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July 20, 2015

LIBRARY OF CONGRESS

Copyright Office

[Docket No. 2015–01]

Copyright Protection for Certain Visual Works

Notice of Inquiry

Comments Submitted by the Graphic Artists Guild, Inc.

By electronic filing

Re: Federal Register / Vol. 80, No. 79 / Friday, April 24, 2015 / Notices

INTRODUCTION

The Graphic Artists Guild would like to thank the Copyright Office for addressing so many concerns specific to visual works and visual creators. We are grateful for this unique opportunity to offer our opinions and suggestions.

Ms. Maria Pallante and the Copyright Office staff have done tremendous work to modernize the Copyright Office since Ms. Pallante became Register four years ago. We appreciate the new rulemaking documents and all of the updates and additional information now available on the website. We look forward to more changes and modernization of the Office that will better enable the Copyright Office to fulfill its directive to benefit all Americans, and improve the daily work and tasks of the staff. The Guild supports the staffing requests, technology requests, and administration changes recommended by Register of Copyrights Maria Pallante in her Statement to the Committee On The Judiciary, U.S. House Of Representatives, titled "The Register's Perspective On Copyright Review" on April 29, 2015.[1]

The Guild supports Register Pallante's call for an independent Copyright Office, separate

1 http://judiciary.house.gov/_cache/files/1c82a3a6-3b1b-4a51-b212-281454d1e56e/written-testimony-of-register-maria-a-pallante.pdf

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from the Library of Congress. We understand that this will facilitate the modernization of the Copyright Office, enable the Copyright Office to control its own budget and seek funding as needed directly from Congress, and make necessary changes more quickly and without the bureaucratic oversight procedures that have encumbered the Copyright Office in the past.

All of the following comments and suggestions made by the Graphic Artists Guild in response to these Subjects of Inquiry of the *Copyright Protection for Certain Visual Works* necessitate the changes and modernization of the US Copyright Office.

Visual art organizations, including the Graphic Artists Guild (GAG), American Society of Media Photographers (ASMP), Digital Media Licensing Association (DMLA), Professional Photographers of America (PPA), North American Nature Photography Association (NANPA), National Press Photographers Association (NPPA), and the American Photographic Artists (APA) have formed an ad hoc committee to work on these issues and other legislative issues of concern to visual creators. Although we are filing individual Comment Letters, we share the common goal of working together to address the economic, marketplace, and legal concerns of visual creators. The Graphic Artists Guild supports their comments and suggestions, as well.

SUBJECTS OF INQUIRY

1. **What are the most significant challenges related to monetizing and/or licensing photographs, graphic artworks, and/or illustrations?**

Infringement Online

The single most significant challenge that graphic artists and illustrators face to generating income from our images in the 21st Century is infringing and unauthorized use of our work on the Internet. This includes unauthorized copying of our images that we or our clients have intentionally and lawfully posted or displayed on websites. Images that are lawfully displayed or reproduced in other media, including digital media, are digitized (by scanning or photographing) and reproduced without authorization on the Internet as well.

Once our images are posted online, whether authorized or not, they are easily copied

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and infringed by an unlimited number of people around the world and there is nothing that rightsholders can do to prevent this.

Work Made for Hire

It has become increasingly common in business for our clients — who are not our employers — to insist on Work Made For Hire [WMFH] or all-rights, in all media, "in perpetuity" contracts, the most unjust result for authors and creators of the 1976 Act. In lieu of a WMFH condition, the client company will instead demand an assignment of copyright to the company, even when the client intends to use the work for only a limited time. Corporate acquisitions in publishing and media industries have resulted in conglomerates that own a huge number of publications, production companies, subsidiaries and outlets which use a master contract for all that is non-negotiable. We see the same standardized clauses turning up again and again, as companies copy these terms from each other, often without even understanding what WMFH is, what licensing is, or why it is unnecessary for them to own the copyright to an image that they have no intention of using for a long time. The fee offered is typically the same fee that would be paid for one-time use, not a higher fee commensurate with the unlimited exclusive usage of a buyout of copyright.

Stock Image Websites and Design Mills

The new business models of digital technology have driven the price of images down. Public domain, copyright-free stock images have been around for a long time. Published in books available from type houses, "clip art" has been available to the public for well over a hundred years. Digital stock images appeared about the same time as graphic software for the computer. Once the Internet improved the display and electronic transfer of large image files, royalty-free image businesses quickly sprung up on the Web.

Logo and website design mills have also proliferated online. Some offer design templates. Some facilitate the commission of speculative design work from many independent contractor creatives using Work Made For Hire contracts. These logo or design mill Web businesses are the interface between the designer and the client and basically manage the business aspects of the project, such as the agreement, job tracking, billing,

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and payment. Copyright is always taken by the client. Sole proprietors, small and larger studio businesses alike, are competing with lower prices than we've ever charged in the past. Designers and graphic artists have lost most of our business to these business models.

It has been observed that often the "designers" who participate in American online logo mills with American clientele live in developing countries. Some of these "designers" are minors (teenagers). Undoubtedly they may not find the pay rate low. There is also concern that "designers" in countries outside of North America and Europe may be totally unaware of copyright and trademark law in general and U.S. Copyright and Trademark Law in particular. There is serious risk that designs produced by these people may include infringed copyrighted images owned by others, or logos already trademarked in the U.S. If an American rights holder were to discover infringing use in a logo created by a foreign national through an online logo mill and took legal action against the business for which the logo was created, that business would have no legal recourse against the "designer."

Identifying Metadata Stripped From Images

Some social media websites strip identifying metadata included in digital image files, including; metadata embedded by the graphic software in which the image was created; metadata embedded by the digital camera; and metadata added by the rights holder. When a user copies an image displayed online with metadata and then uploads it to social media, that identifying metadata is lost in the copy of the image. This inadvertently creates orphaned copies of that image. Subsequent viewers and users who copy that image cannot identify the rights holder or licensing information that had been embedded in the original digital image, making it difficult if not impossible for users to lawfully license use of the image.

Unlicensed Use In The Academic Sector That Is Not Allowed As Fair Use

Educators and administrators alike, in educational facilities both public and private (and religious), ranging from preschool though universities and private professional training programs don't understand the parameters and allowances of fair use of copyrighted

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works for "educational purposes." There is a broad misunderstanding that any educational facility may use copyrighted works without permission and for free under fair use. It is very commonplace for educational facilities and educators to make infringing use of copyrighted works for purposes that are not educational.

Now that computer technology and Internet access is commonplace in American classrooms, unauthorized use of whole, entire copyrighted works available online and in digital format has become a standard in the educational setting. Administrators and teachers choose to make unauthorized use of entire, completely digitized works rather than licensing their use. They may not know or understand that the works should be licensed, or they don't know how to go about licensing use. In some circumstances, there is a deliberate decision to not license the use as a cost-saving measure for the educational institution.

There is an increasing demand from the academic sector to expand fair use in all manner and uses by academic institutions. Some claim this is necessary to benefit the education of our children, others claim that the costs of licensing copyrighted works, producing textbooks and instructional materials containing images is too high, and others see the expense of purchasing instructional materials as a significant factor in the rising cost of education.

The European Commission is seeking to expand Fair Use/Fair Dealing along the lines of the 2010 Bill C-32 change in Canadian Copyright Law. Bill C-32 pretty much blew the roof off fair dealing for educational purposes, and Canadian educational publishers and authors/creators have already taken a big hit.

The College Art Association has cited that academics authoring educational books within the scope of their academic employment are complaining about the high cost of licensing images for their books, especially if they project a relatively small market for their book (small distribution). These academic authors want to reproduce copyrighted images without paying for licensing under fair use. Licensing reproduction of an image in a book (printed book or eBook) has always been a customary business practice in the publishing industry. The type or purpose of the book is irrelevant. An author must license reproduction rights from the rightsholder or visual creator whether he/she is creating a work of fiction, non-fiction, or an educational book such as a text book. Licensing images for reproduction in educational materials is standard industry practice for textbook publishers. An academic who is creating an analytical book of commentary should not

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be permitted to reproduce images without permission. We assert that is not a valid "educational" fair use exception.

ANY book could be used for educational purposes. Of course books about art, photography and many other subject matters (e.g. travel, medical instruction, and horticulture) may include many images; obtaining permission and paying licensing fees is the inherent cost of creating those types of books. It's up to the author to negotiate fees with the rightsholders of the images, and it is possible that under certain circumstances the rightsholder may allow reproduction for free. But allowing any and all use in instructional or educational materials to be free under fair use guts the livelihoods of authors and creators.

Academic authors are also seeking expansion of fair use allowance for the reproduction of previously unpublished images in the educational and commentary publications they are creating. They argue that the previously unpublished images have no value because they have never been sold in the marketplace, and therefore should not require licensing. We've heard this same argument regarding the status and value of unpublished allegedly orphaned visual works in the past. Visual creators create many, many visual works; not every image we create is commissioned by a client for a determined fee and prompt publication or distribution. Many visual works are created that are not used immediately in the marketplace until the occasion arises that someone wants to use them; at that point they have monetary value in the marketplace.

An artist may create many images that are not published. Someday, an author or historian or scholar may decide to make a book about an historical event and will want to include the full scope of relevant images, including works previously not exhibited, published or distributed. At that moment, all of those unpublished works have value in the marketplace. Some of those works may be orphan works, but that doesn't negate their value in the marketplace once a demand exists.

When a visual work is used for educational purposes, usually the entire image is used. Unlike a literary work which may be excerpted to suit the required curricula content, portions of images are not used. The intrinsic value of many educational materials is entirely dependent on the images they contain (illustrations, graphics and photographs).

A big factor of the attitude in education concerning allowing any educational use for free as fair use is the notion that digital files of works cost nothing. People perceive cost of

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production and monetary value in printed, tangible copies; they understand that it costs money to print a book, or make a film copy or DVD copy because the paper, cardboard, ink and disk/case cost money. But emailing or downloading a digital file doesn't involve any tangible materials or postage, so why shouldn't that be free? Schools at all levels are looking to cut the cost of education, and it seems to administrators, students and parents, that eliminating buying textbooks or motion pictures when digital versions exist is an easy way to eliminate that cost. There is a total absence of awareness that people (and publishers) create these works for a living.

Another way the education industry is seeking to cut costs is to increase online education. Depending on the course and how the professor/teacher sets up the assignments and grading, far more students can enroll in an online course — possibly even unlimited enrollment — than can fit in a classroom; and no requirement of classroom space. One adjunct teacher [an independent contractor with no benefits or job security] can be paid $3,700 or less to teach an online course with larger enrollment than an in-person course. All of the content is provided to the students online in digital format, and no one is overseeing what is used or whether a license is obtained.

This is occurring at both non-profit public and private 2-year and 4-year colleges, as well as for-profit private technical/vocational schools. The two intranet browsers most popular for online courses are Blackboard and Moodle. The browser and all content are hosted on the institution's servers. Students who enroll in a course, teachers and administrators are given access to the course. The user logs in with their username & password, and can access the courses they are enrolled in. The teacher can upload ANY digital file to the course webpage (on the institution's server), or link to a file on the instructor's hard drive, or link to any webpage. The storage space is enormous; it's no problem to upload an entire book, image files, an entire video, or music files. Entire works are made available to all the students. Nobody is checking what's uploaded for proper license. At the end of a semester, the institution's IT department archives the entire online course [all content], including any digital works the teacher has uploaded, and that archive lives on the institution's server indefinitely. The browser can [and is supposed to] be set to archive/backup each course weekly in case of crashes, so multiple copies are made and stored by the school. Archived courses can be restored at any time by subsequent professors. Even if someone did license a work for one semester for a specific number of students, the school will continue to make that work available every semester that class offered, and any user can download any file from the browser.

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As online education and virtual schools increase, educational organizations are going to continue to push for expansions in fair use of digital works for education. We need to call attention to this now and set limits before all of the horses are out of the barn.

Millions of Americans — individuals, small and large businesses — create copyrighted works intended for educational purposes. This includes writers, illustrators, graphic artists, photographers, filmmakers, composers and songwriters, musicians, software developers, and publishers. We earn our living from the licensing and sale of our works for educational use to educational facilities, to teachers, and directly to students of all ages. Our works are licensed and sold to educational institutions, teachers and students in a variety of media including in print, on digital media, and online. Depending upon the course curricula and what a teacher or professor chooses to teach, just about anything could be used for educational purposes. If we don't get paid for our work, we're going to stop producing the work.

Google Image Search

Google Image Search, as functionality exists in 2015, shows just the image but does not immediately bring the viewer to the website where the image is hosted. This functionality makes it too easy for a viewer to just copy the image rather than license use, which would require an extra step to go to the hosting website.

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

Most Images Aren't Registered

Responses to the Graphic Artists Guild's 2012 online national survey[2] documented that 60.9% of graphic artists (including illustrators) and photographers had never registered any of their images. 27.7% of respondents agreed with the statement *"It doesn't effectively protect my rights, so why bother?"*

2 Graphic Artists Guild, (Comment Letter for the second Small Claims Notice of Inquiry, Remedies for Small Copyright Claims: Additional Comments [Docket No. 2011–10], submitted to the US Copyright Office 2012).

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The online national survey also documented the occurrences of infringement of visual works, and the difficulties of the current legal system that visual creators experience in the U.S. 60.1% of respondents reported to have had their work infringed by another person or business.[3]

The two most common sources from which infringed works were copied were from a printed piece (including a photographic print) and from the Internet (the creator's own website, or the creator's work on another website). The majority of the infringing uses were for commercial, for-profit purposes, including display or promotional use that should be licensed. This indicates that visual creators are suffering a substantial incidence of unauthorized use of their works, resulting in significant loss of income and possible violations of licensing agreements between the creator and legitimately authorized licensees.

Considering the vast number of images created each year by just professional graphic artists, illustrators and photographers in the U.S., if we were to register all of these works as VA, it would overwhelm the Copyright Office registration system. Compelling visual creators to register all works is not necessarily a solution unless the Copyright Office is able to process an exponential increase in registrations every year.

When queried *"If the Copyright Office established an alternate dispute resolution for small-amount copyright infringement cases… would you be more likely to register your work with the U.S. Copyright Office?"* 64.5% of graphic artists and photographers responded "*yes*," and 29.9% responded "*maybe*."[4]

Solutions:

- The Graphic Artists Guild would like a new ruling to allow Group registration for illustration and graphic design; for all visual works, not just photographs.
- Visual creators would register more works if we were permitted annual "bulk" registration. We would consider tiered scale of registration rates for particular quantities of visual works.

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3 Graphic Artists Guild, (Comment Letter for the second Small Claims Notice of Inquiry, Remedies for Small Copyright Claims: Additional Comments [Docket No. 2011–10], submitted to the US Copyright Office 2012), Survey Question 10.

4 Graphic Artists Guild, (Comment Letter for the second Small Claims Notice of Inquiry, Remedies for Small Copyright Claims: Additional Comments [Docket No. 2011–10], submitted to the US Copyright Office 2012), Survey Question 11.

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- Registration would also be facilitated by eliminating the published and unpublished designation and the need to submit physical samples of the work being registered. Submitting electronic files would not only streamline registration, it would also allow the Copyright Office to keep the files rather than destroying or discarding the physical sample deposit copies.

Enforcement Against Infringers Is Often Impossible

Enforcement of unauthorized use against an infringer is realistically impossible for most independent individual creators and small business rightsholders. According to the Guild's 2012 national survey, even when registered work was infringed, 44% of creators were told that the legal costs would be more than the damages.[5]

Intellectual property attorneys typically estimate that a straight-forward copyright infringement lawsuit would easily cost more than $30,000 in attorney's fees.[6] This far exceeds the actual damages in most infringements of visual works. Even the cost to pay an attorney to write a Cease & Desist or Demand letter often exceeds the actual damages or loss of licensing fee for most infringing use of images, especially online infringement.

Some users deliberately infringe because they know legal costs of enforcement are too high for visual creators to take action. They know they can ignore even a Cease & Desist letter because creators cannot afford further legal action in many circumstances.

Solution:

- The Graphic Artists Guild supports the creation of an alternate dispute resolution, small value copyright infringement court within the Federal district court system so that rights holders can take meaningful action against infringers. [Small Value Copyright Claims Court]

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5 Graphic Artists Guild, (Comment Letter for the second Small Claims Notice of Inquiry, Remedies for Small Copyright Claims: Additional Comments [Docket No. 2011–10], submitted to the US Copyright Office 2012), Survey Question 18.

6 ABA-IPL section, (Comment Letter for the second Small Claims Notice of Inquiry, Remedies for Small Copyright Claims: Additional Comments [Docket No. 2011–10], 2012) http://www.copyright.gov/docs/smallclaims/comments/noi_10112012/ABA_IPL.pdf

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- Incentivize those accused of infringement to participate in ADR by adding increased damages/penalties if infringers opt out of Small Value Copyright Claims Court and want to have the case heard in Federal Court instead.

Public Misconception About Copyright and the Internet

Many people mistakenly believe that images on the Internet are "public domain" or "free." They have heard the term "public domain," and without knowledge of the legal definition confuse public accessibility with "public domain," especially if they don't see a clear copyright symbol or copyright notice next to the image. Some people also confuse the First Amendment right to free speech with their concept of free speech on the Internet, and therefore presume that copyright protection does not apply to anything posted on the Internet. Some people also presume that if an image was protected by copyright, that somehow they would not be allowed to copy the image from the Internet (mouse right-click and "save as" command).

In reality, our work can be infringed as soon as it is posted on the Internet regardless of whether it is registered or we have added identifying and licensing metadata to the image. And every copy of a digital image is exactly the same and of the same quality as the original; there is no degradation of quality and the copy is impossible to tell apart from the original.

Solutions:

- For images displayed on the Internet, it would be very helpful to require information of ownership attached to images to function as a pop-up when the image is clicked on.
- More education for the public about copyright from the Copyright Office.

DMCA Takedown Notices Are Ineffective

Web hosts often ignore DMCA Takedown notices, or the image is reposted again by the infringer after removal. The DMCA Takedown is completely unenforceable if the website has a foreign host.

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Solution:

- We urge a revision of the DMCA Takedown to "Takedown and stay down." Once a host is notified, they should be prohibited from reposting the copyrighted work unless they receive express permission or license from the rights holder.

Customary Use in the Marketplace Creates Orphan Works

There are many typical uses of images in the marketplace where the image is reproduced without any identification of the creator or rightsholder. If an image is used in print, for example on product packaging, on textiles, or in advertising, it is not customary to include identification of the rights holder. These images inadvertently become orphaned as soon as they are distributed in the marketplace simply because anyone who may seek to license the image cannot identify the rightsholder. This is just the nature of that commercial use. However, visual creators currently suffer the inability to pursue infringers, and may risk having these images deemed orphans in future orphan works legislation.

Sometimes even authorized users and licensees will remove identifying metadata from our digital works, either deliberately or inadvertently, or reproduce our images without proper attribution thus creating orphan works.

Solution:

- Small Value Copyright Claims Court

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

Graphic Artists Guild's 2012 online national survey for Small Value Copyright Claims included a number questions about registration. Of the 60.9% of graphic artists (including illustrators) and photographers who responded said that they had never registered any of their works,[7] the five most significant reasons were:

a. 49.9% responded to *"I know I should, but I don't get around to doing it"*

7 Graphic Artists Guild, (Comment Letter for the second Small Claims Notice of Inquiry, Remedies for Small Copyright Claims: Additional Comments [Docket No. 2011–10], submitted to the US Copyright Office 2012), Survey Question 7.

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b. 41.5% responded to *"I don't understand how/don't I need to pay a lawyer to do it?"*

c. 36.4% responded to *"It costs too much"*

d. 27.7% responded to *"It doesn't effectively protect my rights, so why bother?"*

e. 18.4% responded to *"The form/registration is too difficult"*

Of those 39.1% who had registered works with the Copyright Office, only 42.6% of those people responded that they had used online registration at the U.S. Copyright Office web site (eCO) [as of 2012].[8]

a. Visual Creators Don't Understand Copyright Registration

Clearly, a significant number of visual creators either don't know that they can register online, or don't know that they can register their work themselves and they don't need to pay an attorney to file registration for them.

Some visual creators don't understand legal advantages to registration. They may know that registration is not required, and that they claim copyright ownership to their work when they create it. They may think that registration is unnecessary because they are not aware of their advantages if they register their works before an infringement occurs.

b. Enforcing Infringements of Low-Value Damages Is Impossible

Visual creators know that they cannot afford legal action for infringement even if their work is registered if the actual damages are relatively low or all they want is injunctive relief or the removal of a display.

c. The Copyright Registration Procedure Is Impractical For Visual Creators In The 21st Century

Visual artists need group registration to accommodate the volume of graphic art and illustration created with digital media. We need a simple procedure for mass registration of visual works at a reasonable price with real protection of the individual works included

8 Graphic Artists Guild, (Comment Letter for the second Small Claims Notice of Inquiry, Remedies for Small Copyright Claims: Additional Comments [Docket No. 2011–10], submitted to the US Copyright Office 2012), Survey Question 8.

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in a collection valued individually for statutory damages, or group registration for all types of visual works.

Online registration is absolutely necessary, and clearly many visual creators are using eCO. However, not enough do. The Guild has been told by graphic artists, Web designers and illustrators that eCO is badly designed and confusing to use. This is largely due to particular requirements of registration that is confusing or impractical for visual creators.

(a) The deposit requirement is a burden;

- The description of the deposit requirements in §202.20 doesn't make sense to the way graphic artists and illustrators create works and how the works are used in the contemporary marketplace and on the Internet.

(b) Professional visual creators make too many images. It would be too time consuming and costly to register everything and the volume of registrations would overwhelm the Copyright Office. We ask the Copyright Office to consider dropping the registration requirement prior to infringement as a condition for statutory damages.

- It is impossible for highly productive creators who create lower value works. In some instances, the cost of registration is higher than what the works are licensed for.

- This deposit requirement is a burden, often impractical, and sometimes not possible for visual creators:

  i. §202.20 Deposit of copies and *phonorecords for copyright registration. (b) Definitions. For the purposes of this section:*

  ii. *(1) The best edition of a work has the meaning set forth in §202.19(b)(1). For purposes of this section, if a work is first published in both hard copy, i.e., in a physically tangible format, and also in an electronic format, the current Library of Congress Best Edition Statement requirements pertaining to the hard copy format apply.*

(c) The descriptions of what is applicable for a deposit copy doesn't make sense to visual creators depending upon how an image is used, especially in a

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digital environment and when an image is multipurposed in different media simultaneously in the marketplace.

(d) Date of publication is problematic for Visual Art, especially for group registrations.

(e) Distinguishing between published and unpublished works is completely impractical and confusing for visual creators in the 21st Century.

- Differentiating published and unpublished works is a throwback from 1909 Act when works were copied and published in print media only. This differentiation is not applicable to digital technology and the Internet.
- Even the Copyright Office cannot establish a clear definition for all uses of visual works. The Copyright Office has not provided clear definition of whether display on the Internet is considered "publication."
- Most visual creators consider making their work available to the public by display — such as posting it on a website, in a gallery or exhibit, or anywhere else where the work is accessible or visible to the public — to be publication. Images are easily infringed from the Internet, or by a viewer who scans or photographs the image. We differentiate our decision to keep some works from public view as unpublished.
- Often visual creators don't know when our work will be "published" by our clients, and there may be a long delay between submission of production-ready art and actual use in the marketplace.
- Separating published from unpublished images isn't practical for graphic artists and illustrators when we want to register all images created for a client/job/project. Sometimes we don't know which images will be published, produced or used.
- There is considerable real incidence of unauthorized use by clients of art/designs in digital working files and early versions submitted to clients during the working process.

(f) The digital deposits of visual works are not compiled in a searchable image database, or available for view when someone views the registration records.

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Solutions:

- Eliminate the distinction between published and unpublished works.
- Change the deposit requirements for Visual Art.
- Instead of submitting "best edition" physical copies of visual work, we suggest requiring creators to submit a digital thumbnail or low resolution image, not unlike proof sheets, rather than a physical printed sample book, magazine, etc. The Copyright Office could keep and file electronic copies with each registration recordation and build a searchable image database of VA.
- Allow for group registration of all visual works, not just photographs.
- Allow for annual "bulk" registration fees.
- Redesign the eCO website and user interface.

4. **What are the most significant challenges or frustrations for those who wish to make legal use of photographs, graphic art works, and/or illustrations?**

a. Allegedly "Orphaned" Visual Works

Images are often inadvertently orphaned when metadata ID is stripped, or the work is reproduced or displayed without the rightsholder's name. This makes it nearly impossible for users to identify rightsholders to license use.

b. Users Are Unaware of Metadata in Digital Images

Many users don't know to look for metadata ID, that PLUS exists, or a digital watermark (such as Digimarc) in a digital image. This includes images that users find on social media.

c. Misconceptions About Fair Use

Many Americans are confused or misunderstand what qualifies as fair use. The most common misconceptions of allowable use under fair use include:

- Display of the image only, without making physical reproductions (including online display).

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- Use, reproduction and distribution for free; without selling the image/ reproduction.
- Any use by a non-profit entity or organization, including use on the website and electronic communications.
- Any use by a charity, including use on the website and electronic communications.
- Any use by a religious organization, including use on the website and electronic communications.
- Any use by an educational facility or for an event/activity held on the premises of an educational facility, including use on the website and electronic communications.
- Unauthorized display or reproduction of an image is acceptable under fair use as long as attribution to the creator made (citation of credit).
- Misconception that there is some specific amount of an image (or other work) that may be used or reproduced without licensing or permission.

The Graphic Artists Guild has produced a White Paper informational pamphlet about these misconceptions titled *Copyright Myths* based on a compilation of actual questions artists and users have asked us over the years.[9]

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

There are fair use issues regarding visual works that the Guild finds problematic and would like to see addressed.

a. Definition of Transformation Regarding the Doctrine of Fair Use

The concept and interpretation of "transformation" under the Doctrine of Fair Use as it applies to visual works created as derivative works from another original visual work has taken on a new and nuanced definition in recent court decisions. Until fairly recently, a

9 "Copyright Myths" is available as a free download on the Graphic Artists Guild website https://graphicartistsguild.org/tools_resources/copyright-myths

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secondary visual creator necessarily had to use only a portion of an original visual work, or change the original visual work to the extent that the secondary visual creator added a considerable amount of his or her own creative originality to the derivative work he or she created to be considered a fair use and not a simple infringement.

There has been recent fair use cases where the secondary visual creator used the entire original work in their derivative work(s), but the derivative work(s) were created in a different medium, or different context or displayed to a different audience (e.g. *Cariou v. Prince, Seltzer v. Green Day*). Those two cases are examples of an image being copied and recreated from a photograph to a painting, or from a poster or illustration to a projection.

Does the term "transformation" under copyright law mean transformation of work (changing the work itself) or transformation of meaning? Visual works are usually interpretive. Visual works convey a visual message; that message will change depending upon context in which the work is displayed or viewed, or audience who views the work. The display of Dereck Seltzer's, "Scream Icon," by the rock band Green Day during their performance of their song, "East Jesus Nowhere," is a perfect example. Seltzer did not create his "Scream Icon" as a message or visual concept about Christianity, however when displayed with Green Day's song that was the visual message the audience perceived viewing the image while listening to the lyrics of the song.

The interpretation of the meaning of a visual work is subjective. Every viewer sees the work from their own point of view and with their own cumulative experiences. Regardless of the creator's intended visual message, a viewer will subjectively interpret meaning of the visual work based on the context in which the visual work is displayed/presented/used. This is individual interpretation, not transformation of the work by the user. This is the basis of visual concept taught to graphic artists, illustrators, fine artists and photographers. Changing the definition of "transformation" under copyright law to allow copying of entire images as fair use makes no sense to visual creators. We see that as clear and basic copyright infringement.

Visual creators typically license the same images for different uses in different media, to be seen by different markets or audiences; this is standard licensing of images in the marketplace. How can this be considered fair use in some circumstances? Allowing a defense of fair use for the unauthorized copying of whole images in derivative works conflicts with the creators' licensing rights. How can a visual creator grant a client

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exclusive license/use if the courts allow reproduction of same entire work in the marketplace under fair use?

We also assert that if the rights holder of the original work that's incorporated in a derivative work isn't cited, then the secondary creator has plagiarized. If you don't identify the person you copied from, then you necessarily give the impression that you've created the entire work yourself. This is an issue of ethics.

Does fair use enable a person to make something that is really new? Or is it currently being used as a work-around to licensing or payment by people who don't have the talent, creativity, or ingenuity to make something new?

Copyright is meant to protect the economic rights and interests of authors and creators. Fair use is not intended to protect the rights of users by taking works away from authors and creators so that others can profit from their works.

We would like to see a rulemaking by the Copyright Office regarding images clearly defining "transformation" within the Doctrine of Fair Use as changing the appearance of the original image so as to add significant creative or artistic originality.

b. The College Art Association Fair Use Best Practices

The College Art Association released its *Code of Best Practices in Fair Use for the Visual Arts* in February 2015.[10] We are very disappointed that Professor Jaszi and his investigators chose not to include any of the American artists' professional organizations in either of his fair use studies. Professor Jaszi did not consult with the Graphic Artists Guild [GAG], the American Institute of Graphic Arts [AIGA], or the Society of Illustrators [SOI] to gather information for his study about how student, professional, and arts educator members of these organizations worked with images when creating derivative works for class assignments, professional production, or teaching content. Nor were any of the professional photographers' organizations or their members consulted for the study.

The Guild believes that the study group chosen and researched by CAA for the *Copyright, Permissions, and Fair Use among Visual Artists and the Academic and Museum Visual Arts Communities: An Issues Report* to be seriously incomplete and lacking in breath of experience of the issue. The Guild's members include some of the professional visual creators who make the images that other creators and authors use. Our members

10 College Art Association, *Code of Best Practices in Fair Use for the Visual Arts* (2015), http://www.collegeart.org/fair-use/best-practices

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are also more likely to have some knowledge of copyright and fair use and experience licensing our own images as well as licensing images owned by others.

As the professional organizations that represent graphic artists, illustrators, photographers and other visual artists, we know that the allowances for fair use under U.S. Copyright Law can be difficult to understand and apply to visual works. Many visual creators and authors use images created by others in their own works, in academic settings, as professional visual creators composing works intended for reproduction or display, for scholarship purposes, and as amateurs creating for pleasure. People want to have the creative freedom to produce their ideas. People also want to control how their own original creative works are used by others and where, when or how their works are reproduced and displayed. And people want to earn money from the fruits of their (creative) labor. Fair use is intended to provide a fair balance in this.

Our organizations advocate for the rights of visual creators, including economic rights, legal rights and creative rights. This includes educating visual creators and educators about professional business practices, copyright, licensing, fair use and professional education. We seek to improve the understanding and application of this information for all visual creators, not just our members. We strive to help visual creators understand fair use and licensing. We understand very well how visual creators incorporate images owned by others, and already have content about fair use to assist visual creators. We are very disillusioned with most of the content in the CAA *Code of Best Practices in Fair Use for the Visual Arts* and ask that we be included going forward in the development of Best Practices guidelines.

c. First Sale

The House Judiciary Committee Subcommittee on Courts, Intellectual Property and the Internet is considering changes to the Doctrine of First Sale Under Title 17 to apply to digital works as well as printed works.

Graphic art (illustration and graphic design) is sold primarily on the basis of usage and reproduction rights. Usage rights are generally sold according to the client's needs.

Graphic artists, illustrators and photographers generally license, rather than sell, our work commercially. Other uses for a work may be licensed to other clients as long as they are noncompetitive or do not compromise the commissioning client's market. Clients that manage their businesses well only buy rights that are particular to the project

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since it is not economical to pay for additional rights that are not needed and that will not be used. This allows us to provide our clients exactly the rights they need, and to set a price that fairly compensates for those rights, while allowing us to retain control over the copyright in our work for other purposes. This is beneficial to us both because it keeps the costs for the client reasonable, and the compensation to us appropriate to the rights we're licensing.

Changing the Doctrine of First Sale to be more expansive in the digital world than it is in the analog world and/or imposing the requirements of that doctrine on licensing transactions would result in significant changes in the marketplace that would be detrimental to illustrators and graphic artists as well as our clients. The end user would be forced to acquire usage rights they've never had before and weren't paying for, resulting in an increase in expenditures for clients that might make it impossible to contract the services of a graphic artist.

The House Subcommittee has been considering two related issues which would be relevant to our work: (1) whether the first sale doctrine should be amended in order to have it apply in the digital world; and (2) whether artists and other copyright owners should be able to write the terms of our license agreements with our clients based upon their actual needs.

As we understand it, the first sale doctrine is intended to limit the rights of a copyright owner to control what a purchaser of a particular copy of a work does with that copy of the work after it is sold. In the analog world, since the doctrine applies only to the specific copy of a work sold to a customer and doesn't permit the customer to make additional copies of the work, this doctrine has not been particularly relevant to our work, given that most of our work is licensed to clients rather than sold, and the licenses provide for very specific permissions as to how the work may be reproduced and published. Once our work is reproduced and published in book form, for instance, the fact that the first sale doctrine allows a downstream purchaser of that book to later sell the used copy of the book at a yard sale does not trouble us, because the risk in the analog world of our work being reproduced and distributed without our permission as a direct consequence of this doctrine is relatively small.

In practicality, there is no such thing as a "used book" in the digital world; every copy of a digital work or image is exactly the same as the original. So every digital book sold under the first sale doctrine would compete directly with our client's sales — this means our

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clients will have fewer sales, and fewer resources to devote to illustrate their works. As a result, we would likely have fewer clients and we might see a decline in the publishing industry.

Another result of permitting First Sale to apply to digital works would be that every consumer who bought a digital work (including compilations) would outright own a digital copy of our image, and would have the right to license our image as well, and set their own licensing fee. We would then be competing against an unlimited number of consumers to license or sell our own images. If we were required to allow our clients (and other downstream purchasers) to resell our work it would commoditize that work to the point it would lose its value.

Additionally, under the proposed change, we are concerned that once our artwork has been published, our images may then be altered by an end user who owns a digital copy of our artwork in a manner that may be objectionable to us, and then reselling or licensing their altered version. This may include reworking of the art in an objectionable way or using it to promote or convey a message with which the visual creator does not agree. Our artwork represents our point of view and ourselves, and changes unapproved by the creator might impact negatively upon our professional reputation. As a creative professional and business owner, we are able to choose which clients we will work with.

Of course, the work of visual artists is already subject to infringement — often to a burdensome degree for individual artists and small businesses. The proposal to add a digital first sale doctrine would make it wholly unmanageable for creative professionals to control our work. The visual arts community is NOT asking for a change to this doctrine.

The second, related question is whether visual creators and other copyright owners should be able to write the terms of our license agreements with our clients based upon their actual needs without terms being dictated by copyright law. If the government were to intervene in the license agreements we negotiate with our clients, or if we were required to allow our clients to compete with us by selling copies of our work to others (as applying the first sale doctrine to a licensing based business would suggest), that would be incredibly destructive to the livelihoods of commercial visual artists, and would raise prices for clients.

In summary, changing the Doctrine of First Sale to include digital works would result in two significant changes in the marketplace that would be detrimental to illustrators and

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graphic artists as well as our clients. The end user would gain usage rights they've never had before and weren't paying for, resulting in a loss of income of additional usage fees for illustrators and graphic artists. And, our commissioning clients would no longer be able to secure exclusive rights to the unique images that they want to limit in the marketplace.

Visual creators are not a commodity. The right to own the copyright to our original artwork and the potential to earn income from licensing reuse of our work to different clients, businesses, and media in different forms and formats is essential to our income as creative professionals.

d. Educating The Public About Copyright And Licensing

Most Americans don't understand copyright, and that includes clients who license graphic art — both individual clients and employees of large businesses. It is not unusual for a client to make additional unauthorized use of an illustration or graphic design beyond the original license for the project. Clients mistakenly presume that either they've purchased the copyright when they haven't, or that whatever fee they've paid grants them unlimited usage. Sometimes the illustrator or graphic artist is able to bill the client for the additional usage and successfully collect, but often the client refuses to pay.

e. Searches of VA Registration Records

Searchable registration records of VA ought to include a thumbnail of the image (beginning with registrations made online with digital deposit images). An opt-in permission for this function could be added to online registration. If an electronic thumbnail or low resolution image were accepted as the deposit copy of an image rather than a physical sample, the Copyright Office could keep and file electronic copies with the registration, and build a searchable image database. This would also help users trying to locate rights holders of allegedly orphaned images.

f. Copyright Registration And Date Certification Services

A number of copyright registration "services" and creation "date certification services" have sprung up around the U.S. and online, seeking to make money off of artists, photographers and writers who are either naïve or misinformed about the process of copyrighting their own work. These entrepreneurial services offer creators "registration" of the date of creation of their work within their company's databank in lieu of actual

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copyright registration with the U.S. Copyright Office, a "professional service" that will register the work with the U.S. Copyright Office, and in some cases both. They feed into and prey upon the intimidation and misinformation of what copyright registration actually entails, and that copyright registration is too difficult, complicated, time consuming or confusing for us creative types to do on our own without the aid of an attorney or some other sort of "professional." Uninformed authors and creators use these online date certification services mistakenly believing that they have legally registered their work and will have the protections and qualification for statutory damages of registration if their work is infringed. We question what the real value of these date of creation services are, and whether this is a fraudulent practice altogether. These online businesses confuse the creators and the general public.

g. Resale Royalties

The Graphic Artists Guild wishes to express gratitude to the Copyright Office for studying the establishment of national resale royalty rights for artists. As an organization composed entirely of artists and related professionals, we look forward to sharing more of the rights enjoyed by our European colleagues. For the most part with some specific exceptions, the Graphic Artists Guild approves of and supports the European Union Directive 2001/84/EC for resale royalties adopted in 2001.

Many illustrators and graphic artists still work in what is now termed "traditional media": paint, pastels, pencil, ink, cut paper, etc. on paper, board or fabric. Some illustrators and graphic artists create "originals" using a variety of traditional printing methods including wood or linoleum block, silk screen, etchings, etc. Some illustrators work with three-dimensional materials including clay, fabric, found objects, and collage to create a complete work that is then photographed for reproduction. Many illustrators and graphic artists still produce original, unique works of art that are photographed or scanned to produce a digital copy for commercial use. Illustrators and graphic artists sometimes sell their original works as fine art, or create limited edition fine art prints that they sign and sell to art buyers, either directly, online, through an agent, or through a gallery. Anyone who has watched the PBS television show, "Antiques Roadshow," has seen original illustrations, as well as limited edition prints of works such as posters, appraised at considerable value based on sale prices as works of fine art.

As an advocacy organization for American artists, the Graphic Artists Guild supports the legal and economic rights of all American artists, regardless of the medium in which

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they work or how many or what sort of original works and limited-edition fine art prints they sell. We believe that the right to earn royalties from the increased value of our original works through resale to subsequent owners is as justified and important as the right to earn a licensing fee or royalties from the commercial use and reproduction of any artwork. We have all seen original fine art works licensed for reproduction for commercial use and on consumer merchandise. As artists, we see no substantive distinction of the original work as "fine art" or "commercial art." Any "fine art" work has the potential to be reproduced for commercial purpose.

We want to state clearly that, consistent with the practice in Europe and California, the reproduction of an original work of art in a book, magazine, catalog, or online, does not disqualify the original physical artwork from VARA or a potential resale royalty right.

Referencing the Copyright Office's Resale Royalty Report, *Resale Royalties: An Updated Analysis December 2013* http://www.copyright.gov/docs/resaleroyalty/usco-resaleroyalty.pdf

Of course, the Guild supports the stated premise:

> *"If resale royalty legislation is proposed, Congress should take steps to ensure that it benefits the greatest number of artists while causing the least amount of disruption in the art market."*[11]

The Guild supports the establishment of national artist resale royalties in the United States by Federal legislation.

> *"Given most artists' comparative lack of bargaining power in relation to auction houses, galleries, and other art market professionals, some level of congressional involvement may be necessary for these negotiations to achieve meaningful results."*[12]
>
> *"C. KEY LEGISLATIVE CONSIDERATIONS*
>
> 1. *"Types of sales covered*
>
> *A resale royalty law should be broad in scope, covering not only sales by large auction houses, but also sales by other art market professionals."*[13]

11 U.S. Copyright Office, "Resale Royalties: An Updated Analysis," December 2013, 66. http://www.copyright.gov/docs/resaleroyalty/usco-resaleroyalty.pdf
12 U.S. Copyright Office, "Resale Royalties: An Updated Analysis," December 2013, 72.
13 U.S. Copyright Office, "Resale Royalties: An Updated Analysis," December 2013, 73.

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This is consistent with the EU Directive. Considering that there is so much collecting of American artworks by Europeans and vice versa, we believe it makes sense to adopt resale royalty provisions very similar to the EU Directive.

The Guild opines that any artist should be paid resale royalties from the sale of his/her work directly by the seller, including galleries, dealers, agents, auction houses and Internet sales. If for any reason, the artist or his/her heir does not want to participate in the resale royalty rights process, they should be able to decline either by stating so in the original first bill of sale (contractually), or when contacted after a sale. Artists or their heirs should also have the option to appoint a separate entity acting as a collecting society to handle the royalty payment transactions. The collecting society would by default manage the transaction only if the artist or heirs could not be located by the seller.

> *"Given that fewer than half of all art sales are made through public auction, a law limited to those transactions would exclude vast numbers of artists from royalty eligibility. Beyond that, such a law would likely have the effect of driving art sales into the private market, which would undermine the transparency and other public benefits provided by auction sales."*[14]

The Graphic Artists Guild agrees with the U.K. organization, Design and Artists Copyright Society (DACS), and their comments about resale royalty rights; however we disagree concerning sales between private individuals.

> *"We therefore conclude that any resale royalty law should cover, at a minimum, auctions, dealers, and galleries engaged in the business of selling artwork, including instances in which "an art market professional is using a web-based platform or service such as eBay or ArtBank to conduct [his or her] sales." "It should, however, exclude sales between private individuals, which the collecting societies agree would present substantial enforcement difficulties."*[15]

If resale royalty payments are allowed for transactions between private individuals, it would necessitate some education of artists regarding writing proper bill of sale agreements that include a resale royalty payment clause that would be enforceable in the event of non-payment in the civil court system in the future. The Graphic Artists Guild and other artists' organizations could be helpful informing American artists and providing artists with boilerplate agreements and perhaps a label of some sort that could be affixed

14 U.S. Copyright Office, "Resale Royalties: An Updated Analysis," December 2013, 73.
15 U.S. Copyright Office, "Resale Royalties: An Updated Analysis," December 2013, 74.

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to or kept with the artwork. Indeed, the burden of enforcement would be on the artist and his/her heirs.

> *"2. Threshold value*
>
> *A resale royalty law should include a minimum price threshold that is sufficiently low to cover a wide range of sales, while not so low as to be offset by the administrative costs of collecting and distributing the royalty. The previously proposed EVAA legislation would apply to works sold for $10,000 or more. While there was some disagreement, most participants in the Office's review process felt that an appropriate threshold should fall within the $1,000 to $5,000 range."*[16]

The Guild supports the threshold of $1,000, which is consistent with the California Resale Royalty Act. This amount will need to be adjusted periodically according to inflation. This threshold would benefit the greatest number of American artists, not just the extremely successful artists.

Royalty Rate:

The Copyright Office report recommends between 3% and 5%. The Graphic Artists Guild supports the flat royalty rate of 5% as has been in practice in the U.S. under the California Resale Royalty Act. At this time, we do not recommend the sliding scale in the European Directive.

Collection and Administration:

The Guild respectfully disagrees with the Copyright Office recommendation that a resale royalty system should be collectively managed exclusively by private collecting societies. The Graphic Artists Guild strongly supports the default collective management of royalty payments (for artists or heirs who could not be found by the seller) by a non-profit public agency. Considering existing public agencies, at this time we suggest that the Copyright Office or the National Endowment for the Arts could act as the collecting agency. The agency would establish an escrow account for royalties, to function in the same manner as the California Arts Council under the California Resale Royalty Act. Interest earned on the escrow account and unclaimed royalty payments for artists or their heirs that cannot be found may be kept to fund the operating expenses of the program.

The Graphic Artists Guild supports the European concept of *droit de suite*, VARA, and the

16 U.S. Copyright Office, "Resale Royalties: An Updated Analysis," December 2013, 74.

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California Resale Royalties Act.

h. The Artist- Museum Partnership Act

Since the first introduction in 1999, the Graphic Artists Guild continues to support what has been variously titled, The Artist-Museum Partnership Act, The Art and Collectibles Tax Parity Bill, and The Artists' Contribution to American Heritage Act, in the past— a revision to the IRS tax code applying to the charitable donation of artwork. "To amend the Internal Revenue Code of 1986 to provide that a deduction equal to fair market value shall be allowed for charitable contributions of literary, musical, artistic, or scholarly compositions created by the donor."

i. Internet Search Functions

Some Internet search engines for images display a full copy of the image without taking the user to the web site. The image is displayed without any copyright notice or rights holder information. This makes it too easy for users to copy and download images without licensing because locating the rights holder on the hosting website takes an extra step. Images downloaded or copied in this situation may be separated from any copyright notice or rights holder information located on the website, inadvertently creating orphaned copies of the images (if there is no embedded metadata with the rights holder's information in the image).

j. Moral Rights

The Graphic Artists Guild has always supported the moral rights of authors and creators (*droit moral*), and the provisions of the Visual Artists Rights Act of 1990. We would like to see increased legal protection of moral rights in the U.S. in accordance with those that European creators enjoy.

k. Support for PLUS

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The Graphic Artists Guild continues to support the endeavors of PLUS (Picture Licensing Universal System http://www.useplus.com/aboutplus/system.asp). We would defer to PLUS for metadata standards regarding digital image files, with the purpose of creating an identification system for images that would work internationally to help identify the rightsholders of images.

The Guild supports PLUS' continued work to create a hub registry that would search image databases and registries internationally as part of the solution to prevent images from being deemed orphans (having no identifiable or locatable rights holder). It is critical that in addition to for-profit registries, and in addition to non-profit registries offered by various stakeholder groups representing the interests of their constituents, there must be a least one solution that is operated collaboratively by all communities, in all countries, on a non-profit basis, and is impervious to acquisition and undue influence. This will ensure that the connection between visual works, rightsholders and rights information is owned and operated cooperatively by the users of that solution, for the benefit of all. It is even more critical that we avoid a situation in which there are hundreds or thousands of disconnected registries throughout the world, each an independent silo of data. This would require that rightsholders register their works in every country and in every registry. Instead, we need a "hub of hubs" — a system that connects all image rights hubs and registries into a global network, so that a search of any registry or hub will search all. It is vital that the "hub of hubs" must not be operated by a government or special interest group or any one stakeholder. Lastly, in order for all of this to succeed, systems must be able to "speak" with each other, using a standardized machine readable language to facilitate the exchange of information. The solution must not be proprietary — it must be available to all. This is PLUS; a global language for image rights, and a global system connecting all registries and hubs.

With regard to the PLUS Registry, it is important to understand that the term "Registry" does not fully describe the system, which is more accurately described as a "hub of hubs," connecting hubs, registries and databases throughout the world (see #7 below). To quickly sum up the major categories of functionality, the PLUS Registry will:

1. Provide unique persistent identifiers for owners of visual works in all countries.

2. Provide current contact information for the owners of visual works in all countries.

3. Identify the authors and owners of billions of visual works in all countries.

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4. Provide current, detailed rights information for billions of visual works in all countries, including general rights information and license-specific rights information.

5. Provide access rightsholder opt-ins and opt-outs (in relation to all manner of licensing schemes and royalty distribution schemes) at the rightsholder level and at the asset level.

6. Allow rightsholders to declare representation by specific entities on a global level and on a regional level, for the purposes of licensing representation and royalty distribution.

7. Provide orphan works search certification.

8. Provide for identification of responsible parties after the death of rightsholders in visual works.

9. Allow for queries via identifiers issued by any and all authorities, in addition to PLUS identifiers.

10. Allow for queries via image recognition to ensure that authors, owners and authorized licensors can be identified even for images stripped of identifying information.

11. Provide a means by which users of visual works may assert the right to use such works under agreements, policy or law.

12. Serve as a "hub of hubs," globally connecting all manner of hubs, registries, databases and similar systems, to ensure that a search of any one system will search all connected systems, and to ensure that the operation of the "connection:"

- is not subject to the whim of any one government or governmental agency in any one country
- is not otherwise controlled by participants any one country or region
- is not operated by any one industry or stakeholder group
- is "industry-neutral" and is impervious to undue influence by any one industry or stakeholder group
- is impervious to takeover or acquisition

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- is conducted in a neutral, open and transparent manner allowing for participation by any person or organization in any industry or region
- is performed on a not-for-profit, cost recovery basis
- is as efficient as possible so as to minimize costs of operation
- is operated without bias as to legal and legislative issues or perspectives
- as accessible via API to all manner of systems operated on a non-commercial or commercial basis by all manner of persons and organizations in all countries (subject to security controls and to the permission of registrants where applicable)
- allows for access via all manner of third party interfaces – whether web sites, digital asset management systems, mobile apps, etc, to ensure maximum access to the connection
- enables all manner of new business models
- enables external systems to more efficiently identify rightsholders, assets, and rights information
- enables external systems to more efficiently complete rights transactions and communicate rights information

CONCLUSION

From the moment you get up in the morning, you are surrounded by graphic art. A graphic artist's job and talent is to translate society's ideas and messages from the market to you in visual form. Your sheets are designed by a textile artist, as are the fabrics you wear. The enticing packaging on the food you buy at the grocery store, or the bags and containers that you get from a fast-food restaurant, are designed by graphic artists. Your morning newspaper (in print or online), or TV news program was formatted by a graphic designer or broadcast designer. The book or magazine, you read as you commute to work are designed by graphic designers, and illustrated by artists and photographers. The logos, letterheads and brochures you see at work present visual

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images that enhance the written messages you receive and were also created by graphic artists. Indeed, the type fonts used in these documents were developed by graphic artists. Our society depends upon the work of graphic artists to make our products and messages interesting and attractive. Virtually all areas of commerce and communications use graphic artists. Graphic art is a necessary business sector for the American economy.

Because graphic art is so integral to the American economy, the graphic art industry is uniquely vulnerable to copyright infringement. Protecting the creative works of graphic artists should be a vital, necessary, integral part of U.S. law. Graphic artists' livelihoods depend on their ability to claim authorship of the work they produce, and to control and set fees for use of their works in the marketplace. The ability to sell or license limited usage, or limited rights, to a creative work for a fee is not only an issue of basic fairness; it is the economic essence of copyright law that sustains the productivity of American creative professionals.

All of these changes and provisions that we've asked for in this Comment Letter will not help visual creators unless we have Small Value Copyright Claims Court as redress for infringement of our work.

Respectfully submitted,

Lisa Shaftel, National Advocacy Liaison

Haydn Adams, President

Tricia McKiernan, Executive Director

ABOUT THE GRAPHIC ARTISTS GUILD

In the course of its 48-year history, the Graphic Artists Guild has established itself as the leading advocate for the rights of graphic artists on a wide range of economic and legislative issues, from copyright to tax law. Through its publication, *Graphic Artists Guild Handbook: Pricing & Ethical Guidelines* (now in its 14th edition), the Guild has raised ethical standards in the industry, and provides an invaluable resource on pricing guidelines and information that is relied on by both artists and clients.

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The Guild also provides a wealth of services and benefits for its members, including educational programs, discounts on a multitude of products and services, a legal referral network, and grievance handling. The Guild's website offers up-to-date information on Guild activities, updates on advocacy issues, members' portfolios, individual chapters, and tools and resources for all graphic artists.