pro-imaging
International Support for Professional Image Creators

July 23, 2015

Maria Pallante
Register of Copyright
U.S. Copyright Office
Library of Congress
101 Independence Ave. S.E.
Washington, DC 20559-6000

RE: Notice of Inquiry, Copyright Office, Library of Congress Copyright Protection for Certain Visual Works (Docket No. 2015-01)

Dear Ms. Pallante & U.S. Copyright Office Staff:

I am writing on behalf of Pro-Imaging.org, the international, professional photographic and imaging organization formed in 2004 to provide a self-help business and technical platform for working professionals who, collectively, vigorously advocated against the encroachment of the low-ball, royalty-free stock image market, a development that brought devastation to an existing rights-managed model, one that provided quality work to buyers and sustainable incomes to its creators. Collectively, our membership represents many, many decades of working experience encompassing a wide spectrum of the analogue and digital world.

Overall, in response to your Notice of Inquiry, we wonder what category of orphan works the Office is addressing. Certainly, there are legitimate orphans from the 20th Century publishing world. We feel, as others do, they can effectively be managed by modifications to the Fair Use provisions, as proposed by Bruce Lehman.

The numbers of the above-mentioned works, however, pale in comparison to the many hundreds of millions of orphan works created and published since the advent of the Internet. We hope the Office recognizes this reality in its orphan works' mission, and we address most of our comments to that problem, while hoping to answer the questions posed by the Office to the visual arts community.

Commercial Use: Applicability to All Categories of Works, All Types of Uses and Users

Good Faith buyers already know where to search for the images they need. Commercializing orphan works will merely be a time-consuming process for both parties, yielding confusion and distress with little or no net benefit.

The assumption that everyone wants to commercialize their visual work is, frankly, presumptuous. Section 106 of the copyright code (Exclusive rights in copyrighted works) also means the right to remain "undiscovered" without being burdened by an orphan works scheme that requires constant monitoring (the Office's Notice of Use proposal).

Originally, the Internet was not conceived to be the vast, complex marketplace it is today - it was developed to share information via text. Until the problem of online durable authorship (stripped metadata) in media files is solved, the currently proffered notions of commercialization seem pointless.

To this end, the Office should really be advocating for a change in the DMCA to make stripping of authorship metadata illegal under any circumstance, not just for purposes of deceit. Furthermore, the Office should be using its powers to advocate for new standards in media files, server configurations and browser software to secure and display authorship throughout the Internet process. The main priority of any orphan works agenda should be to address and solve these structural problems, thus eliminating a major source of orphan works.

Finally, let artists decide by what means they wish to be discovered and if they wish their work monetized, or not. It should be their choice, by default, to remain quiet if they choose. The Office should not assume artists are in need of extra marketing assistance - the economy will not go into recession because of it.

Text-based Notice of Use

It seems unlikely this will work as intended, and would, therefore, result in the failure of a critical pillar of the Office's proposal. How is one to interpret an infringer's text description of an individual image in a way that the creator will know it is her image? What if five infringers each write a description of the same image? Because the descriptions will not be identical, how is the creator to know that five parties are infringing the same image?

Millions of new images are posted online daily. Most, if not all, are orphaned by default, or certainly after one "share".

- Does the Office wish to expose family photos to commercialization?
- Must every internet user search the Notice of Use database to discover they've been infringed?
- Must professional artists who have granted exclusive use of a work diligently search the Notice of Use regularly so as not to be liable for breach of contract to their client?

Small Claims

That the artist must prove their rate as reasonable in a marketplace driven down to pennies where dollars used to be returned is essentially asking artists to give their work away below cost, if not for free. Should an artist even discover an infringement in the text-based Notice of Use, the costs of time and any attorney fees (that can't be recovered) in a Small Claims process realistically gives the artist only two choices: accept the infringer's rate or request a takedown. The former perpetuates the current miserable market conditions; the latter choice seems pointless. By the time the infringement is discovered, the image has likely long served its purpose and may have been subsequently copied and shared many times over.

These collective burdens in the Office's proposal - registration in databases, searching Notices of Use, and negotiating in a Small Claims court - are not desirable, and would constitute a net loss of income for artists.

"Safe Harbor" for Certain Nonprofit Institutions and Uses

"*…the Office's proposal restricts the applicability of the safe harbor both in terms of a user's identity and the nature (educational, religious, or charitable) of its use.*" ~p66, Orphan Works and Mass Digitization, USCO.

At face value, this statement seems to be giving these classifications free use under safe harbor, after a qualifying search. Yet, nonprofit does not mean "without profit". What qualifies as a religious organization? A search of Guide Star brings up 2,644 religious media organizations alone. This is not a small class of users. In terms of a charity, isn't everything a charity publishes, including appeals for funding, "charitable" by "nature"? In the same way, a university press publishes books that, by their nature, are educational. Why should they be treated differently than Simon and Schuster, for instance, who might publish a similar work?

We think reexamination of Safe Harbor is needed.

Mass Digitization

The internet marketing model today requires extensive image use to attract eyeballs and keep them "stuck" to seemingly endless varieties of marketing text. Any image used for this purpose ("stickiness" in marketing parlance) should be deemed commercial use, whether the webpage is ad-based on not. If an image use aids in the promotion of one's brand, even in a personal blog created by an owner associated with a service or nonprofit, it is commercial use. For that reason, "commercial use" under the Office's Mass Digitization proposal needs to be defined much more precisely. To consider commercial use only as work placed on mugs and T-shirts is missing the real commercial market picture.

We thank the Office and the community for their participation in these discussions.

Sincerely,

Don Schaefer
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on behalf of: Pro-Imaging.org
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and

Artists-Bill-of-Rights.org, a project of Pro-Imaging