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Response to Notice of Inquiry ("NOI") on Copyright Protection for Certain Visual Works

Introduction and Background

Imagewiki is pleased to provide these comments in response to the Notice of Inquiry ("NOI") on Copyright Protection for Certain Visual Works (Docket No. 2015–01) dated April 24, 2015.

Imagewiki is a technology company providing a practical market-based solution to the problem of unlicensed sharing of visual works online. Imagewiki has built a technological framework designed to make copyright compliance easier for online service providers ("OSPs") such as social media sites. Many OSPs provide their users with platforms on which to discover and/or share content which often belongs to third parties. Imagewiki's technology helps such OSPs identify the image content uploaded to their sites and follow the predefined usage rules specified by the owners of those images.

In addition, Imagewiki maintains a free wiki-based registry (available at http://www.image.wiki) that offers a crowdsourced solution to the Orphan Works problem by allowing the public to add or vet ownership information for visual works (photographs, graphic artwork, and illustrations), which may or may not have a registered copyright.

While the Orphan Works issue is a serious obstacle to a functioning *marketplace for visual works online*, one of the most significant challenges for rights holders is to devise a monetization strategy that accounts for the widespread use of their work on many OSPs. Such widespread infringement is enabled by unrestricted access to image content, poor awareness of copyright issues, and a lack of viable options for users to exercise their rights as set forth in the Digital Millennium Copyright Act ("DMCA").

Registries as a Solution to the Orphan Works Problem

Various image owners and commercial users of creative works have affirmed the need for a centralized image ownership database searchable by reverse image lookup. Registration, proper use, licensing and enforcement of copyright on digital works depend on a streamlined identification and searchability system. Each step in that process contains a fail point today, and would be aided by such a centralized database and automation layer.

The Copyright Office is aware of this problem and its importance as the root of many associated problems for digital image use. The PLUS Registry (Picture Licensing Universal Standard) and a few other registries were established as attempts to solve the problem of Orphan Works and facilitate connections between the underlying image creators, rights holders, distributors, licensors, and licensees. Such registries have been making progress in this endeavor**.** However, with little immediate economic incentive for rights holders to register images, those registries have yet to acquire the critical mass necessary for tangible relief of the licensing challenges created by orphaned works. In a sense, the problem is a paradoxical one: a clear profit model cannot exist in the absence of `a centralized content registry, and a content registry cannot arise without a clear profit model**.**

Meanwhile, images for which there exists ownership metadata are continuously being divorced from that metadata and disseminated across the internet faster than these registries can index them. In the photo industry, a multitude of stock photo libraries now have high quality image licensing outlets equipped with discovery tools and shopping cart features to make legitimate licensing of visual works easier for commercial licensees. Nonetheless, many potential licensees find works suitable for their needs by searching the web at large, for instance on image search engines. Many of those suitable images are either orphans or effectively orphaned because of a lack of a cohesive registry.

Imagewiki supports all industry registries and provides its own community-sourced registry built on wiki principles to allow knowledgeable parties the opportunity to contribute to the solution. The purpose of the wiki approach is to make the solution available to the types of image creators, such as amateur photographers or users of photo applications such as Instagram, who many not be sophisticated enough to submit their content to an industry registry. Until the available registry solutions reach the required critical mass, even the most informed potential licensee who is willing and able to perform the most diligent of searches will have no easy way to license an Orphan Work.

Social Sharing Defies Proposed Legal Categorization

There is general consensus among rights holders that any unlicensed publishing of copyrighted material on social media platforms by commercial entities must be taken seriously. However, those same rights holders have a range of opinions about the significance of 'social sharing' of copyrighted works by individuals without a commercial purpose. Some in the image licensing industry view the rampant unlicensed personal use of images on social platforms as a serious problem, while many others see it as simply an unavoidable cost of doing business. The latter view is understandable because although the DMCA provides recourse for infringements when they are found, it does not remove the onus from the copyright holder to locate all the uses of their works across the multitude of online websites, which is a burdensome, if not impossible, task. Even when content owners have the resources to identify a substantial number of infringements, they must then determine which of those uses are commercial in nature and further, which of those commercial uses are unlicensed. After handling infringing commercial uses, they are still left with unsatisfactory modes of action to handle the leftover personal-use cases.

An individual who shares unlicensed third party content may do so to express some sentiment, to share something of interest or to establish social "clout." Most of the users who share images on these platforms are unaware of copyright compliance laws, or assume they are already accounted for in the OSPs' terms of use, and proceed to flood platforms with infringing posts. Attempting to pursue any legal action or to request a retroactive license fees against all individual users would be logistically and financially impossible. Without compensation as a likely outcome, the content owner may elect to issue DMCA takedowns. Unfortunately for content owners and OSPs, this path requires tremendous effort. Some Imagewiki contributors have expressed concern that issuing DMCA takedown notices could result in a negative reaction from the general public, who are unaware of their infringing behavior. Other contributors to the Imagewiki database, especially those who own iconic content, are cautious about issuing DMCA takedowns out of concern concerned about alienating any users from their brand.

The proposed Shawn Bentley Orphan Works Act of 2008, S. 2913, along with the corresponding House bill, H.R. 5889, excluded the issue of social personal use altogether. The legislation would only provide limited remedies against an infringer who can prove that he or she has performed "a reasonably diligent search in good faith to locate the copyright owner before using the work," filed a "Notice of Use," and provided attribution to the owner of the copyright. Most social users are unlikely to perform such due diligence.

However, since the legislation would have protected uses that are “charitable, religious, scholarly, or educational” in nature, many infringers in the social personal use category may claim that their uses fall into those categories. Therefore, implementing a system that allows owner-defined rules for social use could preemptively alleviate the need to resolve ambiguity in many use cases.

Despite the lack of proactive options available for content owners to combat infringing personal use, ignoring these cases sets a dangerous precedent regarding the use of copyrighted image content online. As long as this problem exists, OSPs will be able to use third party content to drive engagement by users, and can therefore benefit financially from unlicensed copyrighted material. In effect, OSP’s benefit from infringement even if they are not directly responsible for it.

Proactive Instead of Reactive Licensing for Social Personal Use

It is our position that online use of copyrighted material in a social and personal context simultaneously presents monetization opportunities as well as the opportunity to solve various related problems with the use of copyrighted material online (including but not limited to Orphan Works). By utilizing a technological framework such as the one built by Imagewiki, in partnership with content owners, other registries, and OSPs, the visual works industry has the best chance to solve these related problems for image owners and users.

Users’ image sharing behaviors on OSPs are entrenched. Any attempt to educate such a vast consumer group about licensing would be futile. Hence, a licensing solution for personal use of images on social media must involve a distributed, proactive, and automated approach. In Imagewiki’s particular model, the content owner defines proactive usage rules for certain images in a personal non-commercial setting on various OSPs. Various OSPs can continuously request live-time image identification and usage rules from Imagewiki (automated and at mass scale) in order to implement a policy that pre-empts DMCA takedowns, does not affect user behavior, and satisfies the content owner.

Imagewiki is currently negotiating with various OSPs on behalf of visual work rights holders. Imagewiki respectfully recommends that the Copyright Office propose legislation designed to address monetization and licensing, in particular, requiring or incentivizing OSPs which allow unregulated uploads of image content to take a more active role in attempting to programmatically identify image content. This would reduce the sisyphean task placed on rights holders and the overall tension caused between rights holders, OSPs, and their users as a result of DMCA takedowns.