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**Written Statement of Brad Holland and Cynthia Turner on Behalf of
The Illustrators' Partnership of America**

**The Subcommittee on Courts, the Internet and Intellectual Property
Committee on the Judiciary
U.S. House of Representatives**

**Concerning
Orphan Works Legislation**

March 20, 2008

Mr. Chairman and Members of the Subcommittee, while this statement is being filed by the co-chairs of the Illustrators Partnership of America, it reflects a statement previously submitted to the Copyright Office and endorsed by 42 national and international organizations representing a broad spectrum of the commercial and fine artists who make their living from the exercise of the exclusive rights guaranteed to them by the U.S. and international copyright law and treaties.

We respectfully request that the subcommittee delay any action on the pending legislation until we have been able to inform its members fully about our concerns and to work with the subcommittee to address those concerns. It then may be possible to craft legislation that does not unfairly prejudice the interests of those whose livelihood depends on meaningful copyright protection. We also are concerned that the legislation, as drafted, may have spillover effects on a wide variety of copyrighted works that are important to a growing and healthy U.S. economy in the information age.

Under this legislation, as we understand it, effective copyright control to a work, including works of visual art, would require submission of a copy or copies of the work to as yet-to-be created private registration companies that would use untested technologies to scan images submitted by unlicensed users. These users would then be excused from any liability for infringement unless the legitimate rights holder responded within a certain period of time to grant or deny permission to use the copyrighted work. This is a radical departure from any existing business models or practices in the field of copyright.

Further, it radically abridges the fundamental principal of exclusive rights granted to creators under the copyright law, and creates a sweeping compulsory license permitting large scale unauthorized use of not only older works, the provenance of which may be difficult to determine, but also of the valuable contemporary works that are the economic life blood of those in our profession.

U.S. copyright law currently contains a number of statutory licenses that legitimize either *de minimus* use of a work created principally for other uses, or that deal with the special needs of not-for-profit organizations and others that skirt the boundaries of fair use. However, all of these statutory licenses provide for a system of remuneration to the copyright owner for uses that have not been directly authorized. This legislation is neither limited to *de minimus* uses of works nor does it provide a method of compensation for such uses.

The cavalier disrespect for the fundamental principle of exclusive authors' rights that is inherent in the Copyright Office's legislative scheme is reflected in the following colloquy between this author and the General Counsel of the Copyright Office at a meeting in which he responded to the concerns of visual artists about the potential harmful effects of this legislation.

Holland: If a user can't find a registered work at the Copyright Office, hasn't the Copyright Office facilitated the creation of an orphaned work?

Carson: Copyright owners will have to register their images with private registries.

Holland: But what if I exercise my exclusive right of copyright and choose not to register?

Carson: *If you want to go ahead and create an orphan work, be my guest!*

(From the author's notes of the meeting.)

We believe strongly that this legislation as now written violates the obligations and commitments of the United States under Article 5 (2) of the Berne Convention on Literary and Artistic Rights which states:

The enjoyment and the exercise of these rights shall not be subject to *any formality*. (Emphasis added)

This Berne Convention principle has been incorporated into the Universal Copyright Convention and Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). These agreements acknowledge narrow limitations and exceptions to the exclusive right of copyright – so long as the exceptions don't exceed the constraints of the TRIPS **Three-Step Test**:

Member [countries] shall confine limitations and exceptions to exclusive rights to:

- (1) certain special cases
- (2) which do not conflict with a normal exploitation of the work
- (3) and do not unreasonably prejudice the legitimate interests of the rights holder.

Legal scholars Jane Ginsburg and Paul Goldstein have warned that Orphan Works legislation must precisely define the scope of its mandate or fail to meet the three-step-test. As they wrote in their submission to the Orphan Works Study:

[T]he diversity of [orphan works] responses highlights the fundamental importance of **precisely defining the category of "orphan" works. The broader the category, or the lower the bar to making the requisite showing of due diligence, the greater the risk of inconsistency with our international obligations to uphold authors' exclusive rights under copyright. Compliance with Berne/TRIPs is required by more than punctilio; these rules embody an international consensus of national norms that in turn rest on long experience with balancing the rights of authors and their various beneficiaries, and the public. **Thus, in urging compliance with these technical-appearing rules, we are also urging compliance with longstanding practices that have passed the test of time.**** 1., p. 1, OWR0107-Ginsburg-Goldstein (Emphasis added).

We do not believe the Copyright Office proposals address the concerns of professors Goldstein and Ginsburg and would, if enacted, subject the United States to complaints of treaty non-compliance at the World Trade Organization. And, we would expect the international reprographic and artists rights societies which endorsed our submissions to the U.S. Copyright Office would be able successfully to encourage their governments to bring such complaints.

As the world's leading creator and exporter of copyrighted works, the credibility of efforts of the United States to secure effective international enforcement of copyright would be materially weakened by the enactment of this proposed legislation. Certainly any law that prevents effective remedies or imposes arbitrary burdens on the right to bring infringement actions – much less provide for compensation for *de minimus* uses – would be seized upon by those in other countries who wish to defend piracy of U.S. works.

In addition to our concerns about the compulsory licensing aspects of this legislation we would like to acquaint the subcommittee with the unique characteristics of illustration and other visual works of art that distinguish us from those who create other categories of copyrighted works such

as literary works, songs and films. Unlike these other categories of works, works of visual art lack universally accepted titles that would allow users to search for them by name. Therefore the role of image recognition technology is critical. This technology is still in its infancy, is untested, and its use raises a number of very practical concerns. Among these concerns:

- The number of works created by the average visual artist far exceeds the volume of the most prolific creators of literary, musical and cinematographic works;
- The cost and time-consumption to individual artists of registering tens of thousands of visual works, at even a low fee, would be prohibitive; therefore
- Every artist would see thousands of his creations potentially orphaned from the moment of creation.
- No registry would be meaningful until billions of pre-existing works (both published and unpublished) from artists (both living and dead) have been digitized; but
- Few, if any, living artists could afford the time and expense of digitizing and registering a backlog of tens of thousands of their own works; therefore
- Countless working artists would find countless existing works orphaned from the moment they create them.

Further, we have a number of unanswered questions about how the registries that are key to this legislative scheme would work, such as:

- Who is to be trusted with this [these] valuable database(s)?
- Why should any professional creator be forced to entrust his or her entire creative inventory to the control of other commercial entities?
- What happens when a registry is hacked?
- What happens when it's acquired?
- The contents of these image registries will be more valuable than secure banking information. What happens when the terms of service are changed?
- What happens when registration fees become prohibitive?
- What if individual artists cannot afford to maintain their immense bodies of work in competing registries?

Finally, we are concerned that, even if artists do comply with these coercive measures, they might still find their work orphaned. Let's say an artist registers tens of thousands of images with one or more commercial registries. A user searches for one of his images and makes a match. The user contacts the artist and asks to use the art for a silly or distasteful ad. Or he asks to use the art for free. Most artists already see such inquiries and we know there aren't enough hours in the day to deal with them. **Yet under this law, we would be obligated to respond to every irresponsible request!** All this uncertainty would drive ordinary business transactions into the courts where uncertainties would multiply: judges unfamiliar with commercial markets would routinely have to render decisions regarding countless disputes in fields in which they lacked expertise.

The imposition of coerced registration in the U.S. could force foreign rightsholders to pay to register their work with U.S. registries, inviting foreign governments and business to retaliate in unpredictable ways.

And, many of the images to be affected by these proposals will be works created since 1976, when the current copyright act was passed. That law promised artists that their art would be protected even if it was not marked and registered. Yet if the Copyright Office proposals become

law, any unmarked picture created in compliance with the 1976 law will become an instant potential orphan. Countless rightsholders will be penalized for not having done over the last 30 years what the law never required them to do.

We appreciate the ability to submit these comments and look forward to working with the subcommittee to address our concerns.

– Brad Holland and Cynthia Turner, for The Illustrators' Partnership of America