Comment on Visual Works

Shutterstock, Inc. ("Shutterstock") appreciates this opportunity to respond to the Copyright Office's Notice of Inquiry, published in the Federal Register Vol. 80, No. 79 on April 24, 2015, regarding copyright protection for certain visual works.

The Notice seeks comment on challenges that content creators face in monetizing content and enforcing their rights to content. We believe that Shutterstock is uniquely positioned to comment as a global digital licensing agency that serves both content licensors and content licensees, and therefore represents the duality of the content marketplace.

I. Introduction and Background

Shutterstock presently offers more than 50 million items of stock content for licensing, including photographs, illustrations, vectors, video and music, among other content types, on behalf of the copyright owners of such content.

Shutterstock's collection consists of content submitted by Shutterstock contributors around the world, who license their content non-exclusively through Shutterstock and receive royalty payments for paid downloads of their content by Shutterstock customers. Shutterstock currently represents approximately 60,000 content creators located in 150 different countries. Shutterstock also owns the content licensing platforms Bigstock, Offset and PremiumBeat.

As a licensing intermediary, Shutterstock has provided content licenses covering more than 500 million downloads of licensed content to its base of 1.2 million customers. Shutterstock customers may download content by purchasing a subscription plan that allows the customer to download a certain number of images for a fee. Content licenses are "royalty-free", allowing customers to pay a one-time fee for a general set of uses, as opposed to paying a fee based on a limited, specified use.

As the operator of a global digital marketplace that licenses content from content creators and to creative professionals, Shutterstock strongly advocates robust intellectual property protection mechanisms for its creators, in addition to a fair marketplace for its customers.

II. Enforcement Challenges for Digital Visual Artists

A. The Cost and Burden of Enforcing Rights Commonly Exceeds the Potential Relief

When comparing the ease of sharing content digitally against the financial and time-consuming burden of enforcing intellectual property rights, it is abundantly clear why digital visual artists struggle to effectively enforce their rights. Content can be reproduced and distributed in the time it takes to click on a button.[1] Conversely, the finalization of legal proceedings, including administrative proceedings that are designed to be less burdensome, may take months or even years[2] at a significantly higher cost to the artist. [3]

We have observed that many visual artists on Shutterstock create large collections of content, due to (1) the creative market's need for constantly updated, fresh content, and (2) the abundance of technology that exists to create visual content. While producing a large amount of content has obvious monetary benefits for visual artists in the form of licensing opportunities, the visual artists are effectively paralyzed from monitoring and enforcing their rights in that same content in a manner that is efficient and worth the cost.

For example, if a single image is displayed without authorization on a single website, a content creator may have a few hours at his disposal to track down any additional unauthorized uses of that image and send enforcement correspondence to the initial website or other sites discovered during that initial search. However, when this same scenario is replicated with hundreds of images, the amount of time for the content creator to monitor and enforce his rights multiplies exponentially. This is compounded by the reality that many requests to cease unauthorized uses may be ignored.

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[1] One recent estimate proffers that at least 1.8 billion images are uploaded and shared on internet platforms a day. *See* MARY MEEKER, KLEINER PERKINS CAUFIELD & BYERS: INTERNET TRENDS 2014 – CODE CONFERENCE, May 28, 2014, at slide 62, *available at* http://www.kpcb.com/blog/2014-internet-trends (estimate is based on the publicly disclosed company data of Flickr, Snapchat, Instagram, Facebook and WhatsApp as of May 2014).

[2] *See* UNITED STATES COPYRIGHT OFFICE, REPORT TO THE HOUSE COMMITTEE ON THE JUDICIARY: SMALL CLAIMS, September 2013, at 8, *available at* http://copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf ("In districts that see the most copyright cases, it is likely to be a year and a half before the parties can get to trial.").

[3] An estimate suggests that the median cost to litigate a copyright infringement suit with less than $1 million at issue through appeal is $350,000. *See Id.* (*citing* AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION, 2011 REPORT OF THE ECONOMIC SURVEY 2011 (2011) at 35.

In order to bring a civil action for infringement of copyright, an artist must have first registered or preregistered the subject work.[4] As promulgated by the Copyright Act, a copyright owner who fails to register a work within three months of publication of the work is not entitled to statutory damages or attorney's fees for infringement that occurred prior to the registration, or which stems from the same underlying infringement following registration.[5]

Unfortunately, we have observed that artists frequently fail to register copyrights in a timely manner due to lack of education, perceived lack of time, and trepidation at the sheer volume of content to be registered.

Therefore, we often find that artists fail to register the work within three months of publication of the work. The artist is thus estopped from claiming a significant amount of potential damages related to the copyright infringement, and limited to injunctive relief, actual damages incurred and any profits of the infringer resulting from the infringement.[6]

In the digital space, where the exchange of content is as prolific and diverse as the number of users who participate, determining how to appropriately calculate damages of the artists and the profits of the infringer is highly speculative. The artist, who cannot claim statutory damages or attorney's fees, commonly cannot accurately assess any potential remedies against the burden of initiating a proceeding, particularly without incurring the added cost of legal counsel and therefore opts enforcement proceedings entirely.

B. Enforcing Rights Against Non-Compliant ISPs is Time Consuming and Costly

In theory, the provisions set forth in the Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (the "DMCA") provide copyright owners with efficient means to remove unauthorized uses of content hosted by internet service providers ("ISPs"). A major underlying purpose of the DMCA is to protect "strong incentives for service providers and copyright owners to cooperate to detect and address copyright infringements that take place in the digital networked environment".[7]

To effectuate this goal, the DMCA's takedown and notice process allows copyright owners to alert ISPs to infringing activity initiated by a third party user, and limits liability for compliant ISPs. An artist who believes that his copyright is being infringed must send a notice and

[4] 17 U.S.C. § 411. With the exception of an action brought for a violation of author's rights as defined in 17 U.S.C. § 106A9(a), "no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title."
[5] 17 U.S.C. § 412.
[6] 17 U.S.C. § 502; 17 U.S.C. § 504.
[7] H.R. Rep. 105-551, pt. 2, at 49 (1998).

takedown to the ISP in adherence with the requirements set forth in the DMCA.[8] An ISP that responds expeditiously to remove content claimed to be infringing, or disables access to such content, is protected from liability under the DMCA.[9]

We have observed that ISPs tend to be "all or nothing" when it comes to DMCA compliance. DMCA-compliant ISPs generally serve websites that are respectful of intellectual property rights, and therefore more effectively manage potential infringement. Additionally, we have noticed that such websites are more likely to be used by communities that are similarly educated about copyright, and often self-regulate against copyright infringement.

Conversely, we note that ISPs that are not DMCA-compliant tend to be the more egregious rights violators. Such ISPs largely disregard takedown notices, and tend to utilize privacy-protected domain names to avoid being identified. Furthermore, the communities on these sites are more likely to engage in and encourage infringing activity.

In practice, a non-compliant ISP would be exposed to liability for the infringing activity of its users. However, content creators rarely pursue such sites as it is costly and time consuming. The artist must first obtain information to identify the site owner, and companies that provide domain name privacy protection are averse to providing this information without a court order.

Assuming that an artist can ascertain identifying information to contact the ISP, the artist may try to initiate an action against the ISP. Additionally, the artist may attempt to subpoena the ISP for information about the users engaging in the infringing activity.[10] However, both actions require the artist to initiate an action in court, or otherwise go in person to a United States District Court. The requirement to physically go to a District Court (or otherwise have an attorney represent the copyright owner in court) is costly and unduly burdensome, especially for artists who do not reside in the United States.

While we recognize that the DMCA is a valuable tool for enforcing a copyright owner's exclusive rights, we do not believe the DMCA adequately protects rights owners against websites and their ISPs that flagrantly disregard copyright ownership. Furthermore, such ISPs arguably stand to cause more harm to copyright owners since they may support a number of online communities that are similarly indifferent to intellectual property rights. Yet, we have seen that copyright owners rarely pursue such sites, despite removal of safe harbor immunity, since they lack the resources to do so.

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[8] *See* 17 U.S.C. § 512(c)(3), which sets forth the requirements for a proper DMCA notice.
[9] 17 U.S.C. § 512(b)(2)(e).
[10] 17 U.S.C. § 512(h). A copyright owner may request the clerk of any United States district court to issue a subpoena to an ISP by filing the following with a clerk: a) a copy of the DMCA notice; b) a proposed subpoena; and c) as sworn declaration that the purpose of the subpoena is to obtain the identity of an alleged infringer and that such information will only be used for the purpose of protecting rights under the DMCA.

III. An Online Uniform Resolution Policy, Coupled with Copyright Registration, Would Adequately Protect Intellectual Property Rights Owners and Content Users

A large reason that Shutterstock visual artists find it difficult to monitor and enforce their rights online relates to the sheer number of internet users and amount of content available on the internet. In 1995, the internet had about 35 million users, compared to 2.8 billion users in 2014.[11] Global internet penetration has leaped from 1% of the world's population in 1995 to an astounding 39% of the world's population in 2015.[12] One recent estimate suggests that at least 1.8 billion images are uploaded and shared on internet platforms *per day*.[13]

Though the growth of the internet and the proliferation of digital content continue to rapidly surge ahead, we have observed that traditional legal enforcement channels do not work as quickly and therefore cannot meet the needs of our visual artists in protecting their intellectual property.

We note that the Copyright Office submitted a report to the House Committee on the Judiciary in September 2013 regarding the issue of adjudicating small claims related to copyright infringement.[14] Recognizing that the challenges small copyright claimants face under the existing federal system is "beyond dispute", the Copyright Office advocated for an alternative forum for copyright owners to pursue small infringement matters and claims.[15] The Copyright Office has suggested a centralized process for hearing small copyright claims, which notably would not require personal appearances, instead allowing hearings and conferences to take place over "internet-based applications and other telecommunication facilities".[16]

The House Committee on the Judiciary has held several hearings regarding the creation of small claims courts, including a hearing earlier this year,[17] but it is evident that the process to create such courts is lengthy.

A. An Online Dispute Resolution Provider Would Be More Effective at Handling Small Copyright Claims Related to Digital Content

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[11] *See* MARY MEEKER, KLEINER PERKINS CAUFIELD & BYERS: INTERNET TRENDS 2015 – CODE CONFERENCE, May 27, 2015, at slide 4, *available at* http://www.kpcb.com/internet-trends.
[12] *Id.*
[13] *Ibid*. 1, at slide 62.
[14] UNITED STATES COPYRIGHT OFFICE, REPORT TO THE HOUSE COMMITTEE ON THE JUDICIARY- SMALL CLAIMS, September 2013, *available at* http://copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf.
[15] *Id*. at 3.
[16] *Id.* at 140, § 1405.
[17] *See* REGISTER'S PERSPECTIVE ON COPYRIGHT REVIEW: HEARING BEFORE THE COMMITTEE ON THE JUDICIARY, 114th Cong., April 2015, *transcript available at* http://copyright.gov/laws/testimonies/042915-testimony-pallante.pdf.

While Shutterstock supports the creation of small claims courts for copyright infringement, we do believe that a greater amount of digitization of the copyright enforcement process is crucial to protecting the rights of digital visual artists. The creation of small claims courts is one step towards modernization, but by the time small court claims become a reality, this may not be enough to meet the enforcement needs of digital visual content creators.

Specifically, the most common source of frustration for Shutterstock's visual artists is that they are unable to remove unauthorized uses of their content from infringing sites. The predominant concern of our artists is that they be able to quickly remove unauthorized content so that the potential market for their work is not diminished or diluted. Initiating a suit in a small claims court, despite improving the arduous process of bringing a claim in federal court, would not satisfy the very simple remedy many artists desire.

Based on the above considerations, Shutterstock advocates the creation of an online uniform resolution policy regarding online copyright disputes ("UDRPC"), administered online by a dispute resolution provider, and with the cooperation of entities that manage generic top level domains ("gTLDs") and country code level domains ("ccTLDs").

The idea behind this type of online uniform resolution policy is similar to the basis for the Uniform Dispute Resolution Policy (UDRP), which has been adopted by the Internet Corporation for Assigned Names and Numbers ("ICANN") in relation to gTLDs and independent ccTLDs that have adopted the UDRP.[18] ICANN is responsible for coordinating the unique identification numbers of computers to enable the global internet to function properly, and generally runs technical operations for important Domain Name Systems resources.[19] Recognizing the need to create a process to resolve potential conflicts between trademark owners and domain name owners, ICANN adopted the UDRP in 1999.[20] Currently, the World Intellectual Property Organization ("WIPO") is the dispute resolution service provider for the UDRP.[21]

The UDRP was created "based largely" on WIPO's recommendations, which included multiple intellectual property protection considerations.[22] In WIPO's recommendations to ICANN, WIPO stated that the ability to contact domain name owners "was a key to the enforcement of

[18] WIPO GUIDE TO THE UNIFORM DOMAIN NAME DISPUTE RESOLUTION POLICY (UDRP) at Section A, *available at* http://www.wipo.int/amc/en/domains/guide. Last accessed on July 18, 2015.
[19] ABOUT ICANN, *available at* https://www.icann.org/resources/pages/welcome-2012-02-25-en. Last accessed on July 18, 2015.
[20] ICANN RESOLUTIONS APPROVED BY THE BOARD, SANTIAGO MEETING, August 26, 1999, at 99.81- 83, *available at* https://archive.icann.org/en/meetings/santiago/santiago-resolutions.htm.
[21] *Ibid*. 18, at Section H.
[22] *Id.* at Section A.

intellectual property rights."[23] WIPO also discussed the idea of applying different registration conditions to "commercial" and "non-commercial" domains in order to assist copyright owners in enforcing their rights.[24] To some extent, ICANN recognized the importance for managing entities of domain names to protect intellectual property rights by requiring a representation "to the best of the applicants knowledge and belief, neither the registration of the domain name nor the manner in which it is to be directly or indirectly used infringes the intellectual property rights of another party".[25]

Thus, Shutterstock believes that organizations like ICANN have the ability, as well as an interest, in helping develop a UDRPC relating to copyright disputes in conjunction with the Copyright Office.

Conceivably, by way of general example, the UDRPC could require domain name accreditation entities to make a contractual representation by domain names that neither the domain name nor the use of the domain name would be used in a way to infringe the intellectual property rights. For domain name disputes related to trademark, domain name holders would agree to the current UDRP process for resolution. In the instance of copyright disputes related to the activities on the website located at the domain name, domain name holders would submit to the UDRPC process.

A copyright owner could submit a complaint regarding copyright infringement to the UDRPC online, in which an owner has to attest to its intellectual property rights much the same as it would in a UDRP proceeding or a DMCA notice. The UDRPC would assess the volume and type of infringing activity, and response from the domain name owner. The UDRPC could either determine that no further action is warranted (requiring copyright owners to pursue the traditional methods of legal enforcement), or that the domain name owner is not in contractual compliance with the accrediting domain name agency. The domain name owner would then be afforded an opportunity to comply with its representation to the accrediting domain name.

An appropriate penalty for non-compliance could be the revocation of the domain name from the domain name holder. Note that the actual site and the content would not be removed or deleted in this scenario, but that the domain owner would simply be prevented from using the traffic generated from that particular domain name. This would allow domain names that are willing to remedy infringement issues to retrieve and "reactivate" their work and content to be legally compliant.

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[23] FINAL REPORT OF THE WIPO INTERNET DOMAIN NAME PROCESS, April 30, 1999, at Section 75, *available at* http://www.wipo.int/amc/en/processes/process1/report/finalreport.html.
[24] *Id*. at Section 85(i).
[25] *Id*. at Section 108 (*citing* ICANN STATEMENT OF REGISTRAR ACCREDITATION POLICY, March 4, 1999, at Art. III.J.7.g, *previously available at* http://www.icann.org/policy_statement.html).

Although malicious infringers could attempt to host their site and content on a new domain name with a new registrar, a history of truancy would be visible to registrars in future UDRPC proceedings (similar to how bad faith domain name registrants can be found on WIPO's log of UDRP proceedings).

We believe that an online dispute resolution service relating to copyright infringement, as described generally above, would satisfy the legitimate digital content creator's interest in removing infringing content quickly, yet would not overly penalize a domain name owner.

B. Copyright Registration Should Be Required to Utilize the UDRPC

In order for copyright owners to avail themselves of the UDRPC, the copyright owners would submit to the dispute resolution service provider: 1) proof that previous enforcement or DMCA correspondence to the domain name holder had failed; and 2) proof of copyright registration.

The copyright registration requirement would incentivize copyright owners to register their works in order to avail themselves of the remedies offered by the UDRPC. Copyright registrations would further assist the dispute resolution service provider in assessing ownership to copyright, and serve as proof of infringement to a domain name holder.

Furthermore, the copyright registration requirement would minimize the risk of chilling speech, as only legitimate copyright owners could submit a complaint to the UDRPC.

IV. The U.S. Copyright Website Catalog Must Be Modernized to Incentivize Copyright Owners to Register Copyrights

In Shutterstock's observation, many digital visual artists choose not to register copyrights because they believe that the cost, time and benefits of registration are not worth it for their needs.

However, as discussed above, copyright registration is vital to enforcing intellectual property rights in a manner that is both effective for the rights holder, and fair to an alleged infringer.

As explained previously in III(a), when an artist's work is infringed, the predominant concern is that the content be removed so that the potential market for that work is not diminished or diluted. Registering copyright may be particularly advantageous for federal court actions, but many digital artists do not have the desire, means or time to pursue such actions, nor would the potential damages make such actions worthwhile.

A. The U.S. Copyright Office Website Catalog Should Incorporate Visual Examples to Assist Copyright Owners in Enforcement Actions

A major frustration for digital artists when registering copyrights with the U.S. Copyright Office is the complete lack of visibility of the visual work for both the artist and third parties against whom they seek to enforce rights.

Even if an artist registers a copyright and attempts to use it in an enforcement action or DMCA notice, the artist cannot provide a link containing an example of the image to the registration online. For visual artists who need to send multiple notices to recipients online, links to original content online are vital to sending a notice that adequately informs the recipient of the issue.

We have observed that visual artists frequently provide a link to content on their Shutterstock portfolio, or a link to their content on other licensing agencies' websites, when sending DMCA notices. Since the artist's name appears as a display name chosen by the artist on licensing agency websites, this creates confusion for the recipient, who cannot assess whether the complaining party is truly the owner of the copyrighted work shown in the link received.

We believe that if the U.S. Copyright Office website's catalog were updated to include image examples, digital artists would find greater utility in registering their copyright, as it would assist the artist in enforcing their copyright online.

B. The U.S. Copyright Office Website Catalog Should Have Interoperability with Digital Media Online

Additionally, visual artists would have more incentive to register copyrights if the U.S. Copyright Office website catalog featured interoperability with visual content online. Specifically, visual examples of copyrighted visual works should functionally integrate into reverse image search engines, so that a web user can locate a copyright registration for specific images.

Currently, there are several reverse image search engines that exist online.[26] Shutterstock contributors commonly use these search engines to locate uses of their images online to gather information about the market for their content, and/or to locate potential misuse of their content for enforcement actions. Content users also use reverse image search engines to locate the source of images, and to determine how to properly license images.

[26] Reverse image search engines that are popular with Shutterstock contributors include Google Image Search, (located online at www.images.google.com), and TinEye (located online at www.tineye.com).

By creating interoperability between the Copyright Office website catalog with reverse image search engines, content users could more easily determine whether an image is subject to copyright protection and determine the identity of the copyright holder for licensing purposes. Additionally, the ability of content users to locate copyright holders for licensing purposes would be a significant advantage to registering copyright for copyright owners.

V. Conclusion

We hope that the comments above adequately describe the challenges digital visual artists face in enforcing their rights. Additionally, we hope that our discussion illuminates the invariable benefits of enacting an online dispute resolution policy for copyright disputes, and the potential of the U.S. Copyright Office website catalog to better assist protection of digital visual artists' rights if modernized.

We thank you for this opportunity to comment and remain available for further comment as necessary.

Sincerely,

Shutterstock, Inc.