BEFORE THE U.S. COPYRIGHT OFFICE

Response to Notice of Inquiry Regarding Copyright Protection for Certain Visual Works

We write in response to the questions posed by the Copyright Office in its Notice of Inquiry (NOI), published April 24, 2015, regarding Copyright Protection for Certain Visual Works.

The following questions were posed in the above-referenced NOI:

A. What are the most significant challenges related to monetizing and/or licensing photographs, graphic artworks, and/or illustrations?

B. What are the most significant enforcement challenges for photographers, graphic artists, and/or illustrators?

C. What are the most significant registration challenges for photographers, graphic artists, and/or illustrators?

D. What are the most significant challenges or frustrations for those who wish to make legal use of photographs, graphic artworks, and/or illustrations?

E. What other issues or challenges should the Office be aware of regarding photographs, graphic artworks, and/or illustrations under the Copyright Act?

As an intellectual property attorney representing innovative businesses and individual creators, I can say that frustration with the current system is wide-spread. My colleague is an art licensing agent representing illustrators, artists, and photographers in the licensing of their copyrights for application on goods and services. Many of our clients participate in the copyright ecosystem and have an interest in effective mechanisms for registering and licensing copyrights. Additionally, there is considerable difficulty in monitoring the usage of images, particularly online.

In researching this response, I spent some time reviewing the current progress made in the U.K., particularly with respect to the Copyright Hub and the Digital Catapult. I will frame

many of my comments with the backdrop that I feel the U.S. should strongly consider implementing similar programs here. Together we present the following observations and comments in the interest of assisting the Copyright Office in making changes to the current system.

One overarching theme is that there is need for improved communication with and education of the public regarding the scope of U.S. copyright law and the related processes. While the current copyright website has a wealth of information available it does need to be presented in a more user friendly way.

Registration Challenges

One of the most significant challenges to the registration of particular visual works is the complexity of the current system and the volume of works generated by some creators. While some works can be registered as a collection, the time involved in submitting an application for registration, as well as the fee to file, can add up considerably for artists who create numerous images that, at least initially, have limited marketability.

If the registration procedure was modified so that upon uploading a specimen it would become part of search by image database and then produce a simple web-fillable form for the applicant to populate with relevant identifying information (e.g., name, contact information, title of work, etc.) across a collection and/or per work that would be a huge improvement over the current system. The current system is cumbersome and daunting to those who are not familiar with the e-CO.

In its current form, the copyright database is ineffective. Even if you already know the author or the title of a work that you are searching for, you cannot easily verify that because the image you are searching for will only be represented as text. If registered images were easily searchable by image then there would be a robust repository that could be used by the public when they are seeking permission.

In addition to implementing an image-based system and simplifying the process, it would be extremely beneficial to provide copyright registrants with the ability to select from an array of common licensing preferences. That way, if an artist is interested in allowing limited use of their

work then they could indicate that upon registration (similar to the Copyright Hub's options), they could be directed to a list of organizations that could facilitate the use of their work for them (ASCAP, etc.), or they could indicate an interest in discussing specifics on a case by case basis by providing up-to-date contact information. The form should also include a feature to enter the contact information for any representatives of the artist.

It is essential that the artist be able to easily update their information in the search by image database such as contact information, licensing preferences, and representation. This is important for a variety of reasons. First, the copyright term is sufficiently long so the likelihood that contact information will change is large. Second, depending on the type of work that is registered, some pieces may gain value over time and it would be helpful for artists to be capable of modifying permissions. Artists will also need to be able to select pieces from a collection to modify/update should they develop a market of their own. This would also be a useful way to catalog the licensees of individual works.

Challenges for Potential Users of Works

One of the most significant challenges or frustrations for those who wish to make legal use of photographs, graphic artworks, and/or illustrations is the inability to make contact with those responsible for granting permission. Having a search by image database, coupled with a simplified registration process could change that. Currently, no amount of due diligence will excuse an unauthorized use and in some instances clearance searches can be so time and cost prohibitive that projects are abandoned, or are modified significantly, not out of a sense of design, but because the current system is ineffective.

These improvements to the registration process would help greatly. Additionally, the public could be educated as to 1) when they need permission, and 2) how to go about getting permission if they do need it. Some discussion of fair use would also be helpful, but is not the subject of this response. By having simple licensing options available to the public, similar to those introduced in the Copyright Hub's pilot program, artists would have the potential for revenue and users could make decisions based on facts, not based on actual or perceived failures to get permission. Additionally, by making the database image-based and dynamic then the public should be able to contact the appropriate parties if a license is needed.

Monetization and Licensing Challenges

One of the most significant challenges related to monetizing and/or licensing photographs, graphic artworks, and/or illustrations is related to the challenges for those wishing to make legal use of photographs, graphic artworks, and/or illustrations. It is often very difficult for creators to make direct contact with those who would benefit from their work and who are interested in paying for the use of the work. A search by image registry would facilitate the initial contact. If the artist selected one of the simple licensing options then the two parties would not need to negotiate. If the artist indicated a willingness to discuss licensing options and/or listed a representative then the next significant challenge would be negotiating a license. Because one to one negotiation would not be necessary in every situation, the artist would be able to prioritize the use of an attorney and/or agent. In these cases, the challenge would be negotiating the terms of a particular license. The economy has made the market for art licensing even more competitive and has created a trend for more pro-licensee contracts so giving artist the option of engaging counsel when needed most would be an improvement on the current system.

Enforcement Challenges

One of the most significant enforcement challenges for photographers, graphic artists, and/or illustrators is identifying unauthorized uses. In addition to the difficultly in identifying who is using a work without permission, there is the challenge of funding an enforcement action. One possibility, in addition to the progress being made on a small claims process for copyright-protected works, is having an enhanced damages or fee shifting option available in cases where a work registered in the search by image registry was used without permission. An artist will still need to seek counsel, but would be rewarded for including their work in the registry. This of course does not address works that are not in the registry or are not entered until after the infringement began, but it would be a start.

Another widespread issue is infringement by foreign entities. One potential benefit of a search by image registry would be the ease of access by our Customs and Border Patrol personnel. This may not help with infringement occurring entirely overseas, but it could help mitigate the importation of infringing products.

Other Considerations

Other issues that the Office should be aware of regarding photographs, graphic artworks, and/or illustrations relate to a need for clarity. There is a great deal of confusion around what is protectable, what fair use is, and how to get permission if you need it. It is also very important for the Office to take action soon. There has been considerable work done in the U.K. and it would seem prudent to adapt what is already working there rather than attempt to reinvent the wheel. This would provide some much needed predictability for those who are in the business of creating and consuming content, which is well overdue.

Thank you for your consideration.

Sincerely,

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