US Copyright Office
Visual Works Comments due July 23, 2015

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

- First, there are so many photographers and so many images available that it is hard work for a photographer to attract business and sell images. Second, the flood of available images, and the willingness of many casual photographers to sell work cheaply or give images away drives prices down dramatically. Third, since many photographers don't understand contracting and licensing, prevailing contracting standards are not very favorable to photographers except for the most established photographers. Fourth, the rampant theft of images undermines the efforts of photographers to sell their images to honest buyers. Because there is no real economic deterrent to most image copyright infringement, many images are used without permission and without payment to the copyright owner, depriving photographers of licensing fees that should be earned.

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

- Photographers have to spend time and money to stop image theft and are not likely to recover their costs. Few photographers have the resources to pursue most instances of theft. Knowing that their efforts will neither recover their cost nor decrease the incidence of theft discourages many photographers from enforcing their rights, especially once photographers learn that those who steal suffer no penalties that would stop them from stealing again. This particularly applies to images that have not been registered, where the potential recoveries are so small that it is cheaper for dishonest users to steal and pay the occasional penalties than it would be to pay even the miniscule licensing fees that most photographers can charge for their work. Photographers lose money pursuing their rightful licensing fees for unregistered images, and trying to enforce rights even for registered images is time-consuming, uncertain, and potentially costly. Few photographers understand legal processes very well and most find legal action intimidating.

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

- The most significant challenges are efficiency, administrative burden, timeliness and in some instances, cost.
- Photographers typically generate thousands of images each year and may have more than a hundred images posted on-line at any time to promote their business. Photographers need to refresh their on-line portfolio continuously resulting in potentially thousands of images exposed to on-line theft over several years. The logistics of registering these thousands of images is an administrative headache. Many images are not immediately posted or given to clients, and so not exposed to theft; these images are suitable for periodic batch registration. Other images are posted or distributed to clients immediately, so these images need to be registered soon after creation. Keeping track of which images are being saved for batch registration and which are submitted for immediate registration is an administrative burden.
- Unless images are periodically registered in relatively large batches, registration is too expensive. Registering individual images as they are created or posted on-line would quickly become uneconomical, at $55 per registration, for active photographers.

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?

- Not being a buyer I can't really say, but if I were buying from anyone other than the photographer or a large stock agency I would be concerned about inadvertently contributing to copyright infringement. Sometimes infringement is a result of poor training or sensitivity of junior staff in large organizations who fail to appreciate that they are infringing, but companies can certainly train their people if they choose. Personally, I find this the least troubling type of infringement because reputable organizations will generally make good on the actions of their employees if they are notified of the issue.

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

- Unless the cost of registration can be greatly reduced for registering single images as the images are produced, it is too expensive for photographers to protect all their work on a timely basis. Periodic batch registration is fine, except that some images are likely to have been "published" while the batch is being accumulated (the definition of "published" is challenging in itself). Registering some images in batches and some as they are published is unwieldy and can be expensive. Saving all images for periodic batches leaves any images in these batches, which have been posted on-line vulnerable to theft without the economic protection registration provides. Registering all images from a given calendar period (e.g., quarterly) is the most economical solution for most photographers but it leaves the photographer exposed to significantly reduced damage awards.
- Another problem with periodic batch registration is that if the batches are too large, there is a risk that any damages awarded may be "equalized" by the court based on the number of images in a batch, significantly reducing a photographer's damage award should the photographer prevail in court. That argues for very frequent, very small batches, driving up the registration cost.
- Requiring separate registration for published vs. unpublished images seems unnecessary and makes registration much more cumbersome. The current law does not seem to be supportive of today's environment, and should be updated.
- Perhaps an annual "open" registration process could be developed, where photographers could open a registration for a fee and then add images continuously throughout the year as the images were produced.
- Without much more significant economic costs to infringers, particularly willful repeat offenders, image theft will never get better. Short of increasing the economic penalties across the board (which photographers would certainly welcome) or criminalizing willful, repeated image theft, dramatically increasing copyright registration may be the most useful thing the Copyright Office could do to help photographers. This could change the economic consequences for infringers, and if coupled with a straight-forward administrative claims process that photographers could pursue, would both discourage willful infringement and improve the copyright owners' chances of collecting damages that would justify enforcing their rights. The registration process itself is easy enough to use, but the cost of registering hundreds of individual images is prohibitive, and separating published images from unpublished images, considering the ubiquity of on-line posting, adds difficulty that seems to serve no useful purpose.

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