

I L L U S T R A T O R S '  
P A R T N E R S H I P

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March 24, 2010

Victoria A. Espinel  
U.S. Intellectual Property Enforcement Coordinator  
Office of Management and Budget  
Executive Office of the President of the United States  
Washington, DC 20500

Re: **Federal Register** / Vol. 75, No. 35 / Tuesday, February 23, 2010 / Notices

Dear Ms. Espinel,

Thank you for the opportunity to comment on the importance of copyright law. The Illustrators' Partnership is a grassroots organization incorporated in 2000 to represent the interests of professionally published artists. Over the years we've forged working alliances with 84 other professional organizations representing hundreds of thousands of world-renowned artists, writers and photographers as well as numerous independent licensing businesses and music labels working both in the US and abroad.

On behalf of this far-flung creative community, we'd like to call your attention to a proposed change to US copyright law that would jeopardize billions of currently-protected copyrights. This *Orphan Works* legislation would allow infringers to exploit the exclusive rights of individual copyright holders with little or no penalty. It would do this by granting infringers the right to "orphan" any copyrighted work whose owner the infringer was unable to locate by a "reasonably diligent" search. Intended to give libraries and museums greater latitude to commercialize archival works, this legislation has been drafted so broadly it would permit any infringer to commercially exploit any copyrighted work, from professional art to family photos, including any work ever placed on the Internet by private citizens.

To obtain this expansive right, the infringer would be required merely to observe certain bureaucratic protocols before infringing. This would place an impossible burden of diligence on artists, writers, small businesses and ordinary citizens by requiring them to register any work they ever create with privately owned, for-profit databases. Failure to register each and every work would expose that work to infringement. We oppose this radical change to the law because as infringers come to rely on these databases to "search" for rights holders, any works not found in the databases could be exploited as orphans.

By granting infringers the right to profit from the property of others without their knowledge or consent, this legislation would devalue commercial inventories, drive business decisions

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*ILLUSTRATORS' PARTNERSHIP OF AMERICA*

into the courts and create uncertainty in commercial markets. It would void any contracts – including those already in force – which involve the licensing of exclusive rights. And since the creator's ability to license exclusive rights triples the value of any work, this bill would automatically devalue each artist's inventory by two thirds from the moment the legislation became law.

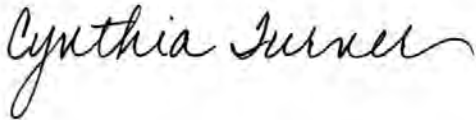
The creative arts industry believes this bill represents a major reversal of America's historic staunch protection of property rights and the creative process. By undermining a creator's right to control and profit from his or her own work, it would have a detrimental effect on the economy, leading to theft from creators and fewer choices for consumers.

Twice Congress has drafted Orphan Works bills in secret with the participation of special interest groups and tried to pass them with little or no debate. Both times the bills bogged down under fire from rightsholders. Since these bills may well come before Congress again, we'd welcome an opportunity to discuss with you how they could be corrected so that they meet the needs of libraries and museums without endangering the primary intellectual property rights of all American citizens.

Sincerely,



Brad Holland  
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Cynthia Turner  
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Encl: March 24, 2005 Letter to Copyright Office  
RE: Orphan Works Study (70 FR 3739)

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March 24, 2005

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P.O. Box 70400  
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RE: Orphan Works Study (70 FR 3739)

**On behalf of the undersigned illustrators and arts organizations, we respectfully petition the U.S. Copyright Office to maintain copyright protection of so-called orphaned works on all visual artistic works for the following reasons:**

**It's not valid to infer that a protected work of art has been abandoned simply because a potential user has difficulty identifying or locating an artist.** Many works appear in print or on the internet as a result of unauthorized usage, and unsophisticated users may copy art from multiple sources. Also, as publishers adapt previously printed editions to the internet, artistic works may be separated from their original context without attribution. If a work of art is orphaned because of unlawful or feckless usage, its integrity will be irreparably compromised by stripping it of protection.

**Automatic protection of visual artistic works is guaranteed without formalities.** To strip past work of existing protections would bring copyright law into disrepute. Authors have been guaranteed protection under U.S. copyright law, the Berne Convention and other international copyright treaties. Because a searchable international registry of published visual artists does not presently exist for users to clear authors' rights, it would be unjust to penalize authors because new technology has given users a greater appetite for their work and easier access to exploit it.

**Many published artistic works are independently copyrighted contributions to collective works.** Even if a collective work is orphaned because a publication ceases or a publisher fails, an artist still retains the rights to his or her own individual contribution to the publication.

**Authors' rights are exclusive.** The public interest does not compel artists to publish their work. Therefore the public cannot demand that an artist's published work, even if orphaned, be made available for free usage before its copyright has expired.

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**Authors' rights are their incomes.** The *exclusive* right to publish or not publish gives the artist the right to determine what compensation is due for usage. Most freelance artists and writers have no other source of income but their creative work and the accumulated value of that work is no different than the value that accrues to one's home. Therefore the copyright that protects creative work does not deprive the public of an "entitlement" any more than does the ordinary ownership of private property.

**Creativity is not chilled by protecting orphaned works.** The human imagination is not dependent on unlimited access to an unlimited body of other people's work to physically appropriate. Even with copyright protection intact, orphaned work can inspire and influence others.

**Free speech is not restricted by protecting orphaned works.** Since ideas and influence are not copyrightable, no one's free speech is restricted by placing legal limits on their appropriation of other people's tangible expressions.

**Archival preservation is not hampered by copyright protections.** Copyright law already permits the copying of work for archival preservation and does not necessitate giving anyone a broader privilege to copy and distribute work without the author's permission.

**Culture is not impoverished by protecting orphaned works,** because orphaned works will still be available for study and enjoyment. But if copyright protection, once given, can be taken away, the thread of broader rights could unravel. Stripping orphaned works of their protection would encourage some users to attribute orphaned status even to works whose authors *can* be located, but with a bit of effort. This would endanger the rights of known authors.

The internet has destabilized the environment in which creators must work. And as artistic works become available worldwide, there is an increased demand for content. But the opportunity this presents to artists for disseminating their work is currently menaced by the threat to authorship that comes with unauthorized usage by others. Artists, like other creators, are trying to meet the organizational, financial and legal challenges necessary to create licensing systems to let them compete with corporate content providers. But it takes time, investment, and creative organization to achieve these goals, and in the meantime, artists must still be able to protect their works. Removing protection from work that has fallen through the cracks of this system-in-flux will unfairly reward opportunists at the expense of creative individuals. It would foreclose the ability of future licensing systems to protect and distribute that same work at a future date in a way consistent with the intent of copyright protections.

**To strip orphaned works of their protection would invite unjust exploitation.** Commercial stockhouses, databases and print and web publishing industries could freely gather "orphaned" images for use by simply declaring authors hard to locate. The Copyright Clearance Center, which currently claims they cannot track usage or identify authorship, would see their continued failure to pay artists legitimized.

**To strip orphaned works of their protection would favor corporate interests over individual creators.** Corporate copyright holders could easily staff up to handle the increased cost of monitoring and maintaining copyright protection while individual creators might well find the added burden of maintaining multiple copyrights prohibitive.

**To strip orphaned works of their protection would threaten an author's integrity.** It's a natural evolution for artists to create derivatives of their own work throughout their

careers. To force an artist's "orphaned" work into the public domain for others to "remix" without consent is hostile to the centuries-old recognition of authors' rights. It would allow others to create a bastard body of derivative work to compete with the artist's self-created derivatives. This could injure both an artist's reputation and the value of his or her work.

**The removal of copyright protection for orphaned work would reinforce the agenda of the "free culture" movement to subvert existing copyright protection for other work.** The alternative copyright drafted by Creative Commons and being promoted as law in various countries includes a "Share Alike version" that "requires derivative users to adopt a similarly open license." In the words of a proponent: "Widespread voluntary adoption of this [alternative] license will render measures like the extension of copyright irrelevant... The greater the volume of material with this kind of license that is out there, the greater the incentive to make use of it, even at the cost of forgoing commercial copyrights. Since most commercial culture depends ultimately on unpaid appropriation of older material, the effects will be cumulative, even VIRAL [emphasis added]." – "Lessig on the Limits of Copyright" by John Quiggin 1/26/05  
<http://johnquiggin.com/index.php/archives/2005/01/26/lessig-on-the-limits-of-copyright/>

**Since it is not self-evident that "most commercial culture depends ultimately on unpaid appropriation of older material,"** we should be cautious about accepting this argument as a legal premise. If users of unprotected "orphaned" work could embed their "new derivative creations" with a "viral copyright," then standard copyright law could become as vulnerable to its unintended consequences as computers to an internet worm.

**The "Free Culture" argument is at odds with the principle of tangible expression, which is the only aspect of the creative process protected by copyright law.** By arguing that creative work is only a "remix" of the work of others, the critics of copyright ignore the factors of experience, personal development and individual vision that are embodied in any author's tangible expression of an idea. The computer and internet, as well as Photoshop, stock and royalty-free content have all made it possible for many people to become content providers by "sampling" the work of others. But the demands of this "new modality" for free and easy access to usable work should not induce lawmakers to legislate as if creativity can be adequately defined by the "remix" model. There is a difference between the alchemy of new creation and the assembling of "found work." Legal protections for this difference have been built up over centuries and once eroded, would be painful and costly to recover.

**The internet has created a culture of appropriation,** and immediate global access to artistic works has facilitated piracy, unintentional infringement and plagiarism. But instant and unrestricted access to work should not be construed as a *necessity* just because technology has made it a *possibility*. That an artist's work now can be instantly transmitted around the world without the artist's permission or control does not justify a user's "right" to take the work. And if inability to trace a work to its author becomes the justification for creating such a "right," who and what will define the inability to trace the work?

The "orphaned" works currently under consideration by the Copyright Office include the work of many artists now in the prime of their careers. To remove copyright protection from this work has the potential to undermine the important public policy behind copyright: To promote the creation and dissemination of culture by rewarding incentive. Rescinding guaranteed protection from copyrighted works will do more harm than good to the creative community and by extension, to the public good.

Please maintain copyright protection of so-called orphaned works on all visual artistic works.

Sincerely,

By Brad Holland and Cynthia Turner, Illustrators' Partnership of America

## *Arts Organizations*

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### **UNITED STATES**

**Illustrators Partnership of America (IPA)**  
**American Institute of Architects (AIA)**  
**American Society of Architectural Illustrators (ASAI)**  
**Artists Rights Society New York (ARSNY)**  
**Association of Medical Illustrators (AMI)**  
**Association of Science Fiction and Fantasy Artists (ASFA)**  
**Guild of Natural Science Illustrators (GNSI)**  
**National Cartoonists Society (NCS)**  
**Pittsburgh Society of Illustrators**  
**San Francisco Society of Illustrators (SFSI)**  
**Society of Children's Book Writers & Illustrators (SCBWI)**  
**Society of Illustrators Los Angeles (SILA)**  
**Society of Illustrators New York (SI)**  
**Society of Illustrators San Diego (SISD)**  
**Society of Photographers & Artists Representatives (SPAR)**  
**Akron Society of Artists**

### **AUSTRALIA**

**Illustrators Australia (IA)**  
**Australian Graphic Design Association (AGDA)**  
**Australian Association of Architectural Illustrators (AAAI)**

### **CANADA**

**Association des illustrateurs et illustratrices du Quebec**  
(Quebec Illustrators' Association)  
**Island Illustrators Society (British Columbia)**  
**Canadian Association of Photographers & Illustrators in Communications (CAPIC)**

### **PAN EUROPEAN**

**Association Européennes des Illustrateurs Médicaux et Scientifiques (AEIMS)**  
France – Germany - United Kingdom - Italy - Switzerland - Belgium – Holland

### **BELGIUM**

**Flemish Illustrators Association**

### **FRANCE**

**La Maison Des Illustrateurs Francia / French Society of Illustrators**

**GERMANY**  
**Illustratoren Organisation / German Society of Illustrators**

**GREECE**  
**Aesopos / Greek Society of Illustrators**

**IRELAND**  
**Illustrators Guild of Ireland**

**ITALY**  
**Associazione Illustratori / Italian Society of Illustrators**

**JAPAN**  
**Japan Architectural Renderers Association (JARA)**

**KOREA**  
**Korean Architectural Perspectivists Association (KAPA)**

**MEXICO**  
**Ilustracion Mexico / Mexican Society of Illustrators**

**THE NETHERLANDS**  
**Association of Dutch Designers**

**NORWAY**  
**KOPINOR The Reproduction Rights Organisation of Norway**  
**Grafill**

**SPAIN**  
**Federaciòn de Asociaciones de Ilustradores Profesionales**  
(Federation of Spanish Illustration Societies)  
**Madrid Professional Illustrators Association (APIM)**  
**Catalunya Professional Illustrators Association (APIC)**  
**Valencia Professional Illustrators Association (APIV)**  
**Galicia Professional Illustrators Association (AGPI)**  
**Pais Vasco Professional Illustrators Association (APIE-EIEP)**

**SWEDEN**  
**Svenska Tecknare / The Association of Swedish Illustrators**

**UNITED KINGDOM**  
**The Association of Illustrators (AOI)**  
**Society of Architectural Illustrators (SAI)**