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U.S. Copyright Office
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Response In Behalf of:

American Photographic Artists, Inc. ("APA")

To

VISUAL WORKS, Notice of Inquiry

(80 F.R. 23054) (Docket No. 2015-01)

Introduction:

American Photographic Artists ("APA") thanks the Register and Copyright Office for its continued efforts in the research and investigation of obstacles presented to visual artists under current copyright law, and the ability of APA members to enforce their rights in, and to monetize and license, their work.

The American Photographic Artists (http://www.apanational.com) is a leading national organization run by and for professional photographers. The APA's culture promotes a spirit of mutual cooperation, sharing and support, and APA offers outstanding benefits, educational programs, and essential business resources to help its members achieve their professional and artistic goals. Recognized for its broad industry reach, the APA continues to expand benefits for its members and works to champion the rights of photographers and image-makers worldwide. The APA has a core value of advocacy for its members, as well as for the benefit of all photographers. The APA is committed to

achieving a fair system that provides more opportunity for copyright holders whose rights are infringed to vindicate their rights when legal proceedings are required.

Comments:

American Photographic Artist members include world-renowned photographers and leading photographic professionals whose income is principally generated through the rights management of their images. They are among those visual artists who continue to experience declining revenues, particularly in the digital space, as new media increasingly supplants their financial opportunities in analog and print communication. In recent years these challenges have taken on new dimensions as content users have become more sophisticated in their understanding of copyright law limitations, and as they have become more scientific in their methods of appropriation. In this context, APA members continue to struggle with the ease with which their images are accessed and copied, the stripping of copyright management information from their work, and the inadequacy of takedown remedies. They also continue to struggle with the obstacles imposed upon their recovery of remedies, which include prerequisite registration of their rights involving cumbersome, time consuming, expensive, and impractical registration procedures for what are sometimes large volumes of work.

APA members look to the copyright law, as a model for their daily business operations, and to preserve the income they realize from image production. However, the copyright law as it currently functions has itself become the mechanism by which their commercial interests are being defeated. The current paradigm in which rights are enforced and licensed is one in which legal remedies for theft are legislatively limited and practically speaking nominal, or non-existent, in a vast majority of cases. With this, there are a variety of other statutory components that, operating together, create a climate conducive to infringement and adverse to the enforcement of rights. APA members find themselves working in an environment where an author's ability to commercialize their rights is easily thwarted. This problem is described by APA attorneys and APA members based on information gathered through copyright forums that APA has held throughout the United States, and is based upon case histories that the attorneys and APA members have confronted in the processing of legal claims, and in member efforts to commercially exploit their work.

APA attorneys report that a significant number of infringement cases involving commercial infringers involve infringers who have considerable levels of knowledge of copyright law, and almost always involve infringers with at least some knowledge of copyright law. The offenders also demonstrate sophistication in their appropriation methods, and are prepared to run the risk of infringement due to the limited consequences they know they face. They are typically emboldened by the challenges the author faces in enforcement. Among commercial users, who provide APA members with the bulk of their revenues, sophistication, not lack of education, is frequently the operative factor in their infringement.

Furthermore, consumers or end users, typically exhibit a basic knowledge that images cannot be used without permission. They are often quick to assert the limitations of copyright law when confronted with a claim. Appropriation in social media is thus

rampant, and the problem of enforcement is fomented, as social media users strip copyright management information from work, and perpetuate subsequent unauthorized uses. While in the commercial and noncommercial context a total lack of education is seldom the actual reason for infringement, education must nevertheless be considered an important factor in prevention, and an important means to prevent further erosion of the rights-owner's marketplace.

The environment is not difficult to understand. The paradigm in which enforcement efforts are asserted include provisions for statutory damages, and the ostensible statutory ceiling for willful infringement is $150,000; for non-willful infringement $30,000.[1] However, APA attorneys report that the standards for willful infringement are ill defined, ranging from "actual knowledge"[2] that copyright infringement is occurring, to "reckless disregard" of the owner's rights.[3] And the standard for willfulness (not defined in the statute but by varying court rulings) is, in any case, hard to meet, and operates as a barrier, not as an aid, to recovery in most cases. The law fails to embrace the fact that almost any unlicensed use of contemporary material must necessarily be willful, inasmuch as almost any such use, if unlicensed, or not a fair use, must necessarily violate someone's copyright.[4]

APA interviewed attorneys also report that for non-willful infringements, statutory damage awards tend to be quite low, particularly where infringer profits or applicable licensing fees fall below the $30,000 statutory ceiling. Some cases, for example, imply that the statutory damages might require a "reasonable relationship" to actual damages.[5]

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[1] 17 USC Section 504 (c) Statutory Damages.—
(1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than $750 or more than $30,000 as the court considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.
(2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than $150,000. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than $200.

[2] Yur*man Design, Inc. v. PAJ, Inc.,* 262 F 3d 101, 112-113 (2d Cir. 2001).

[3] *Island Software & Computer Service., Inc., v. Microsoft Corp*, 413 F. 3d 257, 264 (2d Cir. 2005), *Microsoft Corp v. Grey Computer,* 910 F. Supp. 1077 (D. MD 1995).

[4] All images fixed in tangible form after March 1989, even if published without copyright notice, are protected. Thus the use of any image created in the past 26 years potentially infringes someone's right if used without permission.

[5] *Peer International Corp v. Luna Records*, 887 F. Supp 560, 568 (S.D.N.Y 1995); RSO *Records, Inc. v. Peri*, 596 F. Supp. 849, 826, (S.D.N.Y. 1984); *Dae Hon video Production v. San.,* 1990 WL 265976 *7 (E.D.Va June 1990).

In these cases, awards typically involve small incremental increases over profits realized, or licensing fees to be paid. Because there can be only one award of statutory damages for all infringements of a work in a single action by any one infringer,[6] the law rewards infringers with a ceiling if they produce multiple infringements of the same work. Thus, some APA members report that despite finding hundreds of infringements of their images, they find they are limited to one possible statutory award. In any case, even where statutory damages can be awarded, infringement is little more than a zero sum game for the infringer. The infringer will go free if un-noticed or not pursued, and it will cost the infringer nothing, or little more than the typical fee they would pay were the infringed work to have been licensed rather than infringed. In this context it is not difficult to understand the advantage of infringement: why pay, when stealing costs the same as licensing if you get caught, and nothing if you don't?

Theoretically preserving a solution for the infringed author, the copyright law also provides for a recovery of attorneys fees to the prevailing party.[7] However, there are critical shortcomings to, and challenges with, the application of this provision. Rule 68 of the Federal Rules of Civil Procedure[8] terminates the rights owner's ability to recover fees in any case in which they do not recover more than a Rule 68 "judgment offer."[9] Therefore, the availability of attorneys' fees, even in a case where the rights owner prevails, and their work is registered before an infringement, is fictional where a Rule 68 offer is made, even if the rights owner wins but recovers less than the Rule 68 offer.

APA attorneys report that Rule 68 is asserted by the prospective defendant in almost all infringement settlement efforts to discourage the prospective claim and to minimize settlement payments. And because of it, before filing a claim, the rights owner must think

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[6] 17 US Section 504(c)(1).

[7] 17 U.S.C Section 505. In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

[8] Rule 68. Offer of Judgment

(a) Making an Offer; Judgment on an Accepted Offer. At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.
(b) Unaccepted Offer. An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.
(c) Offer After Liability is Determined. When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time—but at least 14 days—before the date set for a hearing to determine the extent of liability.
(d) Paying Costs After an Unaccepted Offer. If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.

[9] *Marek v. Chesney*, 473 U.S. 1 (1985)

long and hard about whether they will be able to pursue the claim, and pay legal fees, even if they win; and even if the copyright law permits a fee award, because the copyright law provisions for fees may be blocked by Rule 68 in actual practice. Frequently these Rule 68 offers will be made early in a case, before the rights owner performs discovery and becomes aware of the scope of use, the revenues generated, and their potential recovery. This forces the rights owner to make a decision about settlement in the dark over whether they will recover more and preserve their rights to fees, or less, finding themselves obligated for attorneys fees even if they win their case. A simple statutory revision could provide a remedy by making attorneys fees available under Section 505, but not as part of the "costs" that fall under the rubric of Rule 68.

Additionally, there is a critical imbalance in the application of the attorneys' fees provision. On the one hand, it is available to rights owners only where their work is registered prior to infringement, while it is available to any defendant who prevails without precondition. Rights owners are thus entitled to no fees if they are unregistered at the time of infringement (or within safe harbor time frames) in the same case in which the prevailing defendant will be compensated should they prevail. This means that rights owners who are subject to considerable limitations on recoverable damages, must now litigate under the threat that attorneys fees will not be recovered and, in fact, under the threat that fees may be awarded *against them* should their claims fail. The typical paradigm for the pursuit of a copyright claim is therefore one in which there will be low reward and extremely high risks, at a possibly substantial cost.

Infringers are poised and ready to capitalize on the statutory challenges to rights owners. So much so, copyright infringement has itself become its own form of art. Operating in a context of little consequence for their infringement, infringers are now aided by the provisions of the DMCA.[10] These immunize ISPs from infringement in the first instance of infringement, and also from the responsibility of disclosing infringers absent a subpoena. The DMCA's immunity provisions have now spawned a new genre of electronic publication. These include websites, and electronic magazines, that are depending almost entirely on user-generated content (UGC). As a result of their immunity, web hosts, including media publications, now specifically structure entire on-line publications around user-generated-content for which they assert they have no legal liability. Further, APA attorneys report in recurring cases that content is frequently presented as UGC when in fact the ISP's own representatives are found to be falsely posing as "anonymous" contributors. An analogous model is used for social media hosts and sites relying largely on UGC. A large industry has been spawned by DMCA immunity and anonymity for UGC providers. These providers increasingly include commercial content users as well as consumers.

In dealing with the DMCA immunity provisions the rights owner's paradigm for enforcement includes not only low reward, and high risk, but the additional cost to unveil the identity of the infringing content providers, who are anonymous or who use fictitious names. APA attorneys report that in many instances the ISP merely reports that the identity of the posting party is unknown. APA attorneys indicate that in more than half of the cases of on line infringement involving an ISP, the internet service provider or web host simply asserts their immunity and refuses to even disclose the identity of the

[10] 17 U.S.C. Section 512.

provider of the user generated content. Confronted with a low reward, high risk scenario before they start, the rights owner's recourse is essentially to file a claim, obtain a subpoena, and litigate to obtain the identity of the content provider (if it is even discernable), simply in order to contact them.[11] Further, many APA attorneys and members report that the infringer's concern over infringement is so low that many ISPs and even identified infringers simply ignore the rights owner's claim. Thus, the limited rewards do not often justify the involvement of counsel and the possibly unreimbursed cost of seeking the infringer's identity.

In non-statutory damage cases, (which due to lack of timely registration necessarily also involve no attorney fee award for the rights owner), the rights owner is limited to a recovery of "profits" and "actual damages." The availability of injunctive relief has been substantially narrowed by court decisions in recent years following the decision in *eBay v MercExchange, LLC.*[12] Within the paradigm for enforcement this functionally means that the infringer, if caught, and if pursued, will only forfeit their "net gain." That is, if they are caught and pursued, they will merely be required to give up their net "profit" after retaining their expenses.[13]

APA attorneys report that in profits-based cases, the end result is typically one yielding at least some benefit to the infringer. The infringer typically retains their gross revenues, deducts their direct and indirect costs, and enjoys the benefit of paying for overhead and other expenses. They are then required to remit only their "net profit." As a practical matter, small margins in mass markets mean small recoveries, and mass retailers diversify their inventory as a means of limiting infringement exposure. Large amounts of revenue are not usually attributable to single images or the designs in which they are included, and risks are spread among numerous appropriations. The larger margins in small markets yield similarly small recoveries due to lower volumes. Rights owners also confront the challenge of print-to-order technology for giclees, and posters, for print-to-order apparel, personal items, and home décor items. In many cases they confront hundreds of items that might advertise their images, with the prospect of limited recoveries because few articles of any one item are sold. The ability to monetize their rights is eroded by a large number of sources and none of them give rise to a beneficial remedy. Rights owners also report that they frequently confront the challenge of short-time image postings in commercial sites that may be removed and go undiscovered. Again, isolated infringements become lost revenue sources.

In all of these cases the infringers are incentivized to infringe, as they retain benefits from their gross sales, and merely give up their net gain, at no net cost to themselves. In cases where actual damages include a license fee,[14] their exposure is limited to the license fee

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[11] 17 U.S.C. Section 512(h).

[12] See, *eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006) and its progeny.

[13] *Sheldon v. Metro Goldwyn Pictures Corp.*, 106 F. 2d 45 (2d Cir. 1939) aff'd, 309 U.S. 390 (1940); *ZZ Top v. Chrysler Corp.*, 70 F.Supp. 2d 1167,1168 (W.D. Wash. 1999).

[14] See, *On Davis v. The Gap, Inc.*, 246 F.3d 152 (2d Cir. 2001).

that would ordinarily be paid. However payment of this fee is frequently refused or negotiated into a reduction due to the legal cost associated with obtaining it. Thus, infringers are paying lower fees than licensees in arms-length transactions.

"Apportionment" doctrines are of further aid to the infringer, who may apportion and reduce these net profits, or license fees, based on non-infringing factors.[15] Thus, artful infringers include multiple images in their infringing material, with the intentional objective of further limiting their damage exposure through apportionment for any one particular work if the infringement is found. APA attorneys report that "apportionment" defenses are routinely asserted and that there are numerous cases where the additional works upon which "apportionment" is to be based are themselves found to be infringing. Thus while, enforcement efforts with regard to both registered and unregistered works confront formidable, if not daunting, obstacles, the unavailability of statutory damages and attorneys for unregistered works eviscerates the plausibility of a claim in most cases where there are not substantial recoverable profits or sizeable recoverable licensing fees, i.e, where the financial benefit is not worthwhile, and where it is fractionalized.

The publishing industry is increasingly international in scope, and publishing businesses commonly provide content digitally from countries throughout the world. Therefore rights owners report that they are confronted with the additional problem of pursuing infringement claims affecting U.S. audiences that appear to be originating in other nations. APA attorneys and members report that a significant component of copyright claims, particularly Internet based claims, must also address extraterritorial infringement, or infringement claims against, or arising with, foreign publishers. Although many of these "foreign" publishers also have domestic affiliates, their publications are intentionally structured to deliver content from non-domestic sources. As a result, "foreign" publishers are used to circumvent unauthorized uses directed to domestic (U.S.) audiences. An ever-increasing number of infringements bearing images also involve the distribution of tangible items that are sourced from over-seas. Frequently these are from companies related to a domestic publisher or domestic enterprise to which otherwise recoverable monies are funneled, thereby reducing the remedies available to the rights owner domestically. The overseas companies are generally not subject to the jurisdiction of U.S. courts. As a result, publishing groups with a domestic presence are escaping infringement remedies within the United States by utilizing foreign entities to launch the distribution of infringing content. Rights owners are then faced with the pursuit of claims in foreign countries; a challenge with which they are ill equipped to deal. Nothing about this scenario is accidental. There is simply an awareness of copyright remedy limitations on a legal and practical basis, which prospective infringers easily exploit.

In light of the enforcement paradigm in which copyrights functionally live, infringers must logically question the need to engage in licensing. They can structure their publications with UGC, they can enjoy immunity, they can surreptitiously participate in publication with anonymity, they can aggregate content from different sources and argue apportionment, they can use newly published material that has a lower likelihood of registration. If caught, they can retain financial benefits, cut off attorneys' fees with Rule 68 offers, and run up costs for the rights owner. The consequence of incurring liability is

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[15] See, e.g., *Hamel America, Inc. v. GFI*, 193 F.3d 92,105 (2d Cir. 1999).

to typically retain financial benefits, or to pay no more than they would if they did not get caught, and that is assuming the rights owner even pursues the matter. So today infringers are operating within a system that financially de-incentivizes licensing and that encourages appropriation. Understandably, they are establishing publishing and distribution models that exploit the limitations on rights control. They have easy access to content, and little financial incentive to pay for it. One need not look far to see why licensing models are broken and why rights-based revenue is declining. Many APA members report that they have found hundreds, and in some instances *thousands*, of uses of their work in the digital space by unauthorized parties throughout the world against whom they have little or no practical recourse, due to the limitations they confront in enforcement.

In summary, APA attorneys and members report that the statutory difficulties with enforcement, procedurally, and substantively, and the statutory impediments to remedies in the existing system *are drivers, not bystanders*, in the breakdown of licensing capabilities and the ability to monetize their rights. The problem is owing to not one, but to various components of the copyright law, and the manner in which the various components interact. The overarching answer is that photographic artists cannot monetize their rights, unless the users of their materials have a legally enforceable reason to pay. This requires the reworking of the system at least to the point that the available damage remedies are, if not increased, preserved. Towards this end, APA strongly endorses that statutory damages and attorneys' fees should be available without registration. Under Title 17, Section 505, attorneys' fees must also be preserved despite F.R.C.P., Rule 68, and they must be awardable under Section 505 without regard to "costs." Publishers who utilize UGC must become answerable for it. Immunity for on-line infringement must be limited, and disclosure of infringers must be automatic, and mandatory, without the need for a subpoena. The removal and stripping of CMI must itself, without other factors introduced by Section 1202(b), be impermissible so as to aid prospective licensees who are interested in licensing compliance, and so as to prevent the orphaning of works. Vicarious liability remedies must be available against the domestic representatives of "foreign" offenders that operate as straw men in infringing publications.

APA is in the forefront of marketplace based initiatives to help resolve the challenges that their members confront with voluntary rights licensing, and is a founding member of the American Society for Collective Rights Licensing, Incorporated ("ASCRL"). The purpose of ASCRL is to engage in collective rights management and distribution for authors and to protect and represent authors and rights owners in collective licensing and extended collective licensing scenarios with the purpose of distributing substantially all of the funds to the authors for whom the fees are paid. ASCRL hopes to utilize the PLUS Registry and other image identifiers in order to facilitate licensing and for the purposes of making distributions. APA strongly endorses ASCRL with the belief that collective licensing, with appropriate controls, may provide additional revenue streams for APA members, and other visual content creators, while at the same time providing simple content access solutions for content users. Further, APA believes that with the use of today's technology, collective licensing might operate to substantially supplement author income and that collective licensing opportunities, with appropriate restrictions, provide authors with greater financial potential than they currently enjoy under the current copyright scheme; a scheme in which the control they retain over their work becomes

increasingly illusory as it succumbs to infringers with whom they are ill equipped to deal. However, while APA supports ASCRL's objective, to provide a seamless system of easy licensing for prospective content users, the paradigm in which copyright functions must be one in which there is real cost to infringement, and where the advantage of licensing is more attractive to the user than the cost or advantage of infringement. Absent that, the incentive to use a content licensing system will not be maximized, no matter how simple, affordable, or fair it may be.

Conclusion:

APA greatly appreciates the Copyright Office's request to submit comments on the challenges that their members confront in licensing and in monetizing their work. Towards that end, the APA has participated with other visual art organizations in discussions these important subjects. Those organizations include Graphic Artists Guild (GAG), Professional Photographers of America (PPA), Digital Media Licensing Association, and National Press Photographers Association (NPPA). APA appreciates the opportunity to work with the Copyright Office and these distinguished associations to achieve a fair system that provides more opportunity for copyright holders whose rights are infringed and who might seek to vindicate their rights in a court of law.

Respectfully Submitted,

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