Maria Pallante
Register of Copyrights
U.S. Copyright Office
101Independence 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 and the Copyright Office Staff:

Copyright law is not an abstract legal issue. Our copyrights are our assets. Licensing them is how we make our livings. As a photographer and website and graphic designer copyright law is not an abstract legal issue. Our copyrights are our assets. Licensing them is how we make our livings.

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

Existing copyright law has opened the door to abusive business practices by permitting work-for-hire contracts. When these agreements are imposed on freelance artists, they deprive the artist of authorship and designate the commissioning party as the art's creator. The artist becomes a de facto “employee" *for the sole purpose of forfeiting copyright,* but receives none of the benefits of "legal" employment. The artist is treated as an independent contractor in every other way: covering overhead, supplying his or her own tools of the trade, workspace, training, and covering his or her own liabilities, retirement, insurances and other costs of business. Work-for-hire undermines the very principles of authorship embodied in Article 1, Section 8 of the Constitution. I believe it would be a step forward for American artists if the US Copyright law was amended to repeal work-for-hire imposed on independent contractors. Add commercial registries that have already radically undermined the markets for creative artists and there is every reason to believe that if registration is reintroduced as a condition of protecting our work that the new for-profit registries would act in the same ruthless way charging $150 per image or more to accept the work with commissions that range from 50% to 90%.

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

The high cost of legal fees in an infringement lawsuit. Under current law, a copyright owner who has registered his copyright can get statutory damages and attorneys fees. As a result, it is possible to find a contingency fee lawyer to take these cases (i.e.,
copyright owner doesn't have to pay lawyer). In addition, the copyright owner usually finds that he gets more in settlement than he pays in legal fees. If a copyright owner has NOT registered his copyright, he can only get actual damages. It is usually impossible to find a contingency fee lawyer for these cases. Moreover, it is often not wise for
the copyright owner to litigate these cases anyway, because the settlement value is so small. Under the orphan works legislation, ALL infringement scenarios would
be the same as if the copyright owner has NOT registered his copyright, and he can only get actual damages. "Without the deterrent of statutory damages and attorneys' fees, and without a permanent injunction against repeat offenses by the same infringer, this experience would now act as an incentive for the infringer to exploit other uncredited, and therefore effectively orphaned, images by other artists. In effect, he has discovered that infringing artists is a rational business decision, and this would be the same for other infringers."

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

Volume, expense, paperwork and time – and if the US returns to the bad old days of registration, ruthless competition from the registries themselves.
Many graphic artists produce that many images (including published and unpublished works) in a year. To register those images, the artist would have to locate them, unframe them if necessary, scan them, spot them, color correct them, keyword and catalog them, return them to their files or frames, add metadata and fill out registration forms for each one for at least two registries. All of that would take thousands of hours. And all this non–income-producing time would have to be stolen from time that the artist would otherwise be using to create new work. All of my work was done under the existing copyright law, which did not require me to register anything. To comply with the kind of provisions proposed in the Shawn Bentley Act, I would estimate – based on my own experience digitizing work – that it would cost me way more than I could afford and take me at forever to comply with the law. There is no way I can afford that expense, and at my age, the thousands of hours I would have to commit to the effort would effectively end my creative life. Worse, it would make me the unpaid employee of the registries. They would not only be getting my art for free. The law would force me to spend my time and money processing it for them. Then they would charge me maintenance fees and commissions for clearing my rights for clients – clients, who at the moment are still mine but would in time become theirs. *There is no way I would comply with a system like that even if I could afford to.* Under the Shawn Bentley provisions, there would be no way I could stop infringers from harvesting my "orphans" and Photoshopping them into cheap "derivatives." I and every other artist in the world would then have to compete at a disadvantage against commercial infringers licensing ghosts of our own works. But the 1976 Act was a definite improvement for artists. Although it is hardly perfect, I could not have had the career I've had without it. The new proposals would be worse for us than the pre-76 law. The new technologies available to infringers would make it worse. And so if these proposals are ever enacted into law, when young artists in the future ask me for career advice, in all good conscience, I would have to tell them to consider another career.
The best solution for artists would NOT be to re-introduce registration, but to do away with it entirely, as has been done with copyright registration in the rest of the world.

What are the most significant challenges or frustrations for those who wish to make legal use of photographs, graphic art works, and/or illustrations?

I would suggest that where the current copyright law is working, it is working as intended, compelling a certain rigor regarding the use of work that I fear will be lost entirely if the laws currently being proposed are liberalized to permit massive commercial infringement. As I understand it that in libraries and museums most recent filings with the Copyright Office, they believe that recent legal decisions expanding fair use exceptions are all libraries and museums need for their purposes. If that's the case, then the original justification for orphan works legislation has vanished and the cause stands exposed as simply a drive to permit the commercial infringement of copyrighted art by working artists. And since there can be no just excuse for that, I, like most of my people I know, believe that the orphan works crusade should be dropped and copyright law strengthened to "promote the useful arts."

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

I was concerned to hear from others of the claim in the Copyright Office's 2015 Report that there is already a "credible" visual arts registry that "functions as a 'hub' connecting registries in eighty-eight countries, and provides both literal and image-based searches." If this is true why has no one hear of it? Sure there are many wannabe registries, beta sites, etc., But not a single one of them is even remotely ready to start licensing work to the public. And even if someday they ultimately develop the necessary technology – it would still take decades for artists to load up their works – *if they could afford to.* Such a registry would not solve the problem of all the preexisting works for the last 70 years that are still under copyright. Scanning and digitizing such works would be impossible with any conceivable technology.

The concept of creating an inclusive, cost effective database for imagery is impossible. Not possible. Not feasible. Not cost effective. And if there were multiple, smaller databases, not workable.
A registry would only benefit corporations…REMEMBER corporations don't create. Individuals do. And if Congress chooses to certify a couple of visual art supermarkets that only corporate image banks could afford to patronize, the US government itself would be striking another blow against the small business owners who actually create new art. And in doing so, it would strike a blow against art itself, and with it, the public interest.

We are already losing out to massive secondary licensing already taking place in the reprographic rights markets. I have been informed that in the US this licensing has been going on for over 30 years, with combined revenues of roughly $300,000,000 annually. With no royalties going to the creator/copyright holder. So unless something is first done to correct the current system, I fear that the creation of an extended collective licensing program will only serve to lock artists out of their secondary rights income forever. Instead, I support Congressman Jerrold Nadler's American Royalties Too (ART) Act of 2015. It may not be a perfect solution to the current black hole that is reprographic licensing in the US, but it contains a provision that would create an honest visual arts collecting society that would begin returning lost royalties to artists. This would at least start to bring transparency, accountability and justice to artists' secondary licensing rights, and I thank the Copyright Office for recommending this bill to Congress.

Sincerely

Jill Marci Sybalsky