviated the need for such legislation.³ So if that's the case, then the original

³ Comments of Jonathan Band, Library Copyright Alliance; and David Hansen, Digital Library Copyright Project, University of California, Berkley School of Law & Law Library, University of North Carolina School of Law; Transcript of the Orphan Works and Mass Digitization Roundtables; Session 1: "The Need for Legislation in Light of Recent Legal and Technological Developments"; March 10, 2014.

Mr. Band: "[O]ur view for the library community...[is] that the fair use jurisprudence as it has evolved over the past 5 to 10 years, certainly since the last [2005] roundtable, has really diminished the need for

justification for orphan works legislation has vanished, and the terms of the Shawn Bentley Act would seem to serve no other purpose now than to permit the commercial infringement of work by living artists. And since that would abridge the Constitutional rights of authors guaranteed in Article 1, Section 8, we're left to wonder what possible benefits accrue to society by incentivizing infringement at the expense of creation.

Our position on this subject has not changed since 2006, when we testified before the Senate Intellectual Property Subcommittee:

“We believe the orphan works problem can be and should be handled with carefully crafted, specific limited exemptions. A limited exemption could be tailored to solve family photo restoration and reproduction issues without otherwise gutting artists’ and photographers’ copyrights. Usage for genealogy research is probably already covered by fair use, but could rate an exemption if necessary. Limited exemptions could be

orphan works legislation.

“We’ve always seen the problem largely as a gatekeeper problem, that the kinds of uses we wanted to make have always been fair use, that it was simply a matter of convincing our gatekeepers that it was fair use. But now with these recent cases, it’s a lot easier to do that.

“And it’s not just the fair use cases, it’s the combination of the fair use cases plus the eBay decision in the Supreme Court concerning the standards for injunctive relief as now it is being applied. That was, of course, a patent case. Now its being applied in the copyright context. And so that reduces the problem of injunctive relief. And so from that perspective we think that the status quo is a pretty good place.” (pp.16-17)

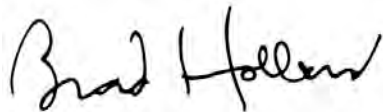
Mr. Hansen “[O]ver the course of the last year we’ve gone around and worked with and had conversations with over 150 different libraries and archives of all different varieties, large academic libraries, small local public libraries, small historical societies.

“And the general sense that we’ve got from every group that we met with is that there’s increasing comfort with relying on fair use as a means of making orphan works available...we’ve heard the same rationale from all of those groups that Jonathan just talked about. There’s a strong sense that those uses that libraries and archives are making are transformative. And then for orphan works in particular within the collections there’s a strong argument that there’s very little market harm.” (pp. 19-21) <http://www.copyright.gov/orphan/transcript/0310LOC.pdf>

designed for documentary filmmakers as well. Libraries and archives already have generous exemptions for their missions. If their missions are changing, they should abide by commercial usage of copyrights, instead of forcing authors to subsidize their for-profit ventures.”⁴

Once again we thank the Copyright Office for issuing this special Notice of Inquiry; and we ask you to please recommend to Congress that the House Judiciary Subcommittee conduct further hearings to take the direct testimony of artists, both visual artists and others, regarding the challenges that all creative authors face in the digital era.

Respectfully submitted,



Brad Holland, on behalf of my colleagues and of any visual artist who shares the concerns expressed here.

Our responses to questions 1-4 are embodied in these previous comments:

Remedies for Copyright Small Claims January 17, 2012:

http://www.copyright.gov/docs/smallclaims/comments/27_ipa.pdf

Orphan Works and Mass Digitization, Initial Comments February 3,

2013: http://copyright.gov/orphan/comments/noi_10222012/Illustrators-Partnership-America.pdf

Orphan Works and Mass Digitization, Reply Comments March 6,

2013: http://copyright.gov/orphan/comments/noi_11302012/IPA.pdf

Orphan Works and Mass Digitization, Additional Comments, May 21,

2014: http://copyright.gov/orphan/comments/Docket2012_12/American-Society-of-Illustrators-Partnership%28ASIP%29.pdf

⁴ Senate Testimony of Brad Holland, Illustrators' Partnership of America, April 6, 2006.

<http://www.judiciary.senate.gov/imo/media/doc/Holland%20Testimony%20040606.pdf>