FROM THE DESK OF

JENNIFER BOLES

July 22, 2015

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

RE: Notice of Inquiry, Copyright Office, Library of Congress **Copyright Protection for Certain Visual Works** (80fr23054)

Dear Ms. Pallante,

It is hard to reconcile this tremendous theft of licensing revenue from American visual artists that remains unexamined and unchecked. It is very hard to reconcile this outcome with the goals of the Copyright Act. The sustained authorship of professional authors is not indestructible. In fact, it is becoming rather frail. Our rights urgently need to be secured.

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

Little can be done to right the current extreme imbalance between author and publisher, or author and user if you prefer, but I have three solutions.

The right to authorship in the U.S. should be inalienable. It is self-evident that work-for-hire for independent contractors deprives an artist of authorship in direct contravention of my constitutional right to secure

the exclusive rights to my work for limited times. This loss of authorship is compounded by the loss of all secondary income created by the ongoing licensing and exploitation of that work, including the exclusive right to create derivative works. Meaningful copyright reform would prioritize amending the law to apply work-for-hire only to true employees.

The length of time to exercise the termination right must be shortened. By the time a creator can exercise a termination right he or she has been impoverished for three and a half decades while those copyrights have built a billion dollar corporation or four. The exercise of the termination right has become a grossly unmatched legal fight against a leviathan. No example describes this more tragically than Jack Kirby and his inability to exercise his valuable termination rights during his own lifetime against the four Marvel and Disney Corporations.
All statutory remedies should be automatically available to visual artists at the moment an artist fixes a creative expression in a tangible form. Statutory remedies are the only viable method by which an artist can enforce and defend their property right. The substantial deterrent of automatic statutory remedies will have a significant effect on the rampant piracy and unauthorized use suffered by American visual artists.

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

It is self-evident that is fundamentally unreasonable to require registration for visual artists as a prerequisite to statutory remedies. Without theses remedies, including attorney fees, costs recovery and injunctive relief, visual artists cannot adequately enforce their rights. Most visual artists create exponentially more works than any other genre of creator. And although there is a commendable, special group registration solution for photographers, non-photographer visual artists need to be especially vigilant when using the group registration system. If the illustrator or fine artist registers a group of works labeled as a

“collection” or a “compilation” the artist risks a limitation of a single grant of statutory remedies for the group, or a fractional grant of statutory remedies for an infringed image within the group.

Most artists would reasonably assume that they have “perfected” their copyright by timely registration within three months of publication, and have therefore secured statutory protections for the lifetime of the copyright. Few know that the Copyright Office does not retain most visual art deposits after ten years, and has discarded millions of visual art registration deposits.

Even fewer artists know that the already unaffordable $55.00 cost to register a work only secures retention of the visual art image record for 10 years, and if the artist wishes to full term retention of a published copyright deposit in the Copyright Office for the life of the copyright, the artist must pay an additional $540.00. This means the real cost of a “perfected” visual art copyright registration is $595.00 per image.

Registration for visual artists is too burdensome, unrealistic, costly and fraught with potentially fatal technicalities of which many artists are unaware. The Copyright Office has long known that most visual artists are unable to afford the time and expense to register all their works. The 1976 Copyright Act was revised in part to try to prevent the loss of rights to American creators by removing burdensome formalities that caused the forfeiture of rights.

Because of this, the true spirit of the Berne Convention prohibition on formalities should be honored for U.S. visual artists.

I realize this stands in stark contrast to current policies being pushed that would limit or remove artists’ remedies. Such policies favor infringers and not artists, and favor the extinguishment of professional authorship for the protection of infringers.

I no longer know the cost of overdue library fees, but when I was in college the fee for an overdue book (or never returned book) was quite

small. It was to encourage you to go ahead and be sure to return the book. The penalty wouldn't become so overwhelming that it might cause you to abandon the idea of returning the book. So, it was a minor penalty, no matter how overdue, until it was time to register for the next semester when you could not re-enroll unless you returned the book or paid for its replacement if lost. Because it had the dramatic hammer of an effective penalty it worked.

If a thief steals a handful of loose candy from a convenience store the thief is charged with shoplifting, a very serious crime. If a thief steals more than a $1,000 of anything it is a felony. Steal $30, $3,000 or $30,000 worth of art usage and the only penalty is on the artist, unless statutory remedies are automatic.

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

The overdue implementation of the resale royalty, and the designation of that royalty as inalienable would certainly make this list. American illustrators wholly support the implementation of the resale royalty and filed a detailed report with the Copyright Office in 2012.

The legislative implementation of the federal resale royalty has been in abeyance since the U.S. joined Berne in 1983, and that has resulted in a generation of resale royalties lost to artists and their heirs in the U.S. and around the world.

It is hard to reconcile this loss with the goals of the Copyright Act. The sale of American illustration paintings and drawings is an emerging market attracting sophisticated collectors worldwide, and these rights owners deserve to participate in the wealth they have created. I have observed first hand the sale of many illustration works I remember being created and published by my mentors and peers, including this one where the National Geographic Society auctioned part of its 11.5 million image archive at Christie's in New York.

In the case of illustrators, painters and photographers, in many instances the original art was never sold by the artist, but passed into

the hands of publishers, advertisers and others through the production process.

American illustration is evocative of a unique type of American artistry and personal expression. As more publishing archives are mined for illustrators' original works of art, the market for published illustration originals will continue to grow. Contemporary illustrators today are creating the Americana of tomorrow, and some are experiencing the market exchange of the growing value of their original art occurring during their lifetimes, and enriching only others. There can be no doubt that the adoption of a federal resale royalty regime would further incentivize and protect visual authors. The artists of financially productive works would finally share in the equity of the value they have created.
I therefore support the Congressman Jerrold Nadler's American Royalties Too (ART) Act of 2015 which calls for the institution of the reciprocal resale royalty in the United States, and for the Copyright Office to bring transparency and justice to artists' secondary licensing rights. I thank the Copyright Office for recommending this bill to Congress.

Summary
Each of the exclusive rights conferred by copyright can be subdivided and each divided right has a value. We rely on the divisibility of our exclusive rights to earn our livings. Any rights not specifically transferred in a license belong to the artist, including rights to uses not yet known or invented.
When the use has value, part of that value belongs to the creator; without the creative work the market—and the demand—would not exist. Yet, we experience significant difficulty enforcing our rights because of the dramatic imbalance between the individual creator and giant publishing enterprises and their cronies. In many cases, revenue streams that directly belong to visual artists have been wholly diverted to other parties, and artists are foreclosed from the exercise and enjoyment of their rights.

No meaningful copyright reform is possible without seeking solutions to this state of affairs in the U.S. today.

As Justice Ginsburg wrote in Eldred,
"the economic philosophy behind the Copyright Clause . . . is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors. Accordingly, copyright law celebrates the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge . . ."

It is my sincere hope that this Copyright Office will take care to firstly cause no harm to visual artists. Secondly, that the Copyright Office will proactively work with visual artists to craft policy to protect visual authors and their exclusive rights, and support a sustainable environment for professional authorship.
Thank you for issuing the first Notice of Inquiry dedicated to examining copyright and visual artists.

Respectfully submitted,

Jennifer Boles