Comments of Artists Rights Society

Library of Congress
U.S. Copyright Office
[Docket No. 2015-3]

Mass Digitization Pilot Program and Request for Comments

Introduction

Artists Rights Society (ARS) is the largest American Visual Arts Copyright Management Organization (CMO), licensing the reproduction of copyrighted works of visual art. ARS currently represents more than 70,000 artist members, the majority of whom create paintings, drawings, prints, art photographs, and sculpture that are generally characterized as fine art rather than commercial art. Recently, ARS has been authorized by a large number of illustrators to act as their licensing agent as well.

This inquiry focuses on mass digitization. In recent years digital technology has become the primary means by which many works of authorship are created and fixed. However, many years will pass before such works become the majority of those protected by copyright.[1] The vast majority of existing works were created in analog format where, print and paper, vinyl recordings, tapes and film were the original means of fixation and remain the primary means by which they are stored and archived in collections, museums and libraries. That is particularly true of works of visual art.

While digital technology is available to artists, traditional techniques of drawing, painting and sculpting continue to be the primary means by which they create new works. Digital images of these works can be generated only by use of scanning technology and therefore constitute a reproduction of the original work from the moment the work is scanned. Works of visual art found in library collections are almost always images of paintings, drawings or sculptures that have been reproduced for publication in books or periodicals *after the artist has conveyed a license* to the publisher to use the copyrighted work *on a title-specific basis*. As noted above, ARS currently is by far the largest CMO providing publishers such title-specific licenses.

For purposes of these comments, ARS assumes that the term "mass digitization" refers to the practice of scanning and uploading into a digital database the entire content of books and periodicals stored in the collections of libraries, both text and images. ARS recognizes that there are also other forms of mass digitization, that occur on a multitude of websites that benefit from the upload and display of numerous unlicensed works of art on their platforms. The scanning

[1] This statement refers to traditional works of authorship and does not include computer programs which have always been fixed in digital media.

and uploading process would typically be indiscriminate and often would be fully automated. This practice, in itself, has been found by the United States Court of Appeals for the Second Circuit not to constitute copyright infringement. *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014). While the database at issue in the *HathiTrust* case is intended to be used as a search tool rather than a means of downloading large portions of a publication, ARS agrees with the plaintiff that scanning and downloading itself constitutes the making of copies and, therefore, infringes copyrights in the scanned text and images. The well-known case involving the Google Books library raises the same issues. ARS understands Google's policy to be – like that of the HathiTrust – that its use of its "library" is only for search purposes, permitting access only to small portions of text and, therefore, is fair use (even though the small portion made available to the searcher may contain the complete image of an artwork).[2] ARS does not agree that the *HathiTrust* litigation has settled the dispute over whether such access is fair use. ARS shares the view of publishers and authors of literary works that downloading of the full text and accompanying images of a work in a scanned library collection constitutes infringement unless authorized by rights holders.

ARS emphasizes that the *Google Books* case has not been finally resolved and that the *HathiTrust* case represents a single circuit's interpretation of the law that cannot yet be said to constitute controlling precedent. However, ARS believes that the Extended Collective License (ECL) described in the Notice of Inquiry could be a mechanism of resolving these disputes while also providing much broader access to and use of digitized works.

Responses to Questions

1. Examples of Projects

This question, indeed the entire inquiry, contemplates that ECL may be a solution to copyright problems associated with mass digitization. The Federal Register notice states that the Copyright Office "is particularly interested in the views of prospective *users*…." (Italics supplied.) However, ARS believes that its members have a stake in any such restrictions on their exclusive rights at least equal to if not greater than those of users. This is all the more the case given the extensive use of unlicensed works of art in the digital environment, from library projects to commercial third-party content generated websites

To avoid problems of infringement, the ECL pilot contemplated by this question either would have to be limited to digitization authorized by every rights holder in a collection or it would have to be authorized by statute. Since it would be impracticable to obtain advance permission from all affected rights holders, the only realistic means by which a pilot program could proceed would be through legislation. Any action of Congress that would restrict existing rights inherently would be a matter of grave concern to rights holders.

[2] *See, Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014); *Authors Guild, Inc. v. Google, Inc.* 721 F.3d 123 (2d Cir. 2013), *on remand*, 954 F. Supp. 2d 282 (S.D.N.Y. 2013), *appeal docketed*, No. 13-4829 (2d Cir. Dec. 23, 2013).

a. Qualifying Collections

While public and academic libraries may continue to store bound books and journals on library shelves, users primarily access the works through digitized libraries assembled either by the publishers themselves or by for-profit aggregators.

However, publications that contain the kind of fine art images licensed by ARS on behalf of its members, for the most part remain available only in traditional formats involving print and paper. Therefore, the rights of the majority of ARS' fine art members would be significantly impacted by any pilot program or subsequent statutory authorization of ECLs covering works containing visual images.

The context in which fine artists' works are licensed for publication in books and periodicals differs in degree from that for commercial illustrators. The primary means by which the work of a commercial artist is monetized is through the exercise of the exclusive right to make *copies* of an image which is embedded in a book, periodical or advertising medium. In the case of fine artists, the right to reproduce in a publication can also be very valuable and generate significant income. However, their primary market is the sale of the original work itself. It is for this reason that ARS strongly supports the adoption of a resale royalty right in the United States. Such a right would give the artist the ability to continue to participate in the commercial exploitation of the original work subsequent to the first sale.

At the present time there is no functioning system of non-title specific – or blanket – licensing of *reprographic rights* (digital or analog) in works of fine art in the United States. As explained in ARS' earlier response to the visual arts inquiry, the entity currently issuing such licenses to profit making and nonprofit institutional users in the United States, the Copyright Clearance Center (CCC), does not distribute royalties from its annual blanket licenses to visual artists. This is much different than the practice in Europe where ARS' sister artists' CMOs receive a portion of reprographic fees which they then distribute to individual rights holders. ARS strongly favors the adoption of such a system in the United States.

ARS regrets that the CCC does not acknowledge that its annual blanket licenses include the visual art content in works it licenses, as is the practice in Europe, where artists, through their visual rights societies that administer extended collective licenses, receive their fair share of rights fees. The CCC appears presently to distribute solely to publishers, in the process ignoring the rights of visual artists whose works often constitute significant components of the publications. The licenses typically accorded by artists for visual works are for one-time use, limited to the publication in question. They do not convey the rights to reproduce the work in a myriad of other print or digital forms without authorization or compensation, a fact overlooked by the CCC. The impact of the unbridled use of an artist's work without his/her permission, has a crippling impact on the artist's livelihood. It should be borne in mind that most artists are self-employed, sole practitioners, working independently in their studios with truly modest incomes.

The Office's notice of inquiry asks whether the program should be limited to out-of-commerce works. Since there is no functioning system of blanket reprographic licensing for visual art in the United States regardless of whether works are commercially available or not, ARS would support a system which encompasses publications that are commercially available as well as those which are "out-of-commerce". The visual artists' CMO will allocate and distribute individual shares to visual artists, similar to the way ASCAP and BMI allocate and distribute to music authors their individual shares of blanket licensing collections.

b. Eligibility and Access

ARS' response to the question of who should be eligible to be a *licensee* under an ECL and the conditions of access to works covered by the ECL, is predicated on a bedrock assumption that any user should obtain access by receiving permission from the CMO administering the ECL, or through a specific licensee who has received permission to provide such access. For example, a student or faculty member should be able to access a work digitally from a university library only if the library has entered into an agreement with a qualified CMO that authorizes such access. This can be accomplished through several methodologies, including on a subscription basis. The same principle would govern access through any other institutions, such as private companies or businesses. An ECL should also apply to other forms of mass digitization including commercial websites that regularly display protected artwork.

The difference between a *collective* license and an *extended collective* license is that the ECL would cover all works, including those of authors who had not specifically authorized the CMO to issue a license on their behalf. ARS understands and supports the principle that a CMO should have a system for locating all rights holders regardless of whether they are members, and that royalties should be allocated and distributed on a non-discriminatory basis to non-member and member rights holders alike. The share of royalty distributions allocated to each rights holder should reflect the relative amount of use of each rights holder's works. Such a system could be administered only by a CMO that could demonstrate to a regulatory authority – such as the Copyright Office – that it has the long and requisite experience and capability of making equitable distributions to rights holders.

To qualify to issue ECLs a CMO should have to document that it has had extensive past experience in collecting and distributing copyright royalty payments to visual artists, an activity to which ARS has devoted itself for nearly 30 years.

ARS envisions that the artists' CMO would issue site licenses to individual institutions and believes that the terms of such site licenses should be negotiated between the CMO and the licensee. A negotiated license should offer licensees a range of options, depending on the fee paid and number of users who would have digital access to artists' images under the collective license. In response to the question of whether access by users would be limited to computer terminals physically located in a library ARS would suggest that this would depend on the nature of the library and the number of users served by the library. In other words a library serving a university or research institution might be permitted under a site license to provide online access through an intranet to students, faculty and researchers in such institutions. Such access would

have to be password protected and utilize appropriate copyright management technology to restrict the ability of a user to break the firewall surrounding the intranet as well as to prevent any use not specified in the site license.

With regard to free public libraries that are open to all, ARS believes that it would be very difficult to impose such limitations. Therefore, in the case of public libraries access should be limited to computer terminals physically located in the library.

c. Security Requirements

ARS suggests that rules governing security requirements be based on Article 11 of the WIPO Copyright Treaty (WTC) and Sections 103 and 1201 of the Digital Millennium Copyright Act (DCMA). The actual anti-circumvention technology used or required under a CMO's license would be left to the CMO itself. Given the constantly changing nature of software technology it is impossible to mandate such technologies by statute. The CMO should have the freedom to employ expeditiously the most recent technologies, restricted only by the terms of the collective licenses it issues.

2. Dispute Resolution Process

Given the prohibitive cost of copyright infringement litigation that characterizes the current environment for visual artists, ARS would not object to a dispute resolution role for the Copyright Office. Existing responsibilities exercised by the Copyright Royalty Board provide a foundation for such a role. ARS would suggest a model similar to that currently embodied by the "rate court" that supervises the antitrust consent decrees governing the music collecting societies. Further, ARS envisions that such a regulatory role might extend to enforcement matters currently dealt with only through infringement litigation.

This dispute resolution role could be handled by administrative law judges or hearing examiners appointed by the Copyright Office. The post grant opposition process currently in use with regard to patent disputes at the USPTO provides a model. The Patent Trial and Appeals Board (PTAB) consists of highly qualified administrative patent judges who are selected by the presidentially appointed Undersecretary of Commerce and Director of the USPTO. Trials before the PTAB take place under rules that permit a vastly more expeditious and inexpensive resolution of disputes than is the case in federal district court litigation.

ARS believes that any mechanism for mediation – and most certainly for compulsory arbitration – that is outside the parameters of the Copyright Office's administrative litigation mechanism should not be mandatory and used only with the consent of all parties to a dispute.

The objective of any dispute resolution system should be to provide a fair mechanism for the resolution of disputes that is accessible to artists who currently lack the practical ability to seek justice in copyright disputes because legal costs are prohibitively high for them.

An important caveat, however, is that any dispute resolution mechanism must provide relief to rights holders commensurate to the harm they have experienced. In some cases this can and should include a punitive component that would deter future abuses. It is for this reason that ARS is wary of various proposals for a small claims court for copyright disputes. Meaningful justice will typically require the ability of the adjudicator to award injunctive and financial relief in excess of what are thought of as "small claims."

Finally, the existing system where copyright disputes can only be resolved in complex and costly district court litigation is compounded by the formality of registration as a precondition to the right to receive statutory damages. Currently, these formalities make it almost impossible to obtain damages commensurate with the legal costs to artists. As described in ARS earlier response to the visual arts inquiry, ARS strongly urges that the registration requirement be eliminated for works of visual art. The sheer number of works created by a visual artist in a given year can number in the hundreds, taking into account the numerous prints, studies, preliminary sketches, and finished works which are an artist's customary output. This obviates the likelihood that the visual artist could devote his/her time, and undertake the cost of registration, and alas few have been able to do so.

3. Distribution of Royalties

ARS cannot emphasize enough the importance of the ability of a CMO to return copyright royalties to the rights holders themselves. Royalties should never be distributed to entities that purport to represent the welfare of artists but which have not been given specific contractual authority to collect royalties owed to an artist. Also, as discussed above, demonstrated experience in past distribution of copyright royalties to artists should be a prerequisite for a CMO. And, the CMO should be able to demonstrate long and ongoing experience in allocating shares of distributions to individual rights holders.

The time period within which royalties should be distributed depends on the time necessary for a CMO diligently to determine use of the works of the artists whose rights it licenses, and to fairly allocate shares of blanket royalty payments made by licensees. ARS assumes that bi-annual distribution would meet these criteria, but would not object to more frequent distribution if recommended.

4. Diligent Search

ARS has no objection to the requirement that a CMO make a diligent attempt to locate non-member artists whose works might be covered by an ECL. The specifics of what constitutes diligent search standards can be developed by the Copyright Office in the context of this inquiry.

5. Other Issues

In its earlier submission to the Office's inquiry on visual artists' issues, ARS identified a number of concerns for visual artists that also impact on the fairness and effectiveness of any form of collective licensing, including an ECL. However, the most important issue for ARS is that any recommendation by the Office give due weight to the fact that copyright exists to incent, support and encourage the individual author. Exceptions to exclusive rights are just that – exceptions. Copyright law and policy should never provide an excuse for infringement. Exceptions should be made only when consistent with the traditional doctrine of fair use and the three-step test of the WIPO treaties.

Submitted on behalf of Artists Rights Society

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