BEFORE THE
U.S. COPYRIGHT OFFICE

Copyright Protection for Certain Visual Works	**Docket No. 2015-1**

COMMENTS OF THE COPYRIGHT ALLIANCE

Introduction and Background

The Copyright Alliance welcomes the opportunity to provide the U.S. Copyright Office with comments on how certain visual works, particularly photographs, graphic artworks, and illustrations, are monetized, enforced, and registered under the Copyright Act.

The Copyright Alliance is a non-profit public interest and educational organization that is supported by over forty entities comprised of individual artists and creators, as well as the associations, guilds, and corporations that invest in and support them. Besides these institutional members, we represent more than 15,000 individual "One Voi©e Artist Advocates" who give their personal time and creativity to support our work.

Among the diverse types of copyright owner and creator groups represented by the Copyright Alliance are many of the most vibrant visual art membership organizations in the United States, including the American Photographic Artists, the American Society of Media Photographers, the Graphic Artists Guild, the National Press Photographers Association, and the Professional Photographers of America. Additionally, the Copyright Alliance represents Getty Images, a leader in stock imagery licensing, as well as a wide

array of organizations and companies that regularly engage in uses and licensing of visual works—publishers, journalists, filmmakers, record labels, and others. In representing individual creators, major licensing entities, and users of visual works, the Copyright Alliance is in a unique position to provide a balanced perspective on the challenges and opportunities presented by the digital world to both creators and consumers of visual imagery.

While all creators face challenges in the digital environment, visual artists face specific challenges due to the nature of their works, how they are used, and public perceptions about both the value of imagery and the various legal issues related to the use of imagery. Image licensing is a growing business. At the same time, more amateur photographers are taking photographs than ever before.[1] Professional creation of images continues to play a vital role in capturing our experiences and understanding our world, while driving the technical innovations related to image capture, meta-tagging, and distribution that benefit the general public.[2] Likewise, amateur photography drives social media uses and allows individuals to share their experiences with friends and family in new, interactive ways.

At the same time, the livelihoods of professional visual artists are being threatened in a variety of ways:

- Existing registration procedures are not optimized for visual imagery. This leads to many artists electing to not register their works.
- Visual works are more easily infringed online than any other type of work, due to the ease in which images may be uploaded or downloaded, the ubiquity of services that automatically strip out metadata, and the availability of right-click copy and save functionality.

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[1] COORDINATION OF EUR. PICTURE AGENCIES, IMAGE PROVIDERS CALL FOR BETTER PROTECTION OF CREATIVE WORKS ONLINE 3 (2015) [hereinafter "CEPIC"] ("[I]n the first 170 years of photography up to the year 2000, it is estimated that 85 billion images were taken. In 2014 alone, thanks to an estimated 7.3 billion camera phones, almost 1 trillion photos were taken.").
[2] *Id.* at 4.

- High barriers exist to effective enforcement of copyrights for visual works because the costs of bringing a successful enforcement action under federal law typically exceed the damages available for infringement of an individual work.

Copyright exists in part to sustain professional authorship. The Copyright Office should keep this principle in mind as it examines these issues and focus in particular on those challenges that impair the ability of visual artists to sustain a livelihood.

The public benefit of copyright lies not just in having access to content, but in having access to high quality content created by professional artists who develop their craft, invest in their skills, and build an audience over time.[3] It is thus important that copyright acts to sustain a professional creative class of artists. While new technologies have enabled a new class of user-generated content, the investments in equipment, production value, and training that go into producing professional quality visual works necessitates a robust copyright regime that supports professional creators.[4] Likewise, innovative companies like Getty Images invest resources in developing tools to connect high quality images with users—including its new Embed program which allows non-commercial users to embed many Getty images on their websites, blogs and other online venues for free.[5]

We urge the Copyright Office to bear in mind the important contributions of professional creators and distributors of imagery as it evaluates the ways in which the registration, monetization, and enforcement of copyright in visual works can be improved.

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[3] Jon M. Garon, *To Promote the Progress: Incentives, Exclusives, and Values to Build a More Perfect Creative Culture*, 40 OHIO N.U.L. REV. 467, 494-95 (2014) ("Since the public ultimately benefits most from those works that develop the critical new ideas most effectively and those that influence the aesthetics of their age most powerfully, the focus should be on the professional authors who can invest the time and effort to hone their crafts and build a powerful body of work.").

[4] Sean M. O'Connor, *Creators, Innovators, and Appropriation Mechanisms*, 22 GEO. MASON L. REV. 973, 989-91 (2015) ("Thus the issue is not whether people will create new songs and other content without appropriation mechanisms such as copyright, but whether they can *produce* them to the degree we (and they) would like.").

[5] GETTY IMAGES EMBED PROGRAM, http://www.gettyimages.com/embed (last visited July 13, 2015).

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

Visual artists are facing challenges to their ability to exploit their works commercially because of a variety of emerging practices that fail to respect their copyrights.

Full-size image search. Full-size image search is becoming a substitute for the licensing of images online and is reducing incentives for entities such as magazines, newspapers, and website creators to commission or license works.[6] Some search engines no longer merely display tiny thumbnail previews that lead to the source-website, but rather, display full-size images in high resolution and use images in contexts other than just related to search.[7] This is not only a challenge for visual artists but also, as discussed below, for users and licensors of images as well as for the general public at large.

There is currently a $7.5-8 billion market for visual content commissioned or licensed by users. Many of the customers licensing works are small and medium-sized businesses that depend on powerful imagery to engage audiences and build traffic to their sites.[8] Search and aggregation services that frame and in-line link full-size images undermine the investments in creating and distributing visual works.[9] They undercut the marketing and search engine optimization efforts of licensed users of images by steering traffic away from their sites and instead keeping users within the search engine results. And they divorce such works from the broader context that users and licensors place them in, to the ultimate detriment of the general public.

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[6] *Press Release: CRC, Copyright Alliance, host Briefing on Challenges to Photography in the Digital Age*, COPYRIGHT ALLIANCE (Apr. 30, 2014), http://copyrightalliance.org/2014/04/press_release_crc_copyright_alliance_host_briefing_challenges_photography_digital_age ("Search results have gone from providing direction to, to becoming a complete substitution for licensed content. Once an image is displayed in high resolution large format, there is nothing more to share from the content owner.").

[7] CEPIC, *supra* note 1, at 14.

[8] *Innovation in America (Part I): The Role of Copyrights: Hearing Before the Subcomm. on Courts, Intellectual Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 52 (2013) (statement of John Lapham, Senior Vice President, General Counsel of Getty Images).

[9] CEPIC, *supra* note 1, at 5.

Public display and public distribution. Likewise, in-line linking and framing allows companies to exploit images and, at least in some jurisdictions, circumvent liability.[10] Though the public display right deals with the right to transmit or otherwise communicate to the public by means of any device or process, in-line linking and framing allows a site to make high resolution images available without even relating back to the original site authorized to display the image.[11]

Expansion of Fair Use. The doctrine of fair use has in recent years been read expansively by courts to excuse uses traditionally licensed by visual artists, such as the creation of derivative works. For example, the Second Circuit said in *Cariou v. Prince*, "[t]he law imposes no requirement that a work comment on the original or its author in order to be considered transformative, and a secondary work may constitute a fair use even if it serves some purposes other than those identified in the preamble to the statute."[12] By validating the appropriation of entire photographs to create new works that in many cases add very little original expression or commentary, the Second Circuit drastically undermined visual artists' ability to explore new markets for their works—instead awarding those markets to others who took no role in the creation of the original work.

All of these activities are damaging visual artists' ability to monetize and license their works, especially on the Internet.

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[10] *Id.* at 6 ("To an increasing extent, framing is replacing the upload of content like images. Rather than pay to license, store and display large-size images, Google and others simply take what they want via framing and thus avoid the costs."); *see* Perfect 10 v. Amazon.com, Inc., 508 F.3d 1146, 1159 (9th Cir. 2007) ("[T]he owner of a computer that does not store and serve the electronic information to a user is not displaying that information, even if such owner in-line links to or frames the electronic information.").
[11] COPYRIGHT ALLIANCE, COMMENTS IN RESPONSE TO STUDY ON THE RIGHT OF MAKING AVAILABLE; REQUEST FOR ADDITIONAL COMMENTS, 3-4 (2014) (quoting Nancy Wolff (PACA: Digital Media Licensing Association)).
[12] Cariou v. Prince, 714 F.3d 694, 706 (2d Cir. 2013).

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

Most visual artists simply cannot enforce the copyrights in their works. Visual works are, by their nature, a high volume-low individual value enterprise, meaning that most individual licensed uses are of relatively small economic value. This leaves creators of such works without recourse when their works are infringed because the costs of bringing a claim in federal court will almost always exceed the expected licensing revenues and damages which might be recovered. As the Copyright Office noted in its Small Claims report, few attorneys will take cases expected to yield damages less than $40,000, leaving most infringements of visual works practically unenforceable.[13]

Even if a visual artist could afford to bring a federal copyright infringement case, visual artists may face challenges identifying alleged infringers or site operators. This is a result in part of the public Whois system for gTLD registrations and a completely unregulated proxy registration system.[14] Current efforts by ICANN to develop and implement an accreditation framework for proxy and privacy services are a step in the right direction.

Tools outside of litigation in federal court are likewise inefficient for protecting works of visual art online. For instance, the Digital Millennium Copyright Act safe harbors[15] have paved the way for a diverse marketplace of online services, but have left copyright owners without efficient and effective remedies when their works are posted online without authorization. Although the safe harbors were designed to preserve "strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked

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[13] U.S. COPYRIGHT OFFICE, SMALL CLAIMS REPORT 25 (2013) ("The median for the responses thus indicated that an attorney would not file an uncomplicated copyright case in federal court unless the value of recovery was in the $40,000-$49,999 range.").

[14] *See, e.g., Stakeholder Perspectives on ICANN: The .Sucks Domain and Essential Steps to Guarantee Trust and Accountability in the Internet's Operation: Hearing Before the Subcomm. on Courts, Intellectual Prop., and the Internet of the H. Comm. on the Judiciary*, 114th Cong. (2015) (statement of Steven J. Metalitz, Counsel, Coalition for Online Accountability).

[15] 17 U.S.C. § 512 (2011).

environment,"[16] courts have construed them in ways that often give service providers incentives to turn a blind eye to potential infringement.[17] Individuals in particular cannot find relief through the DMCA given the immense scale of infringement and the speed at which visual works can be copied and uploaded to sites even after they have been subject to a DMCA notice.

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

Registration of copyrighted works provides many important benefits to creators and users of works alike, such as providing important remedies to authors and creating a more robust public record of copyrighted works. In order to maximize the benefits to the public, registration of works should be made easy and seamless for visual artists.

First, the registration process itself and the deposit requirements do not easily integrate into an artist's workflow. Many professional visual artists can easily create thousands of works a week. The current registration and deposit system imposes time consuming obligations on such artists and requires the transmission of many terabytes of data should an artist decide to register all of the works he or she might produce in a year. While group registration is an attractive option for high volume creators that are interested and able to complete a submission,[18] basic group registration is currently unavailable electronically, and it is not available at all to artists other than photographers, such as graphic artists and illustrators. Moreover, group registration is not always the best alternative for registrants who would prefer to take advantage of the benefits of single

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[16] H.R. Rep. 105-796, 105th Cong., at 72 (1997) (Conf. Rep.).

[17] *See, e.g.* Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 35 (2d Cir. 2012) (finding §512(m) is incompatible with a broad common law duty to monitor or otherwise seek out infringing activity based on general awareness that infringement may be occurring); Capitol Records, LLC v. Vimeo, LLC, 972 F. Supp. 2d 500, 523-24 (S.D.N.Y. 2013) (adopting the reasoning in *Viacom* to hold that plaintiff did not establish willful blindness of specific instances of infringement at issue despite strong evidence that defendant adopted a policy to ignore the legality of content on its site).

[18] AM. SOC'Y OF MEDIA PHOTOGRAPHERS & PROF'L PHOTOGRAPHERS OF AM., JOINT COMMENTS IN RESPONSE TO COPYRIGHT OFFICE FEES 2012-2013 NOTICE OF PROPOSED RULEMAKING 3 (2012).

work registration to maximize protection and potential remedies, and facilitate searchability of their works/registrations.

Additionally, rising registration fees are burdensome on independent visual artists who generally produce a high volume of works but earn small incomes.[19] Photographers, graphic artists, and illustrators typically retain the copyrights to their work and make their income through exclusive and non-exclusive licenses. An affordable registration system is critical to these visual artists, who need to register their works to have any hope of a remedy in the event they are infringed.[20]

These challenges are magnified by the fact that visual artists have to distinguish between published and unpublished works when registering,[21] a distinction that is currently not well-defined and can be confusing for visual artists whose work product is voluminous. For photographers, who often create hundreds of works in a single session, this type of fee schedule makes registration unnecessarily challenging and time consuming. It is also impractical for illustrators and graphic designers, who often create and share with clients many rough drafts and revisions from the beginning of a project to the final, published illustration or design.[22] There are many reasons why graphic artists should retain the rights to the preliminary works;[23] however, the inability to register final art and all other art on the same project together makes this task more onerous.

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[19] AM. PHOTOGRAPHIC ARTISTS, COMMENTS IN RESPONSE TO COPYRIGHT OFFICE FEES 2012-2013 NOTICE OF PROPOSED RULEMAKING 1 (2012) ("The overwhelming majority of professional photographers are one-person businesses and earn well less than six figures, with many having incomes of $50,000 or less.").

[20] GRAPHIC ARTISTS GUILD, COMMENTS IN RESPONSE TO COPYRIGHT OFFICE FEES 2012-2013 NOTICE OF PROPOSED RULEMAKING 3 (2012).

[21] Copyright Office Fees Rule, 37 C.F.R. § 201.3 (2015).

[22] GRAPHIC ARTISTS GUILD, COMMENTS IN RESPONSE TO COPYRIGHT OFFICE FEES 2012-2013 NOTICE OF PROPOSED RULEMAKING 3-4 (2012).

[23] *Id.* For instance, it is often the case that clients who mistakenly presume they have the right to use preliminary drafts or alternative works not accepted for final implementation infringe by subsequently using preliminary drafts and rejected art for other projects. Additionally, by retaining rights to their preliminary works, it allows graphic artists to charge clients less for the project because the artists can repurpose some preliminary works for other projects.

The deposit requirements further add to the burden of registration.[24] Whether or not the current "best edition" requirements determined by the Library of Congress[25] are still necessary for its archival and library purposes, they are not necessary for copyright registration purposes and are not compatible with creation in the digital age. Considering the high volume of works now being created in digital formats by photographers, graphic artists, and illustrators, it is not sensible to still require physical copies for registration.

Finally, the Copyright Office itself faces obstacles in addressing these challenges. Because the Copyright Office lacks autonomous decision-making power over the planning and implementation of the systems used to facilitate registration, it has been unable to implement an optimal electronic registration system.[26] Infrastructure challenges are exacerbated by the limited funding available to the Copyright Office and the high rate of vacancies in registration staff.[27] The result is significant delays in processing registration claims—8.2 months for paper applications and 3.3 months for electronic applications.[28]

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

One of the more significant challenges for those wishing to make legal use of visual works is finding copyright ownership information. Visual works do not generally have visible authorship information, and online platforms routinely delete attribution and metadata containing such information. A lack of authoritative image search also makes finding ownership information challenging.

Even if ownership is known, there is frequently a lack of education informing users about proper practices on obtaining licensing or permission and engaging in fair

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[24] 17 U.S.C. § 407 (2011).
[25] 37 C.F.R. § 202.19(b); 37 C.F.R. § 202 app. B.
[26] Sandra M. Aistars, *The Next Great Copyright Act, or a New Great Copyright Agency?: Responding to Register Maria Pallante's Manges Lecture,* 38 COLUM. J.L. & ARTS 339, 343 (2015).
[27] *Id.* at 343-44.
[28] *Oversight of the U.S. Copyright Office: Hearing Before the Subcomm. on Courts, Intellectual Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 39 (2014) (statement of Maria Pallante, Register of Copyrights, U.S. Copyright Office).

uses. Because fair use is inherently an *ex post* determination built on flexibility and fact-specificity, it can create uncertainty for potential users. And while several organizations have attempted to create more uniformity and certainty in the fair use doctrine by publishing "best practice" documents, these documents are often arrived at absent consultation with visual artists and other copyright owners whose works are being used, thereby running the risk of being more aspirational than descriptive.[29]

This point was recently highlighted by the process used to create the College Art Association's *Code of Best Practices in Fair Use for the Visual Arts.*[30] Although it was ostensibly created "with and for the visual arts community," it lacked input from professional visual artists and the organizations that represent them. While numerous groups and individual artists had sought to offer assistance in the development of these guidelines, their efforts were rebuffed. When members of the National Press Photographers Association raised this issue at a panel discussion with representatives of the College Art Association, they were invited to submit comments on the document after it was already published. In response, six visual artist membership associations —the National Press Photographers Association, American Photographic Artists, the American Society of Media Photographers, the Graphic Artists Guild, the Digital Media Licensing Association, and Professional Photographers of America—submitted a thoughtful letter outlining some of their members' views and concerns.[31] Despite having solicited the letter, the College Arts Association has failed to acknowledge it or to open a dialog. Indeed, members of academia who advise this organization have stated publicly that they need not include organizations of professional artists in their discussions.[32]

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[29] U.S. COPYRIGHT OFFICE, ORPHAN WORKS AND MASS DIGITIZATION 45 (2015).
[30] COLL. ART ASS'N, CODE OF BEST PRACTICES IN FAIR USE FOR THE VISUAL ARTS (2015), *available at* http://www.collegeart.org/pdf/fair-use/best-practices-fair-use-visual-arts.pdf.
[31] Letter from Mickey H. Osterreicher, General Counsel, Nat'l Press Photographers Ass'n to Janet Landay, Program Manager, Fair Use Initiative, Coll. Art Ass'n (Mar. 12, 2015), *available at* https://graphicartistsguild.org/general/CAABestPracticesLetter_03-12-15.pdf.
[32] BRANDON BUTLER, MICHAEL CARROLL & PETER JASZI, COMMENTS IN RESPONSE TO NOTICE OF INQUIRY ON ORPHAN WORKS 8 (2014) ("By definition this intra-community

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

The Copyright Alliance would like to reiterate the profound importance of modernizing the Copyright Office and welcomes the recent discussion draft of the CODE Act circulated by Representatives Marino and Chu in the House of Representatives, which outlines one possible way the operational inefficiencies of the Copyright Office might be reduced.[33] In many ways, addressing organizational obstacles in the Copyright Office through this or an alternative modernization approach is a necessary first step in addressing issues facing not only visual artists and the consumers of their works, but all authors, users and consumers of copyrighted works.

Conclusion

We thank the Copyright Office for examining the challenges facing visual artists and welcome future opportunities to support its efforts.

Respectfully submitted,

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Legal Fellow

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deliberative project differs fundamentally from the process of negotiating among groups with adverse interests.”).

[33] Copyright Office for the Digital Economy Act of 2015, H.R. ____, 114th Cong. (2015) (discussion draft).