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May 21, 2013

LIBRARY OF CONGRESS

Copyright Office

[Docket No. 2013-2]

Technological Upgrades to Registration and Recordation Functions

Notice of inquiry.

Comments Submitted by the Graphic Artists Guild, Inc.

by electronic filing

Re: Federal Register/ Vol. 78, No. 56 / Friday, March 22, 2013 / Notices

INTRODUCTION

The Graphic Artists Guild is pleased to have the opportunity to submit our comments, opinions and suggestions to the US Copyright Office as contribution to the study of potential improvements and technical enhancements to the information technology platforms that support its registration and recordation functions, including its online registration system. These comments are submitted on behalf of visual artists, with a focus on illustrators and graphic designers (together "graphic artists").

Graphic arts are integral to a broad range of industries, such as publishing (illustration, book design, graphic novels), advertising, educational and training materials, motion pictures and broadcasting, retail packaging, websites and online commerce, textiles, video games, apparel, home furnishings, computer graphics, stationery, posters, CD and DVD art, ceramics, and editorial illustration. Because graphic art is so integral to the American economy, the graphic art industry is uniquely vulnerable to copyright infringement. Protecting the creative works of illustrators and graphic designers must continue to be a necessary and integral part of U.S. law. We believe it is of vital importance to the professions of graphic arts for the Copyright Office to facilitate online registration procedures that are easy and affordable to individual and small business creators as well as large corporate creative businesses.



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Our comments and suggestions to the broad questions posed in the NOI are as follows:

(1) how stakeholders use the current online offerings of the Copyright Office, especially with respect to registration and recorded documents, and how the current offerings meet, fail to meet, or exceed user expectations

Artists using online registration were not confident that they had used the procedure properly. *Once the registration was completed, I was unsure if the steps were followed correctly. My only confirmation was the transaction being deducted from the checking account.* [P.L. illustrator]

Our National Advocacy Committee conducted an online national survey applicable to all authors and creators of copyrightable works to collect information regarding the 2012 (2nd) NOI Remedies for Small Copyright Claims: Additional Comments, [Docket No. 2011-10]. Survey results were initially submitted with our Comment Letter in October 2012.

The survey queried how rights holders have experienced infringement of their works, and if, or how, they have taken action against the infringer, including whether they used the federal court system; if not, why they didn't, and if they would consider using an alternate court system for small-value copyright infringement. The survey included questions that relate to this NOI regarding online registration.

- 39.1% of creators responding to the 2012 survey said they'd registered work with the US Copyright Office
- Of those who registered their work, 42.6% said they'd used eCO (online registration)
- 18.4% responded that they didn't register their work because "The form/registration is too difficult"



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The response to the question, "*Approximately how many total works/images have you registered to date?*" was:

- 1-10 works: 35.1%
- 11-20 works: 7.9%
- More than 20 works: 57.0%

Most people are aware that a photographer creates many images for each job/project, and perhaps thousands of images each year. The Copyright Office has recognized this and accommodated the large quantity of works photographers need to register by establishing the registration category of "group" registration of photographs. However, people are unaware of how prolific most professional graphic artists are. Response to our 2012 survey documented that on the average, illustrators and graphic designers:

- Produce 57.16 (average) finished pieces of art/design in a year.
- Produce 201.71 (average) preliminary pieces (roughs, drafts, comps) in a year during the working process.
- Register 12.16 (average) of all those pieces.
- 49% of those responding register nothing. We believe that the registration rate has actually increased from past years as a result of copyright education, advocacy efforts, the availability of online registration, and the orphan works issue.

The quantity of individual works created during the working process for a particular project ties in directly to both issues of group registration and the requirement in registration of designating whether a work is "unpublished" or "published."

The Graphic Artists Guild also conducted a Fee Increase survey in 2012 in conjunction with the NOI regarding Copyright Office Fees. [Docket No. 2012-1]. Some of the questions posed in that survey also relate to this problem with registration for visual artists. We proposed a new registration procedure and discounted fees for large volume registrations of visual art by single owners.



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It is more cost effective for the Copyright Office to process the online registration of multiple works from one author/creator at once than to process multiple individual claims for single works.

In order for this new procedure and category to be truly useful in practicality for illustrators and graphic designers and to incentivize registrations, some modifications to existing classifications would be necessary.

We propose a "pay-one-price bulk registration" option for an annual fee for basic registration for individual visual creators. We agree with the "bulk registration" yearly fee of \$300 proposed by American Society of Media Photographers. Visual artists would like to register multiple works together throughout the calendar year according to their production schedules. Artists would like to be able to choose this option each year depending upon their particular projects for that year.

On the average, the number of visual works illustrators and graphic artists create (including all roughs, comps/revisions, and finals) are...

- 14.91 For a logo design
- 9.27 For an illustration
- 7.77 For a website design
- 5.68 For other type of graphic design works
- Overall average of works created for each job/project = 9.4

When asked, "Would you personally use "bulk registration?" 49.0% of visual creators replied, Yes, while 38.8% replied Maybe.

When asked, "Would you like to be able to register multiple visual works for one client/job/project together at once in one registration filing for the fee of a single registration, regardless of whether the individual works were 'published' or 'unpublished?'" 86.4% responded Yes, 13.6% responded Maybe, and 0% No.



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Illustrators and graphic designers create many rough drafts and revisions from the beginning of a project to the final, published illustration or design. Many of these drafts are provided to the client, either on paper (photocopies or fax prints) or as digital files. The client has copies of many versions along the way, not just the final art.

In many situations, the final art would qualify as "published," and all other art created for the same project would qualify as "unpublished," and therefore cannot be registered together. Accordingly, in order to cover all the copyrights for a client project, often at least two registrations are required.

It is legally and financially detrimental for illustrators and graphic artists to register all artwork produced for one professional job/project as an "unpublished collection."

At the very least, the Copyright Office needs to offer clearer guidance for determining whether works are "published" or "unpublished," specifically with respect to online use.

Over fifty-six percent of those responding to our 2012 NOI [Remedies for Small Copyright Claims: Additional Comments](#) survey indicated that they found the registration definitions of "published" and "unpublished" confusing with respect to online works. The traditional definition of "published" is "the distribution of copies of a work to the public by sale or other transfer of ownership, or by rental, lease or lending" or "the offering to distribute copies to a group of persons for purposes of further distribution, public performance, or public display." The Copyright Office has declined to provide guidance for determining whether works posted online qualify as "published." See Circular 66. As the Copyright Office acknowledges, publication is an important concept, and there are significant consequences to making the wrong determination. Incorrectly designating a work as published when it was unpublished, or vice versa, can render the registration invalid. Unfortunately, the courts have not provided clear guidance on this issue.



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Many visual creators are unclear as to whether posting/uploading digital images to an intranet or the Internet, is considered publication within the context of the overall content. Some graphic artists consider the act of posting an image on the internet or uploading a website to be publication. However, other artists do not interpret posting their images on the Internet as publication because they still think of publication as traditional printing.

However, allowing one's image to be seen on numerous end users' computers could be considered more analogous to distributing multiple copies than to displaying a single work, especially if downloads or printing of the image is allowed. It would be very helpful if the Copyright Office would offer guidelines for registrants and the courts for determining when online works should be considered to be published works, including specific examples - online periodicals, web pages, catalogs, blogs, portfolio web sites, animated computer games (images considered separately from the software), CGI, low resolution image files intended for use only with electronic devices, etc.

In all of these instances, the opportunity exists for anyone to make an unauthorized copy and infringe the work. Artists would benefit from the legal advantages of registering their work and would be more likely to register if the existing instructions were more helpful in determining whether online works should be registered as published or unpublished.

The U.S. District Court in the Central District of California dismissed otherwise valid infringement claims on the grounds that the plaintiff's registrations covering collections of designs, violated the 'single unit of publication rule,' and were void and invalid, causing the plaintiff designer to lose a potential judgment of approximately \$ 2 million. Olander Enterprises, Inc. vs. Spencer Gifts, LLC, 812 F. Supp. 2d 1070 (C.D. CA 2011). [Greg Victoroff, Esq.]*

Researching the 'single unit of publication rule' (the litmus test for validity of crucial registrations of multiple works), we found that the rule is published in the Compendium of Copyright Office Practice § 607 (1984), but that the Compendium is not on the Copyright Office's website, or



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anywhere else on the Internet, or in most law libraries, or in any of the appendices of the Nimmer copyright law treatise, and thus not readily available. [Greg Victoroff, Esq.]*

The rule can be found in the Code of Federal Regulations 37 CFR § 202.3(a) (i) (2010) and tucked away in a corner at the Copyright Office's website at <http://www.copyright.gov/ecolhelp-type.html>. [Greg Victoroff, Esq.]*

But as confirmed in my April 9, 2013 telephone interview with Copyright Office Visual Arts Section Registration Specialist Ivan Proctor, the Copyright Office has no published guidelines for what constitutes a 'single unit of publication,' making understanding and complying with and advising clients about the rule risky and uncertain. [Greg Victoroff, Esq.]

It would improve user satisfaction and avoid forfeiture of valid claims if: 1) the complete Compendium was available on the Copyright Office's website, 2) information about the 'single unit of publication rule' was included on an information circular, or better, in the instructions and prompts for completing the eCO registration application form. [Greg Victoroff, Esq.]

Clear and readily available guidelines should be available, and better yet, part of the application. Better yet, the Copyright office should change its rules to allow all authors, such as illustrators, to register collections comprising published and unpublished works together. Currently, only photographers can do so. [Linda Joy Kattwinkel, Esq.]

The concept of "publication" as a relevant requirement to copyright registration is a throwback to the 1909 Copyright Act that was not resolved when the registration requirement was dropped in the 1976 Copyright Act. Obviously, digital media didn't exist in 1909 and the internet didn't exist in 1976. "Publication" was thought of in terms of reproduction and distribution in print. This concept of "publication" is long outdated and no longer serves any purpose for authors/creators, especially if neither Congress, nor the courts, nor the Copyright Office can devise a clear and practical definition of what constitutes "publication." Seventy-six percent of visual creators responding to the 2012 Fee Increase survey we conducted in conjunction with the NOI regarding Copyright Office



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Fees [Docket No. 2012-1] indicated that they would like to see the registration distinction between "published" and "unpublished" work eliminated altogether.

The problem of group registration needs to be clarified by the Copyright Office and the congress and not the courts. There needs to be standardization on the protection that group registration affords. [J.P.S., illustrator]

(2) how stakeholders would like to interact with the Copyright Office electronically in the future,

eCO online registration needs a major User Interface overhaul. Many authors/creators were accustomed to the paper registration forms, which were simple and included instructions. We would suggest a registration form as a single page akin to a sheet of paper which scrolls down. All questions and content would be visible to the user on one webpage, instead of moving from one page of content to the next without the ability to see the context or significance of the information being filled in.

The online application process should be completely revamped so that users can easily comprehend what they are doing. A simple pdf form that allows users to enter the information in the appropriate fields on an actual application form (e.g., one that looks just like the paper form) would be best. Each heading on the form ("title" etc) could be a hot link to information and guidelines about filling out that field. [Linda Joy Kattwinkel, Esq.]

Also, there should be a way to save and print the application BEFORE it is submitted, so that clients can review the filled-in information and verify that it is accurate. Currently, you can only get a pdf of the application AFTER it's already been submitted and when its too late to change it. [Linda Joy Kattwinkel, Esq.]

Simpler for the user is better, and the ability to save the application as a draft is critical. [J.C., graphic designer]



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Our comments and suggestions to the specific topical questions posed in the NOI as follows:

(1) The nature and capabilities of the Copyright Office's public portals (e.g. for electronic registration services), including interface-based portals as well as business-to-business portals, or access to Copyright Office services or data through application program interfaces;

The Copyright Office's erratic review of applications compounds the problem of the lack of readily available information on the 'single unit of publication rule.' [Greg Victoroff, Esq.]

For example, on 2 of the 4 registration applications invalidated by the District Court in the above-cited Spencer Gifts case, the Copyright Office actually called the Claimant's attorney about a mistake on the application on Space 2. But due to the Copyright Office's traditional policy of allowing vague and general descriptions of pre-existing material (EXCLUDED from the material being registered on Space 5), and vague and general descriptions of "Material Added to the Work" (INCLUDED as the work being registered on Space 6), the Copyright Office allowed the registration of all 4 collections. Tested in court, all 4 of the registration applications including 2 examined and corrected by the Copyright Office, inadvertently combined published and unpublished works on the same application, violating the 'single unit of publication rule,' rendering all 4 registrations invalid. [Greg Victoroff, Esq.]

We welcome and applaud the 'Limitation of Claims' section on the new, electronic eCO forms. This area of the form replaces the information formerly located in Spaces 5 and 6 of the old paper application forms. With the addition of published guidelines alerting Claimants to the 'single unit of publication rule and no space limitation, the Limitation of Claims section on the new eCO forms can make registrations more complete and help Claimants avoid violating the single unit of publication rule by explaining the rule, forcing Claimants to specifically identify specific limitations to the claim, what works are excluded, and which works are included in the registration application. [Greg Victoroff, Esq.]



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Members reported positive experiences getting help over the phone with Copyright Office staff.

(2) the nature and scope of information captured during the course of the registration and recordation processes, including that which could be captured through user input, or through metadata harvesting;

The naming of images individually in a collection is also silly, especially if the Copyright Office is not keeping copies of the visual materials sent to them. With present technology, metadata or other nomenclature technology would make this naming unnecessary; it could be done automatically on the form. Metadata would be more efficient than naming each item in a collection and it would seem easier to find once registered. [J.P.S., illustrator]

(3) metadata standards in particular industries that the Copyright Office might adopt or incorporate into its systems (e.g., IPTC for photography; ISRC for sound recordings; ONIX for books);

We would defer to PLUS (Picture Licensing Universal System <http://www.useplus.com/aboutplus/system.asp>) for standards regarding digital image files.

(5) new ways of searching and accessing registration and recordation data and/or registration deposit metadata (e.g., image or music search technology); and

Graphic artists and illustrators want the Copyright Office to retain electronic copies of their deposited works with their registration information in the database, and to facilitate image searches of their works that will connect the images with the rights holder.

Especially for artists and photographers, a thumbnail preview of the copyrighted work would be a huge improvement. For music, a clip in .wav, .mp3 or other audio format would be, too. [J.C., graphic designer]



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All deposits of digital visual works must be protected with online security to prevent images from being copied for reproduction or downloaded by people searching registration records.

(6) the integration of third-party databases of copyright ownership and licensing information (such as those maintained by collective management organizations) and related technologies with data maintained by the Copyright Office.

Maybe the application process could ask the registrant to include a URL that includes an example, which would then become part of the record once the copyright is approved and the work is registered. [J.C., graphic designer]

I think there should be a cost charged to those searching the data. They should register and there should be a record of their searches. As for specific technologies, Google and Amazon and various others seem to be able to offer and track so there are models out there. [J.P.S., illustrator]

CONCLUSION

eCO as it works now, is too confusing and impractical for most visual creators. Coupled with current copyright laws and designations that aren't practical or appropriate for how most illustrators and graphic artists work and how our visual works are used in the marketplace, eCO and our copyright laws need a major overhaul before illustrators and graphic artists will register more visual works. We need a simple procedure for mass registration of visual works at a reasonable price with real protection of a collection and the individual works included, or permitting group registration for all types of visual works.

ABOUT THE GRAPHIC ARTISTS GUILD

In the course of its 46-year history, the Graphic Artists Guild has established itself as the leading advocate for the rights of graphic artists on a wide range of economic and legislative issues, from copyright to tax law. Through its publication of the *Handbook: Pricing & Ethical Guidelines* (now in its 13th edition), the Guild has raised ethical standards in the industry,



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and provides an invaluable resource on pricing information that is relied on by both artists and clients. The Guild's newsletter, the *Guild News*, provides lively, provocative, and useful coverage of developments in the visual communications industry for its readers.

The Guild also provides a wealth of services and benefits for its members, including educational programs, discounts on a multitude of products and services, a legal referral network, and grievance handling. The Guild's website offers up-to-date information on Guild activities, updates on advocacy issues, members' portfolios, individual chapters, and tools and resources for all graphic artists.

Respectfully submitted,

Haydn Adams, President
Todd LeMieux, National Advocacy Committee Chair
Lisa Shaftel, National Advocacy Committee
Tricia McKiernan, Executive Director