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January 17, 2012

Maria Pallante
Register of Copyrights
U.S. Copyright Office
101 Independence Ave. S.E.
Washington, D.C. 20559-6000

RE: Notice of Inquiry, Copyright Office, Library of Congress
Remedies for Small Copyright Claims (76 FR 66758)

On March 29, 2006 the Illustrators' Partnership appeared before the House Subcommittee on Courts, the Internet and Intellectual Property regarding the issue of a copyright small claims court. Noting that the proposal was linked to the Orphan Works Act then before the same subcommittee, we testified in opposition to the measure:

> "Creating a new form of legalized infringement without statutory remedies – even for registered copyrights – and offering a small claims court as a solution to the wave of infringements that will result is not a workable approach. It will only serve to legitimize the taking of our copyrights…The attempt to lessen the damage by adding the burden of a small claims court to our overloaded federal judiciary is simply not a viable approach."

Our testimony was based on in-depth conversations with both copyright attorneys and professional artists who had weathered copyright infringement cases. The truth is few working artists have ever filed copyright lawsuits. Most have no idea of the rigorous process necessary to ascertain and document the facts necessary to bring justice to the proper parties in such disputes. On its face, the concept of a short order court of law would no doubt appeal to many artists. However, there are several fundamental problems with the idea that we continue to believe make it untenable:

1. **Jurisdiction: Copyright is a federal law and a small claims court would have to be administered on a local level.** That means a) it's unlikely that local judges would have the expertise to properly administer the complexities of copyright law; and b) this would inevitably lead to hundreds or thousands of contradictory rulings, all constituting different interpretations of the same federal law. How this would affect the coherence of copyright law itself is anybody's guess, but in practice it would mean dissonance, with countless actions being judged infringements in various jurisdictions while not in others.

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2. **Discovery: Small claims litigation would deprive plaintiffs of discovery, expert witnesses and other tools necessary to discover hidden facts or test false claims.** The relevant facts of any infringement are rarely self-evident. So unless an infringer has a Perry Mason Moment and confesses his offense, a typical small claims lawsuit would probably lead – as one lawyer advised us – to a judge simply splitting the difference between contending parties.

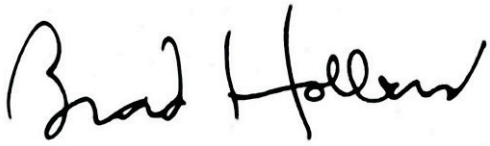
3. **Feasibility: The feasibility of introducing a different system of litigation would ultimately be a matter for the Justice Department – not the Copyright Office – to decide.** So even if the Copyright Office study were to conclude that such a system was workable, we suspect the Justice Department would have the last word. Since previously, the proposal was linked to the Orphan Works Act and was promoted solely by the parties who supported that bill, there's every reason once again to consider it in terms of that legislation. Here's the scenario that concerns us: The Copyright Office "determines" (as a result of this "study") that rightsholders "want" a copyright small claims court. Lawmakers link it to Orphan Works legislation, as they tried to do with their failed *Copyright Modernization Act of 2006*. Then they speed the new bill through Congress and turn the small claims matter over to the Justice Department. But Justice concludes that it's not feasible to administer federal law on a local level, so that proposal dies, while the Orphan Works Act becomes law. If this is the scenario that plays out, then the proposal for a copyright small claims court will have merely shoehorned into law a bill that was widely and thoroughly condemned by tens of thousands of artists, writers, photographers, songwriters and other small business owners in 2006 and 2008.

4. **On the other hand, perhaps the concept of a small claims court could again be packaged with the Orphan Works Act and promoted to Congress on the premise that it would "streamline" the administration of copyright law**. We'd consider this scenario equally problematic. Since Orphan Works law would make any unregistered art a potential "orphan," a small claims regime could theoretically be implemented in which plaintiffs – deprived of the tools of discovery – would see their lawsuits resolved in local courts, not on the basis of authorship, but on the fact and dates of registration. This, of course, is exactly what Congress has already done with patent law. The new "streamlined" patent system would determine patent ownership based not on who invented something, but on who was "first-to-file." It should be easy to see how this system will tend to favor large corporate interests over the lone inventors who often have to seek investment capital from – and therefore share privileged information with – those same corporations. Just as "first-to-invent" will no longer be the decisive issue in patent disputes, it's conceivable that copyright small claims litigation could become the mechanism by which authorship of creative work is determined, not by authorship, but by priority of registration.

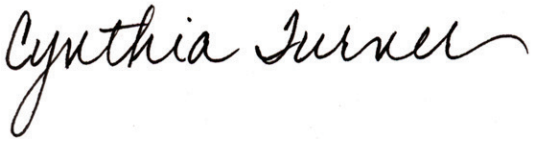
In our 2006 testimony before the House subcommittee, we gave specific examples of how such "streamlining" of the judicial process would benefit infringers under an Orphan Works

regime. A copy of that testimony is attached. We continue to believe that the "need" for a copyright small claims court could be alleviated by not passing an orphan works law that would create the "need" for one.

Respectfully submitted,



Brad Holland
Director, Illustrators' Partnership of America



Cynthia Turner
Director, Illustrators' Partnership of America

Attachment:
Statement of Brad Holland
Founding Board Member, Illustrators' Partnership of America
before the
Subcommittee on Courts, the Internet, and Intellectual Property
Committee on the Judiciary

U.S. House of Representatives
109th Congress, 2nd Session

March 29th, 2006
Re: Oversight Hearings on Remedies for Small Copyright Claims

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Subcommittee on Courts, the Internet, and Intellectual Property
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March 29th, 2006

Re: Oversight Hearings on Remedies for Small Copyright Claims

Chairman Smith, Ranking Member Berman, members of the Subcommittee: My name is Brad Holland. I've been a freelance artist since I was 17 and I'm here to represent the Illustrators' Partnership of America. The IPA is the outgrowth of a grassroots movement started by artists in 2000 for the specific purpose of adapting our cottage industry to the challenges of the digital era. In that capacity, we filed a submission last year to the Orphan Works Study. It was endorsed by 42 international arts organizations, representing a broad spectrum of popular artists, fine artists, medical and architectural illustrators, cartoonists and educators who work in the U.S. and overseas. The Illustrators' Partnership is a non-profit, self-funded organization and an associate member of the International Federation of Reproduction Rights Organizations. I'm pleased to have the opportunity to say a few words about the subject of Remedies for Small Copyright Infringement Claims.

Wherever possible, artists have attempted to work on a traditional business model. Our work is commissioned by clients to whom we license initial rights for one-time usage for an agreed-upon price. Most artists retain their supplementary rights, which with the advent of the digital era, have been recognized as a potential stream of income – and therefore a contested prize – for any party that can obtain access to them.

Now comes a proposal that risks transferring a vast body of those rights into an orphan works limbo by legalizing the infringement of any work whose creator is said to be hard to find. This would harm artists and photographers disproportionately because images are often published without identifying information, signatures may be illegible and information can be removed by others. We've been told that this committee plans to pass Orphan Works legislation quickly, but will consider the creation of a small claims courts or arbitration mechanism to try to litigate the infringement cases that will follow.

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We strongly oppose the creation of such courts. The Orphan Works Report states that a "good faith reasonably diligent search" for a copyright holder will be "a very general standard" defined solely by the users themselves, many of whom may well have an interest in an unsuccessful search for the copyright holder. Absent a settlement by negotiation after the infringement has taken place, the copyright owner's sole recourse will be to bring an action before the courts.

Copyright law is a Federal law. There are only 11 Federal Circuits in the country with 97 U.S. District Courts. Would copyright holders have to travel to one of them every time we need to file a small dollar infringement claim? If so, we wouldn't be able to add travel and lodging expenses. And under the proposed "limitations on remedies," the copyright owner could not obtain court costs or attorneys' fees, not even if the work were pre-registered. The Orphan Works amendment virtually guarantees that the cost of suing an infringer would exceed whatever sum the copyright owner could recover in a successful small claims action.

By "limiting remedies," the Orphan Works amendment will create a no-fault license to infringe. Let's look at a hypothetical small claims action that I might be obliged to bring in the future.

In the 1990's, I licensed a series of pictures for one-time use in a corporate annual report. In such cases, copyright notice and credits are most often omitted by art directors for annual reports, and almost always for advertisements in spite of the wishes of the artist to preserve his credit. I registered my copyright in the work as part of a group registration, the title of which was based on the annual report. I subsequently licensed some of these pictures for exclusive use in various ads in the United States, and I make it a practice never to license my work for inexpensive or distasteful products.

But let's say an infringer finds the annual report. He likes the pictures, sees no credit and does a "good faith" search that fails to identify me as the owner of the copyright. He begins selling cheap t-shirts bearing my art. Under current copyright law, my remedies would include statutory damages, attorney's fees, impoundment and injunction for this flagrant infringement because it's damaged my exclusive right to license my work in high-end markets. But in small claims court my remedy would be what? Reasonable compensation for use of my work on cheap t-shirts. And even this would be limited to whatever maximum the small claims court might set and would be constructed not to deprive the infringer of the profits he made "in reliance" on his so-called failure to locate me.

Without the deterrent of statutory damages and attorneys fees - and without a permanent injunction against repeat offenses by the same t- shirt seller, this experience would now act as an incentive for the infringer to exploit other uncredited (and therefore, effectively orphaned) images by other artists. He's discovered that infringing art is just a rational business decision. In turn, this would inspire yet other infringers.

This clearly violates the Three-step test of the Berne Convention, which states that exceptions to an author's exclusive rights should apply only to certain special cases, should not conflict with the author's normal exploitation of the work and should not prejudice the author's legitimate interests. As legal scholars Jane Ginsburg and Paul Goldstein stated In their submission to the Orphan Works Study:

> "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)

Creating a new form of legalized infringement without statutory remedies - even for registered copyrights - and offering a small claims court as a solution to the wave of infringements that will result is not a workable approach. It will only serve to legitimize the taking of our copyrights. For these and other reasons, we would respectfully ask this committee to consider the negative effects that OW legislation will have on free market transactions. The attempt to lessen the damage by adding the burden of a small claims court to our overloaded federal judiciary is simply not a viable approach.