Maria Pallante
Register of Copyrights
U.S. Copyright Office
101 Independence Ave. S.E.
Washington, DC 20559-6000

Comments submitted by Marian Buchanan

July 22nd, 2015

RE: Notice of Inquiry, Copyright Office, Library of Congress
Copyright Protection for Certain Visual Works (Docket No. 2015-01)

Dear Ms. Pallante & U.S. Copyright Office Staff:

I'm an American visual artist living in Canada and I'm affected by the U.S. Copyright Law both in terms of works published in the U.S. and in terms of what I post on the internet.

I'm writing to respond to the call for comments and, in particular, to express my concern about some of the proposed changes to the U.S. Copyright Act. I agree that copyright law needs to be revisited to take into account the challenges of the evolving digital environment and the changing needs of both copyright owners and consumers. What concerns me is the risk that certain kinds of changes could jeopardize the existing rights of artists, not only legalizing the kind of infringements that are now happening, but actually adding to the erosion of copyright protection through reclassifying certain works as Orphan Works.

Before I respond to the five questions you've asked, I'd like to address those additional concerns.

I've been told that some lobbyists and corporation lawyers have claimed that once an artist's work has been published it has virtually no further commercial value and should therefore be available for use by the public. Let me dissect both parts of this damaging fallacy:

1. Once an artist's work has been published it has **virtually no further commercial value**?

Nothing could be further from the truth. Here's why:

- Print-on-demand reproductions of my artwork are one of my sources of income. By definition, this is an ongoing venture, not a one-time printing. So “once it has been published” has no meaning, unless it refers to the online publication of the images in a web-based catalog from which customers choose and place their order. And if that's the meaning, then on the contrary, that online publication is **the very means by which** commercial value **continues** to be attached to the artwork.
- Even in a one-time publication situation, like, say, the publication of a book of which I am the illustrator, the fact that the book will not be reprinted does not mean that I can no longer derive profit from my illustrations. On the contrary, now that the book is out of print, my illustrations are **more** available for me to use in other ways, such as for print-on-demand reproductions onto posters, T-shirts, mugs, etc.
- Does anyone really believe that cartoons of Mickey Mouse or Charlie Brown have virtually no further commercial value because they've already been published? It's not just because they're famous that they do. While fame certainly helps to *increase* commercial value, a work doesn't have to be that famous for the same principle to apply: the potential for commercial value is there before publication. Publication itself **demonstrates** commercial value, but certainly **doesn't use it all up**.

2. If a work has no commercial value, it **should therefore be available for use by the public**?

This "reasoning" contains no logic. Here's why:

- Any "use" the public can make of a work of art **demonstrates by that very use** that there is commercial value: the potential to sell the license to use that work to the person who wants to use it. Just because no one **wants** to pay for art or music or any other intellectual property anymore, everybody wants everything for free nowadays, doesn't mean that there is no commercial value to what they "want" to "use." The public wanting to use an artist's work for free is not a good enough reason to pretend it has no commercial value. A work of art **never** loses commercial value. The question is simply to whom that value will be paid or given, or in the case of infringement, by whom it will be stolen.
- **Commercial value is not the only thing that copyright law needs to protect**. The right of the artist to decide what happens to their work is also a **moral right**. I don't want my children's book illustrations to be used in anti-gay propaganda (this actually happened, and I sent a cease-and-desist letter), or my nudes to be used in pornography. The public wanting to use an artist's work without permission is not a good enough reason to trample all over the artist's rights to decide when and where and how and by whom their own work gets used.

Let me turn now to the five specific questions you've asked.

Monetizing and/or Licensing

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

Current challenges:

- Some publishers have unreasonable requirements that artists sign away their rights in order to be published. Aside from what it does to moral rights, this forbids other ways of monetizing or licensing the work.
- Freelancers are sometimes asked to sign contracts that treat their commissioned works as "work for hire" and thus hand over the copyright to the commissioning company. This, too, disallows further monetization or licensing by the creator.
- Among some businesses and non-profits, there is sometimes an attitude that creators should be happy to get paid in "exposure" rather than in financial compensation.
- Among some businesses, there can be an attitude of greed and exploitation whereby the focus is on them maximizing their profit, partly by minimizing their costs. Therefore such companies are often unwilling to pay for the artwork they need, and would rather find a loophole to exploit, or lobby to have the copyright law changed in their favor, than engage in ethical and equitable business practices with artists.

Challenges under certain potential changes in the law:

- I'm concerned that any changes that would make it difficult for me to control my own works (like a re-categorization of them as orphan works if a user allegedly can't find out that I'm the copyright owner) would transfer the monetization of my works to such a person and deprive me of benefiting financially myself.

- If derivatives of such falsely orphaned works are allowed to be registered for copyright by such a person, then I would lose all other benefits of copyright as well.

Enforcement

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

Current challenges:

- It's the age of piracy – a combination of lack of copyright literacy, lack of scruples, ease of copying, and a mindset of entitlement and wanting everything digital to be free.
- Every digital 2D work is easy to copy and distribute, and most non-digital 2D works are easy to digitize.

  > **Please note** that when I list something as a challenge, it doesn't necessarily mean that I think the solution is to do the opposite. For instance, just because I'm saying that digital copying being easy makes enforcement more challenging, doesn't mean that I think the solution is to make copying hard. People will always find ways to circumvent technological measures, and there are legitimate reasons for copying as well. So it wouldn't help to make things harder for legitimate users. The solutions need to take all things into account, and one of the main ones needs to be education for greater copyright literacy so that people truly understand why copyright is a good thing and how infringement hurts not just the particular artist but also the whole culture.

- Too many consumers are uneducated about copyright. For example, if they can find it on Google Images they think it's in the public domain and available for them to use as they wish.
- Even when consumers are aware that something is copyrighted, they're often unwilling to abide by the law. Many people just want everything to be immediate and cost-free: they don't want to take the time to find out who the creator is, where to get a hold of them, and actually contact them to request permission; and they don't want to pay a fee even if they do get permission.
- The internet is too vast to detect every instance of infringement. There are reverse image search services available (Google, TinEye, and others), but they can only reveal images they have indexed.
- It's virtually impossible to detect offline infringement.
- It's difficult to prove infringement without registration, but currently prohibitively expensive to register.
- If a cease-and-desist letter proves insufficient, taking the violator to court is also prohibitively expensive for someone like myself who is not rich and famous.
- Some websites (like wallpart.com) exploit the tendency to infringe, by using image search engines like Google as their source of images to present for being printed ("Find and print your favorite images" - printing is done by the website's company, of course). They put the onus on the user not to infringe copyright but don't provide a way for customers to upload their own artwork, so they **only** print images taken from other websites. (Little do the buyers know that they can't just take an online image and expect it to print properly anyway. The web version resolution is too low for print quality. But there is no mention of this on the wallpart site.)
- Some websites (like pinterest.com) have ambiguous Terms of Service that are inadequate to protect copyright of user content, and in fact could encourage other users to infringe.

- Some marketers, selling “how to make money online” types of info products, actually encourage users to interpret ambiguous Terms of Service like those of Pinterest as a license to use other users' content in any way they wish, on the basis that anyone who has uploaded their work to the site has agreed to the Terms, including the terms that appear to require creators to hand over all rights to other users, basically forfeiting their copyright to anything they upload (even though, elsewhere, Pinterest claims to be serious about copyright protection).

Challenges under certain potential changes in the law:

- If, under proposed changes, my works became re-categorized as orphaned because some user supposedly couldn't find out that I'm the copyright owner, I would not necessarily find out about it in a timely manner and, even once I did, would not be able to afford the cost of defending my copyright any more than I can afford to register each and every one of my works.

Registration

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

Current challenges:

- It's prohibitively expensive for an independent artist to pay a registration fee for each and every piece of work they've created.
- I also understand that it's even more expensive if you want the registration to be retained by the Copyright Office for more than 10 years.

Challenges under certain potential changes in the law:

- I'm very concerned about the idea that protection of my copyright would be dependent on my work being registered, whether with the government or with some organization. If I'd have to pay a fee for each piece registered, I couldn't afford it, so it would amount to having no copyright at all. It would make copyright protection available only to the rich, and not to ordinary middle-class or lower-class artists who are already struggling financially as it is.

Legal Use

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

Current challenges:

- It can be hard to know whether or not a particular piece is copyrighted, since sometimes works are distributed by third parties as public domain when they're actually not, and websites do not always provide credits even when they're not claiming the artwork is in the public domain.
- Google Images contributes to the ignorance and inadvertent infringement by not having a visibly clear enough way of presenting its “search by usage rights” options and its warnings about possible copyright. Not enough users realize that these options are there, and many think that anything that's on Google Images is public domain.
- If a book or magazine is out of print, the publisher has folded, and you're trying to track down the illustrator, all you have is a name. I'm not aware of any free registry in which artists could keep their

credits and contact information updated. It would make sense to me if the Copyright Office maintained such a database, free to both creators and users wishing to contact them for permissions.

Challenges under certain potential changes in the law:

- My concern is not about users who wish to make legal use of works through granted permissions. My concern is about any changes that would make it legal to use works *without* permission – for example, if a work is reclassified as orphaned. Under current copyright law, people have to wait for a number of decades after a creator's death before they can use the creator's works without permission. If I've understood the proposed changes correctly, it sounds like people would be allowed to bypass the permission-requesting process altogether, even while the creator was still alive, as long as they *claim* they've done a due diligence search for the creator and couldn't find them. Then, if the creator got wind of it and brought it to Small Claims Court, the infringer wouldn't even have to pay statutory damages and attorneys' fees, nor be given a permanent injunction against repeat offenses? That scenario would be very damaging to the artist's reputation, investment of time, money and energy, ability to protect their copyright, and ability to make a living.

Other Issues

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

- In the age of the internet, every country's copyright law (and copyright culture) affects every creator on the planet.
- I sincerely hope that any changes to the Copyright Act retain the mission to protect creators' rights and livelihoods, rather than encouraging and legalizing infringement.

Respectfully submitted,

Marian Buchanan

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U.S. citizen