July 23, 2015

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

Re: Copyright Protection for Visual Works: Response to Notice of Inquiry (80 F.R. 23054) (Docket No. 2015-01)

Dear Register Pallante:

These comments in response to the Copyright Office's Notice of Inquiry are submitted on behalf of the Canadian Association of Professional Image Creators (CAPIC). Formed in 1978, CAPIC is a Canadian association of professional image creators working in the field of visual communications (photographers, illustrators, digital artists). CAPIC is dedicated to maintaining industry standards that are fair and equitable in recognition of the generous cultural contributions made by our members both nationally and internationally. CAPIC strives to create a vibrant community for image creators and to act as a strong advocate for copyright protection. The premier national organization for image creators, CAPIC has six chapters across Canada with its main office in Toronto.

CAPIC greatly appreciates this opportunity to provide comments on the subject of this Notice of Inquiry. Without professional image creators such as CAPIC's members and strong copyright laws that protect their work, the digital landscape would lack the vibrant content that educates, enthralls and enriches our culture. Strong copyright laws help to ensure that creators can earn their livelihoods and contribute to the economy by employing others. It is vital that the world's largest economy takes a leading role in helping to address the significant challenges confronting creators in the digital environment.

1. Challenges Relating to Monetizing and/or Licensing Images

There are multiple challenges facing CAPIC members relating to monetizing and licensing images in the digital environment.

As professional image creators, CAPIC members depend heavily upon licensing fees to earn their livelihoods. In order to compete in the worldwide digital economy, our members

CAPIC NATIONAL OFFICE
720 SPADINA AVENUE
SUITE 202
TORONTO ON M5S 2T9
TEL 416-462-3677
1-888-252-2742
FAX 416-929-5256
EMAIL INFO@CAPIC.ORG

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must create online platforms that allow their clients to easily view their work and obtain licenses to use their work. In this digital environment, members must compete with image creators and licensors around the globe, including many stock image libraries that license images for increasingly shrinking fees. Adding to this challenge – which is an unavoidable part of doing business in the legitimate digital marketplace – is the fact that all too frequently, images are copied and reproduced through a simple right-click and save action in a search engine without any regard to copyright.

Commercial clients generally do not want to have the creator's watermark or copyright notice appear with the image that they have licensed. Accordingly, once the image is used online, it is only a right-click away from a high quality reproduction of the image being used by someone else without permission. This rampant right-click infringement has been facilitated by the legal protections provided to Google and other search engines. In the *Perfect 10 v. Amazon* decision, the Court of Appeal for the Ninth Circuit held that Google was shielded from liability for linking to images on third-party websites and that its display of thumbnail images constitutes fair use. CAPIC disagrees with the Court's interpretations of the exclusive right to display a copyrighted work under 17 U.S.C. §101 ("to transmit or otherwise communicate … a display of the work … to the public by means of any device or process") and fair use under 17 U.S.C. §107, but at the time of the *Perfect 10* decision, Google and other search engines displayed a thumbnail of the image in a manner that made it easy to determine the source of the image. In other words, they were acting as true search engines. However, since that time, search engines have stretched the boundaries of *Perfect 10* by increasing the size of the embedded images and obscuring the original source of the image, rendering it nearly impossible to determine the source of the image.

For many Internet users, Google Images has become the default source for "free" images on the Internet based on the misguided assumption that if the image is available on the Internet it must be in the "public domain" and understandably not noticing the small print warning that "images may be subject to copyright". The manner in which search engines such as Google display images also makes it difficult and cumbersome for users to determine the legitimate source of an image.

CAPIC submits that Congress should clarify Section 101 of the *Copyright Act* to emphasize the right of display so that it includes techniques such as "framing", "embedding" and "inline linking" that are used by search engines and other sites to generate substantial advertising revenues without any remuneration to the individuals who created the content, with language that is flexible enough to encompass technologies developed in the future. This would allow creators to receive fair compensation for their work and to change the current environment in which a creator largely loses the ability to monetize or control what they have created.

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CAPIC members are also concerned with the expansion of the fair use exception – a concern that we are also increasingly confronting with the equivalent Canadian fair dealing exception. In the Second Circuit's recent decision in *Cariou v. Prince*[1], the Court held that the bulk of the works at issue by the appropriation artist Richard Prince constituted fair use by almost exclusively relying on the notion that these images were transformative because they created an "entirely different aesthetic" from the original works created by the photographer Patrick Cariou.[2] In doing so, the Court paid short shrift to the four factor test set forth in Section 107 of the *Copyright Act*, including the substantial harm to the market when entire works are misappropriated without providing the creator with any compensation or credit. CAPIC is hopeful that courts will adopt the more balanced approach to fair use recently endorsed by the Seventh Circuit in *Kienitz v. Sconnie Nation*[3], emphasizing the importance of the effect on the market for the copyrighted work and the requirement to examine all of the fair use factors and not be solely based on whether the new use is transformative.

2. Challenges Related to Enforcement

In the global digital environment, CAPIC members need to monitor the use of their images around the world, particularly in the United States as the world's largest economy with a strong legacy of protection for intellectual property rights. The U.S. market is critical for the livelihoods of many CAPIC members. New tools have made it easier for members to locate online uses of their images, but these tools are rendered impotent unless our members can realistically enforce their rights. Unfortunately, because of prohibitive legal costs, it is generally not feasible or practical for CAPIC members to enforce their rights in U.S. courts.

As of 2011, the American Intellectual Property Law Association determined that the average cost of litigating a copyright infringement case through trial ranged from $384,000 to $2,000,000 per *party*.[4] Setting aside the impracticality of asserting an infringement claim for a non-commercial use, most infringement claims involve the use of one image as they generally (and with increased frequency) occur through a right-click and save action on an image by an unwitting search engine user. Legal costs render it prohibitively expensive for individual photographers, illustrators and digital artists to assert an action for copyright infringement for such claims. It also makes it unlikely that an attorney would be willing to accept a case based on a contingency or flexible non-hourly rate arrangement – especially if litigation is required in a claim involving the unauthorized use of one image. CAPIC members are confronted with the

[1] 714 F.3d 694 (2d Cir. 2013).
[2] *See id.* at 706-07.
[3] 766 F.3d 756 (7th Cir. 2014).
[4] AMER. INTELLECTUAL PROP. L. ASSOC'N, REPORT OF THE ECONOMIC SURVEY 2011, at 35 (2012).

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additional hurdle of trying to find a qualified lawyer in a foreign country. As noted in a recent study, "[i]f creators and authors recognize that enforcing their copyright claims in court is an unworkable prospect (i.e., for cost reasons), copyright law's ability to induce creative expression begins to automatically diminish."[5]

For these reasons, CAPIC endorses the adoption of the Copyright Office's Copyright Small Claims initiative and hopes that Congress prioritizes creating a copyright small claims court. This would provide an effective and realistic alternative for many infringement claims that could be asserted by CAPIC members in the United States, but it should not be limited to cases in which the defendant is asserting that the image is an orphan work. The copyright small claims court option would encourage unauthorized users of images to resolve the creator's claim by making it a realistic possibility that the creator will assert an action instead of ignoring the claim because it is unlikely that the creator will want to incur substantial costs to assert a claim where significant damages are unlikely. Indeed, a similar intellectual property small claims court in the United Kingdom (the Intellectual Property Enterprise Court) has allowed creators to significantly reduce the cost of litigation and resolve claims more quickly than a traditional court action. Canada has also adopted a simplified procedure in its Federal Courts in which discovery is streamlined and damages are capped at $50,000. The adoption of a similar streamlined process in the United States would be an important and welcome addition for CAPIC members.

3. Challenges Related to Registration

The copyright registration regime in the United States is particularly burdensome for CAPIC members. The United States is the only signatory nation to the Berne Convention that requires copyright registration to assert an action for infringement or to allow recovery of statutory damages and attorneys' fees and costs. The legal process for copyright claims in Canada and other Berne signatory countries functions well without having any copyright registration requirements. CAPIC submits that it should no longer be required to register a work within three months of publication or before the infringement occurs in order to be entitled to statutory damages, but in any event, the registration process should be simplified and made less cumbersome for image creators.

CAPIC's members often create large volumes of work and it would be expensive and inefficient to have to register images individually. Thankfully, the Courts of Appeal for the Fourth and Ninth Circuits recently upheld and endorsed the ability for photographers and their assignees to simultaneously register multiple images[6], but the process for registering multiple

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[5] *Copyright Infringement Markets*, by Shyamkrishna Balganesh, 113 COLUM. L. REV. at 4 (2013).

[6] *See, e.g., Alaska Stock, LLC v. Houghton Mifflin Harcourt Publishing Co.*, 747 F.3d 673 (9th Cir. 2014); *Metropolitan Regional Information Systems, Inc. v. American Home Realty Network, Inc.*, 722 F.3d 591 (4th Cir. 2013).

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images still needs to be further streamlined. The Copyright Office should continue the ongoing process of allowing creators to easily register images online through the Copyright Office website or through an API or other technological means.

The distinction between registering published and unpublished works creates another obstacle to the efficient registration of images. Photographers may provide images directly to clients or distributors without knowing whether the image has been published by their clients or not. Because group registration is limited to published works, this uncertainty as to whether an image has been published or not makes it difficult to register multiple images in one registration.

Further, the ability to register multiple images simultaneously should be expanded to illustrators and graphic artists who also create large volumes of copyrighted works. As with photographers, illustrators and graphic artists create multiple visual works and it is extremely burdensome and unnecessarily expensive to require them to register each image individually.

CAPIC continues to have concerns with the feasibility of the Copyright Office's proposal in its June 2015 *Orphan Works and Mass Digitization* report that as part of an image user's obligation to engage in a "diligent effort" to locate the source of the purported orphan work, the user should utilize the Copyright Office's online records. From a practical standpoint, and in particular for group registrations of images, users may not be able to identify an individual work in the Copyright Office's online records. This is particularly true for locating works created by artists based overseas who may not elect to register their images in the United States and the user may have no reason to know that the creator is based in another country. The problem of conducting a diligent search effort is compounded in a digital landscape where metadata and other identifying information can easily be altered or removed from an image.

The registration process is especially burdensome for creators based outside of the United States, such as CAPIC members, who may not be aware of the need to register their images to litigate a claim or be entitled to certain remedies since registration is not required in Canada or other Berne Convention signatory countries. CAPIC endeavors to educate its members on U.S. copyright law and the registration process, but it still creates an obstacle for CAPIC members to enforce their rights in the United States. If copyright registration continues to be a prerequisite to obtain certain remedies, CAPIC submits that the Copyright Office should provide convenient and cost-effective methods for the digital registration of multiple images by all visual image creators.

4. Challenges for Those Who Wish to Make Legal Use of Photographs, Graphic Art Works, and/or Illustrations

One of the primary obstacles for users who want to make legal use of images is that there is a general lack of understanding about copyright and images – specifically, the prevailing belief that images found on the Internet are not protected by copyright. Users are confronted with the ability to choose from millions of images when they search for images on Google or other search engines making it appear that a vast universe of beautiful images are available for free. Unlike highly publicized infringement actions involving music, movies and television shows through peer-to-peer file sharing sites, the unauthorized use of images has had less exposure. This lack of understanding that images are protected by copyright is often exposed when creators use reverse search tools or image recognition software to find their content. The user is often caught completely by surprise that they were not permitted to use the images on their websites after obtaining the image from a search engine or using sites that offer free images. These sites crawl the Internet for images and make them available for free while generating advertising revenues. They are often based in countries that do not have the equivalent of the DMCA or robust copyright laws, thus making it completely impractical to pursue them for reproducing and distributing visual content without permission. Creators should be allowed to pursue these rogue websites that generate advertising revenue in the U.S. and target users in the U.S. through the U.S. court system.

CAPIC and its members want to have a viable marketplace where they can compete fairly with other creators and their agents, but it is becoming increasingly difficult to do so when the prevailing climate is that content is available for free either through search engines or rogue websites. It is hard to have a level playing field when a large percentage of image users are not playing by the rules largely because they do not know that rules exist. In addition to reaffirming the display right under the *Copyright Act*, it would serve the interests of both creators and users if the Copyright Office engaged in a vigorous campaign to educate the public on the importance of determining the source of visual works before using them, that visual works are not automatically in the "public domain" when they are displayed on the Internet, and the general need to obtain a valid license unless the user can confirm that a license is unnecessary. Image databases with content from multiple creators could help make it easier for the public to find the owner of visual content, especially if such registries are linked to registries around the world, but these tools are only effective if the public is made aware that such tools exist.

Conclusion

CAPIC and our members appreciate this invitation from the Copyright Office for international stakeholders to comment on these critical issues for creators of visual works. We are hopeful and confident that the Copyright Office will continue to work with creators to help foster a market in which creators can be compensated fairly for their work and have viable tools for registering copyright and enforcing their rights, with users of visual content gaining a

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better understanding of creators' rights with the ability to easily locate images and obtain valid licenses to use visual content. In particular, CAPIC supports the copyright small claims court initiative and any initiatives and amendments to the *Copyright Act* that allow creators to compete fairly with large search engines that profit from their works by generating massive advertising revenues through displaying images with creators receiving no compensation.

As with the music industry, image creators have been the canary in the coal mine of the Internet era. They have seen their livelihoods shrink and uncompensated exploitation of their works increase. They are also confronted with having to compete with billions of images being uploaded to the Internet every year – an estimated one trillion photos will be taken in 2015.[7] CAPIC members simply want to have the opportunity to earn their livelihoods by doing what they love to do – a modest goal that is shared by billions of people around the world. CAPIC and its members look forward to working with the Copyright Office, governments and private enterprise to advance creative solutions that protect their work and create a fair and vigorous market for images. The music industry has transformed itself through developing legitimate streaming services, but that transformation did not occur in a vacuum as it was bolstered by legal decisions shutting down illegitimate file sharing sites. Similarly, image creators are working to develop new business models to help their industry in this era in which more people are communicating through images than ever before, but in order to achieve their goals they need modern copyright laws that protect their rights.

On behalf of our members, we thank the Copyright Office for this opportunity to provide our comments and suggestions in response to this Notice of Inquiry dedicated to visual works.

Respectfully submitted,

Bryon Johnson
CAPIC National President

[7] http://mylio.com/one-trillion-photos-in-2015/

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