The Illustration League
Grand Rapids, Michigan
TheIllustrationLeague@gmail.com

July 22, 2015

U.S. Copyright Office, Library of Congress
101 Independence Ave. S.E.
Washington, D.C. 20559-6000

RE: Notice of Inquiry, Copyright Protection for Certain Visual Works
Docket No. 2015–01, FR Doc. 2015–09575

Dear Staff of the U.S. Copyright Office:

We are an informal society of illustrators and other visual artists in Grand Rapids, Michigan. We thank you for the opportunity to comment on the importance of the rights currently granted to us as creators of visual works—such as photographs, graphic artworks, and illustrations—under the Copyright Act of the United States.

These days, it is easy to share visual works via the Internet. Inexpensive image scanners, digital cameras, and camera-equipped mobile phones, combined with free and widely used web-based image sharing services such as Facebook and Flickr and Instagram, enable millions of people to create and distribute visual works easily.

For artists such as us, the Internet has become an essential business tool for promoting the visual works and services that, for many of us, are the value we deliver as small businesses. Most working artists have a web site and/or use social media such as Facebook and Twitter to promote their visual works and services. Unfortunately, the Internet has also become an essential business tool for those who seek to enrich themselves by illegally exploiting artists' copyrighted visual works.

Fortunately, it is easy to make legal use of visual works created by others, and it is increasingly easy to find and try to stop those who are illegally using copyrighted visual works, thanks to at least two developments.

First, the nonprofit organization Creative Commons has made available free and easy-to-understand copyright licenses known as Creative Commons licenses.[1] Creators of visual works can share their works on the Internet with a Creative Commons license, if they so choose, and anyone can use those works free of charge under the terms of the license without needing to negotiate individually with the creator of the work. Today, over 343 million images with Creative Commons licenses are available on Flickr,[2] and other visual works with such licenses are available on other web sites. The vast amount of visual works available with a Creative Commons license means that it is easier than ever for users to find existing visual works that they can use without negotiating with the creators of the works and without infringing copyrights.

Second, search engines such as Bing, Google, and Tineye have made available free and easy-to-use reverse image search systems that can be used to locate the source of visual works or find more information about them, to find higher resolution versions of images, and to track down the creators of visual works. These reverse image search systems also allow creators of visual works to find users who may be using copyrighted works illegally. The fact that most artists working today can easily be found on the Internet by prospective users of their visual work, and the fact that artists can easily find users who may be using copyrighted visual works legally or illegally, provides a high level of mutual findability between creators and users of visual works.

All of the above-mentioned facts form the background for the following subjects of inquiry:

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

As artists, many of us are dependent on the monetary income from licensing our visual works. Thanks to the Copyright Act, our visual works do not immediately lose value upon creation. But for artists, monetizing and/or licensing visual works (beyond a single use by one user) requires, as a prerequisite, that the artist is the copyright owner. This means that any conditions that weaken an artist's position as a copyright owner will weaken her ability to monetize and/or license her visual work.

[1] See http://creativecommons.org/licenses

[2] As enumerated at http://www.flickr.com/creativecommons on July 21, 2015

Conditions that weaken an artist's position as a copyright owner include (but are not limited to): (a) any contract between an artist and a client (or an employer) that stipulates that the artist's work is work-for-hire, which strips copyright ownership from the artist and assigns it to the artist's client or employer instead; and consequently, (b) any situation that limits an artist's ability to negotiate such contracts, such as unsympathetic legal policies of large client organizations; finally, and perhaps most relevant to the U.S. Copyright Office, (c) any legislation that changes the Copyright Act so as to weaken an artist's position as a copyright owner: for example, by reducing the duration of copyright or by permitting the unauthorized use of so-called "orphan works." (The word *orphan* effectively implies that the artist is dead and so are her rights. We will say more about this at the conclusion of this letter.)

In addition, any collective rights management organization that diverts royalties away from artists will have a negative impact on artists' ability to monetize their work; companies that sell royalty-free stock photography and illustration could be considered an extreme example. It is very important that the U.S. Copyright Office not exacerbate this problem by creating any kind of extended licensing program that would further divert royalties from artists.

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

As noted above, it is easier than ever for artists to discover illegal use of their copyrighted visual works. And we should note that not all artists are opposed to all illegal use of their copyrighted visual works. For example, occasionally we may discover unauthorized non-commercial use of our images by hobbyist bloggers who are fans of our work and who are using our work in an admiring way that gives proper credit and prominently links to our web sites; many of us consider such use of our work to be beneficial to our promotion and visibility as artists, and we would not initiate enforcement action against all such uses. But when we decide to initiate enforcement action against illegal uses of our visual work that has not been registered with the Copyright Office, the biggest challenge is the high monetary cost of hiring an attorney, since artists are not legal experts. In such cases, the cost of enforcement can be called prohibitively high, because the value to be gained by winning the case is usually so small. The easiest way for the Copyright Office to alleviate

this challenge would be to extend all the rights currently given to creators of registered works to unregistered works as well.

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

A recurring theme of our letter is that it is easy for creators and users of visual works to find each other via the Internet. Effectively, current information technology lessens, rather than increases, the importance of copyright registration. For many illustrators, registration requirements can be confusing, the process of registration can be time consuming, and there is a high monetary cost if the artist is very prolific. An obvious solution to these challenges would be to extend the statutory rights given to creators of registered works to unregistered works as well.

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?

At the risk of sounding too repetitive, we would like to repeat our observation that it is easier than ever to share visual works via the Internet. It is easier than ever for creators and users of visual works to find each other. Thanks to widespread Creative Commons licensing of visual works, it is easier than ever to find existing visual works that can be used without negotiating with the creators of the works and without infringing copyrights. Many of us are also big fans of museums, libraries, and archives, which still provide essential services to our country and provide artists with invaluable fair-use visual works for purposes of inspiration and research.

In this day and age, we find few barriers to the legal use of visual works and few barriers to the progress of illustration for the benefit of all. We are not saying that the current situation is perfect; it may be possible for the U.S. Copyright Office to initiate changes that would improve the ease with which creators and users of visual works can find each other, and lower the cost of registering copyrighted works. However, we are concerned that the U.S. Copyright Office may initiate changes that would weaken artists' rights. As we will discuss further below, any legalization of the false concept of "orphan works" would only weaken artists' rights and damage the currently positive climate for creation and sharing of visual works.

5. What other issues or challenges should the Office be aware of regard-

ing photographs, graphic artworks, and/or illustrations under the Copyright Act?

It is important to note that monetary gain is not the only reason why artists value copyright. As artists, we also value the increased control that copyright gives us over the purposes for which our visual works are used. If others use our visual works in ways that promote ideas that we consider unethical (such as using our works to illustrate hate speech), or in ways that could damage our reputations or the reputations of our licensees, the Copyright Act gives us more power to stop such unauthorized use. Thanks to reverse image search systems, we are more likely than ever to discover such potentially damaging copyright infringement. Of course, if we are unconcerned about the purposes for which our visual works are used, we can always choose to make those works available with a more permissive Creative Commons license.

We would like to make a final statement on the issue of so-called "orphan works," which are copyright-protected works that a prospective user desires to use, but he or she cannot identify and/or contact the artist who owns the copyright. We understand that the U.S. Copyright Office released a report last month titled "Orphan Works and Mass Digitization" that advocated for limited liability for users of so-called "orphan works." In the case of visual works, we believe that limiting the liability of users of so-called "orphan works" would severely weaken all artists' copyright ownership. In this era of high mutual findability between creators and users of visual works, there is no reason to consider any visual work "orphaned." Copyright law in the United States should stipulate that prospective users of a visual work who cannot identify and/or contact the rightsholder should either refrain from using the work or else face full liability for any copyright infringement. (Fair use limitations, as currently described in the Copyright Act, should still protect uses such as criticism, news reporting, teaching, or scholarship.)

A more promising solution to the so-called "orphan works" problem, at least in the case of visual works, would be to educate artists on the great value of creative reuse of visual works in the digital commons, and to encourage all artists to make their work available on the Internet under the most permissive Creative Commons license that they are comfortable using. This would more faithfully fulfill the constitutional mandate to "promote the Progress of Science and useful Arts..." in a way that preserves the rights that the Copyright Act currently gives to artists.

We thank you again for this opportunity to comment on the above-mentioned subjects of inquiry, and we hope that this letter gives you a greater knowledge of the pertinent issues from the perspective of creators of visual works.

Sincerely,

The Illustration League
Grand Rapids, Michigan
TheIllustrationLeague@gmail.com