



March 6, 2013

Maria Pallante  
Register of Copyrights  
US Copyright Office  
101 Independence Ave. S.E.  
Washington, D.C. 20559-6000

RE: Notice of Inquiry, Copyright Office, Library of Congress  
**Orphan Works and Mass Digitization (77 FR 64555)**

**Reply Comment of the  
American Society of Illustrators Partnership**

On behalf of 4,500 of the most prolific and widely published cartoonists and illustrators in the world who are members in the 12 organizations comprising our partnership, we, the American Society of Illustrators Partnership (ASIP), unanimously endorse and adopt the Orphan Works reply comments submitted under separate cover on this date by our colleagues at the Illustrators' Partnership of America (IPA). Please also note that many officers or representatives of ASIP's member organizations previously submitted individual papers regarding this legislation to the U.S. Small Business Administration's *Orphan Works Roundtable* in 2008. These were appended to the February 2013 IPA Comment.

The *Orphan Works Roundtable* is online:  
<https://vimeo.com/channels/artistsrights>

**Thank you for the opportunity for a Reply Comment.**

We would like to reiterate and clarify some critical points on behalf of visual artists.

- We do not object to a precise and limited exception to copyright law that would give certainty to libraries and archives to carry out their preservation and cultural heritage missions.
- We are adamantly opposed to extending any orphan works exception or grant of use to commercial actors that would invade commercial markets.
- Previous legislation overlooked artists' current and future rights. It also imposed draconian registration formalities of such magnitude that most artists would have been unable to comply.
- The legislation would have pre-empted artists from engaging with continuing technological advancements for exploitation of our creative works.

- Illustrators' Partnership of America
- Association of Medical Illustrators
- American Society of Architectural Illustrators
- National Cartoonists Society
- Guild of Natural Science Illustrators
- San Francisco Society of Illustrators
- Pittsburgh Society of Illustrators
- American Society of Aviation Artists
- Society of Illustrators of San Diego
- Society of Illustrators of Los Angeles
- Illustrators Club of Washington DC,  
Maryland and Virginia
- Association of American Editorial Cartoonists
- Illustrators-at-Large (nonaffiliated)

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## Current Rights

Visual artists repeatedly warned that *licensing contracts* were completely overlooked in the 2006 and the 2008 legislation. The network of contracts and agreements – the very fabric of the business of copyright that surrounds the marketing of images – was ignored. The legislation threatened the entire commerce of visual art licensing.

Each visual artist holds a rights repertoire of their life's work. Artists are engaged in licensing contracts with their images on a constant, renewed and ongoing basis. Some of these licensing contracts are *exclusive*.

David Carney, author and publisher of *Tech Law Journal*, noted this deficiency in the 2006 bill as well.

“... the bill would result in Section 514 status being extended by courts to works that were infringed immediately upon creation, where the author is alive, in business, and licensing the work.”<sup>1</sup>

The orphan works exception as previously defined would unleash a torrent of unauthorized usage that would throw artists into multitudes of breach of contracts. Because the legislation prohibited injunctions, in recognition of the infringer's investment in utilizing an “orphaned” work, it ensured that *artists' exclusive rights could never again be effectively exercised*.

Moreover, *the right to exclude* is fundamental. Yet, the right to exclude to protect our reputations and preserve the integrity of our works was another casualty of orphan works legislation. Artists rely on copyright for creative control over our works. It prevents corrupt editions. It protects the privacy of our unpublished works and early drafts. It is this protection of original authorship that *guarantees an artist's independent voice*, now and for posterity.

Orphan works and mass digitization exceptions that invade working commercial markets will trap valuable visual works in markets we would have avoided, and degrade and devalue both artists' reputations and their repertoires. Infringers and digitizers will be unfairly competing with the visual artists themselves.

## Future Rights

Orphan Works legislation ignored artists' future rights. The *exercise of termination rights*, established with the passage of the 1976 Copyright Act, **begin this year** in 2013 for works whose copyrights were transferred in 1978, and will continue into the future

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<sup>1</sup> May 22, 2006, Rep. Smith Introduces Orphan Works Act of 2006, *Tech Law Journal*, <http://www.techlawjournal.com/topstories/2006/20060522.asp>

with **each passing year**.<sup>2</sup> Congress realized that many important writers, musicians and artists had signed away their copyrights for little or no money early in their careers. To protect these authors from permanent loss of an inequitable deal they entered into when they had little negotiating skill or leverage, Congress gave authors and their heirs the exercise of termination as another opportunity to negotiate a better deal, or control the work themselves.

Some artists have been waiting decades to reclaim rights. They should not now face the prospect that these rights will be foreclosed.

### **Technological Shifts**

The challenge of technology and copyright is not the “antiquated”<sup>3</sup> notion of a copyright system.

“Copyright was technology’s child from the start.”<sup>4</sup> In his seminal book, Copyright’s Highway, From Gutenberg to the Celestial Jukebox, author and copyright scholar Paul Goldstein imagines the celestial jukebox of the future – a digital repository of books, movies, and music available on demand, and where transactions could be distributed among all rightsholders.

Copyright was, is, and *should remain* the legal mechanism to connect users and consumers to authors and publishers as technology continues to create new distribution methods, uses and markets.

The answer to any orphan works and mass digitization policies before this new Copyright Office administration is not to diminish rights or remedies for independent authors, or impose new and crippling formalities, but to ensure that independent authors can thrive in the ever-changing creative ecosystem, that exclusive rights are not compromised, and incentives are preserved (and restored).<sup>5</sup>

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<sup>2</sup> USC 17, § 203. (a)(3) (2009). Termination of transfers and licenses granted by the author. (Enacted under The Copyright Act of 1976. The changes of The Copyright Act of 1976 went into effect January 1, 1978). If an artist sold the copyright before 1978 they, or their heirs, can take it back 56 years later.

<sup>3</sup> [http://www.copyright.gov/orphan/comments/noi\\_10222012/Digital-Media-Association-DiMA.pdf](http://www.copyright.gov/orphan/comments/noi_10222012/Digital-Media-Association-DiMA.pdf)

<sup>4</sup> Paul Goldstein, Copyright’s Highway, From Gutenberg to the Celestial Jukebox, rev. ed., Stanford Law and Politics, 2003.

<sup>5</sup> Michael Mabe, CEO of the International Association of Scientific, Technical and Medical Publishers (STM) comments that STM publishers have been actively engaged as a representative stakeholder on these same issues in Europe. He notes that the progress has been achieved the European because “The legal vehicle enabling these access initiatives is licensing, as opposed to reduced level of copyright protection by way of exceptions or limitations.”

[http://www.copyright.gov/orphan/comments/noi\\_10222012/International-Association-STM-Publishers.pdf](http://www.copyright.gov/orphan/comments/noi_10222012/International-Association-STM-Publishers.pdf)

The prototypes of the celestial jukebox have been forming for many years now and is nearly here, except that it has thus far foreclosed independent authors.

The increasing economic hardship on contemporary creators is not a new development. The loss of the revenue share earned by visual artists began with the uncompensated exploitation of our secondary rights through publishers' reprographic licensing. Revenue from photocopy licensing that began with the enactment of the 1976 Copyright Act, and was followed by mass digitization of print archives, has been withheld from independent authors whose contributions are contained in collective works.

This impasse remains unresolved, in part because of publishers' intransigence to acknowledge the copyrights of independent authors in their collective works, in part because of the inability of independent creators to bargain equally, and in part because of the toxic rise of "advocacy" associations that have willingly and aggressively intercepted "orphaned" copyright royalty streams belonging to creators.<sup>6</sup>

Publishers began mass digitizing and licensing authorial printed works nearly 20 years ago. The ongoing secondary revenue derived from the licensing of individual articles and/or images from published collective works can exceed the revenue earned through first publication. It is old news that publishers have raced to digitize their print archives to take advantage of this new secondary rights stream served by the Copyright Clearance Center, Lexis-Nexis, Pro-Quest, EBSCO and others.

Former Register of Copyrights Mary Beth Peters, in her Commentary on *NYT Times v Tasini*, noted the issue in *Tasini* was "whether authors are entitled to compensation for downstream uses of their works." She observed that although the 1976 Act

"focused more on safeguarding the rights of authors, **freelance authors have experienced significant economic loss since its enactment.** This is due not only to their unequal bargaining power, but also to the digital revolution that has given publishers opportunities to exploit authors' works in ways barely foreseen in 1976 (emphasis added)."<sup>7</sup>

Supreme Court Justice Ruth Bader Ginsburg dismissed the publishers' warning that a ruling adverse to them would have "devastating" consequences for the historical record as unavailing in her *New York Times v. Tasini* opinion:

"The parties may enter into an agreement allowing continued electronic reproduction of the Authors' works; they, **and if necessary the courts and**

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<sup>6</sup> *Graphic Artists Guild Inc. v. Brad Holland et al*

<sup>7</sup> Mary Beth Peters, Register of Copyrights, U.S. Library of Congress, Letter to Congressman James P. McGovern re *New York Times Co. v. Tasini*, Congressional Record, February 14, 2001, at pages E182-3.



The previous legislation made no realistic provision or timeframe for registries to become viable. When are *enough* works in the registry? We warned then, “As clients come to rely on these [visual arts] registries as one-stop shopping centers for rights clearance, *any works not found in the registries could be infringed as orphans.*”

During a discussion of image registries and potential orphan work commercialization at the 2008 IFRRO (International Federation of Reproduction Rights Organization) conference, Carola Streul, Secretary General, European Visual Artists aptly observed, “The trouble with registries is that everything that is not in a registry *becomes* an orphan.” Former Register of Copyrights Mary Beth Peters echoed that observation in her September 10, 2009 testimony before Congress in opposition to the Google Books settlement: “[The Book Rights Registry] is likely to have the unfortunate effect of creating a false database of orphan works, *because in practice any work that is not claimed will be deemed an orphan.*”<sup>15</sup>

The promise of the PLUS registry is that **the works of today’s visual authors will not become tomorrow’s orphans.** But it will take many years for the PLUS Registry to grow. It cannot be considered a solution, reason or excuse to open commercial exploitation of “orphan” visual works. It should instead be a part of the celestial jukebox that grows to its fullest potential to match unattributed images to their creators, thereby matching licensors with creators.

We urge the Copyright Office to maintain the constitutional intent of copyright law for authors. Orphan works legislation and mass digitization considerations cannot invade and usurp our commercial markets.

We urge you to construct policy and recommend legislation that lends support to restoring and strengthening the economic security of the nations’ independent published authors through licensing and fair participation in the new markets created by our work. Do not diminish the rights or remedies of independent authors *even as we are adapting and embracing emerging markets and technological models ourselves.*

It is, after all, **the works of the independent authors** that are at the very root of the nation’s copyright wealth.

– The Board of the American Society of Illustrators Partnership

Respectfully Submitted,

Joe Azar, Esq.  
Director  
Representative for Illustrators Club of Washington DC, MD, VA (IC)

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<sup>15</sup> <http://www.copyright.gov/docs/regstat091009.html>



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