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COMMENTS IN RESPONSE TO COPYRIGHT OFFICE NOTICE OF INQUIRY [DOCKET #2015-01]

Introduction. The following brief observations on the current state of copyright are submitted based upon observations drawn from 24 years of legal practice on behalf of independent authors—primarily visual artists—and the commenter's previous 20-odd years working as a self-employed visual artist.

The Internet, and the easy infringement that it consistently enables, continues to challenge the effectiveness of copyright protection. Nonetheless, in the opinion of this commenter, the difficulties that exist in the present day are due largely to two things—lack of copyright education in both the community of independent authors and in the society at large, and the Copyright Office's failure (despite its best and very-well-meaning intentions) to develop a smoothly-operating, user-friendly, efficient and reliable registration process.

The Copyright Office should not allow itself to be distracted or bamboozled by those claiming that copyright itself requires major revision. Rather, the means by which copyrights are recorded and enforced need significant improvement.

A) Registration.

1) The Need. There has been an ongoing failure in disseminating basic copyright information to those most affected by it. Too many artists and independent freelancers do not understand that registration is a necessary prerequisite for *any* enforcement of their copyrights—or that registration prior to infringement is usually the difference between the mere possibility of enforcement and the chance of *effective* enforcement. The need for registration, and particularly pre-infringement registration, as a prerequisite to effective

enforcement is very ill-known and little-explained to artists. As a result, artists continue to wrongfully believe that mere investment of copyright at the moment of fixation provides them with some measure of effective protection. Meanwhile, the utter lack of copyright education in an increasingly computer-centered public school system has raised two generations that are unaware of the basic rules of the road on what was once called "the Information Superhighway."

2) The Process. Processing registrations remains slow and cumbersome. Over the decades I have seen the length of time required for registration processing wax and wane in duration (once, it went as low as six week—without the need for special handling!), but currently, it appears that it is routine for ordinary examinations to take between six months and one year to process.

In addition to the general lengthiness of the processing time, misstatements or alterations on completed certificates when finally sent out by the Copyright Office (which require additional time for correction), and, in the processing interim, loss of deposit checks, of registration applications, and of deposit copies and samples all appear to be on the increase. All of these elements make the process of registration more onerous, particularly for the sole-practitioner author who must monitor numbers of pending registrations while continuing to produce the works which the author is attempting to register.

3) The Website. The online registration section of the Copyright Office Website is visually unattractive, limited in its options, and opaque in its explanations, and, as a result, clumsy and counterintuitive to use. The sections where one attempts to list multiple unpublished works for registration is especially opaque.

Fortunately, the site retains draft applications, making it possible for the would-be registrant to return to a partially-completed application. But the website could be, and should be, far more user-friendly than it is.

B) Orphan Works.

1) A Non-Existent Problem. Proponents of "orphan works" have repeatedly blamed the uncertainties surrounding renewal terms of old-law copyrights for the supposed existence

of "orphan works"—yet the concept of "orphan works" did not exist prior to the enactment of the current copyright law in 1978.

In other words, when the uncertainty of whether or not a copyright holder had renewed a copyright term—at a time when people were much more difficult to trace, and it was therefore more difficult to find rights transferees and successors at interest—"orphan works" were not an issue. It is only now that **no** uncertainty exists regarding the length of the copyright term, only now that it is **easier than ever** to trace people by means of the Internet, that Americans are being asked to believe "orphan works" present a copyright problem.

The "orphan works" concept rests on two utterly contradictory propositions, advanced simultaneously by its advocates: that an "orphan work" is ***so valueless*** that the legitimate copyright holder has no interest in it, yet ***so valuable*** to everyone **except** the copyright holder that the copyright holder must be legally compelled to grant others free use of it.

2) An Unnecessary Solution. "Orphan works" advocates propose to solve the nonexistent problems they have posited by truncating, pruning back, or otherwise drastically reducing the copyright term. The orphan works advocates and anti-copyright campaigners never tire in coming up with new and ingenious ways to shorten the copyright term or to make it onerous for authors and copyright holder to retain their rights in their own creations—all the while attempting to make it seem as though the authors of creative works **owe** their creations to those who would use them for free. Such proposals, wholly antithetical not only to the current copyright law, but to its authorizing language in Article I, Section 8 of the Constitution, and to fundamental common sense, are the stock in trade of the "orphan works" proponents.

C) Small Claims.

Several times over the last few years the notion of a "copyright small claims court" has been raised. There is a certain threshold appeal to this—to the credulous. A "copyright small claims court" is a means to institutionalize cheap settlements as a "cost of doing business" by big-time infringers. Create enough precedents for cheap payoffs in a

"copyright small-claims court," and the big-money infringers have found a way out of the liability to which they are exposed by the Digital Millennium Copyright Act.

Yes, it would be nice and painless and quick and easy and convenient if it were possible to put infringement claims to bed quickly with a cheap payoff. If the "cost of doing business" with systematic infringement can be paid off in the cheap court, then that is a boon for which the big-bankroll Internet players have prayed every day. But if one is an author whose work has been systematically infringed by someone whose bankroll is huge, but who would prefer to pay off on the cheap, the notion of a "copyright small claims court" is not so good. It is, rather, an invitation to the wealthy to lowball the value of their thefts, and to make cheap payoffs to those incapable of mounting a larger suit.

D) Searchable Databases. The databases on the Copyright Office site need serious improvement. Google and its adjunct Google Images search sites—not to mention the searchable sites of various illustration stock houses—have shown for some time that the Copyright Office's searchable site, however well-meaning, is far behind the curve. That it is not yet possible to search the Copyright Office website for images as well as authors is nothing short of a scandal; it should be possible to type a description of an image into the Copyright Office search engine and get results, just as it is currently possible to get results by typing in the names of authors or claimants.

Searchable databases, however, should not be **outsourced** to private companies. Rather, private companies should be induced to assist the Copyright Office, and partner with it, to provide a more-comprehensive and more-accurate searchable database entirely under US government auspices. There should be no intimation whatever that the recordation—let alone the protection or enforcement—of copyrights and copyrighted material are being outsourced by the government to private companies.

Conclusion. There is much room for improvement in the current status of copyright education, copyright recordation and registration, and copyright database searchability. All of these things can, and should, be accomplished without changing the nature, or the term, of copyright protection itself. It is to be hoped that the Internet companies, whose formidable search engine and database abilities have been so intimately involved with

creating the current confusion in protection and enforcement, will be willing to partner with the government to assist in undoing some of the chaos their technological innovations have wrought.

Respectfully submitted,

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