To: the US Copyright Office

From: Cindy Schnackel, artist

Re: Copyright Reform

14 July 2015

Our copyright laws are great on paper, but almost meaningless due to the impracticality of enforcing them. For millions of independent artists it's getting harder to make an income due to infringements. The cases are rarely worth enough to interest a law firm. Added up, they're Death by 1000 Papercuts. Special interests, who would like to profit from work they didn't do, would like to see laws weakened.

The images artists post online to market their work are in themselves a usable "product." Even small (low resolution) web images can be used as ads, illustrations, etc. If they look good on the artist's page, they will look just as good on an infringer's. No infringer cares if their buyers get a blurry reprint. Many of the uses are commercial, and many are cases of false endorsement that imply artists support causes and companies that they may actually oppose.

For artists who license their work, infringement preemptively kills licensing deals, since their paying clients want an image that is identified with their brand, not numerous infringers' brands.

The artist cannot choose to ignore infringements of their work, as that becomes tacit permission and an invitation to spread the infringements further, causing more damage and devaluing their work.

Difficulty enforcing copyright laws sends the message that there are no consequences. Myths about copyrights and the internet are growing as a result, (e.g. spreading disinformation that the internet is 'public domain'). This makes it increasingly hard to market visual art online and puts the art industry at a distinct disadvantage. It is restraint of trade.

It's not helped by the investment art world's appropriation artists, whose schtick is stealing and getting publicity. These so called artists then enjoy numerous incorrect media stories claiming it must be legal because some rock star status thief got away with it. The artists and photographers they stole from rarely have the resources to fight it effectively, thus weakening the effect of copyright law.

Myths and misinterpretations are overtaking the law, because meaningful enforcement of the law isn't a message being sent very often.

ORPHAN WORKS

Orphan works laws will likely add to the wild west atmosphere, especially if poorly or vaguely written. Independent artists can't wait years for appeals court decisions they can only hope favor the art industry. They need to know that the law is enforceable, now, and they need a way to do it. Orphan works will further muddy those waters and delay justice. I might be less concerned about it if it ONLY applied to libraries,

museums, etc, but it does not apply only to those institutions.

Orphan works laws are not likely to benefit the public. Taking the work of others, or copying, is not a benefit and doesn't motivate people to create. The public would benefit more from value being put on doing one's own original work, or paying for the use of work by other artists. Devaluing work is damaging to the creative industries that provide the very things that are wanted.

Going viral has become a problem that will be exacerbated by orphan works laws. It's NOT promotional for the owner of the image because their name is quickly left off, and even watermarks are sometimes removed. This leaves many images, that are under copyright, hard to identify and potentially at risk of being declared an orphan. It would increase the amount of time needed to police works, and increase the difficulty of dealing with them when found if they'd been used under an orphan works law.

The owner of the image has the exclusive right to declare how much they'd license or sell it for, or what uses they'd permit, but orphan works takes these rights out of artists' hands and lets the government set the fee and allow the uses.

This goes against existing law, from the constitution to modern copyright statutes. It also opens up artists to many instances of false endorsement that could irreparably damage their reputation particularly when their stance on issues is as important to their work as the images themselves. E.g. political views, wildlife conservation, religious concerns, and others, that artists alone determine which uses they find acceptable at any fee.

Online images are not abandoned (orphaned) simply because someone can't find the owner. The technology, and misuse of it, that allowed so many images to become harder to identify should not be used as an excuse to expose numerous artists works to uses they don't approve of and may never recover fees for.

DIGITAL MILLENNIUM COPYRIGHT ACT/ the DMCA Takedown

Artists use the DMCA takedown process frequently, and many times it's effective, negating the need to do anything more. We need to keep this tool, and if anything we need to strengthen it.

There are enforcement problems when hosts ignore it. It's our only free, DIY tool, to combat infringement. Even when it works, it is still time consuming to go thru the process over and over as new infringements are discovered.That work load increases with each host that doesn't comply. Some hosts are notorious for stonewalling copyright owners, increasing both the artist's workload and the site host's. If they would simply comply with valid takedowns it would be beneficial for all.

The more sites hosts that play games, ignore artists, or stall, the more time and energy is spent on infringement, and the less is devoted to creating new work. That is money out of artists' pockets, and deprives the public of seeing new and interesting artworks.

Big stores hire security firms to watch for shoplifters, and can call the police if one is caught; independent artists can't, and feel losses more keenly. Independent artists can usually only send a takedown. They usually

can't afford to do anything else--even if it's within their rights--that would compensate them for the infringement's damage. Without at least an effective takedown process, many artists would soon be forced off the internet, more restraint of trade.

DMCA's SAFE HARBOR IS PUSHED PAST THE LIMIT

Few of these site hosts are really enforcing a vaguely required 'repeat infringer policy.' Much less, any due diligence to remove known infringements before receiving a takedown, or to not profit from infringements.

Facebook, Pinterest, most Print On Demand type sites (PODs), and many others, host members whose pages are virtually all infringed images, have received numerous takedowns, and yet those pages are sometimes still there and still using, even selling, images they don't own. Some sites encourage and enable infringement, often with handy tools to copy, pin, download, etc, on every image. Many are "Like Farms/Content Farms" that use other people's content to gain income from ads and sometimes malicious methods. They often rank higher in search results than the legitimate sites their content came from, despite artists' efforts to combat them by working on their own 'search engine optimization' in above-board ways. (SEO)

Scraper sites, which robotically gather internet images and offer them as free downloads, etc, cause further problems including blocking artists' attempts to deal with them, and infecting visitors' computers with malware and viruses. Search engines either aren't trying very hard, or have lost the battle, in de-ranking these nefarious scraper sites, as they often come up at the top in searches, far outranking the legitimate sites where the art may be seen. These sites should be flat out illegal and that, too, should be enforced. Some site hosts gladly look the other way and host many scraper sites. Including some right here in the US.

RETALIATORY INFRINGERS

Many site hosts stonewall by telling artists to 'contact the infringer.' If the artist does this, even if politely, it often results in retaliatory behavior including false reports of abuse that disrupt the artist's ability to use the internet to continue promoting their business, obscene language, threats, attempts at hacking, and cyber stalking.

Infringers declare themselves the victim, calling copyright owners 'greedy,' (or worse), and fantasizing about a 'free world' where no one has to pay for anything. Generally, when a takedown is promptly and correctly complied with, the artist never hears from the infringer. It's when the artist has to directly confront them that retaliation is common.

LEGAL RECOURSE REMAINS A FANTASY

It is simply not possible to "just get a lawyer" for the countless infringements we deal with on a continual basis. Most cases are not worth enough money, registered or not, to interest a law firm, especially since the

likelihood of collecting huge damages is slim.

No one, including many law firms, can afford to front the money to fight infringers in court in most cases. Enforcement may be available to large corporations with legal departments, but leaves independent artists with almost nothing on their side, even when they have jumped through the hoops of "optional" registration.

EXPECTING TO BE PAID FOR ONE'S WORK IS VIEWED AS BEING A COPYRIGHT TROLL

Some artists have their attorney send a bill for unauthorized use and hope 'most' will pay up, so that in the long run they don't lose money. Some bad actors in this industry have tarred the reputation of all who try to enforce their rights, not because all ARE trolls, but because it's a convenient excuse to blame the victim and paint the infringer as downtrodden.

INCREASED INFRINGEMENT LEADS TO LESS NEW CREATIVE WORK

Infringement makes creative industries into a wild west that rewards thieves and punishes workers and innovators. It's a disincentive to go into these industries at all, if one's product can't be protected. Artists spend far too much time now on policing their work, and being drained of time and energy needed to focus on the creation of new and unique works of art.

REGISTRATION IS AN OBSTACLE

Registration remains an outmoded obstacle that other countries don't use anymore, and added expense that is now unique to the USA, and yet it really doesn't provide any benefit that can't be had in countries that don't have it.

Making it "optional" decades ago was a step in the right direction but was also a false sense of security. Registering the thousands of images visual artists produce is a tedious and expensive task that adds up to many hours and dollars that are not spent on making new art, just as infringement eats into our productivity.

The process and rules for fine art are just enough different from photos to make it iffy as to whether it is even much protection. Many lawyers don't even understand the group registration process for fine art well enough. Registering each image individually is prohibitively expensive and time consuming when artists may produce hundreds or even thousands of images per year, and have adequate record of their creation, making registration redundant for the purpose of proof.

FINES INSTEAD OF DAMAGES COULD FUND THE COPYRIGHT OFFICE; SMALL CLAIMS

It's in the public interest to fine offenses that are obvious, and of detriment to the public, such as speeding. A

similar system might be examined for infringements, especially small damage cases, at least those which are obvious, such as scraper sites that take images from all over, or the infringer who is selling art images taken from many different artists.

Laws that theoretically allow recovery of "up to $150,000 per infringement" but are unenforceable and noncollectable, are of little protection to the creative industries. Realistic fines for small cases might be preferable and more realistic.

Fines might also address the version of small claims copyright court as it is now proposed. I commented several years ago on the proposal of creating a small claims process, but the way it is written now, it requires infringers to agree to be sued, which is as big or bigger of an obstacle to justice as registration is.

The right to sue exists in countries without registration; this could be changed in the US, too, by eliminating registration and retooling the copyright office. The USCO already wishes to become a separate agency and this is the perfect time to retool. In part the USCO could fund itself by fining obvious infringers and non compliant site hosts.

STRONG COPYRIGHT PROTECTION BENEFITS THE PUBLIC

A legal system that makes enforcement of our rights all but impossible is one that rewards thieves and punishes those who actually create and produce.

The ability to protect our product, (our intellectual property as well as the physical property), and do so in a practical and meaningful way, allows for creation of MORE new art, music, etc. Real life consequences for infringers also educates the public what the law really IS, so there would be less confusion, fewer takedowns necessary, and more creatives being asked--and paid!--for their hard work.

When creatives know their work will be pirated the instant it's created, (and especially when it's displayed online), they hesitate to go into a creative field and hesitate to make more work available. It's not justifiable to expend their energy, time, or money, into making more new work, unless they know they can be the one to profit from it. In the digital age, that also strongly means the only one to decide where and how it's displayed.

Orphan works would devalue much of the art out there, that is simply hard to identify. This is exacerbated by the viral and attribution-less nature of the internet. When art has so little value there will be far less of it made and/or shared in a public display that the public may enjoy, and that artists may make an income from.

We don't tell the plumber or doctor that they're not going to get paid because we didn't know their name. We don't get to take things from stores without paying because we can't clearly see who designed it. We don't "orphan" the accomplishments of other industries; we should not do so to artists.

Sincerely,

Cindy Schnackel

Artist