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RE: Notice of Inquiry on ORPHAN WORKS AND MASS DIGITIZATION (Docket No. 2012–12)

Comments of the Association of Medical Illustrators

The Association of Medical Illustrators (AMI) respectfully submits our comments to the U.S. Copyright Office in response to the October 22, 2012 Notice of Inquiry about the current state of play with orphan works and mass digitization.

The AMI is a 501(c)(6) non-profit organization committed to advancing the understanding of science, medicine and healthcare through visual media. We represent approximately 1,000 professional illustrators and animators in the U.S. and twenty foreign countries. Biomedical and scientific illustrators are unique and highly educated professionals who have earned advanced degrees and certifications in art and science. Our members are independent business owners and employees who work for and in universities, teaching hospitals, research institutes, pharmaceutical and biotech corporations, publishers and medical education companies. Every year we produce many thousands of medical/scientific illustrations, animations and models that are essential for the ongoing education of health professionals and the advancement of scientific research. Our work is used as demonstrative evidence to teach jurors and judges in the legal proceedings of personal injury and malpractice. We play a key role in health literacy and patients' understanding of their medical conditions, enabling them to be active participants in maintaining their own health.

As noted in the 2006 Orphan Works Report, visual works are particularly vulnerable to orphaning. Illustrations can be separated from accompanying text and credit lines. Artist signatures and copyright notices are often removed or cropped from the final reproduced image. Even though professional illustrators embrace applying metadata¹ and steganography² protections before releasing digital images to clients, the marked images are easily defeated. Metadata embedded in the digital image files are routinely stripped in the production and online dissemination of published work. Moreover, artists have many legacy analogue works in print. Artists have no control over the copyright management information assigned by publishers during mass digitization programs of their archives. Infringers also create orphans by scanning and uploading analogue works. Thus, through no fault of his or her own, and despite employing best practices of today, images in an artist's lifetime body of work are continually and routinely "orphaned" with no way of tracing them back to their copyright owner.

We acknowledge the issue of orphan works in the cultural heritage sector and support limited exceptions for museums and libraries for preservation and education. However, the past several years of litigation by "good faith users" of orphan works in order to cure their potential liability and "gridlock in the digital marketplace," 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.

¹ IPTC Photo Metadata Standard, <http://www.iptc.org> and the PLUS, Picture Licensing Universal System, <http://www.useplus.com>

² Digimarc® and other steganography solutions embed and communicate copyright information in digital images.

We note some salient selections from Judge Denny Chin’s March 22, 2011 Opinion³ when he rejected the Amended Settlement Agreement (ASA) in the Google Book Search litigation:

- A copyright owner’s right to exclude others from using his property is fundamental and beyond dispute.
- ... it is incongruous with the purpose of the copyright laws to place the onus on copyright owners to come forward to protect their rights when Google copied their works without first seeking their permission.
- ... that the ASA is an attempt to use the class action mechanism to implement forward-looking business arrangements that go far beyond the dispute before the Court in this litigation.
- ... that provisions of the ASA pertaining to “orphan works” would result in the involuntary transfer of copyrights in violation of the Copyright Act, as copyrighted works would be licensed without the owners’ consent.
- ... the ASA would grant Google the right to sell full access to copyrighted works that it otherwise would have no right to exploit.
- The ASA would grant Google control over the digital commercialization of millions of books, including orphan books and other unclaimed works. And it would do so even though Google engaged in wholesale, blatant copying, without first obtaining copyright permissions.
- While its competitors went through the “painstaking” and “costly” process of obtaining permissions before scanning copyrighted books, “Google by comparison took a shortcut by copying anything and everything regardless of copyright status.” (Hr’g Tr. 43 (Thomas Rubin, counsel for Microsoft)).
- As one objector put it: “Google pursued its copyright project in calculated disregard of authors’ rights. Its business plan was: ‘So, sue me.’” (Objection of Robert M. Kunststadt to Proposed Settlement 3, ECF No. 74).

We therefore join our illustration colleagues in recognizing that the challenge for visual artists remains in asserting a clear and true voice that advocates for visual artists and their working markets, to be sure Congress does not again craft legislation to permit what the courts have so far denied.

The AMI urges preserving the integrity of copyright protection for creators by addressing precise and limited solutions for orphan works digitization and preservation. Any future orphan works legislation must take care not to harm working creators and working markets.

The AMI opposed the Orphan Works Acts of 2006 and 2008 for a number of reasons. The Comments, Reply Comments and Congressional Testimony provided by the Illustrators Partnership of America (IPA) and independent illustrators are just as relevant today as they were when originally filed. These filings and testimony are herein restated and incorporated into this Comment by reference.⁴

³ Authors Guild v. Google Inc., Opinion Denying Settlement, Case 1:05-cv-08136-DC Document 971, March 22, 2011, http://www.copyright.gov/docs/massdigitization/statements/gbs_opinion.pdf

⁴ Orphan Works Study Comment, March 24, 2005, <http://www.copyright.gov/orphan/comments/OW0661-IllustratorsPartnership.pdf>
Orphan Works Study Reply Comment, May 9, 2005, <http://www.copyright.gov/orphan/comments/reply/OWR0139-IPA.pdf>

Statement of Brad Holland, Founding Board Member, Illustrators' Partnership of America. Subcommittee on Courts, the Internet, and Intellectual Property Committee on the Judiciary, U.S. House of Representatives March 29th, 2006, Re: Oversight Hearings on Remedies for Small Copyright Claims, March 29, 2006, <http://ipaorphanworks.blogspot.com/2006/03/statement-of-brad-holland-house.html>

Statement of Brad Holland, Founding Board Member, Illustrators' Partnership of America, Subcommittee on Intellectual Property, Committee on the Judiciary, U.S. Senate, Hearing on “Orphan Works: Proposals for a Legislative Solution” April 6, 2006 <http://ipaorphanworks.blogspot.com/2006/04/statement-of-brad-holland-senate.html>

Written Statement of Brad Holland and Cynthia Turner, On Behalf of the Illustrators’ Partnership of America, Concerning Orphan Works Legislation, The Subcommittee on Courts, the Internet and Intellectual Property, Committee on the Judiciary, U.S. House of Representatives, March 20, 2008, <http://ipaorphanworks.blogspot.com/2008/03/written-statement-of-brad-holland-and.html>

HR 5889 Amendments, <http://ipaorphanworks.blogspot.com/2008/07/hr-5889-amendments.html>

In response to the second question posed by the Copyright Office, we respectfully offer the following comments of specific concern to our field.

2. Orphan Works in the Context of Mass Digitization How should mass digitization be defined, what are the goals and what, therefore, is an appropriate legal framework that is fair to authors and copyright owners as well as good faith users?

1. Stand-Alone Visual Works Are Never Out-of-Print or Out-of-Commerce

AMI concurs with the IPA's position that out-of-print and out-of-commerce abandonment theories are categorically inapplicable to stand-alone visual works.

We have witnessed the inexorable overreach from those who desire to unilaterally exploit authors' copyrighted works by attempting to create a new class of "orphaned" or "abandoned" status if the work is simply *out-of-print*. This has now been further stretched to a theoretical abandonment status by the so-called *out-of-commerce* status.

A visual artist's lifetime body of work begins with the first image created and ends with the last image created. That body of work may stretch decades, and it may contain many versions of a given image, many derivatives, and many sketches and preliminary studies. A work may be published many times, or once. The demand for any particular image in an artist's archive is dependent upon many subjective and objective variables. An image that is not currently going to press would fall under the false rubric of "out-of-print" or "out-of-commerce." Nor is it theoretically possible for an artist to make available their entire body of work. Some examples include marketing costs, digitizing and metadata costs, publication or exhibition embargoes by in-force non-disclosure or confidentiality agreements, the development of internal personal projects that may take years, and an artist's fundamental exclusive right to withhold works from publication or re-publication *for any reason*.

In response to the first question posed by the Copyright Office, we respectfully offer the following comments of specific concern to our field.

1. Orphan Works on an Occasional or Case-By-Case Basis. Please comment on the continued viability of the above framework [2008 proposed legislation] in the case of occasional uses of orphan works.

2. No Safe Harbor for Nonprofits

The AMI would like to again emphasize that our profession would be particularly harmed by a safe harbor clause for nonprofit educational institutions. The nonprofit sector comprises a large portion of our industry. Many of our members work in and for nonprofit universities and foundations. Allowing a safe harbor for this large class of users is without merit and would likely destabilize this robust licensing marketplace. It could also be detrimental—even fatal—to the vital contributions made by biomedical and scientific illustrators to advancements in medicine, science, research, education, and drug and medical product development in this country.

The visual works created by our members generate important intellectual property for U.S. businesses, nonprofit organizations and universities, and nonprofit educational institutions. Under the previously proposed legislation, biomedical and scientific illustrators lose the economic incentives to continue creating innovative new works. Potentially, the very economic foundation of our profession could become unsustainable.

There should be no safe harbor exception for nonprofit educational institutions, and no orphan works exemption for educational use. Fair use already generously covers scholarship. Any other usage should involve appropriate licensing in accord with existing copyright law that protects a creators' exclusive rights, regardless of whether the use is "commercial" or not.

3. Fair Use Supports Use of Orphan Works in Education and Research Visualization

Fair use is one of the most distinctive features of U.S. copyright law that promotes the progress of science and free expression. It provides a case-by-case approach to proper use of orphaned works **without harming the markets** for creators. The AMI believes the specific provisions in the Copyright Act for the use of copyright-protected materials provide adequate and generous exceptions to artists' exclusive rights and limit a user's infringement liability, including:

- Section 107 on fair use, which applies to activities such as using excerpts for illustration or comment, unexpected and spontaneous reproduction of classroom materials, and creation of parodies.
- Section 108 on reproduction by libraries and archives, which applies to such activities as archiving; replacing lost, damaged or obsolete copies; patron requests for entire works; and interlibrary loans.
- Section 109 on first sale, which permits the resale or lending of copies of works, providing the basis for library lending and the sale of used books.
- Section 110 on performance and display in the classroom, which permits certain types of content use in the classroom and in distance education.

Further, we again bring to your specific attention that current law already exists to limit statutory damages to not less than \$200 for infringements by an employee or agent of a nonprofit educational institution, library, archive or public broadcasting entity acting within the scope of his or her employment. See *USC, Title 17, § 504 (c) 2 (i) and (ii): Remedies for infringement: Damages and profits*.

In fact, the IPA noted in 2006 that the 1976 Copyright Act considered and rejected orphan works legislation:

“A point that has concerned some educational groups arose from the possibility that... a life-plus-50 year [copyright] term would tie up a substantial body of material that is probably of no commercial interest but that would be more readily available for scholarly use if free of copyright restrictions...

“It is true that today's ephemera represent tomorrow's social history, and that works of scholarly value, which are now falling into the public domain after 29 years [the term of copyright prior to 1978], would be protected much longer under the [1976] bill. Balanced against this are the burdens and expenses of renewals, the near impossibility of distinguishing between types of works in fixing a statutory term, and the extremely strong case in favor of a life-plus-50 system.

“Moreover, it is important to realize that **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.

“The advantages of a basic term of copyright enduring for the life of the author and for 50 years after the author's death outweigh any possible disadvantages.”⁵

⁵ H.R. Rep. No. 94-1476, at 136 (1976) (emphasis added)

4. Compulsory Private Image Registries Are Not a Viable Solution

We remain adamantly opposed to any proposals that compel artists to register their works with one or more private image registries as a condition of copyright retention, *even* when artists already have registered image deposits with the U.S. Copyright Office. AMI rejects the idea that artists should turn over their intellectual property and confidential business information to any databases held and controlled by the private sector. The risks for abuse or fraud in the administration of any such private image registry would be great.

Additionally, the Copyright Office is well apprised that copyright registration costs are uniquely burdensome to visual authors **due to the sheer volume of images**. No reasonable case can be made to expose visual authors to loss of copyrights due to an inability to comply with the institution of yet more onerous and expensive registration formalities.

The AMI supports the initiatives of the **voluntary** nonprofit PLUS (Picture Licensing Universal System). The problems of orphan works and indeed infringement would be greatly improved by industry-wide adoption of machine-readable metadata, standardized licensing language, and an up-to-date registry of artist's contact information. We encourage the Copyright Office to use this model developed and operated cooperatively by a global coalition of all communities engaged in creating, using, distributing and preserving images. Moreover, we believe that preservation of its current industry-neutral balance of stakeholders is paramount to its success.

The AMI applauds the Copyright Office's efforts to upgrade their systems and digitize the inventory of historic copyright records. We urge the Copyright Office to undertake **digitizing visual art deposits** as well, and make them searchable by users in a manner that does not display the images online. We urge that any orphan works legislation proposed in the future *must harmonize* with the Copyright Act's mandate to the U.S. Copyright Office to administer the mandatory deposit provisions to fulfill its mission "to promote creativity by administering and sustaining an effective national copyright system."⁶ Indeed, we believe that any legislative orphan works registration formalities be retroactively and prospectively compulsory for all Copyright Office deposits. If the Copyright Office were to recommend to Congress that visual images must be identifiable through a searchable interface with an image registry, then the Copyright Office past and future records of the nation's visual art deposits should be required to meet the same compliance.

5. Limited Remedies on Orphan Works—or—Small Copyright Claims Court

Past orphan works legislation called for the U.S. Copyright Office to undertake a feasibility study of a small copyright claims court because Congress conceded orphan works legislation would increase infringement litigation.

We believe that the unintended consequences and risks of an alternative small copyright claims system outweigh any potential benefits. It endangers the Seventh Amendment Right to a jury trial. It is damaging to rightsholders because it will begin to create a competing body of alternative law that will disrupt more than a century of case law from adjudicating rights. The very real threat of abuse exists that users, from behemoth publishers to garden-variety infringers backed by powerful anti-copyright advocates, will bring declaratory actions against rightsholders in this venue.

A small claims system would deny visual artists the full range of enforcement options and legal remedies necessary to fully protect their copyrights. Injunctive relief, especially for derivative works, is vital. The right to counsel should be unquestionable but we note most proposals require creators to represent themselves. The federal rules of evidence and the discovery process are essential elements to determine the level of abuse involved in a copyright infringement. Some of our members have previously provided examples of infringements that were found during discovery to be almost 10 times greater than originally realized.⁷ Copyright infringement cases are rarely simple enough to follow a small claims process and any court's ability to distinguish the simple infringement from the

⁶ <http://www.copyright.gov/circs/circ1a.html>

⁷ Teri J. McDermott, CMI, et al v. Advanstar Communications, Inc.

massive one will not happen without discovery and due process. Finally, it must be remembered that enforcement costs following litigation can exceed litigation costs.⁸ Small claims court enforcement is dubious, at best.

If there is a way to implement an entirely new branch of the judicial system we caution that it must be limited to special, narrowly-defined claims that answer the specific grievances of photographers for example, guarantee full remedies, and it must be *voluntary*.

However, we believe there are better ways to approach the problem of infringement relief for small claims/small copyright holders. Improvements to the registration process would make federal litigation of copyright infringement more accessible to independent creators without the sacrifice of copyright protection. Visual artists most frequently encounter the dilemma of “small recovery, high plaintiff attorney fees.” This is due in large part to the reality that visual artists are severely taxed with burdensome registration compliance because they create hundreds or thousands of images per year. Contrast a visual artist with a book author or a movie house that may register one, or a few, works every year. Creating registration rules that would allow visual artists to more readily obtain registration (and thereby its enforcement benefits) would greatly ameliorate the problem of copyright infringement resolutions. For example, allowing registration of all visual works created during a calendar year would provide equitable relief of full remedies to visual artists and put them on a par with all other authors who need to register with far less frequency. When these remedies **are not available** there is a significant chilling effect on copyright claims because *the successful defendant is eligible for attorney fee recovery* even though the rightsholder is not. When full registration remedies **are available**, small, and larger, claims are generally settled *without resort to litigation*.

6. An Orphan Works Solution that is Harmonized with National and International Law

The AMI notes the equitable balance demonstrated by the E.U. on orphan works solutions thus far.⁹ Directive 2012/28/EU permits uses of visual orphan works contained within collective works *by public cultural institutions only*, to allow them to fulfill their public missions to digitize their collections and make them available online. In cases where there are multiple rightsholders, the work cannot be deemed an orphan if even one rightsholder can be identified. We note that the Directive exempts stand-alone visual works like illustration at the present time, acknowledging the very special problems presented in identifying and attaching permanent copyright information to individual images. The Directive is compliant with all international treaties and all national copyright laws of member states. Full infringement remedies are available to rightsholders for non-diligent searches.

This contrasts with the current proposed U.K. legislation, which has been strongly rejected by visual authors, just as the proposed U.S. 2006 and 2008 legislation. There is a concerted effort to rush through the U.K. measures before Europe-wide orphan works proposals are incorporated into law. Europe’s orphan works legislation forbids commercial exploitation of private property, but the U.K.’s encourages it just as past U.S. legislation. The U.K. is receiving warnings from around the world that this legislation will put it in breach of international law, just as the U.S. did.

On July 11, 2008 on behalf of all those who wish to see a true orphan works bill, the Illustrators’ Partnership of America (of which AMI is a member), Artists Rights Society and Advertising Photographers of America submitted Amendments to the Subcommittee on Courts, the Internet and Intellectual Property.¹⁰ The Amendments have never been considered. A new Congress would have the opportunity to do so.

⁸ In 2001, after **eight** years of copyright infringement litigation, the Supreme Court found for writers, and affirmed writers have the right to be compensated for the electronic sales of their individual articles in collective works, *New York Times Company, et al v. Tasini*. In 2013, after **twelve years** of enforcement litigation which remains ongoing, including another 2010 Supreme Court win for writers, no writers have yet been compensated, *Reed Elsevier v. Muchnick, In re Literary Works in Electronic Databases Copyright Litigation*.

⁹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:299:0005:0012:EN:PDF>

¹⁰ <http://ipaorphanworks.blogspot.com/2008/07/hr-5889-amendments.html>

7. A Collecting Society for American Illustrators

In closing, we note that visual authors continue to have a serious and unresolved conflict with the Copyright Clearance Center. The CCC does not remunerate visual authors for the reprographic licensing of their images contained within collective works. The CCC has provided various rationales for this lapse, including the “inability” to identify or track independent rightsholders within collective works. Orphan Works legislation risks legitimizing this impasse between the recognition of the nations’ creators’ rights and the premiere licensing body of the nation’s published works. We urge this new Copyright Office administration to support the nation’s creators’ right to receive non-title specific and title specific royalty streams generated by the burgeoning licensing of previously published works. The AMI joins its fellow members in the American Society of Illustrators Partnership (ASIP) to support an amicable resolution, and pledges its cooperation to this end.

Respectfully submitted,

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