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RE: Orphan Works Study (70 FR 3739)  
*Reply Comment*

The broad diversity of comments received by the Orphan Works study illuminates what we believe is a spreading indifference to creators' rights. Published freelance illustrators may represent a small class of creators, but along with freelance photographers, this class has done much to shape the content of modern popular culture.

Because freelancers must conduct business as independent contractors, their copyrights are among the most vulnerable to piracy, infringement and negotiated exploitation. The Illustrators' Partnership believes that existing copyrights on all visual works should be maintained and we hope that copyright law can be strengthened to protect against the growth of abuse.

We've restricted our additional comments to the following:

**The Creative Commons Proposal**

Because Creative Commons has displayed a special interest in the problems raised by Orphan Works, and because they state (p.12 of their submission) that "Creative Commons licenses . . . point to a solution," we'd like to comment on the unexamined premise behind the Creative Commons agenda.

Creative Commons states (p.11) that "Current copyright law is just like a 'no trespassing' sign on land - a user must assume that she cannot use a work unless she first obtains the owner's express permission."

But it's not clear to us why a user should assume otherwise. While certain creative works (*The Waste Land*, for example) might take their specific character from the inspired use of quoted material, any artist whose work is critically *dependent* on the re-mixing of

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others' work should be assumed to have staked out a unique creative niche. As such, the user *should* assume responsibility for clearing the rights to the work he or she wishes to use. And while this may prove "difficult" in many cases, the wishes of users to incorporate existing work – orphaned or otherwise – should not impose new obligations on the rightsholders of existing work.

Creative Commons acknowledges (p.12) that their "alternative" licenses "cannot solve the problem of Orphan Works" without being modified into law because (p.11) "the Creative Commons approach depends upon the existence of an active rightsholder - i.e., someone who is motivated to invest in educating herself about the 'Some Rights Reserved' approach, and to utilize a CC license for her work."

But it's not clear why any creator *should* be motivated to "educate herself" to the "Creative Commons approach" simply to make it easier for others to use their work. Creative Commons licenses are available to those who wish to use them. So it's also not clear why the law should be changed to embody the "Creative Commons approach."

Creative Commons states (p.10) that their alternative licenses have facilitated transactions between "producers who want to share some uses of their content and consumers looking for royalty-free content . . ." They add that their "marking and searching technologies have unearthed an unmet demand far larger than even the organization anticipated."

But we assume surveys would also unearth an "unmet demand" for free cameras, cars, computer equipment and TVs. Once again, the demand for free content, like a demand for free consumer goods, should not impose an obligation on the supplier. Since current copyright law already permits artists to give away some or all of their rights for little or no pay, we see no imperative to change the law to make this kind of transaction easier for the user. To do so would create a government-sponsored "users' market." And we believe that this would act as a dis-incentive for creators who wish to earn their living by creating new, non-derivative work.

The Creative Commons submission recommends (p.16) "that congress amend the copyright law to require that holders of copyrights . . . *register* their works within a 25-year period following publication" (italics in the original). "Failure to register within [that] period . . . moves the work into 'orphan' status," permitting others to use the work without permission.

On its surface, Creative Commons seems to be suggesting that creators trade in their current term of copyright for a vastly shorter term of protection. In return, artists would get a vastly longer grace period in which to register their work. Some problems with this proposal come to mind immediately, such as harmonizing this shortened term of protection with international copyright standards. But for artists, the real catch would come after the first 25 years of their careers, when slip-ups in record keeping would start causing work to fall through the cracks in the system and into the public domain.

For artists who must produce a running body of work under short deadlines the extended grace period would be attractive, and the downside of the CC proposal might not be readily apparent. But painters, illustrators and photographers are likely to produce

hundreds or thousands of individual creative works in a lifetime. How and when such a law permitted them to register work would be critical to its advisability, and the balloon of paperwork and renewal fees that would follow the initial grace period might guarantee slip-ups in record keeping that would cause a great deal of work to fall through the cracks in the system and into the public domain. Any further comments would be premature, as the Creative Commons proposal provides little more than a thumbnail sketch of how the system they propose would be implemented.

Whatever the term of copyright, however, it is not persuasive to argue, as Creative Commons does (p.17), that an artist's failure to register or renew copyrights under the terms they propose, would "signal that the unregistered work was an orphan, and therefore, that *the rightsholder was no longer exploiting the work . . .* (italics added)." In fact, an artist's failure to register or renew any number of thousands of past copyrights might merely "signal" that the artist was faced with the need to budget precious time and chose to spend it creating new work – which he knows he'll be paid for – rather than spend time and money maintaining old copyrights, which may or may not generate new income.

It's cliché, but true, that the value of an artist's earlier work often depends on its appreciation over time. No artist can tell how, when or why a certain picture may rise from the dead and acquire increased value. So no artist should have to justify the ownership of a fallow copyright by "exploiting" it, any more than the owner of an old guitar should have to justify his right to keep it by playing it.

Behind the reasoning of the Creative Commons approach lies a premise which we would not like to see codified into law. The premise is *that all new work is derived from the past work of others*. This premise is not self-evident. Yet without it, there would be no grounds for Creative Commons to argue that the public domain is a sort of content lender from which the artist withdraws his work and must eventually pay it back - as if the work an artist creates is a debt he owes to society. But having tacitly re-defined all creators as "users" of others' work, Creative Commons can now argue that any law which benefits a user benefits creators. And this confuses a sub-set of creators for a class.

A *collage* made by assembling the work of others may be one *example* of creativity, but it does not define the larger class of creative acts. The history of art, literature and music suggests that creativity is an enigmatic process, not easily pigeonholed, and any attempt to define it as simply a species of collage is counter-intuitive to everything that artists, psychologists and kindergarten teachers know about the creative process. To make the re-mixing of others' work the legal premise for re-defining copyright law would do a disservice to the majority of artists whose drawings and paintings do not depend on the actual appropriation of other people's work. The debt most artists owe to the public domain is rather one of influence and inspiration; and that debt the artist repays by creating a new body of original work.

To sum up: We believe that the Creative Commons proposal defines creative work as a form of public property held by the artist in trust for society. We hope that whatever solution lawmakers adopt for the tracking of orphan works, the Creative Commons premise is not insinuated into law. Compare an artist's work to a similar form of property and a simpler logic prevails: The principles of building construction are a collective body

of wisdom which has accumulated over the ages. These principles are available to everyone, yet the house you build or buy is yours and your heirs. Your debt to the fair use of public information does not obligate you to inhabit your home under a limited government license, then surrender it back to the public at the end of the term.

We understand that the Constitution requires Congress to set a limit to the length of copyright. But we believe that copyright holders should otherwise be afforded the same protections as homeowners and not be challenged, at any time during the duration of copyright protection, to prove that they are not somehow abusing the public domain by failing to make their work available to others.

The proposal by Creative Commons *does* benefit the debate in one way by demonstrating how attempts to solve the problem of tracking art could pave the way to unintended consequences. The difficulty of creating new work under real world conditions is one of the chief reasons so few artists have registered their work in the past. What's needed to bring accountability to copyright is greater *facility* in registering work, not a new "paradigm" in which the creator is seen as the *midwife* rather than the *author* of his or her own creations.

### **Glushko-Samuelson Copyright Clearance Initiative**

It would seem that the Glushko-Samuelson Copyright Clearance Initiative is a competing plan to that proposed by Creative Commons. But like the Creative Commons approach, Glushko-Samuelson seems to grant benefits to scholars, consumers and the public at the expense of authors' rights.

The Glushko-Samuelson plan proposes a "minimalist approach" to amending Title 17 USC. But what it actually portends is an expansion of fair use by weakening authors' rights. It would empower users to annul copyrights based on the user's own definition of due diligence.

Glushko-Samuelson defines an orphan work (p. 3) "as a work for which the copyright owner cannot be reasonably located." But it allows the would-be *user* to define what constitutes a reasonable effort, then it defines "reasonable effort" as "a flexible definition that applies to a variety of situations . . ." It adds: "In the rare instances where there is disagreement about whether a search was adequate, the courts are open to make the required determination."

But while sending authors to court to seek relief from abuses, Glushko-Samuelson would restrict an author's ability to seek redress (p. 5): "Under no circumstances will Sec. 504c statutory damages, attorney fees, damages based upon the user's profits or injunctive relief relating to the challenged use be available against a qualified user." And "*if infringement is proved* (italics added), damages would be limited to the lesser of actual damages or an award of \$100 per work used, up to a maximum of \$500 for any group of works claimed by a single owner and subject to a single use." But with only nominal awards permitted for damages, the cost of proving infringement might be prohibitive.

By empowering the user to determine when he or she has made a "reasonable search" to locate a rightsholder, Glushko-Samuelson claims "compliance with international treaties that forbid requiring a copyright holder to take affirmative steps in the nature of

compliance with formalities in order to obtain or maintain copyrights.” But if a user gets to determine when the standard for a “reasonable search” has been met, and if the rightsholder has no substantial defense against a user’s entitlement, it’s hard to see how this proposal can claim to comply with the intention of international treaties to protect authors’ rights.

Glushko-Samuelson proposes that profits derived from the use of orphaned works not be shared with the author because (p. 10): “the vast bulk of proposed uses of “orphaned works will not yield significant net profits to the user; indeed, many of those uses will be educational or academic ones undertaken by not-for-profit institutions (such as schools, libraries, archives, and museums). But this aspect of this proposal merely highlights why it’s important that a more reliable means of determining orphan status be adopted: most working authors compile their total income from small profits derived from individual uses of their work.

Fundamentally, Glushko-Samuelson claims that orphan works “are not subject to “normal exploitation,” and that the rightsholders of the work have “no legitimate interest in securing an immediate economic return from property that has been (effectively, if not legally) abandoned (p. 9).” But it isn’t clear how the authors of this plan have determined the value of a class of works whose authors can’t be located. And as with the premise that underlies the Creative Commons proposal, not all work that can be “effectively” defined as abandoned will turn out to be abandoned. This kind of assumption overlooks the prerogatives of authors to choose when, where and *whether* to exploit their works.

With all due respect, some assertions in the Glushko-Samuelson proposal suggest that the authors are either unfamiliar with, or indifferent to, the factors that affect working artists. For example, the authors state (p. 3) that a user’s inability to exploit an “orphan work” results in “produc[ing] a new work of lesser value.” But they don’t explain why this should be so, unless they assume that the user lacks the creative ability to assimilate found material and reformulate it to produce new work. The authors also say (p. 3) that “[p]otential users themselves *suffer* because they must engage in *self-censorship* to escape otherwise irreducible risks of liability (italics added).” But this only seems to mean that a user who can’t clear rights to a protected work must find an original way to re-express found material. This obligation may tax the ingenuity of the potential user, but it does not seem to justify the claim that this process would result in “suffering” and “self-censorship.”

We recognize that many of the proposals made in the Glushko-Samuelson proposal are intended to facilitate access to orphaned work by institutions engaged in academic, archival or curatorial activities. But we hope that in addressing the concerns of these institutions, lawmakers remember the potential for unintended consequences to rightsholders. The authors of Glushko-Samuelson dismiss the possibility that the remedies they’ve proposed would be unfair to small individual creators. They say (p.11): “given the existing and potential opportunities for effective self-help by small creators, *a consideration of their interest does not give rise to significant fairness concerns* (italics added).”

It’s not clear what the authors mean by this, but as working artists, we’d like to note that indifference to the competitive realities of a commercial environment could yield

collateral damage to the parties whose work is at stake. Any weakening of copyright protection for individual creators – even if enacted for the benefit of not-for-profit institutions – could open the door to exploitation of those same individual creators by large for-profit media interests. These interests could then unfairly exploit the creative work they once would have had to license. We hope the problem of tracking and clearing the rights to creative work, orphaned and otherwise, can be resolved in the best interests of all parties.

### **Copyright Clearance Center**

We support the CCC suggestion that the problem of tracking orphaned work be solved by “[establish]ing a voluntary works/ownership Registry, where information about works, rights and rightsholders can be recorded.” We commend the CCC for offering its expertise and skills “to assist the Copyright Office as it develops any recommendation to create such a Registry.”

Copyright Clearance Center writes (p.2): “As a not-for-profit corporation established by a group of authors, publishers and users that had worked with Congress in its revision of the Act, and continuing to this day (uniquely among collecting societies around the world) with representatives on our Board of Directors not only from the author and publisher communities but from user communities as well, CCC has created and maintained markets that have served *all parties* effectively and efficiently (italics added).”

This is not entirely accurate. The CCC collects over 130 million dollars a year in reprographic fees, but CCC is unable to track illustration usage to determine how much of that money should be returned to the artists whose copyrighted work is licensed by the CCC. The exclusion of visual authors from these clearing systems *orphans our copyrights*, even though the *locatable and identifiable authors* are attempting to negotiate with CCC for rights clearance.

Acknowledging these individually held copyrights would enable CCC to assure its users of comprehensive rights clearance. We invite the CCC to work with freelance visual authors to implement *a solution for tracking and clearing the rights to visual art, orphaned and otherwise, while expanding its existing registry to include published illustrators.*

Sincerely,

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