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March 6, 2013

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

Reply Comments of the Illustrators' Partnership of America

The responses to the Copyright Office's recent orphan work inquiry can be divided into three broad categories:

- Those who continue to assert that there is an orphan works crisis requiring a radical change to US copyright law;
- Those who assert the opposite; and
- Those who allow that if orphan works legislation is to be passed, it should be carefully crafted, with orphans narrowly defined, in keeping with Article 9.2 of the Berne Convention.

Of these three positions, the only one that requires a detailed response is the first. From the beginning, we've acknowledged the concerns of the cultural heritage sector. And while we believe that fair use would permit libraries and museums to meet their preservation and educational needs even in the digital age, we believe most artists would support legislation that guaranteed these institutions the certainty they seek by carefully and narrowly expanding the definition of fair use. Among creators, there would be little objection to legislation that confined orphan works exceptions to "certain special cases, which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder."¹

In short, if orphan works legislation were to be limited to true orphaned work, there would be little or no objection from creators.

The conflict arises from the fact that "orphan works" has been used as a pretext to call for legislation that would stand existing copyright law on its head. The past decade of

¹ <http://www.law.cornell.edu/treaties/berne/9.html>

debate over this issue has exposed that agenda. The advocates of radical copyright “reform” no longer hide behind libraries and museums, but instead advance a variety of arguments for the mass transfer of the nation’s copyright wealth from individuals to the control of a few select corporations. Those arguments are dependent on certain tendentious assumptions that have become the unexamined axioms of orphan works advocacy:

- Copyright is being used to “lock down” culture;
- Orphan works are of no commercial value to their creators except as a litigation trap for hapless good faith users.

At best, these straw arguments are derived from ideology rather than fact. But before we address the ideology, we’ll respond briefly to the assumptions.

“Copyright is being used to ‘lock down’ culture.” Among the recent submissions, perhaps the most explicit argument of this sort can be found in comments from the Institute for Intellectual Property & Social Justice (IIPSJ): “[T]he orphan works problem has an especially deleterious impact on copyright social justice,” the director writes.

“[I]t can disproportionately impede access to works by and of special interest to marginalized communities and groups...With the advent of digital information technology, the perpetuation of the orphan works problem has become socially intolerable.”²

The paper goes on to call for the mass digitization of creative work, the licensing of that work to the public through compulsory licenses; and the use of “unclaimed digitization royalties” to fund the creation of a permanent commission to review and select works for designation as “special interest works.”

However laudatory the goal of social justice is in theory, the proposals suggested in this paper raise a fundamental question: if it is “socially intolerable” for authors to control access to the work they create themselves, why should other forms of private property be exempt from similar re-distribution? Why should the creators or purveyors of other goods and services not be required to turn over their commercial inventories, confidential business information and trade secrets to the control of a few private registries designated by the state for allocation to the public?

It’s instructive to examine this argument in its extreme form because, in this guise, it becomes clear that the call for copyright “reform” is a call for a collectivization of intellectual property. Indeed, as we documented in our February 3 paper, the principal

² Comments of the Institute for Intellectual Property & Social Justice, February 12, 2012, Page 2. http://www.copyright.gov/orphan/comments/noi_10222012/Institute-for-Intellectual-Property-and-Social-Justice.pdf

author of the *Report on Orphan Works* stated in 2006 that their recommendations were being imposed on artists because artists had failed to collectivize.³

Yet the collectivization of intellectual property would have few historical precedents. The Pulitzer Prize-winning historian Robert K. Massie, a former president of the Authors Guild and an expert on Russian history, noted this in a 2009 letter to the Office of the Clerk of the US District Court for the Southern District of New York. Commenting on the Google Book Search settlement, he wrote:

“Other than the outright theft of copyrighted work in the Soviet Union (now belatedly and only partially corrected), and in China, Google’s current effort is the most egregious effort to steal authors’ creative work that I have ever seen.”⁴

But as we know from these historical examples, the collectivization of private property is a sword that can cut both ways.

The advocates of copyright “reform” advance their cause using the language of consumer advocacy. But in the case of intellectual property, creators and consumers are one and the same: copyright protection is not limited to professional artists and writers. Most citizens, rich or poor, write letters and emails, take photographs, make videos and engage in various hobbies that create tangible works of expression. Under current copyright law, all these works are protected. But under the kind of “reform” we’ve seen proposed in the past, any works that are not registered would become legally designated orphans, potentially free for others to exploit, even for commercial purposes. And since the high cost of registering such work would make copyright protection available only to the wealthiest, it is precisely the poor and marginalized who would be most vulnerable to the harvesting and monetizing of their “orphaned” property.

This was highlighted in comments submitted by Artists Under the Dome director Kathleen Bitetti: “[a] majority of artists of all disciplines are low income and can not afford to officially copyright their work due the cost and/or the volume of the work they have created,” she writes. Therefore “changing our copyright protections could cause artwork to be ‘harvested’ from student artists of all disciplines and those artists who come from underserved and low income populations (folk artists, Native American artists, artists of color, disabled artists, etc.).”⁵

Moreover, because the presumptive beneficiaries of this kind of “social justice” would

³ Jule L. Sigall, “*Orphan Works: A Search for Solutions*,” hosted by the Progress and Freedom Foundation, March 31, 2006: “I use this line a lot, photographers and illustrators like to say, ‘We haven’t collectivized.’ This is a problem, generally, for their marketplace.” <http://www.archive.org/details/PffSeminar-OrphanWorksASearchForSolutions>

⁴ Robert K. Massie, letter to Office of the Clerk, US District Court for the Southern District of New York, September 8, 2009.

⁵ Comments of Kathleen Bitetti, Director, ArtistsUnderTheDome.org. Page 2.

http://www.copyright.gov/orphan/comments/noi_10222012/ArtistsUndertheDome-org.pdf

also be the victims of weakened copyright protection, they would have to register their own life's work with American commercial registries or see it exposed to infringement by opportunists in the US. This fact was cited by Andre Cornellier and Ewan Nicholson, Copyright Chair and President, respectively, of the Canadian Association of

Photographers and Illustrators in Communication, in a 2008 letter submitted to the US Small Business Administration:

“How would a person from Arkansas or Nigeria know about this [US orphan works] law, that it even exists, that it affects him, that he has to register in an American registry for a fee, to protect his wedding picture or pictures of his children from being used by an American corporation or a non-for-profit-organization that may reflect values that are against his religion or his ethics which could add insult to injury?”⁶

In short, the argument for mass digitization as a benign instrument of social justice evaporates when we realize that the poor and marginalized would be subject – like the rest of us, only more so perhaps – to having their property infringed and their rights abused.

“I am genuinely puzzled when copyright discussions treat creative works as if they are a pre-existing resource that the government arbitrarily allocates,” writes Mark Schultz on the website Cato Unbound. “They are not. They aren’t an imaginary regulatory entitlement, such as pollution credits. They aren’t leases or mineral rights on public land handed out to political cronies. Creative works are, instead, the productive intellectual labor of private parties. *Real people make this stuff.*”⁷

The protection of creators’ rights has been the time-tested principle behind existing copyright law. And it’s clear from the legislative history of the 1976 US Copyright Act that it was the *decisive* consideration when they adopted “a life-plus-50 [now 70] year copyright term. They acknowledged that the law would tie up a substantial body of material representing “tomorrow’s social history.” And they agreed that much of that material “is probably of no commercial interest.” But they stated that they had to “balance” those concerns against the “burdens and expenses [to creators] of renewals, [and] the near impossibility of distinguishing between types of works in fixing a statutory term.” This led them to conclude that “the extremely strong case in favor of a life-plus-50 system” “outweighs any possible disadvantages.” –U.S. Code, House Historical and Revision Notes Report No. 94-1476, at 136 (1976)⁸

⁶ Andre Cornellier, and Ewan Nicholson, Canadian Association of Photographers and Illustrators in Communication; “Orphan Works Update: The OrphanWorks Debate in the US,” The Canadian Association of Professional Image Creators, June 1, 2008. <http://www.capic.org/copyright.html>

⁷ Mark Schultz, Cato Unbound “Where are the Creators? Consider Creators in Copyright Reform,” February 1, 2013. <http://www.cato-unbound.org/2013/02/01/mark-schultz/where-are-the-creators-consider-creators-in-copyright-reform/>

⁸ U.S. Code, House Historical and Revision Notes Report No. 94-1476, at 136 (1976) http://www.law.cornell.edu/uscode/html/uscode17/usc_sec_17_00000302----000-notes.html

It is our contention that these factors must still be decisive in balancing the current issues at stake, realizing, as the authors of the 1976 Act stressed:

“the [1976] bill would not restrain scholars from using any work as source material or from making ‘fair use’ of it... the restrictions would extend only to the unauthorized reproduction or distribution of copies of the work, its public performance, or some other use that would actually infringe the copyright owner’s exclusive rights.”⁹

Since this fact is (or should be) known to the advocates of copyright “reform,” we must conclude that their real agenda is not the protection of scholarly or archival uses of orphaned work, but the “unauthorized reproduction...distribution [and/or] performance” of authors’ work; or some other use [in commercial markets] that would actually infringe the copyright owner’s exclusive rights.”

And while it’s understandable that there are people who would like the freedom to exploit other people’s property for free, it’s not clear why Congress should grant them that right.

The Myth of Worthless Work From the beginning of the orphan works crusade, lobbyists for big Internet firms and those smitten with the romance of mass digitization have all sought to justify the rights grab that would follow by asserting that creative work has little or no commercial value to creators and that many artists have no interest in being paid for their work.

In the current comments submitted to the Copyright Office, various parties promoting mass digitization have built their case on these familiar claims. A typical example is the paper filed by Public Knowledge and the Electronic Frontier Foundation:

“Many authors are not primarily interested in financial rewards. Rather, they seek to contribute to the cultural and educational commons, or to obtain the recognition of their peers.”¹⁰

Like John Wemmick’s “Aged Parent” in *Great Expectations*, artists are portrayed as happy to be rewarded by nothing more than a smile, a wink or a nod from other artists. Is this really the best that people trained in the law can do to justify the unauthorized taking of other people’s property?

The myth of worthless work has been advanced, without a shred of evidence, by copyright “reformers” who merely cite one another as authorities. Yet it lies at the heart of their demands for copyright reform. Without it they have no justification for

⁹ Ibid.

¹⁰ Comments of the Electronic Frontier Foundation and Public Knowledge, February 4, 2013. http://www.copyright.gov/orphan/comments/noi_10222012/Public-Knowledge-and-Electronic-Frontier-Foundation.pdf

promoting the kind of drastic legislation that has been falsely presented in the past as orphan work law.

We won't dispute the fact that many people *do* create for the simple pleasure of doing so. And for those who do, today's social media provide outlets for expression that no one would have dreamed of just 20 years ago. But of course, nothing in existing copyright law prevents any artist from making his or her work free to the public. Any creator can "opt in" to the free culture of the "commons" by simply stating that others may use or modify their work in the creation of derivative works. There's no law to stop you from giving your work away.

But many creators *do* wish to control access to what they create; and even the most altruistic hobbyists might object to discover that their work has been pirated and monetized for profit by someone else.

A just government cannot expose millions of copyrighted works of art to commercial infringement on the pretext that *some* may be worthless orphans. This is what the authors of the 1976 Act meant when they noted "the *near impossibility* of distinguishing between types of works in fixing a statutory term (*italics added*)." Nothing in the last four years (or 40, for that matter) has made it easier to make such a distinction. Nor is it clear by what principle of law or logic college professors, lawyers, lobbyists and public servants – all of whom derive income from corporations, foundation grants, university salaries or taxpayers – assert the right to place a value of zero on other people's intellectual property.

Unlike the undocumented claims of the copyright "reformers" however, artists *do* have data to document the value of our work. Tax returns, contracts, invoices to clients: all prove that our work is an ongoing source of income for us. Under current copyright law, we are not required to document the day-to-day value of each and every picture in our inventory – nor should we ever have to. This is just common sense. The value of any work of art is never static. Like gold, John Lennon's guitars or Teddy Bears once owned by Elvis, the value of any property, especially non-essential property, fluctuates. One day a drawing may be worth nothing because there's no client who wants to use it. The next it may be worth tens of thousands of dollars to a client who does.

In a free market economy, there is no justification for a government to unnecessarily replace the voluntary business transactions of its citizens with Rube Goldberg legislation that would make compliance impossible for all but the wealthy, devalue property that has demonstrable value, drive day-to-day market decisions into the courts and create uncertainty in commercial markets.

We believe we can show that the true engine behind the drive to divest artists and writers of their intellectual property is a radical ideology that has become gospel to some and a convenient cover story to those hoping to build financial empires by licensing other people's property on the Internet.

The Ideology of Copyright “Reform” In our own comments, we provided evidence that the rationale for the mass transfer of America’s copyright wealth from the control of individuals to large corporations has been based on nothing more than 215 letters to the Copyright Office. In a nation of three hundred million people, this cannot credibly be characterized as evidence of a “market failure.” Indeed, as David Rhodes, President of the School of Visual Arts has observed, it is rather evidence that the markets are working.¹¹

By contrast, there is sufficient evidence that the case for copyright “reform” rests instead on little more than a “postmodern” analysis of intellectual property. This theory contends that individual authorship is a “romantic myth” derived from nineteenth century capitalism and concludes that all creativity comes from the masses (in this case called “the commons”); therefore a change in the law is necessary to give the masses access to their communal property. In this theory then, Internet corporations that engage in unauthorized mass digitization would merely be sharing the property of ordinary citizens with other citizens for the greater good of the public.

Postmodern theory is currently fashionable with many academics, so it’s not surprising to learn that the “legislative blueprint” for US orphan works law was drafted by eight law students at the Glushko-Samuelsan Law Clinic.¹² Nor did it surprise us to discover that the clinic’s director, Professor Peter Jaszi, has long held the view that in the new “information environment” created by the Internet, authors, artists and others “may require some kind of legal security [for the work they create] as an incentive to participate [in the creative process, but] they may not need the long, intense protection afforded by conventional copyright — *no matter how much they would like to have it (italics added).*”¹³

In 1994, Professor Jaszi co-edited *The Construction of Authorship*, a book of essays by various contributors subtitled *Textual Appropriation in Law and Literature*. In his introduction, he cited the “critique of authorship” by postmodern literary critics and complained that their theories have “gone unheard by intellectual property lawyers.”

“However enthusiastically legal scholars may have thrown themselves into “deconstructing” other bodies of legal doctrine, copyright has remained untouched by the implications of the Derridean proposition that the inherent instability of meaning derives not from authorial subjectivity but from

¹¹ David Rhodes, “Orphan Works Statement,” submitted by the Illustrators’ Partnership of America, Orphan Works Comments, February 3, 2013; Appendix A, Part 1, Document 12.

¹² Glushko-Samuelsan Intellectual Property Law Clinic, Response to Notice of Inquiry on the Issue of “Orphan Works,” Submitted to the United States Copyright Office, Library of Congress March 24, 2005, Page 2. <http://www.copyright.gov/orphan/comments/OW0595-Glushko-Samuelsan.pdf>

¹³ Peter Jaszi, *The Construction of Authorship: Textual Appropriation in Law and Literature*, Page 12, Edited by Martha Woodmansee and Peter Jaszi, Duke University Press, 1994 http://books.google.com/books?id=dpRKltgJYwC&printsec=frontcover&dq=Peter+Jaszi,+The+ Construction+of+authorship&hl=en&ei=1UXsS6aJFsH68AaF4NzBCA&sa=X&oi=book_result &ct=result&resnum=1&ved=0CCwQ6AEwAA#v=onepage&q&f=false

intertextuality. Above all, the questions posed by Michel Foucault in 'What Is an Author?' about the causes and consequences of the persistent, over-determined power of the author construct — with their immediate significance for law — have gone largely unattended by theorists of copyright law, to say nothing of practitioners or, most critically, judges and legislators (emphasis added).¹⁴

Or to put it into plain English, why hasn't Congress written a debatable literary theory into US statute law? In a *Content Agenda* interview entitled "10 Pushy Questions," the professor offered his own answer to that question:

"This is a society built around protection of private property and they've [the content industry] been very effective in persuading people that all property is the same. And if you take someone else's property, that's theft. But all property is not the same; there are differences (emphasis added)."¹⁵

The implication that theft of intellectual property may not be theft can indeed be traced to the French literary critics the professor cited.

In *What is an Author?* Michel Foucault asserted that authorship is a false concept of ownership arising from a "privileged moment of individualism,"¹⁶ a by-product of nineteenth century capitalism. He objectified creative works as mere "texts," a pseudo-scientific classification that can include anything from Shakespeare's plays to "a laundry list."¹⁷ Then he challenged the right of any legal system to treat these "texts" as "objects of appropriation" by anyone, including the author.¹⁸ Citing the "disappearance of the author function,"¹⁹ Foucault predicted a future in which "[a]ll discourses...would then develop in the anonymity of a murmur,"²⁰ and the questions one would ask about any creative work would not be "whose property is it?" but

"What are the modes of existence of this discourse? Where has it been used, how can it circulate, and who can appropriate it for himself (emphasis added)?"²¹

Since we now know that the "legislative blueprint" for the Orphan Works bill was drafted before, not after, the Copyright Office study; and since we know it was drafted by (or under the direction of) Professor Jaszi; and since there's no reason to doubt the

¹⁴ Ibid.

¹⁵ Peter Jaszi, "10 Pushy Questions for Peter Jaszi and Patricia Aufderheide" This interview is no longer online, but was once available at <http://www.contentagenda.com/info/CA6434467.html> (This URL no longer exists.)

¹⁶ Michel Foucault, *What is an Author?* Text of a lecture presented to the Soci t  Francais de philosophie, February 22, 1969 Translation by Josue V. Harar, Page 1. <http://www.scribd.com/doc/11397906/What-is-an-AuthorFoucault>

¹⁷ Michel Foucault, *What is an Author?* Page 3.

¹⁸ Michel Foucault, *What is an Author?* Page 6.

¹⁹ Michel Foucault, *What is an Author?* Page 14.

²⁰ Ibid.

²¹ Ibid.

professor's sincerity in his belief that laws governing intellectual property should be altered to reflect the opinions of ideologues such as Foucault, is there any reason to doubt that the orphan works "solution" his law clinic drafted sometime between 2003 and 2005 reflects this ideological agenda rather than the underwhelming "evidence" of 215 letters submitted in 2005 to the Copyright Office study?

"Where are the Creators in Copyright Reform?" There's no need to denigrate postmodernism to point out that a debatable literary theory does not qualify as grounds for rewriting time-tested principles of copyright law. We can agree that deconstructionist theory contains an irrefutable truth: that all artists are influenced by others. But this has been known for thousands of years. It was certainly known to the authors of the US Constitution and to those who wrote international copyright law. We can even agree that in certain cases and at certain times, the status of authorship has been inflated. Yet as Mark Schultz writes in "Where are the Creators? Consider Creators in Copyright Reform":

"Too often, the modern copyright debate overlooks the fact that copyright concerns creative works made by real people, and that the creation and commercialization of these works requires entrepreneurial risk taking. A debate that overlooks these facts is factually, morally, and economically deficient. Any reform that arises from such a context is likely to be both unjust and economically harmful."²²

In our own comments to the Copyright Office, we stressed two facts of life for creators that we believe are so intractable they override any possible arguments in favor of passing the kind of unbalanced "orphan works" proposals we've seen in the past:

- The high cost of compliance would make copyright protection available only to the wealthiest rightsholders.
- There is no evidence of a market failure to justify the claim that such legislation is necessary.

On these points there is overwhelming agreement among creators and those concerned about creators' rights. Consider the recent comments submitted by Bruce A. Lehman, former Commissioner of the US Office of Patents and Trademarks, an intellectual property expert whose role in crafting and passing past US copyright law is well known:

"To my knowledge this is the first time in American history that the ability to protect one's property rights has been subject to the limitation that only the rich have rights to legal redress...it is hard to understand the urgency with which the Copyright Office approached this matter in 2008 when there was no evidence whatever that the federal courts had been flooded with infringement lawsuits brought by long lost authors of works whose provenance was obscure...I

²² Mark Schultz, Cato Unbound "Where are the Creators? Consider Creators in Copyright Reform"

strongly urge the Copyright Office to recommend that there is no need for legislative intervention on the issue of Orphan Works.”²³

The National Writers Union agreed, and pinned the genesis of this legislation where we believe it belongs. “This ‘problem’ has been to a significant degree manufactured as a polemical device,” they write, “and to a greater degree appropriated and misused to serve commercial interests antithetical to those of writers and other creators.”

“Regardless of the benign intentions of many scholars, academics, and librarians, the (false) perception they promote of an ‘orphan works crisis’ primarily serves Google, other search engines and Web spiders and distributors of digital content, print publishers, and other commercial ‘partners’ and profiteers in copyright-infringing mass digitization and digital distribution schemes. These for-profit companies are the real parties of interest in this inquiry, and these would be the principal potential beneficiaries of a statutory financial windfall from ‘orphan works’ and/or mass digitization legislation – at the expense of the incomes of working writers and other creators.”²⁴

The Association of Medical Illustrators makes the same point, noting that recent litigation by special interests hoping to “cure their potential liability” for infringement has exposed “the insincere agenda driving much of the call for ‘copyright reform’: to transfer the ownership of valuable content – or the copyright revenue streams – from creators to others.”²⁵

In our own paper, we cited the well-founded concern by artists that the commercial databases mandated by previous orphan works bills would follow the example of companies such as Getty and Corbis in using the work entrusted to them to undermine the markets currently being served by freelance artists. This objection is not limited to writers and visual artists, however. In the comments submitted by SAG-AFTRA, we see the same concerns expressed about the deleterious effects of such legislation on rights guaranteed performing artists by their contracts and collective bargaining agreements:

“A copyright owner’s right to exclude others from using his property is fundamental and beyond dispute,” they write, citing Judge Denny Chin in rejecting the Google Book Search settlement. “Creativity cannot flourish and thrive without giving creators an incentive to create. While a solution should be discussed to address the orphan works issue for libraries, and other similarly situated institutions, we must not simply cast aside the legal rights of creators established under the Copyright Act and international treaties. Without strong

²³ Comments of Bruce A. Lehman, Former Assistant Secretary of Commerce and Commissioner of Patents & Trademarks (1993-1999). http://www.copyright.gov/orphan/comments/noi_10222012/Lehman-Bruce.pdf

²⁴ Comments of the National Writers Union, Page 3. February 4, 2013. http://www.copyright.gov/orphan/comments/noi_10222012/National-Writers-Union.pdf

²⁵ Comments of the Association of Medical Illustrators, Page 1. February 4, 2013. http://www.copyright.gov/orphan/comments/noi_10222012/Association-Medical-Illustrators.pdf

assurances that creators' rights will be protected, a broadly drafted orphan works regime would undermine fundamental rights under the copyright law and, in effect, would give anyone free rein to exploit the works of creators... if commercial users are allowed to enter the market by creating large scale digital libraries of music and movies [and we would add, graphic art], it dilutes the market for artists, whose rights would otherwise be licensed, further diminishing an important income stream for artists.”²⁶

It is in this effort to force creators to subsidize giant corporate databases that the past orphan works bills betray their true agenda. Reviewing the evidence, it seems compelling to conclude that the orphan works legislation presented to Congress was not what it was purported to be, but was intended rather to deliver commercial privileges to large Internet interests while furthering the ideological agenda of legal scholars committed to expanding the public domain by stripping creators, small businesses and ordinary citizens of their intellectual property rights.

Turning a Legal Fiction into Reality It's not a compelling argument for a large global corporation to say it should be allowed to infringe your intellectual property based on its own assurance that your property is worthless. But while Internet powerhouses can only make such claims, a devious strategy to make it so was proposed in the “orphan works” paper “Reform(alizing) Copyright,”²⁷ submitted to the Copyright Office in 2005 by the advocacy group Creative Commons.

In it, attorney Christopher Sprigman advanced a scheme that would effectively roll back the 1976 Copyright Act by requiring artists, writers and others to mark and register every work they create or find it deemed (page 491) “commercially valueless”:²⁸

“[T]his Article proposes a system of formalities that, although nominally voluntary, are de facto mandatory for any rightsholder whose work may have commercial value. Non-compliance with the newstyle [sic] formalities would subject works to a perpetual and irrevocable ‘default license’ with royalties set at a very low level, thus effectively moving works into the public domain (emphasis added).”²⁹

The logic behind this proposal is as cynical as it was clearly stated. Since authors, particularly visual artists, would lack the time and resources to mark and register every work they make, then track and renew countless registrations over decades, billions of copyrighted works by working authors would inevitably fall through the cracks and

²⁶ Comments of Screen Actors Guild American Federation of Television and Radio Artists, Page 6, February 4, 2013. http://www.copyright.gov/orphan/comments/noi_10222012/SAG-AFTRA.pdf

²⁷ Christopher Sprigman, “Reform(alizing) Copyright,” Stanford Law Review Vol. 57: 485 November 2004, Comment to Copyright Office Orphan Works Study.

<http://www.copyright.gov/orphan/comments/OW0643-STM-CreativeCommons.pdf>

²⁸ Christopher Sprigman, “Reform(alizing) Copyright,” Page 491.

²⁹ Christopher Sprigman, “Reform(alizing) Copyright,” Pages 490-491.

into the public domain. As we noted in our February 3 paper, this would happen not because the artists had actually abandoned their works (which would be the legal presumption), but merely because the law had swamped them with costly formalities and red tape.

Whether by design or coincidence, this strategy is how the misnamed “orphan works” legislation we’ve seen in the past would have worked.

In 2009, the former Register of the Copyright Office condemned the Google Book Search settlement in Congressional testimony. Noting that it would create a new default position in copyright licensing, she argued:

“In summary, the out-of-print *default* rules [agreed to by the litigious parties] would allow Google to operate under *reverse principles of copyright law*... (italics added).”³⁰

This echoed exactly our previous condemnation of the 2008 Orphan Works Act:

“[The Orphan Works bill] creates the public’s right to use private property as a *default* position, available to anyone whenever the property owner fails to make himself sufficiently available.” “[I]ts logic reverses copyright law.”³¹

Creating a new default position in copyright law was the deceptive strategy proposed by Creative Commons for “effectively moving [copyrighted] works into the public domain.” It would be the practical result of such legislation as the Orphan Works Acts of 2006 and 2008. But since US copyright law is defined by the Constitution as granting exclusive rights to authors, it seems to us that an effort to reverse that default position would require a Constitutional amendment and should be subject to an open and informed public debate rather than presented to Congress as a simple nip and tuck to existing copyright law, then rushed through Congress, as we’ve seen in the past, through the expedient of closed door negotiations, backroom deals and legislative maneuvers.

Conclusion A government that would pass a law it knows its citizens can never comply with, but would strip them of their intellectual property for failing to comply, cannot plausibly be said to be promoting “the Progress of Science and useful Arts...” In 2008 the president of Public Knowledge reflected on the failure of that year’s Orphan Works Acts to pass, but wrote that “visual artists...now understand that they must change their business models (emphasis added).”³²

³⁰ Congressional Testimony of Marybeth Peters, September 10, 2009. Cited in “Orphan Works and the Google Book Settlement/Part III: Compelling Arguments,” The Illustrators’ Partnership of America, October 1, 2009 <http://ipaorphanworks.blogspot.com/2009/10/orphan-works-and-google-settlement-part.html>

³¹ Ibid.

³² Gigi B. Sohn, “The Orphan Works Bill: Wait ‘Till Next Year,” October 6, 2008, Public Knowledge. <http://www.publicknowledge.org/node/1783>

With all due respect, it's not up to lobbyists or public servants – and certainly not to infringers – to decree that millions of artists “must change their business models.” Nor are they qualified to decree how those business models should work. The people who know best how to adjust to the change in our markets are those of us who work in those markets. We're the ones with the greatest incentive to adapt; and it's a rare artist who isn't already working overtime to adjust.

Moreover, it's safe to say that artists who fail to change with the times may well fail to compete. Those of us who have worked in this field for years have already seen scores of talented colleagues drop by the wayside. Yet rather than rush to pass legislation that would allow opportunists to pounce like scavengers on the art “orphaned” by such casualties, our government should understand that the most efficient laboratories for change are in the free market, where freelance artists and small business owners can experiment with different ways to make our work available to the public.

“Copyright law has been reformed in the past, and it likely will be reformed again,” Mark Schultz wrote recently in “Where are the Creators? Consider Creators in Copyright Reform”:

“The goal of such changes has largely been to ensure that the Copyright Act remains relevant and useful to *creators first, and the broad public second. Creators ought to remain central to any future copyright reform discussion.* Most of the current proposals don't really take the needs of today's entrepreneurial creators into consideration (italics added).”³³

We Are Our Work *In response to the question: “Where are the Creators?”, we offer the following comments. These are excerpts from statements written by artists and photographers, writers, musicians and small business owners; and submitted by the Illustrators' Partnership to the US Small Business Administration September 16, 2008. The SBA Roundtable is the only forum so far conducted by an agency of the United States government to consider the economic impact of the Orphan Works Act on creators.*³⁴ It is now available for viewing online at <https://vimeo.com/channels/artistsrights>

³³ Mark Schultz, Cato Unbound “Where are the Creators? Consider Creators in Copyright Reform,” February 1, 2013. <http://www.cato-unbound.org/2013/02/01/mark-schultz/where-are-the-creators-consider-creators-in-copyright-reform/>

³⁴ Comments of the Illustrators Partnership of America, Feb 3, 2013, Appendix A. http://www.copyright.gov/orphan/comments/noi_10222012/Illustrators-Partnership-America.pdf The Small Business Administration Roundtable: How Will the Orphan Works Bill Economically Impact Small Entities?” was chaired by Tom Sullivan, Director of the Office of Advocacy of the SBA. It was initiated by the Illustrators' Partnership, The Artists Rights Society and the Advertising Photographers of America. It was conducted by the SBA August 8, 2008 at the Salmagundi Club in New York City. Seventeen panelists participated; scores of others submitted written papers. The video can be viewed at <https://vimeo.com/channels/artistsrights>

"We're here today to speak as small business owners. Yet for most of us, art is something more than a business. Artists become artists because we want to practice alchemy - to turn the lead of experience into something that doesn't tarnish or rust. At the heart of creativity is independence.

We're here today to defend our independence."

- *Brad Holland, Artist*

"The network of contracts and agreements, the very fabric of the business of copyright that surrounds the marketing of images, has been overlooked by this legislation. This threatens the entire commerce of visual art licensing."

- *Cynthia Turner, Medical Illustrator*

"Licensing is now a \$187 Billion dollar industry...and most of the providers of the creative content are small business owners just like me...the [Orphan Works] changes in the copyright law... will put me and other small business owners in jeopardy of losing revenue that the licensing of our art generates for us."

- *Cheryl Phelps, Illustrator, Designer, Art Licensor, Educator*

"If our government approached any other type of business and told them they could no longer own what makes their business valuable, that their intellectual property including sourcing information, trade secrets, collected knowledge of their industry and so on was now no longer theirs to own and use to prosper . . . imagine the outrage."

- *Brenda Pinnick Owner, President, Brenda Pinnick Designs, Inc.*

"It is clear that this piece of legislation is part of an anti-copyright offensive waged by those who maintain that copyrights are obstacles to creativity and the free flow of ideas, as if copying, mixing, sampling and appropriation are the essence of the creative process."

- *Dr. Theodore Feder President, Artists Rights Society*

"As a young artist, I owe a lot of my professional success to the internet... Copyright law, as it stands, enables us to share work with our fans online, while knowing it won't be stolen by large corporations. What the Sean Bentley Orphan Works act does is remove this protection."

- *"Orphan Works Act-Unintended Effects," by Molly Crabapple, Artist*

"If this legislation passes, it would mean a return to pre-1976 U.S. Copyright Act when many writers' works fell into the public domain because they could not afford to comply with the formalities of registration as a condition of copyright protection."

- *By Gerard Colby President, National Writers Union/UAW Local 1981*

"The financial (and technical) requirements of this Bill truly assume that an artist is "guilty of failing to comply until proven innocent."

– *"The Orphan Works Act: A View From the Trenches,"* by attorney Tammy L. Browning-Smith, J.D., LL.M

"Would you rather Charlie Parker had a law degree and a well maintained data base or his bird qualities? Would you rather see Jimmie Hendrix bend his head around "Reasonably Diligent Search" or bend a string from here to eternity?"

– *"Orphan Works,"* by Gene Poole, Songwriter and Musician

"I know of no other trade or product that requires its creators to register with one government agency and two private ones in order to protect their rights and property from theft."

RE: H.R. 5889 and S. 2913, the Shawn Bentley Orphan Works Act ,"
– *Don Schaefer Don Schaefer Studio*

" [T]he concept of creating an inclusive, cost effective database for imagery is impossible. I represented 400,000 images, had 500 portfolios of artists online, verified listings of 50,000 graphic artists, and I know the time and cost for creating databases. Not possible. Not feasible. Not cost effective. And if there were multiple, smaller databases, not workable."

– *"Orphan Works Compliance: An Impossible Burden for Small Businesses,"* by Alexis Scott, Publisher of *The Workbook* and *workbook.com*

"The 'unknown' entities that will be developing and running the yet nonexistent searchable databases...are set to gain millions from the revenues our artwork can bring them!

– *"Why I oppose the Shawn Bentley Orphan Acts of 2008,"* by Gail Green, *Gail Green Licensing & Design Ltd*

"I fought for the rights of Superman's creators, Jerry Siegel and Joe Schuster. Others made millions while Superman's creators lived in near poverty. Jerry was a clerk and Joe was a legally blind man who lived in his brother's apartment, slept on a cot and worked as a messenger. I met and fought for their small remaining rights when they both turned only 60 years old...The battle took months and the settlement was meager, but it let the men live the remaining years of their lives with dignity. You know what they cared about most? They cared about having their names, once again, associated with their character, Superman! Why? Because it was what they were as people. They were their work. Why do we have copyright law? Because we wish to protect people and their creations, even if they are "hard to locate."

– *"Orphaned Works Legislation,"* by Neal Adams, Artist

"Clearly, if an image isn't 'found' in a private registry, it is fair game according to your law. That's millions, maybe hundreds of millions of images online right now that are not registered, have no statement of copyright or ownership, and will likely not be registered or removed by the time this legislation goes into effect."

– *Harry S. Murray, Letter to Ms. Marybeth Peters Register of Copyrights United States Copyright Office*

"How would a person from Arkansas or Nigeria know about this law, that it even exists, that it affects him, that he has to register in an American registry for a fee, to protect his wedding picture or pictures of his children from being used by an American corporation or a non-for-profit-organization that may reflect values that are against his religion or his ethics which could add insult to injury?"

– *Andre Cornellier, Copyright Chair and Ewan Nicholson, President/ Canadian Association of Photographers and Illustrators in Communication*

"No member of our Society would have the time or financial means to track any unwarranted, illegal activity on the internet, let alone pursue claims against multiple parties that may avail themselves of any artwork. Nor would any illustrator have the resources to register significant collections of current and past works with a proposed system that would offer little or no protection.

– *Frank M. Costantino, ASAI, SI, JARA, FSAI Co-Founder, American Society of Architectural Illustrators/ Vice-Chairman, American Society of Illustrators Partnership*

"In 2006, I registered 58,731 images, and in 2007, 71,919 images. If a registry charged \$0.50 per image to submit and process, I would have to pay \$29,365.50 to protect my 2006 images, and \$35,959.50 to protect my 2007 images, for just those years.

– *"Testimony Concerning How the Proposed Orphan Works Bill Will Economically Impact Photographers," by John Harrington, Professional Photographer*

"Total scanning, personnel, overhead= \$262,560. Additionally, I would have to supervise the operation, losing about two months per year."

– *Photographer MK (NY) in response to internal poll by Advertising Photographers of America*

"Even if the scanning charge were \$.25 per image, which is FAR below the current scanning prices available today, That would cost me approximately one half million dollars ((2,500,000 images x 80%) x .25= \$500,000--)."

– *Photographer GF (SC) in response to internal poll by Advertising Photographers of America*

"In addition to the cost of getting images ready for input into one of these registries/databases, there is the time/cost of uploading these images... which could take as long as it took to digitize the images...add another 20+ years, or another \$859K."

– *Photographer RR (NY) in response to internal poll by Advertising Photographers of America*

"If these fees were \$1 per image, I would incur an additional \$1,000,000 in registration expense."

– *Photographer JS (CA) in response to internal poll by Advertising Photographers of America*

"Scanning would be over 2 million dollars to include keywording from an outside source. This is a very complicated operation and would take hours of my time to prepare. It's too expensive."

– *Photographer JS (NC) in response to internal poll by Advertising Photographers of America*

"The burden of this nightmarish bureaucracy would be overwhelming in expense and complexity for artists. I can speak from personal experience that anyone who has been painting or drawing for any length of time is likely to have thousands of works of art that he would have to pay to digitize and file with one of these companies. And, the Copyright Office has made it clear that failure to register a work with these private companies would automatically render it an orphan, available to be copied by infringers with impunity."

– *Frank Stella, Artist*

"If I had to scan all the images I have made in the past 40 years... in order to post them to a registry, the burden of such an expense would cripple me...[F]or the past 40 years I have been building a library of my creative work believing that this was my retirement and my estate. If I have no protection of this work than my estate will have been essentially bankrupted."

–*Barbara Bordnick Photography*

"[T]he business model that would be created from this legislation...would doom such a large portion of the creative community that the end result would drastically reduce the artistic diversity our country has prided itself on and the rest of the world has been envious of."

– *Photographer RB (NC)*

"[S]ince the expense of registering works will be born by the creative community the expense of copyright protection will be socialized while the profit of creative endeavors will be privatized. "

– *Orphan Works Statement By David Rhodes President, School of Visual Arts*

“Even if we digitize our artwork, paid to have it uploaded on private databases, thousands and thousands of artists would not, could not or wouldn't know that they would have to do this extra work to protect their copyrights.”

– *Lynn Reznick Parisi, Business Manager Atlantic Feature Syndicate/off the mark cartoons*

“The Copyright Office ignores the realities of the market place and places the rights of copyright owners at great risk.” -“Are all Copyright Owners to Become Orphans?”

–*Cheryl Hodgson, Esq., President, California Copyright Conference*

“Why would conflict photographers who risk their lives on a daily basis to cover important news stories so the world can remain informed, be willing to do so if they thought their work could and would be easily appropriated by others?”

–*Debra Weiss, Creative Consultant*

“When a manufacturer wants to feature an artist's work on one or more of their products, it is important to them that they are the only company who has the right to reproduce that design on that particular product. If other manufacturers are able to put the same design on the same product then it hurts the licensee.”

–*Joanne Fink, President, Lakeside Design*

“By opening the floodgates to unauthorized use of protected works, the legislation will result in a tidal wave of litigation as the result of rampant and widespread violation of the rights of publicity and rights of privacy of persons pictured in the orphan works...This wave of litigation between models, photographers and the users of orphan works over publicity and privacy rights will be a particularly disastrous consequence of the proposed amendment.”

–*Constance Evans, National Executive Director, Advertising Photographers of America*

“As an inspirational painter of children, my work is licensed to manufacturers and businesses. The Orphan Works Act of 2008 will create tremendous overhead for my business and an ethics challenge for controlling my message. The message is as important as the artwork; it is my ministry and my career.”

– *Kathy Andrews Fincher, Kathryn Andrews Fincher, LLC*

“Biomedical and scientific illustrators are not opposed to usage of orphaned works by the cultural heritage sector for noncommercial purposes, or use by museums and libraries for preservation and education. However this legislation makes no limitations for these

purposes and will dangerously expose copyrighted visual content to infringements while stripping the intellectual property holders of any practical means to protect their work.”

–Biomedical and Scientific Illustrators' Opposition to the Orphan Works Act of 2008

“The infringer is free to use any work in any manner—there are no restrictions on how a particular work may be used. One of our members recordings could end up in a motion picture—of any rating—a political advertisement or other commercial, or in a mashup that will alter the sound quality and characteristics of the original recording beyond recognition.”

– American Association of Independent Music (“AZIM”)

“Position Paper on the Current Proposed Orphan Works Legislation in the United States

“The Advertising Photographers of America (APA), the National Press Photographers Association (NPPA), the Stock Artists Alliance (SAA) and Editorial Photographers (EP) have all stated they cannot support the Orphan Works bills in their current form. Together, these groups represent more professional media photographers than other U.S. organizations.”

–From “Leading Photographer Associations Urge Congress to Amend Orphan Works Legislation”

“The inherent danger in remixing a medical animation or illustration is that ignorant people can change the meaning, intention or scientific accuracy of an image. They can damage the reputation of the studio from where the work originated.”

–Dena L. Matthews Biomedical Illustrator

“I was the plaintiff in a recent copyright infringement case and I can testify that the full remedies of the current law were necessary for me to prevail...The case took me four years and nearly \$100,000 in legal fees, but I was able to prove that the infringement was a willful act, conducted in bad faith by a major corporation.”

– “How Camel Cigarettes Orphaned My Work” by Michiko Stehrenberger

“Not only was my art desecrated and devalued in the ‘Orphaning’ process but my original specialized art was made to compete with me to my own client while others in the chain of infringements monetarily gained from its value and I received none.”

– “Orphan Works, Unmasked” by Andrea Mistretta

“Big publishing companies can ensure that their works are never orphaned...Even the Copyright Clearance Center insists that it is not

possible to track the use of illustrations which appear in published work. Thus, they refuse to pay compensation to artists, even though those artists often retain all rights, including reprographic rights - to their work. If the CCC is correct that it's impossible to track ownership of illustrations, then virtually all published artwork may be designated as orphaned."

- James Perkins, Medical Illustrator

"NARIP takes issue with this legislation because there is no responsibility to the creative community, it's all about users. We've seen a remarkable shift from incentivizing creators and enabling them to protect their personal property, to 'let's provide a means and find a way to protect infringers so we can make sure they're not prosecuted.'"

-By Tess Taylor, National Association of Record Industry Professionals

"The Orphan Works bill has the potential to erode the protection that copyright owners have fought for over many years. It puts the burden on the copyright owner to find the offending parties and either negotiate with them without the remedies currently available to bring about reasonable compensation or bring costly litigation. In short, for copyright owners, the Orphan Works bill is a disaster."

-Attorney Steve Winogradsky, Past President, Association of Independent Music Publishers and California Copyright Conference

"In 2004, the Copyright Office initiated a theory, with the enthusiastic support of the anti-copyright lobby, that the public was being harmed because it didn't have enough current contact information for authors and owners. The Copyright Office then requested Orphan Works legislation without having conducted a needs assessment study, an independent audit of its registration and copyright history records, an economic impact analysis, or an evaluation on how the public, society and authors would be affected by reduced quantity and quality of art, film, television, music, video games and other copyrighted works in the future."

-Association of Independent Music Publishers (AIMP) and California Copyright Conference (CCC) Joint Position Paper on Orphan Works Legislation

"The steps taken by illustrators over the past few years to address similar changes in their marketplace demonstrate that the incentives of the marketplace should be allowed to work without government intervention such as the Orphan Works Act, a bill that will permanently weaken the rights to the work these stakeholders create."

-Terrence Brown, Executive Director, American Society of Illustrators Partnership

"As an artists advocate for over 20 years...I am deeply concerned that the drafters of the legislation clearly did not do the needed research and outreach to the artists advocates, the artists community, the small business community, and the 'minority' communities before crafting the language of this legislation."

–Kathleen Bitetti, Artist and Executive Director, Artists Foundation

"[W]hile the Copyright Office proposal immediately and unfairly prejudices the little guys in the creative economy, it sets a long term precedent that eventually could come back to haunt even those with deep pockets to defend themselves like Hollywood and Silicon Valley."

– "Orphan Works Legislation – a Bad Deal for Artists," by Bruce Lehman, Esq., Former Commissioner US Patent & Trademark Office

"Illustration work allows me to provide for my family; teaching allows me to give back to the community. My belief in stewardship brings me to the Orphaned Work Bills. This legislation strikes at the core of what we are as illustrators, how we do our business and why we chose to be illustrators."

– CF Payne, Artist

Respectfully submitted,



Brad Holland
Director
Illustrators' Partnership of America



Cynthia Turner
Director
Illustrators' Partnership of America