

I L L U S T R A T O R S '
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March 21, 2005

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RE: Orphan Works Study (70 FR 3739)
Recommendations in Reply to Register's Questions

A Solution for Tracking Orphan Works: Establish an Artists' Registry

We believe there's a solution to the problem of locating the authors of works, orphaned and otherwise. An artists' registry would afford creators copyright protection for their work, while giving potential users the means to locate and clear the rights they want for their own creative purposes.

A possible means of implementing a not-for-profit artists' registry would be for the Copyright Clearance Center (CCC) to work with artists to develop it. The CCC currently collects over \$100 million dollars a year in reprographic royalties and is the largest reprographic re-publisher in the world. Currently, it does not track reprographic usage of visual work; therefore it does not return royalties to U.S. artists for either domestic or international usage. Several other countries do track usage of art created in the U.S. But the royalties collected by these international reprographic rights organizations are currently being dissipated, escrowed or returned to the U.S. in ways that do not include distribution to American artists. Pooling these existing *international* royalties and earmarking them for the specific purpose of creating a U.S. artists' registry might provide the necessary seed money to get it off the ground.

On October 4, 2004 five U.S. visual artists groups sent such a proposal to the CCC. The groups comprising this coalition include (but would not be limited to):

The Society of Illustrators, founded 1901
The Association of Medical Illustrators, founded 1945
The National Cartoonists Society, founded 1946
The American Society of Architectural Illustrators, founded 1986
The Illustrators' Partnership of America, founded 2000

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As of this date the CCC has not responded. Yet accountability by the CCC and a timetable for results might make this market-based solution practical.

Additional Suggestions:

While we believe the creation of an artists' registry would be preferable to stripping orphaned work of existing copyright protections, the tracking and managing of artists' rights is likely to become a moot point without a further reform of publishing contract abuses.

Although the U.S. leads the world in creative output, and the demand for and usage of artworks has never been higher, the creators of that work often face economic decline. Too many are abandoning the creation of new work to seek an affordable living in other fields. The erosion of artists' rights can be traced to various factors: the inability of users to locate artists and clear their rights; the demands of publishers that artists surrender copyrights in return for assignments; cutthroat competition from corporate image providers and legal "visionaries" who wish to emasculate copyright protections while corporate interests see new markets in selling access to "free culture."

To give teeth to an artists' registry, copyright law should seek to restore the negotiating balance between visual authors and their publishers. Here are three possible solutions:

1. Reform the Work-for-Hire Provision in Copyright Law. Increasingly, publishers are forcing freelance artists to sign non-negotiable work-for-hire contracts as a condition of accepting assignments. Many publishers demand all past and future rights from artists as well. By enforcing these terms, publishers are negating the implicit bargaining power copyright law promised to independent contractors. Unless the Work-for-hire loophole in copyright law is closed, the power of publishers to take these rights will increase, and the premise of "Free Culture" advocates - that corporations are using copyright protection to "lock down culture" - will become a reality.

2. Grant a limited, specific antitrust exemption to visual authors similar to the model proposed by Playwrights. It cannot have been the original intent of antitrust law to give media giants decisive bargaining power over independent suppliers. But where the *unintended* consequences of antitrust law undermine the *intended* consequences of copyright law, creators will continue to be deprived of their rights. We believe this conflict in the law deserves to be examined and if possible, reformed.

3. Permit an artists' registry to evolve into a visual authors' collective rights administration. In the likelihood that even a simple antitrust exemption is politically impossible, the development of a non-profit ASCAP-style *Copyright Bank* would provide individual artists with the means of protecting their rights collectively. This could be the natural outgrowth of an artists' registry and provides yet another reason to examine the possibility of using existing reprographic royalties to strengthen copyright protection.

Conclusion

We believe that the issue of orphaned works is tied to the critical imbalance in bargaining power between artists and publishers. An artists' registry would give artists the means to protect their work and track its usage while giving users the means to locate authors and clear rights. This would retain the existing rights-negotiated model and insure that artists retain control over price and usage. It would provide sufficient market flexibility to satisfy the demands of diverse users, while respecting the time-honored tradition of authors' rights.

In making these proposals, we represent only members of the Illustrators' Partnership. While we recognize that a broad consensus exists for preserving existing copyright protections, we've chosen to present these suggestions separately. We believe they would provide relief from current copyright abuses for all artists, regardless of what organization they belong to or whether they belong to any organization at all.

Sincerely,

Brad Holland and Cynthia Turner
For the Board of the Illustrators' Partnership of America