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July 23, 2015

Submitted By Online Submission Procedure

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

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

Dear Register Pallante:

I. Introduction

These comments are submitted on behalf of the Digital Media Licensing Association (formerly the Picture Archive Council of America) ("DMLA"), responding to the Copyright Office's April 24, 2015 Notice of Inquiry concerning copyright protection for certain visual works, including photographs. DMLA also wishes to express its general support for the independent submissions from other visual art associations, including the American Society of Media Photographers (ASMP), National Press Photographers Association (NPPA), Graphic Artists Guild (GAG), Professional Photographers of America (PPA), and the American Photographic Artists (APA), to the extent their responses are consistent with the comments expressed herein.

DMLA has a long-standing interest in working with the Copyright Office to develop solutions to the challenges faced by digital image creators including photographers, videographers, graphic artists, and illustrators, and those who represent their licensing interests, and appreciates the opportunity to provide comments on the subject of this Notice of Inquiry. The digital environment would be sterile and empty without professional images, videos, and illustrations, as either a text-only environment or a world of only amateur imagery would not provide the vital and vivid content that enriches our lives and informs our cultures. Yet it is the visual content creators and their licensing distributors who are facing some of the most severe

copyright and monetization challenges in the digital environment, which threatens both their economic and creative livelihoods.

II. About the Digital Media Licensing Association

DMLA was founded in 1951 as the Picture Archive Council of America, Inc. ("PACA") to represent the interests of those who create and distribute works of visual art – including photographs, footage, animation, and illustration (collectively "images"). Today its members include more than 100 companies and individuals worldwide who are engaged in both image creation and distribution for the purpose of commercial licensing. One of DMLA's primary purposes is to actively advocate for strong copyright protections on behalf of its members.

DMLA, through its members, collectively handle the licensing of hundreds of millions of images, a number that increases on a daily basis. As licensing is now almost exclusively handled in a digital environment—where professional images can be searched, downloaded, and licensed with a few keystrokes—members have real and substantial concerns regarding the economic impact of copyright infringement and technologies that are implemented to sidestep legitimate licensing. While infringement of content made available for licensing is nothing new, even when images were offered in slide format via catalogs, the magnitude of the infringing activity and the real economic harm to image creators and distributors has increased exponentially in the digital environment. Reforms are necessary to protect the interests of image professionals whose contributions are integral to both our economy and our culture. A fair and robust copyright system that protects the livelihood of image professionals and their representatives is of paramount importance.

III. Subjects of Inquiry

1. Challenges Related to Monetizing and/or Licensing Images

There are a number of challenges facing DMLA members relating to monetizing and licensing images. Image distribution and licensing must exist in the digital environment, as no one can or wants to go back to the day where publishers searched through file cabinets for original photographs. Members have made significant investments in developing searchable, user-friendly online databases of images, offering immediate access to diverse image libraries under a variety of licensing models to provide appropriate and licensable images to enhance licensees' products and services. Despite the ability of these users to access many millions of affordable licensable images, too frequently images are acquired without any regard to copyright,

or any intent to license from the owner, because of the ease in which any image can be perfectly copied and re-used once it is initially made available in a digital environment. Coupled with the inefficiency and difficulties of copyright enforcement, described more fully below, many uses that would otherwise be licensed uses are done without any compensation to the image distributor or creator. The loss of income has never been formally calculated, but samplings of commercial websites by some companies with image recognition technology have found the use of unlicensed content to be as high as 90%.

In addition to the ease of what is known as "right-click licensing," the increased use of software code by technology companies to avoid legitimate licensing threatens the image licensing market as a whole. The exclusive right of display under 17 U.S.C. § 106(5), which allows a copyright owner or agent to authorize the public display of a copyrighted work, is in jeopardy in the digital environment due to the increased use of HTML techniques known as "framing," "embedding," and "inline linking." In essence, once an image is published online for the first time, the creator loses any future ability to monetize or control the use of that image.

Using a line or two of simple HTML code, companies can populate entire websites with content they do not own or license and generate substantial ad revenue from posting the content, all without any economic benefit to the content creators or their authorized distributors. Inline linking and embedding allow these companies to incorporate an image into their website by pulling it from its hosting site while blocking all other content from its original location. The image is thus perceived by a visitor to the company's website as being a part of that company's website along with all the other content being perceived, rather than a part of the unreferenced hosting site. The website that embeds images receives all the benefit of the display, yet the image owner receives no compensation and has no legal recourse. This display of a full-size image out of context from the hosting site takes full advantage of the aesthetic quality of the visual content and is purposely designed so the visitor will not leave the site or be redirected to the site that technically hosts the image.

This abuse of the display right grew out of the expansion of the "server test" established by the Ninth Circuit in *Perfect 10, Inc. v. Amazon.com, Inc.* and adopted by the Seventh Circuit in *Flava Works v. Gunter*, which misguidedly holds that a website only infringes the exclusive right of display if the copyrighted image is stored on the website's server, and then that copy is displayed on the website.[1] This interpretation of the public display right is inconsistent with Congress' intent and a clear misreading of the statute, which defines in § 101 the right to display

[1] *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1160 (9th Cir. 2007); *Flava Works v. Gunter*, 689 F.3d 754, 758 (7th Cir. 2012).

publicly as "to transmit or otherwise communicate... a display of the work... to the public by means of any device or process." The server test irrationally looks at where the image resides on a server rather than whether one communicates the work to the public "by means of... [a] process," in this instance, code.

At the time of the *Perfect 10* decision the images displayed as part of Google's image search service were arguably a part of a true image search function, as the images were initially displayed as thumbnails, and if the thumbnail was clicked on, the visitor was directed to the website and the full image was viewed in context to the original page hosting the image. Most damaging, in the eight years since the Ninth Circuit's ruling, search engines have vastly increased the size of embedded images and redesigned search result pages such that they have effectively supplanted the websites actually hosting and showing the content. The high-resolution images are not accompanied by a clear reference to their source or to the copyright holder, and can be viewed and downloaded without visiting the image in its original context. Google's redesigned search results page has resulted in a substantial decrease in web traffic to the content providers – one site noted a 78.69% decrease in traffic from Google Images results in the five months since the redesign was launched in January 2013.[2] Google's competitors, such as Bing and others, have followed suit with similarly redesigned image search pages.

The unfortunate result of this misinterpretation of the display right is that a website can now circumvent the need to obtain a license by implementing a technological sleight of hand. Those viewing a website are unlikely to realize the difference between an image shown and hosted by the same party and an image shown and hosted by different parties. Companies who wish to license images depend on web traffic to drive advertising revenue, and visual artists and licensors rely on these companies to maintain the market value in their copyrighted works. As a result of full-size image searches, licensees are deprived of the opportunity to derive the full benefit of properly-licensed images and licensors are deprived of potential future income from these disenchanted clients, while the search engines retain a benefit without compensating either party. Google Images' position as the largest distributor of images has resulted in the popular public assumption that images can be used without permission from the owner or authorized distributor. Without clarification that this mere technological distinction is a violation of the exclusive right of display, the lack of copyright source information and the ability to seamlessly copy images without licensing on image search will continue to cause image distributors and visual artists to lose control of their images and potential income from licensing. In light of the Supreme Court decision in *ABC v. Aereo, Inc.*, which in analyzing the public performance right

[2] Lauren Margolis, *How the New Google Images is Changing Traffic to Your Site*, PHOTO SHELTER (May 7, 2013), http://blog.photoshelter.com/2013/05/new-google-images-interface-causes-78-drop-in-referral-traffic-to-your-site/.

emphasized the commercial objectives of the alleged infringer rather than the technological means employed, the public display right should not be interpreted on the basis of ever-changing technologies invisible to the reasonable observer and intended to circumvent legitimate and traditional licensing streams.[3]

Another barrier to monetizing the licensing of visual works involves the Digital Millennium Copyright Act ("DMCA") safe harbor, which has been interpreted by recent court decisions such as *Viacom v. YouTube* to discourage cooperation with image distributors to filter infringing content from sites.[4] In apparent fear of obtaining too much knowledge, sites would rather be ignorant of rampant infringing activity than to cooperate with legitimate owners. The problem could be improved in part if sites were rewarded for cooperating and were not in fear of losing immunity from monetary damages under the DMCA. Immunity should be conditioned upon taking reasonable measures to cooperate with content providers to filter infringing content located on sites primarily dedicated to posting infringing content, instead of turning a blind eye to this type of activity.

Another challenge for many DMLA members is the expansion of the fair use doctrine and the reliance upon the doctrine by educational institutions over legitimate licensing, even when images are readily available for license. Many DMLA members have spent years building image libraries with a curated and thorough selection of subject matter relevant for educational publications and institutions, in subjects such as art, history, social sciences, nature and science. These companies rely on educational publishers and institutions to license images to maintain the collections and to compensate the image creators that devote themselves to these specialized topics. Many institutions are now educating faculty to encourage using content without permission rather than licensing, and to rely more heavily on the doctrine of fair use, which permits in limited circumstances the use of copyrighted content without permission. For example, the recently published *Code of Best Practices in Fair Use for the Visual Arts* by the College Art Association was created without any input from image licensors or creators and encourages educators and faculty to use visual images without licensing regardless of whether licensable images are available.[5] This code, which has never been upheld by any court, undermines the ability of image visual artists and the companies that have built specialized libraries just to serve this educational community from legitimately monetizing content and thereby supporting their business model. It should be clear that fair use as defined by § 107 of the Copyright Act requires

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[3] *See* Shannon McGovern, *Aereo, in-Line Linking, and A New Approach to Copyright Infringement for Emerging Technologies*, 64 Cath. U. L. Rev. 777 (2015); *American Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014).
[4] *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012).
[5] COLLEGE ART ASSOCIATION, CODE OF BEST PRACTICE IN FAIR USE FOR THE VISUAL ARTS (2015), *available at* http://www.collegeart.org/pdf/fair-use/best-practices-fair-use-visual-arts.pdf.

the balancing of four factors, and merely because a use of visual work is within a non-profit educational institution does not automatically deem the use a fair use. There are many legitimate uses within the educational arena that should be licensed from the content creator.

Also challenging to visual artists and their distributors is the expansion of fair use with respect to appropriation art. Instead of giving some weight to all four factors under fair use, some courts, particularly the Second Circuit after *Cariou v. Prince*, look only at whether the infringing use is transformative under the first factor by asking whether the use serves a different purpose.[6] Because image licensing is based on the ability to license the same image for many different types uses, these cases undermine the licensing economy of images and disregard the substantial market harm and harm to the creator. Images can be licensed for derivative use, including art reference, and these cases ignore the fourth factor to instead encourage wholesale appropriation of visual art.

2. Challenges Related to Enforcement

Most websites are designed in such a way that individuals may easily right-click and copy image files. The belief on the part of infringers that most uses will never be caught, coupled with the knowledge that most copyright owners will not attempt to enforce their rights, contributes to an exceedingly high rate of infringing uses on the Internet. Even with the increase of image recognition technologies that can assist DMLA members in identifying infringing websites, the high cost and difficulty of enforcing copyright in federal court acts as a nearly absolute barrier to enforcement and thereby encourages infringement. The infringing uses that are found using such technology frequently cannot be resolved without resort to litigation, often because the infringer refuses to respond or pay a fair licensing fee. Due in part to the difficulty in registering the high volume of visual content that visual artists create, enforcing copyright is generally prohibitive in terms of costs, personnel, and time. The culture of pervasive copyright infringement on the Internet is inextricably tied to the challenges related to a visual artist's ability to realize income from the licensing of his or her images.

The most significant challenge to effective copyright enforcement on behalf of photographers, videographers, graphic artists, and illustrators involves the high costs of bringing a federal court action and the protracted litigation process. Furthermore, because Internet use is widespread throughout the world and many infringers may be of foreign nationality, American

[6] *Cariou v. Prince*, 714 F.3d 694, 707-8 (2d Cir.) cert. denied, 134 S. Ct. 618, 187 L. Ed. 2d 411 (2013) ("[W]e... examine how the artworks may 'reasonably be perceived' in order to assess their transformative nature. ... [Whether they] have a different character, give... a new expression, and employ new aesthetics with creative and communicative results distinct from [the original].").

visual artists have no opportunity to enforce their copyrights against these foreign defendants. The difficulty is further compounded by the reality that many visual artists are producing high volume low value works, where even the cost of drafting and sending a cease and desist letter is often prohibitive. Because of the difficulty in registering images, most visual images are not registered, thereby limiting the potential remedy to actual damages with no possibility recovering statutory damages or attorney's fees. If actual damages are equated to a license fee, the cost of registering a work alone may exceed the license fee for many infringing uses.

The financial deterrents in bringing an infringement action include the costs of obtaining a court filing index number, attorney's fees, expert fees, document production and deposition costs. The economic value of copyright infringement actions, even when one is entitled to statutory damages and attorney's fees, is relatively low. It frequently does not make commercial sense to pursue an action unless there are numerous registered images infringed by a single infringer. The lengthy litigation process and the difficulty in finding attorneys willing and able to handle cases in which the economic value may be relatively limited compound these financial deterrents to visual artists. Strict jurisdictional requirements may also prevent a company or individual from being able to bring a claim in a local federal district, thereby denying them the potential benefit of working with an in-house or affordable local lawyer.

The DMLA supports the United States Copyright Office Copyright Small Claims initiative as reported by the Register of Copyrights in 2013. We submitted several responses to inquiries on this subject and hope that Congress will make copyright small claims a priority, because without any effective remedies for copyright infringement DMLA members and the copyright owners of the works they represent essentially have no enforceable rights. We understand that the small claims court implemented in the UK has resulted in increased image licensing, as users understand that there is recourse for the copyright owner if they do not pay a license fee.

The DMCA notice and takedown process presents additional challenges to securing significant and lasting remedies against the misappropriation of visual works. Despite the relatively simple process provided by the DMCA it is more often than not ineffective. Not only do many websites either ignore DMCA takedown requests or do not have proper procedures in place to handle such requests, the proliferation of infringements online vastly outpaces the capacity of both copyright owners and responding ISPs to make and respond to individual takedown requests. While the protections provided by the DMCA are appealing in principal to visual artists who are not seeking monetary relief for an infringement, the system is simply insufficient in light of the viral sharing culture of the Internet. Moreover the difficulty in monitoring potentially infringing websites, in particular the substantial resources necessary to

continually send notice and takedown letters for each particular instance of infringement is too burdensome for individual creators. Some websites even go so far as to refuse to take work down by claiming fair use without justification. The requirement that the visual artist must bring a federal lawsuit if a counter notice is filed is too burdensome and expensive to be practicable.

3. Challenges Related to Registration

The formalities of copyright registration are particularly burdensome for photographers and stock photo libraries responsible for large volumes of work, often produced on a daily basis. It would be prohibitive both in terms of personnel and monetary resources to register images on an individual basis. The process makes it difficult to protect images made available online via stock libraries, individual artists' websites, authorized end-users, and illegitimate sources. Image distributors have a history of attempting to assist contributors in efforts to register works prior to licensing. DMLA officers worked with the Copyright Office to establish registration practices for large volumes of work submitted by contributors. These practices were recently the subject of several litigations, with some courts refusing to uphold the registration practices of DMLA members following the advice of the Copyright Office. We are very pleased that the Ninth Circuit ultimately affirmed the authority of the Copyright Office to provide advice on registration practices and upheld the registrations in *Alaska Stock v. Houghton Mifflin Harcourt*.[7] The court noted in its opinion that:

> We are not performing a mere verbal, abstract task when we construe the Copyright Act. We are affecting the fortunes of people, many of whose fortunes are small. The stock agencies through their trade association worked out what they should do to register images with the Register of Copyrights, the Copyright Office established a clear procedure and the stock agencies followed it. The Copyright Office has maintained its procedure for three decades, spanning multiple administrations. The livelihoods of photographers and stock agencies have long been founded on their compliance with the Register's reasonable interpretation of the statute. Their reliance upon a reasonable and longstanding administrative interpretation should be honored. Denying the fruits of reliance by citizens on a longstanding administrative practice reasonably construing a statute is unjust.[8]

Nonetheless, the difficulties that brought DMLA members to the Copyright Office in the mid-1990s still exist, and the challenges to registering photographs remain.

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[7] *Alaska Stock, LLC v. Houghton Mifflin Harcourt Pub. Co.*, 747 F.3d 673 (9th Cir. 2014).
[8] *Id.* at 686.

Copyright enforcement would be improved if, together with the modernization of the Copyright Office as an independent executive agency, copyright owners could more readily register visual images using an API or system that integrates with their workflow. Even with regulations permitting group registration of photographs, it remains burdensome for photographers to register works they typically create in volume and may not know whether they have been published by licensing clients. Since group registration is limited to published works, the requirement that published and unpublished works be separately registered and the amount of detail that must be included with each image creates a substantial barrier to registration. The definition of a published work is also challenging for visual artists who often must submit images to clients or distributors for subsequent release or distribution. The uncertainty makes it difficult for registration to become an integrated part of a visual artist's business practice.

Even with the much-needed improvements to the group registration process, DMLA supports expanding group registration beyond photographers to other visual artists such as illustrators and graphic artists.

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

Those who wish to make legal use of visual works face challenges in terms of the general lack of familiarity with copyright law, the difficult process of locating authors or their representatives to secure a license, and the rapidly declining economic value of such licenses as a result of online search engine results.

The Copyright Office's online database is outdated and lacks and image-based search function. Because photographs, illustrations, and other visual works are often untitled or known by more that one title, the registration search feature is of little use to a party seeking the copyright owner of a particular visual work.

Many users do not understand copyright or the basis of image licensing and mistakenly believe that images found online are copyright free or in the "public domain." Because photographer credit is not a requirement copyright law, the identity of the copyright owner or distributor may not be readily available to the user, even if the user is looking to legitimately license the image. The metadata that is part of a digital image file and would contain information regarding copyright ownership or the distributor as the source for licensing is often stripped or modified as a result of standard software functions used in uploading images onto the web or other digital platforms, making it difficult for the user to reasonably locate the copyright owner.

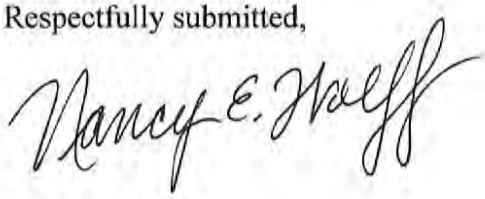
Visual image databases could be part of the solution, whereby using a reverse image search a prospective user could locate the owner or distributor of an image for licensing purposes. The organization PLUS is currently developing a visual registry of images for image search and identification. This registry could link to other registries to assist users in finding licensable content.

IV. Conclusion

DMLA believes an updated copyright registration system and a more economically affordable and speedy enforcement process are necessary to provide visual artists with effective copyright protections. We strongly support the Copyright Office for the Digital Economy Act ("CODE" Act) proposed in the House by Representatives Judy Chu and Tom Marino, to the extent it would establish the Copyright Office as an independent executive agency with the budget and independence needed to bring the registration process into the 21st Century. We also support the findings of the Copyright Office's 2013 report on Copyright Small Claims as a much-needed solution to the financial barriers to bringing federal court actions. A Copyright Small Claims Court will promote the goals of both visual artists and image licensing companies, and in fact promote amicable solutions over litigation.

We thank the Copyright Office for the opportunity to present these concerns and suggestions.

Respectfully submitted,



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