
**BEFORE THE
U.S. COPYRIGHT OFFICE**

WASHINGTON, D.C.

RESPONSE TO NOTICE OF INQUIRY REGARDING MASS DIGITIZATION PILOT PROGRAM

FR Doc. 2015-3, filed June 9, 2015

**COMMENTS ON BEHALF OF THE DIGITAL MEDIA LICENSING ASSOCIATION,
AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, GRAPHIC ARTS GUILD,
INC., NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, AND PROFESSIONAL
PHOTOGRAPHERS OF AMERICA**

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INTRODUCTION

The undersigned, the Digital Media Licensing Association¹, The American Society of Media Photographers², Graphic Artists Guild, Inc.³, and Professional Photographers of America⁴, would like to thank the Register for this opportunity to provide our comments regarding this important proposal.

Preliminary Statement

In general the Associations would support a limited and voluntary (opt-in) Pilot Program provided the licenses to the content do not replace or substitute primary licensing between parties, and are limited to large scale but small value uses that are currently unlicensed and for which content creators and their representatives would prefer to enter into a licensed transaction but for market failure. Important considerations would be the distribution of collected license fees to be paid directly to the applicable content owner or his/her representative and the use of available technology to reduce administrative costs to insure a meaningful program. Ideally a

¹ For over 60 year the Digital Media Licensing Association (DMLA), formerly known as PACA, has developed business standards, promoted ethical business practices and actively advocated copyright protection on behalf of its members. In this era of continuous change, we have remained an active community where vital information is shared and common interests are explored. In addition, DMLA educates and informs its members on issues including technology, tools, and changes in the marketplace. We also connect our members through webinars, our annual conference, industry networking events, and by bringing together buyers and sellers with DMLAsearch (formerly PacaSearch).

² The American Society of Media Photographers (ASMP) is a 501(c)(6) not-for-profit trade association, established in 1944, to protect and promote the interests of independent professional photographers who earn their living by making photographs for publication. Our members represent almost every genre of professional commercial photography from advertising to photojournalism and documentary photography. The mission of ASMP is to create sustainable information, advocacy, and communication systems designed to empower and educate still and motion photographers so they can continue to contribute images that shape our cultural heritage and visual history. We aim to produce photographs that illuminate, educate and inspire while describing the realities of our times.

³ The Graphic Artists Guild is a professional organization for graphic artists that embraces creators at all levels of skill and expertise, who create art intended for presentation as originals or reproductions. The mission of the Guild is to promote and protect the economic interests of its members, to improve conditions for all creators and to raise standards for the entire industry. Its core purpose is to be a strong community that empowers and enriches its members through collective action. In the course of its 48 year history, the 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.

⁴ Founded in 1869, Professional Photographers of America (PPA) is the world's oldest not-for-profit association for professional photographers. PPA represents almost 29,000 direct and an additional 20,000 affiliated professional photographers from dozens of specialty areas including portrait, wedding, event and commercial/advertising photography. Residing in virtually every neighborhood in America, our members are quite literally the copyright holder next door.

Pilot Program would encourage licensing, content attribution, and avoid the further expansion of fair use to replace appropriate licensing of content due to the difficulty in licensing volumes of content owned by numerous creators and representatives. This Pilot Program could address the market failure inherent in the digital environment where visual content is ubiquitous, easy to share, but outside of direct licensing that includes certain social media uses. No licensing structure currently exists to provide compensation to the content owners or their representatives for content that is “shared” without consent. This sharing environment excludes visual artists and their representatives from legitimate copyright income, despite the many entities that have built successful and rich business models based on the display and distribution of unlicensed visual content. A successful Pilot Program could be the model for a future licensing system that balances the interest of content creators and users as well as limiting the burden of monitoring content through DMCA takedown notices.

Response to Requests for comments

This response is limited to two of the three categories of work identified in the NOI, pictorial or graphic works published in connection with literary works and photographs in which we also include other forms of visual art including illustration and design.

1. Pictorial or graphic works published in connection with literary works.

To the extent there are any projects involving literary works, works of visual art, such as pictorial or graphic works published within, such literary works should be eligible for licensing to the same extent that authorship in text is available for licensing. For example, the settlement in the Author’s Guild Google Books project case that was ultimately disapproved by the court specifically excluded any compensation for works of visual art published within literary works and only addressed publishers and text authors. To the extent any Pilot Program includes a system to distribute income for literary works, all authors should be included, regardless of the type of expression. While some authors or their representatives may be difficult to locate (the Orphan Works issue), visual works, particularly in literary works that are relatively recent, are created by visual artists who license works commercially to publishers and rely on continued licensing revenue as a source of income.

No voluntary collecting agency in the United States is currently collecting royalties for visual artists. The voluntary collecting organization, Copyright Clearance Center, only has agreements with publishers and consequently does not make any direct payment to the visual artists or their representatives for the contributions within the literary works. The publishers to date have not shared any of this reproduction rights income with visual artist’s contributors. As technology and registries develop that will assist in linking visual works to owners or representatives (for example the registry in development by the PLUS

Coalition), the administrative burden and nearly impossible challenges of identifying the appropriate copyright party will be reduced, facilitating the purpose of various licensing entities to compensate the appropriate party.

a. Qualifying collections.

With respect to visual content published in connection with literary work, the Pilot Program should be limited to collections of such a large scale that no direct licensing is possible. The benefit to the public must be weighed against the harm that may be caused to the creators and representatives if widespread access to works in a digital format are made available to the public, being especially mindful of the harm to developing and new markets. As a Pilot Program, we agree that the program should be limited to non-profit educational uses for scholarship and research to avoid any harm to the current market for electronic books.

If it were readily possible to identify works that are no longer in commerce, either by a publisher or the author individually (recognizing that not all works are distributed through traditional retail channels), the Pilot Program could be expanded to include broader use by the public for the out of commerce work, with an ability for authors and representatives to correct any misidentification. One bright line, but potentially imperfect cut off, would be to permit access to works that were published after a certain date. A study of published works might be useful to determine what works are more likely to be out of commerce (however that is ultimately defined), by way of example only, for more than 50 years.

As a Pilot Program, eligible collections should represent a significant scale of works by multiple authors. It would seem inappropriate for a collector of a body of work by a limited number of authors to take advantage of the program.

b. Eligibility and access.

For purposes of a Pilot Program for literary works that include works of visual art, the Associations recommend that the pilot be limited to users for educational and scholarly purposes, with the institutions required to establish a user verification system to confirm the intent of the users, and with liability to the user (and institution) for failure to implement or monitor the system. If a secure system is established, the Associations would be more comfortable with allowing qualified users remote access, as the ability to access works for research without the burden and expense of traveling for on premises review is the significant benefit of creating digital copies.

c. Security measures.

Because security of digital works is critical, and the ability for highly skilled computer scientists to breach security and hack digital libraries (for example, the past hacking of the scholarly journals in the JSTOR database), only trusted institutions should qualify to digitize, archive and monitor access to collections. These trusted institutions should demonstrate that they have the resources, staff and qualifications to securely digitize, archive and monitor access and use of any digital archive. The Copyright Office could set standards for security and digital quality to ensure that the collections are properly digitized and operated securely. A certification process for institutions may be appropriate so rights holders have confidence that the institution is following the best practices based on currently available technology and security measures.

d. Dispute resolution process.

Similar to the proposal for a Copyright Small Claims court, the associations recommend an alternate dispute mechanism such as voluntary binding arbitration or tribunal overseen by the Copyright Office that is streamlined, cost effective, centrally located and could be handled using teleconferencing or similar technology to avoid personal appearances.

e. Distribution of Royalties.

The Associations would prefer a quarterly distribution system rather than the nine-month United Kingdom and EU directive. It is acknowledged that a Pilot Program may not initially collect sufficient funds to provide individual creators with royalties quarterly and it may be necessary to establish a threshold amount before distribution so that the administrative costs do not make the distributions financially unviable.

f. Diligent search

For any system to have integrity it is important that the CMO make a diligent search for rights holders. Ideally, a well run Pilot Program will ultimately reduce the number of Orphan Works. A registry of works for which rights holders have not been identified or located would be important for transparency. In addition, the CMO should include registries developed by third parties to help identify rights holders of visual works, (such as the PLUS image registry)⁵, as part of a diligent search.

2. *Visual Artwork*

⁵ See www.PLUSregistry.org

The Association sees a carefully conceived Pilot Program for visual arts as a potential solution for the problem of widespread and large scale sharing of unlicensed visual works on line where the only current option is to monitor the sites and send take down notices under the DMCA, an impossible task. A successful program may ultimately provide a frictionless platform to license visual works on a mass scale provided it is narrow in scope and limited to secondary uses and does not impinge on or replace direct image licensing by users or assignments. It should address the conduct of users who share other's content that is published online without licensing from the content owner or representative because direct licensing is currently too inefficient to accommodate the interests of both copyright owner and users. As a result, many business models (e.g. social media) have been developed that use large volumes of copyrighted works without providing any compensation to copyright owners. Those that benefit from the value of this content and the traffic that it drives to the platform should be the ones responsible for the license fees.

This culture of sharing content has caused a market failure for professional visual artists and their content distributors where professional visual content provides the primary attraction to the use of the online service. For example, sites like Pinterest encourage users to post images from publications that feature works of professional travel, nature, fashion and food photographers. Videos and images are essential to communication today and to the digital economy. Yet most professionals and their representatives are left out of the secondary market, where previously published and licensed material is easily shared and redistributed without any further compensation.

To date the only solution for the US copyright owner or representative is to contact the ISP under the DMCA and demand the removal of content. Not only is this impossible to manage based on the number of works that visual artists and image distributors would need to police and the strain on resources to continually send take down notices, it restrains ISP's to creating business models to comply with many restrictions or lose their immunity from damages. The better solution would be to have a licensing mechanism in place for the ISP's to compensate for the uses to better benefit copyright owners, their representatives and the marketplace.

Further, because there is no efficient and effective licensing system for massive unlicensed image sharing, and no practical way to enforce copyright for these uses, these uses continue to prevail creating an expectation that use of works of visual artists do not need to be compensated. As there is no direct licensing alternative for what would be infringing uses, the risk that these uses will be considered a fair use by courts, without due consideration of the impact on professional visual artists and their representatives.

The assumption that all visual content shared online is by those users who either are sharing their own personal imagery or other imagery for which the owner expects no compensation is inaccurate. While sites like Facebook may have a large proportion of user generated content, professional imagery is prevalent in many social media sites. In addition, professional visual artists use sites such as Twitter, Instagram, Vine and other similar sites for self-promotion and to demonstrate their artistry. These works are frequently shared and used by others. Further, many companies license works from representatives specifically for limited use on specific branded social media platforms only.

A Pilot Program for this type would not be based on third parties undertaking a mass digitization of works, as in the Google Book project, as these works would already be in digital format when initially published to the web. It would instead make sure that once a work of visual art is first published, that the visual artist and their representatives would continue to earn licensing fees from uses made by third parties of their work, many of whom have created highly profitable businesses attracting advertising dollars based on the visual content.

This Pilot Program for these types of social media uses could benefit from the Dispute Resolution Process discussed above as well as the Distribution of Royalties. The program should be an opt-in so only those interested in participating would qualify and thus address the concern of ISP's that royalties would be paid on user generated content for those non-professionals not interested in royalties or those that provide content on a sharing license basis.

Conclusion

We appreciate that the Copyright Office is looking into the issues that face those that license works of visual arts. We know this is the beginning of the conversation and that there will be many issues to address in crafting any pilot program and any final approval will depend on the terms of any pilot program. We are interested in participating to ensure that the copyright laws continue to provide incentives to all creators so that visual artists continue to receive compensation for their work in the digital environment. We thank you for your consideration.

Respectfully submitted,

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