
**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
NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, AMERICAN SOCIETY OF
MEDIA PHOTOGRAPHERS, GRAPHIC ARTISTS GUILD, INC., DIGITAL MEDIA
LICENSING ASSOCIATION, AND PROFESSIONAL PHOTOGRAPHERS OF
AMERICA**

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**COMMENTS OF THE NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION,
AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, GRAPHIC ARTISTS GUILD,
INC, DIGITAL MEDIA LICENSING ASSOCIATION and PROFESSIONAL
PHOTOGRAPHERS OF AMERICA**

INTRODUCTION

The undersigned, the National Press Photographers Association¹, The American Society of Media Photographers², Graphic Artists Guild, Inc.³, Digital Media Licensing Association⁴, and Professional Photographers of America⁵, thank the Register for this opportunity to provide our comments regarding this important proposal. We commend the Copyright Office (“Office”) for segregating the discussion between orphan works and mass digitization and appreciate the Office’s willingness to explore this issue. The undersigned believe that the two issues are very different, and creators benefit from separate solutions.⁶

With mass digitization, companies no longer complain that they cannot find the author, rather they complain that it is simply too difficult to ask for permission. They are essentially saying that their needs to engage in new business initiatives are more important than the rights of creators (in our

¹ The National Press Photographers Association (NPPA), is a 501(c)(6) non-profit professional organization dedicated to the advancement of visual journalism, its creation, editing and distribution in all news media. The NPPA encourages visual journalists to reflect high standards of quality and ethics in their professional performance, in their business practices and in their comportment. The NPPA vigorously promotes freedom of expression in all forms. Its members include still and television photographers, editors, students, and representatives of businesses serving the visual journalism industry.

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 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).

⁵ 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.

⁶ The undersigned note that comments have not been sought on the Office’s most recent orphan works proposal but we would welcome the opportunity to provide input and share some of our concerns regarding that proposal.

case – visual artists) to control their intellectual property. The undersigned can think of no reason why one person’s desired business model should take precedence over another’s right to be compensated for their work. Further, it seems that one of the key components of the pilot proposal is simply a transference of duties—taking the administrative effort of tracking down and compensating copyright holders away from the mass digitization user, and shifting it to the Collective Management Organization (“CMO”). Inherently, this means that an enormous expense will be lifted from the user, and imposed upon the CMO. Given that the licensing value will most likely be low, the undersigned believe that it is imperative to separate licensing fees from administrative costs. We advocate that the user should pay a fair licensing fee plus an administrative fee that is sufficient to cover such costs. To shift the administrative expense from the user and charge it to the copyright owner would be unfair and likely cause the pilot to fail because of that perceived imbalance by the authors.

In theory, the idea that content creators such as photographers and graphic artists would be compensated for a use of their work that they currently do not realize any revenue from is a promising one. However, there are too many unknowns for the undersigned to express total support for the pilot project at this time. The comments below are based upon the presumption that the copyright office will limit itself to the pilot project outlined in the NOI, which the undersigned neither endorse nor reject at this time.

A. Examples of Projects—Qualifying Collections, Eligibility of Access, and Security

1. Qualifying Projects Should be Limited to Collections that are Not Already in Digital Form

The stated goals of the mass digitization proposal include the following claimed public benefits: “facilitating research”; “expanding access to books”; “preserving older books”; and “generating new audiences and sources of income for authors and publishers.” These stated goals all seem directed at works that are not currently in digital form, and not currently in circulation. For that reason, the undersigned believe that any mass digitization pilot project should be limited to works that are not currently in digital form. To permit mass digitization of works that are already in digital form will likely lead to interference with the existing market for digital works and existing digital collections.

Preserving works that are falling into disrepair and are no longer in circulation seems to be a good public policy goal. However, it is important that the goal of preserving older works does not get tangled up in unrelated goals of “collecting” works that already exist in digital form. While it may be commendable for a library to scan an archive of printed photographs or other visual works to preserve them and make them more easily searchable; it is quite something else for it to pull images from the internet to create its own branded collections of certain categories of photos. Whether they are historical photos, or photos of kittens, this is something that we believe has the potential to interfere with the market. We recognize that it would be a difficult and unnecessary task to scan every image in a printed collection in order to determine whether it had already been digitized, but believe it a crucial requirement that the material being digitized come from a printed source.

2. Qualifying Projects Should Be Limited to Published Works

A critically important aspect of copyright law is the right of an author to determine what to publish and when. Therefore, it is essential that any mass digitization authorization be limited to works that are already published, and that unpublished works not be eligible for the program. Regardless of the constraints placed on the use under mass digitization, once works are distributed digitally and made searchable, fair use may grant the right to re-publish under certain circumstances. This would interfere with the integrity of the author's right to choose when a work should be published (or to decide that a work not be published) if mass digitization of unpublished works were permitted. Under such a potential threat, authors and artists would likely choose to destroy works that they intend to keep private-or worse, never create certain works at all.

3. Imbedded Works

The NOI discussed books, and it discussed visual works, but it does not delve deeply into the problem of photographs within books. It is essential that any mass digitization project that digitizes books and compensates the authors or publishers of those books either: 1) separately compensates the visual artists whose works appear in those books, or 2) omits the visual works from the mass digitization content of those books.⁷ In a majority of cases, the copyright holders of visual works within books are not the publishers or the book authors. Those visual works are typically licensed separately. Certainly this is the case for out-of-print books of old (the stated target of the mass digitization project) visual works licensed on a "one-time use" basis which only granted a license for a single, printed edition. To compensate a book publisher for the visual works printed in the books would interfere with the contract by essentially and unjustly transferring intellectual property rights to the publisher.

4. Non-Mass Digitization Projects

The undersigned realize that other groups may support the idea of a much broader compulsory licensing system than that proposed by the Copyright Office, but we decline to address that issue because we do not consider it to be part of the proposal or the notice of inquiry. Because of the myriad of complex issues related to a broader compulsory licensing system, the undersigned urge the Office to limit its proposal to the mass digitization efforts it has specifically proposed. Were such an expansive compulsory licensing system to be considered by the Office, it would be important to address significant issues not raised in the current NOI, including: how it would impact photographers and other visual artists who contract with clients to produce exclusive images with exclusive rights;⁸ the difference in value that iconic works might have; photographs with sensitive subjects which have the potential to be exploited; and when the use of images for certain purposes would negatively impact the reputation of the author or the subject.⁹ These concerns would have a minimal impact if a compulsory licensing system were limited to mass

⁷ See, e.g., *Am. Settlement Agreement, Authors Guild, Inc. v. Google, Inc.*, No. 05 Civ. 8136 (S.D.N.Y. Nov. 13, 2009).

⁸ See *Ad Agency Guide to Photography Usage Terms*, A PHOTO EDITOR, February 5, 2010, available at <http://aphotoeditor.com/2010/02/05/ad-agency-guide-to-photography-usage-terms/> (describing exclusive rights and parameters).

⁹ These issues have been elaborated on in the Response of the National Press Photographers Association to the Notice of Inquiry regarding Visual Works.

digitization of collections for the purpose of research and preservation. However, these concerns would be magnified, and the market would potentially be interfered with, if a compulsory licensing system were to permit broad re-use of digital images.¹⁰

5. Eligibility, Access, and Security

If the goal of mass digitization is to serve the public policy goal of making inaccessible works more accessible it would make sense to permit broad access to view the results. However, we believe there should be a requirement that those who access a mass digitization collection must complete a verifiable registration process. Because the authors and creators are giving up a certain level of control, and there is such a potential for infringement, it is important that the users be verified so that it is easier for infringers to be identified and located. For the same reason, the registration process should include a prerequisite that the end-user consent to submit to the jurisdiction of a copyright small claims court if there is a claim of infringement.

There should also be generally accepted security requirements that are in line with industry standards. Such standards should not be spelled out in the legislation, but rather the legislation should direct the Copyright Office to determine and update those standards based upon evolving industry criteria. The Office should be tasked with evaluating and updating those standards on a continuous basis (or at a minimum of every six months), with the ability to require emergency updates when needed.

Regardless of the security procedures in place, the reality is that no security system can completely protect visual works, which can simply be copied through a screen capture or other technological work-arounds. It is for these reasons that user registration and consent to submit to the jurisdiction of a copyright small claims court are essential to protect the rights of the authors of visual works.

B. Distribution of Royalties

The timeline for payment cited in the notice of inquiry of nine months from the end of the fiscal year in which the royalties were collected could leave an author waiting for a year and a half for their money. There seems to be no rationale for allowing the CMO to retain funds for this length of time. There should be two separate timeframes when setting a distribution deadline. First, if the rights holder is known to the CMO, the distribution of funds should occur within 30-60 days of receipt. If the rights holder is not immediately known to the CMO, and a diligent search is required, an additional period of time should be granted. In situations where the amount collected is below a certain threshold (i.e. \$25), it would be acceptable for distributions to occur at the end of the fiscal year, so that any additional royalties may be aggregated. However, if such royalties are repeatedly too low to meet a minimum threshold, that should be an indicator that the royalty rates are being set too low.

Another important consideration is the frequent situation where visual works are imbedded within other works. If a book or magazine is digitized, a significant portion of the work as a whole might include individual works created by authors other than the primary author. Here the CMO presents

¹⁰ However, a limited compulsory licensing system directed at compensating visual artists for circulation of works on social media platforms might be beneficial to visual artists and might be worth considering.

an advantageous market, as it can maintain a database, or access to a collection of databases such as the Picture Licensing Universal System (“PLUS”) to more easily track down authors. However, for the support of visual artists, it is important that the authors of visual works within books and other printed works be compensated independently from the publisher of those printed works. One of the prime complaints that visual artists have with the Copyright Clearance Center (“CCC”) is that the organization collects royalties for copies of work that includes visual works, where visual artists neither consented to, nor were compensated for, said use.¹¹

Finally, and just as important, administrative fees should be separate from royalty payments, and should not be taxed against said payment. Rather, because the program shifts the cost of finding and delivering royalties from the company to the CMO, any administrative fee should be borne by the company engaging in the mass digitization, based upon the size of the project.

C. Diligent Search

If the work is printed, the printed source should be consulted for credit. Diligent search requirements for authors of visual works should include processing the work through a reverse search system (such as Google’s Reverse Image Search or TinEye). If the name of the author is known, a diligent search should include trade associations such as the undersigned groups, Google searches, and obituary records of all newspapers whose circulation encompasses the last-known address of the author. If there are multiple CMOs, consultation with other CMOs for records on authors should be required, and the sharing of database information between CMOs should be mandatory. The publication of a public notice in the largest newspaper of general circulation near to the last-known address of the author, with a copy of the work and any additional available information on the author would also be appropriate. The CMO should also be required to publish an online list of all works for which an author cannot be found. Only after publication for six (6) months or longer should the diligent search requirement be considered met.

An additional consideration is what happens to royalties when the rights holder cannot be located? Should they be re-distributed to rights-holders whose work has been licensed through the system? Should they be used to offset the administrative costs of the CMO, or should they be distributed to representative organizations, as is done through the Author’s Coalition of America (“ACA”)? Of the three options, distribution to the ACA, which provides grants to author organizations which must be spent “for the benefit of authors” seems to be the most likely method of actually conferring a benefit on the unknown author, as the advocacy work of ACA members benefits all authors, not just those who are members of those organizations.¹²

¹¹ See, e.g., *Resnick v. Copyright Clearance Ctr., Inc.*, 422 F. Supp. 2d 252 (D. Mass. 2006) (photographer plaintiffs alleged that CCC licensed their work without their consent).

¹² The rules of the ACA distribution guidelines require that the funds be spent to benefit all authors within the category (such as photography).

D. Other Issues

1. Requiring Metadata

While the stripping of metadata or copyright management information (CMI) from digital images is a pernicious problem for visual artists, mass digitization has the potential to become a solution for printed works. One of the great potential benefits of a mass digitization program would be the potential to link visual works to important information about that work. Any mass digitization program should require that metadata/CMI be securely attached to the image with information on the author, the copyright holder, the subject, the location, and the date (to the extent this information is known). In addition, once the CMO engages in a diligent search for the author, author information such as name, and last known city of residence should be imbedded in the mass digitization project. This would be one way that mass digitization would prove beneficial to visual artists who often suffer from the problem of having accurate information on authorship stripped from their work.¹³

2. Opt-Out

We agree with the Office that an opt-out provision is essential for such a system to be successful. In addition, if there are multiple CMOs, there should be a mechanism to link opt-outs so that rights holders only have to opt-out once. Authors should also have a right to partially opt-out, allowing some works to stay in the system. Unlike the Office, however, we believe that opt-out must be free rather than at “minimal costs.”

3. Transparency

Transparency is essential to create a legitimate ECL/CMO system. Rather than require artists to conduct audits to access the information of the CMO, the CMO should be required to publish a list of all works under which they have collected royalties. In this way any authors who believe their works may have been licensed can easily determine if royalties have been collected on their behalf and can make sure that royalty distributions have been directed to the correct rights holder. There should be low, set costs to conducting any audits, and the cost of the audit should be borne by the CMO if an error in royalty distribution is found by the audit.

4. The In-Line Linking Problem

If mass digitization of visual works is permitted, a new problem may arise due to the technological ability of “in-line linking.” Under copyright law, the author of a photograph has the exclusive right “to display the copyrighted work publicly” 17 U.S.C. § 106(5). Yet in practice, authors of visual works have almost no such right on the internet due to a court-orchestrated change in the law

¹³ See David Riecks, *Social Media Networks Stripping Data from Your Digital Photos*, LIBRARY OF CONGRESS, April 11, 2013, <http://blogs.loc.gov/digitalpreservation/2013/04/social-media-networks-stripping-data-from-your-digital-photos/>. See also Andrew Orłowski, *Entire internet credits snapper for taking great pic while actually dead*, THE REGISTER, March 28, 2013, http://www.theregister.co.uk/2013/03/28/hive_mind_photo_fail/ (reporting that an image that was erroneously credited to Henri Cartier Bresson was taken years after he died, but “the image file’s metadata, which contains the attribution information, is stripped from digital photographs, often by large news organizations such as the BBC and Sky, on an industrial scale”).

regarding the copyright holder's exclusive right to display their images. In *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1161 (9th Cir. 2007), the court held that the use of a technique called "in-line linking" was not a violation of the exclusive right to display. With this holding, and others like it, any website can display the work of any image on the internet, simply by using in-line linking. And in fact, entire business models, including social media sites, are built on the foundation of in-line linking to valuable content. The problem that has resulted is that the creators of this valuable content earn nothing from these uses, while the users who display the works have developed businesses worth billions of dollars, in some cases, based entirely on the display of copyrighted images. With this interpretation of the exclusive rights in copyrighted works under 17 U.S.C. § 106, the exclusive right to "display the copyrighted works publicly" has been essentially obliterated. We do not believe that the intent of the copyright statute is upheld when visual artists have absolutely no ability to control the right to determine who displays their work, or when corporations reap enormous profits from the works of others without paying any compensation.

The problem of in-line linking could be exacerbated significantly by mass digitization. Without legislative changes that return the right of visual artists to control where their work is displayed (including in-line linking), mass digitization has the potential to become a free-for-all of new visual content which once again leaves the creator uncompensated for the use of their work.

CONCLUSION

We are aware the Copyright Office is receiving many responses to its notice of inquiry, and we greatly appreciate the opportunity to be heard on behalf of visual artists, whose images can only be protected when copyright law is strong and enforceable. We present our views in an effort to continue the conversation about these critical issues. We also support the points and concerns raised in the comments filed on behalf of the Digital Media Licensing Association, Inc. and the other signatories to its comments.

In a digital age of ever-expanding creativity and consumption, updated legal principles and new legislative mechanisms are needed to ensure that copyright law remains viable. The rights of authors and the needs of users must be integrated into a functioning system that incentivizes and rewards creativity and innovation on both sides of the issue while simultaneously recognizing an inherent right of creators to exercise at least some control over the use of their works.

Such an updated and "fair" copyright system is imperative if the exclusive protections imbued in copyright law and the threat to visual artists' ability to receive fair value for their work are to be reconciled with freedom of expression.

We thank the Copyright Office for the opportunity to present these concerns and suggestions.

Respectfully submitted,

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