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Re: Docket Number 2015-1, Copyright Protection for Certain Visual Works, 80 Fed. Reg. 23054 (April 24, 2015)

Dear Ms. Rowland:

I write on behalf of the Digital Public Library of America (DPLA) in response to the Copyright Office's Notice of Inquiry regarding copyright protection for certain visual works.[1]

From its initial planning stages in 2010, DPLA was created to be "an open, distributed network of comprehensive online resources that would draw on the nation's living heritage from libraries, universities, archives, and museums in order to educate, inform, and empower everyone in current and future generations."[2] Since it was launched in 2012, DPLA has already facilitated free online access to more than 10 million cultural and scientific works from libraries and archives located across the United States. That collection includes more than 5 million images, including significant numbers of photographs and illustrations.

These comments respond to the Notice of Inquiry's fourth question, "What are the most significant challenges or frustrations for those who wish to make legal use of photographs, graphic art works, and/or illustrations?" Below we share two challenges and three proposals for the Office to consider that would benefit both creators and cultural heritage institutions such as DPLA by facilitating better communication about ownership of copyright in visual works.

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[1] These comments were prepared with the assistance of DPLA Legal Committee Member David Hansen, UNC Chapel Hill (affiliation for identification only).
[2] *History*, DPLA, http://dp.la/info/about/history/ (last visited June 25, 2015).

1) The Copyright System Does Not Meet Creators' or Cultural Heritage Institutions' Expectations

The first challenge is that that the current system of copyright protection is not matched to the expectations of the vast majority of creators of visual works, especially amateur and home photographers which now drastically outnumber professional creators of visual works. DPLA and our contributing libraries have a special interest in these works because they make up an important part of our collection. Because copyright owners of these works are often unaware or uninterested in asserting their rights, DPLA and its contributing institutions have difficulty identifying and locating owners to obtain permission or to make determinations about the public domain status of these works.

Libraries and archives have long preserved personal, home, and amateur visual works, and smartphones and digital cameras have led to a dramatic increase in the number of images produced and saved, many of which were never created with copyright incentives in mind. At over 250 billion photos and over 240 million uploads each day, Facebook is likely now the largest repository of photos in the world.[3] While some of those works are surely created with a commercial intent, many more are simply created to record personal experiences and share them with circles of friends or wider communities. It is true that some users are aware of their copyright interests and take them into account when sharing their work—for example, the creators of the more than 350 million Creative Commons licensed photos now available through Flickr.com[4]—but many more are seemingly unaware or uninterested in the rights that automatically attach to their visual creations.

While some users may not know or care about their copyright interests in these visual works, libraries and archives do. Digital preservation and access to personal and amateur visual works supports an important part of DPLA's mission. Among other things, these works can provide candid insights into our shared cultural history. In June, for example, DPLA highlighted collections of images in our collections that document camping in America in the early 20th Century.[5] The snapshots, coming from libraries and archives from New York to Minnesota to Arizona, show Boy Scouts and Girl Scouts camping from the early 1900s through to the 1950s. Photos show changes in social conventions over time, such as how Girl Scout uniforms changed from decade to decade, or how Boy Scouts and Girl Scouts responded to major historical events, such as the onset of World War II. DPLA is replete with other examples, and these collections

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[3] *A Focus on Efficiency*, (Internet.org White Paper, by Facebook, Ericsson and Qualcomm) (Sept 2013), http://internet.org/efficiencypaper

[4] *Explore / Creative Commons*, FLICKR.COM, https://www.flickr.com/creativecommons/ (last visited June 25, 2015).

[5] *Hit the Trail: Camping in America,* DP.LA, June 4, 2015, http://dp.la/info/2015/06/04/camping/.

will only grow as libraries and archives begin to acquire and provide access to proliferating number of images from social media platforms such as Facebook and Twitter.[6]

DPLA and contributing organizations face significant copyright challenges in providing digital access to these visual works. Identifying owners and obtaining permissions is nearly impossible for many personal photographs and candid snapshots. Many of those in the camping collections noted above are unaccompanied by any information about the creator at all. Even if creators are identifiable by name, they are often not locatable. Many are dead, raising complicated questions about whether rights were transferred to heirs, or perhaps escheated to the state. Because creators of many of these works never thought about the rights that they acquired in their visual works, they never made formal plans for succession of ownership.

Thus, as the Office undertakes this review, we urge it to consider whether creators, cultural heritage institutions, and the public at large would be better served by a system of protection that explicitly seeks to address the needs, expectations, and motivations of the incredibly large number of creators of these personal, home and amateur visual works, while appropriately accommodating those creators for whom copyright incentives do matter and for whom licensing and monetization are important.

2) The Challenge Lack of Copyright Ownership Information

The second major challenge is related to the first: visual works, particularly photographs, are difficult for libraries to use because dependable copyright status and ownership information is rarely available. Without that information, making determinations about public domain status, contacting owners to seek permission, and even making decisions about uses that rely on limitations and exceptions such as Section 108, is considerably more difficult.

DPLA and its contributing institutions spend considerable time and effort trying to determine the copyright status and ownership of works in their collections. Over the last year, DPLA and its partner the Europeana Digital Library developed a project to create a rights statement framework for more effectively creating and sharing metadata to communicate the copyright rights status of works in digital library collections.[7]

While projects like these are important, the resulting copyright information is inevitably incomplete. Separated by years and sometimes decades from the work's initial creation, without access to private contracts or information about how ownership transferred to third parties such as heirs, cultural heritage institutions are incapable of providing consistently reliable information about copyright status or ownership of every work in their collections. These efforts to retrace copyright ownership are also expensive; even this relatively modest DPLA-European project to develop a framework for communicating uniform copyright information required a $300,000

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[6] *See, e.g., NCSU Libraries developing toolkit to make it easier to collect and preserve social media,* NCSU LIBRARIES NEWS, Sept. 9, 2014, http://news.lib.ncsu.edu/blog/2014/09/09/ncsu-libraries-developing-toolkit-to-make-it-easier-to-collect-and-preserve-social-media/#sthash.ZKJepETP.dpuf.

[7] *Getting it Right on Rights,* DPLA.org, http://dp.la/info/about/projects/getting-it-right-on-rights/ (last visited June 25, 2015).

grant from the John S. and James L. Knight Foundation and relied upon countless volunteer hours from librarians and lawyers.

As the Office recognized in its recent *Orphan Works and Mass Digitization* report,[8] identifying rightsholders and obtaining permissions on a large scale is difficult, particular for photographs and other visual works.[9] While that report does explore options for mass digitization uses, the Extended Collective Licensing system that it proposes would be unworkable for the vast majority of personal, home, and amateur photographs and visual works, primarily because no Collective Management Organization could ever adequately represent the rights of such a group.

Instead, DPLA believes that the best solution for better facilitating legal use of all visual works is for the Office and Congress to encourage the development of a dependable registration and recordation system with as much ownership information as possible provided by those who are in the best position to supply it: creators and owners.

3) Proposals for Encouraging the Development of Better Public Copyright Information

The Office's recent studies of its registration and recordation systems are incredibly important. Visual works, probably more than any other category of works, would benefit from improved registration and recordation systems, and we are especially encouraged by efforts to upgrade the technical aspects of those systems.

Beyond that, policy changes should be considered to help encourage better sharing of copyright information. Because legal use of visual works is so sensitive to the provision of accurate copyright ownership information, visual works may present a good opportunity for the Office to study and propose pilot programs to evaluate how best to maximize the amount of dependable copyright information available to the public to facilitate rights clearance, licensing, and monetization for those creators for whom that is a goal.

a) **Study how to implement "new style" formalities,** with an eye toward creating a pilot program for implementation of formalities with visual works, ultimately allowing the Office to fully develop ideas about how to improve copyright information through formalities for all categories of works. While the Berne Convention prohibition on formalities necessarily influences the scope of such a study, there is a growing understanding that Berne does not prohibit all rules that encourage copyright owners to provide the public with information about their copyright assertions. [10] Ideas that might

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[8] U.S. COPYRIGHT OFFICE, ORPHAN WORKS AND MASS DIGITIZATION 51, (June 2015), http://copyright.gov/orphan/reports/orphan-works2015.pdf

[9] We note that the *Orphan Works and Mass Digitization* report proposals would do little for the types of mass digitization of visual works that would feed into DPLA. Work-by-work diligent searches of the type envisioned in the *Repor*t's legislative orphan works proposal are not feasible on a large scale, as the *Report* recognizes.

[10] *See, e.g.,* Maria A. Pallante, *The Curious Case of Copyright Formalities,* 28 Berkeley Tech. L.J. 1415 (2013); Christopher Sprigman, *Reform(aliz)Ing Copyright*, 57 STANFORD L. REV. 485 (2004); Jane C. Ginsburg, *The U.S.*

be considered in this study, to both ease burdens on users and incentivize creators and owners to provide more publicly accessibly copyright information, could include proposals for Congress to:

i) Limit access to remedies, such as injunctive relief, against users of works that were unregistered at the time of the users' first use;[11]
ii) Condition the validity of transfers (including transfers to heirs) on public recordation of transfer documents;[12]
iii) Provide that scope of fair use should be broader for use of unregistered works;[13]
iv) Encourage owners to timely assert their rights by clarifying that under the Copyright Act's statute of limitations, online distribution is not an ongoing, separate act of infringement from the initial reproduction, nor is it a continuing wrong that would extent the time in which one must assert rights by filing suit.[14]

b) Study more fundamental changes to the registration system to encourage more visual works creators to register their works. To encourage maximum use, registration should be available for as close to free as possible, available for creators to register works in bulk, and registration information should be available to the public in open, structured, data. Ideally this system would be supported by fees other than registration fees. The Office could explore other ways to develop low-cost systems of registration. For example, a supplemental registry that does not carry the full benefits of full registration, such as access to statutory damages and attorney's fees, but that is also less costly because registrations are not reviewed by Copyright Examiners. Such a registry would at least put the world on notice that the individuals or organizations registering those works have an interest in exercising whatever rights they hole, and would establish some public record of an ownership claim.

c) Develop programs that encourage entities such as DPLA and others that have an interest in developing copyright ownership and copyright status metadata for existing

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Experience with Mandatory Copyright Formalities: A Love/Hate Relationship, 33 COLUM. J.L. & ARTS 311(2010); STEF VAN GOMPEL, FORMALITIES IN COPYRIGHT LAW (2011); *Reform(aliz)ing Copyright: Berkeley Center for Law and Technology Symposium*, 28 BERKELEY TECH. L.J. 1415 (2013), http://btlj.org/2013/01/volume-28-issue-3-symposium-2013-2/ (entire symposium issue).

[11] Christopher Jon Sprigman, *Berne's Vanishing Ban on Formalities,* 28 BERKELEY TECH. L.J. 1537, 1545 (2013).

[12] *See* Ginsburg, *supra* note 9, at 345-46 ("Congress could provide a more radical and recordation-incentivizing solution: any exclusive rights that are transferred but not recorded within a stated period will revert to their grantors. Requiring recordation as a prerequisite to suit, or indeed, as a condition of the validity of the grant."); Jane C. Ginsburg, *With Untired Spirits And Formal Constancy": Berne Compatibility Of Formal Declaratory Measures To Enhance Copyright Title-Searching,* 28 BERKELEY TECH. L.J. 1583, 1617 (2013) (suggesting alterative requirements for transfers by operation of law, such as by will or intestate succession); Pallante, *supra* note 9, at 1421; *Daniel Gervais & Dashiell Renaud, The Future Of United States Copyright Formalities: Why We Should Prioritize Recordation, And How To Do It,* 28 BERKELEY TECH. L.J. 1459 (2013).

[13] Pamela Samuelson et al., *Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175, 1200 (2010).

[14] *Compare* Diversey v. Schmidly, 738 F. 3d 1196, 1202 (10th Cir. 2014) (concluding that online distribution was a separate, ongoing act of infringement) *with* Taylor v. Meirick, 712 F. 2d 1112, 1118-19 (7th Cir. 1983) (articulating "continued wrong" rule to extend the time period in which to bring suit).

visual works. The Office's collaboration with Stanford Law School to centrally assemble information concerning marketplace resources for licensing is encouraging. Other entities, such as DPLA, the University of Michigan, and others[15] have independently worked to help develop better information about copyright status and ownership of works in their collections. Using the Office's convening power, perhaps in conjunction with other federal agencies, to bring together a broader group of interested parties to focus their efforts could help in creating more publicly accessible copyright information.

Thank you for considering these suggestions. We encourage you to contact DPLA with any questions.

Sincerely,

Daniel Cohen
Executive Director
Digital Public Library of America

[15] *Copyright Review Management System*, UNIVERSITY OF MICHIGAN, http://www.lib.umich.edu/copyright-review-management-system-imls-national-leadership-grant (last updated June 15, 2015).