AIPLA
AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION

July 23, 2015

The Honorable Maria A. Pallante
Register of Copyrights
U.S. Copyright Office
101 Independence Avenue, SE
Washington, DC 20559-6000

Re: Comments Submitted Pursuant to Notice of Inquiry Regarding "Copyright Protection for Certain Visual Works," 80 Fed. Reg. 23054 (Apr. 24, 2015)

Dear Register Pallante:

The American Intellectual Property Law Association (AIPLA) is pleased to offer comments in response to the above-referenced U.S. Copyright Office Notice of Inquiry regarding "Copyright Protection for Certain Visual Works."

The American Intellectual Property Law Association is a national bar association of approximately 14,000 members who are primarily lawyers engaged in private or corporate practice, in government service, and in the academic community. AIPLA members represent a wide and diverse spectrum of individuals, companies, and institutions involved directly or indirectly in the practice of patent, trademark, copyright, trade secret, and unfair competition law, as well as other fields of law affecting intellectual property. Our members represent both owners and users of intellectual property. Our mission includes providing an objective analysis of issues to promote an intellectual property system that stimulates and rewards invention while balancing the public's interest in healthy competition, reasonable costs, and basic fairness.

Based on our review of the notice of inquiry, AIPLA offers the following comments.

Significant Challenges to Monetizing and Licensing of Visual Works

AIPLA believes the ease of unauthorized copying online is a major challenge to the licensing of visual works. This is particularly true in light of the increasingly prevalent perception that visual works are and should be freely available, a shift which may be attributable to what has been described as a "participatory culture"[1] or "sharing culture."[2] Content providers seeking to satisfy the online community and an ever-shortening news cycle demand posting and sharing of content at an extremely fast pace, which has rendered more traditional licensing mechanisms in the online environment very difficult, if not obsolete. The large and growing number of orphan works and unauthorized mass digitization further hamper licensing efforts. These issues were

[1] https://en.wikipedia.org/wiki/Participatory_culture

[2] Philippe Aigrain, *Sharing Culture and the Economy in the Internet Age* (2012), http://www.oapen.org/download?type=document&docid=409602

241 18th Street, South · Suite 700 · Arlington, VA 22202
Phone: 703.415.0780 · Fax: 703.415.0786 · www.aipla.org · aipla@aipla.org

the subject of lengthy discussions and investigation by the Copyright Office, producing various Notices of Inquiry, in which AIPLA also filed comments, and culminating in the release by the Copyright Office in June 2015 of the Report on Orphan Works and Mass Digitization.[3] As AIPLA advocated in its earlier comments to those Notices, to address impediments to effective visual works licensing, we proposed that the Copyright Office provide, or at the very least endorse, a robust image search tool that would allow potential licensees to identify rights holders and make lawful use of content protected by copyright.[4] We believe such a tool could mitigate some of the challenges to licensing visual works.

Significant Enforcement Challenges for Authors of Visual Works

Authors of visual works protectable under the Copyright Act face unique hurdles to rights enforcement in the online environment. Notably, under § 412 of the Act, an application to register a work must be filed within three months of first publication in order to claim statutory damages and attorneys' fees. AIPLA supports extending this three month time period to provide authors with a greater opportunity to timely register their works and enable the owner to later maintain an action in which statutory damages and attorneys' fees are available.

In addition to formal litigation as an enforcement tool, once a copyrighted work is registered, AIPLA supports additional inquiry into an alternative dispute resolution processes for internet-based copyright infringement disputes. A more efficient alternative to a federal lawsuit – one that provides statutory damages as an exclusive compensatory remedy – would promote enforcement actions relating to visual works. Disputes relating to visual works that originate in an online environment are particularly well-suited for arbitration; limiting available damages in such proceedings to statutory damages such proceedings could prove more efficient than federal litigation.

Germane here are comments of AIPLA, which remain true today, filed in response to an earlier Notice of Inquiry regarding "Remedies for Small Copyright Claims," 76 Fed. Reg. 66758 (Oct. 27, 2011).[5] There, we applauded efforts by Congress and the Copyright Office to ensure that copyright owners of all kinds – large and small – have the ability to effectively protect their rights in their works. The Copyright Office and Congress should work to ensure that any proposed reforms continue to fairly balance the rights of authors with the rights of users. For example, it is important that the system not encourage frivolous claims that require both copyright owners and legitimate users of copyrighted works to defend against at undue expense.

AIPLA continues to oppose use of state courts for copyright small claims for all the reasons expressed in AIPLA's comments regarding small claims. We reiterate that the overwhelming majority of infringement actions arise under federal law and are brought in federal court. As a

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[3] http://copyright.gov/orphan/reports/orphan-works2015.pdf

[4] See http://copyright.gov/orphan/comments/noi_10222012/American-Intellectual-Property-Law-Association.pdf, at 3 ("[W]e would support a proposal, similar to that in the 2008 legislation, to require that the Register of Copyrights develop a certification process for, and the establishment of, a new electronic database for pictorial, graphic, and sculptural works that are registered, to facilitate searching for these types of works, which appear to present the most challenging fact patterns.").

[5] http://www.copyright.gov/docs/smallclaims/comments/01_aipla.pdf ("AIPLA's Comments regarding Small Claims").

consequence, federal judges have developed substantial expertise in hearing copyright matters. Making state courts the venue to hear such matters carries a number of significant risks, including the potential for incorrect and inconsistent decisions, and the burden on courts to learn—and more likely on litigants to teach—the applicable copyright law. Finally, adjudication of copyright disputes by state small claims courts would subvert the goals behind federal preemption in the copyright space.

Significant Registration Challenges for Authors of Visual Works

AIPLA views the current registration process as somewhat incompatible with the current technological environment and with the pace at which visual content is created, posted, and shared online. As stated above, AIPLA supports extending the time period for registration post-publication to enable authors of visual works to gain greater access to statutory damages and attorneys' fees. Particularly with respect to content posted online, we believe relaxation of this requirement will encourage registration of online content by providing more leeway for authors to register their works. In many ways, this will provide authors additional time to evaluate whether a work is one for which they will seek to invest in further protection under the Copyright Act. AIPLA would also encourage the Copyright Office to conduct additional inquiry into ways to facilitate a seamless registration process for authors of high-volume content created and disseminated online.

Significant Challenges for Potential Licensees of Visual Works

As expressed above, we believe that orphan works and mass digitization present significant challenges for potential licensees that wish to make lawful use of visual works but cannot effectively identify rights holders. We also believe that a shortfall in education at large on both fundamental copyright principles and lawful use of protected visual works continues to hamper licensing activity.

Other Significant Challenges Relating to the Protection of Visual Works

The Copyright Office is charged with administering the law in a technological space that is rapidly advancing. The Copyright Office requires greater autonomy and resources in order to stay at the forefront of technological developments to facilitate the creation and licensing of copyrighted works, and to permit potential licensing and enforcement problems to be identified and addressed pro-actively.

We welcome the opportunity to provide the Copyright Office with any assistance and comments on these issues in the future.

Respectfully submitted,

Sharon A. Israel
President
American Intellectual Property Law Association