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**COMMENTS OF RUTGERS UNIVERSITY LIBRARIES
IN RESPONSE TO NOTICE OF INQUIRY CONCERNING
COPYRIGHT PROTECTION FOR CERTAIN VISUAL WORKS**

The Rutgers University Libraries are pleased to respond to the Notice of Inquiry of the United States Copyright Office, Library of Congress, on Copyright Protection for Certain Visual Works, published in the *Federal Register* on April 24, 2015. We appreciate the opportunity to comment on this issue of great importance to the digital future of libraries and archives. We support broad access to creative and intellectual works that enrich cultural life and also understand that the livelihoods and recognition of visual artists, graphic artists, photographers, and other creators diminish when their works are used, particularly in digital media, without their consent and against their interests. In a digital environment where opportunities abound for innovative uses of visual works, it is critical to support creative individuals through legislation and licensing frameworks that keep them at the center of the cultural landscape and that keep art and culture thriving for the benefit of everyone in society.

Question 1.

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

Art and culture is compromised when creators are unable to benefit from their own works because economic gains accrue instead to third parties directly through infringement and indirectly through other forms of third-party monetization. The most significant challenge is the idea that monetization of copyrighted works should be the privilege of digital technology entrepreneurs rather than of creative people or other copyright holders. In seeking to monetize works indirectly through search mechanisms, ad-based public displays and performances, and data aggregation, technology entrepreneurs have created a kind of competition that enables them to benefit financially from use of photographs, graphic artworks, or illustrations and makes it impossible for creators of visual art to monetize or license their own works. When the content is available illegally for free, the public will in most cases not wish to pay for it.

The digital environment has created something approaching a monopoly for digital entrepreneurs and technology corporations, at the expense of those who create works. The distribution of intellectual and creative content puts billions into hands of digital entrepreneurs while most artists and creators can no longer benefit economically from their work. This is not fair, and it is not what copyright, which is recognized as a human right under Article 27 of the United Nations *Universal Declaration of Human Rights*, was intended to achieve.

A second challenge is that licensing mechanisms are not sufficiently developed to provide quick, easy, and reliable access to those who would be willing to pay reasonable amounts to creative people for use of their works. The development of global identifying information and data standards by Stanford Law School is promising and, along with a new Copyright Hub

prototype for licensed transactions being developed in the U.K., it may help to resolve the market failure that has left many creators on the sidelines of digital commerce.

There may be concerns that monetization creates challenges for the exercise of copyright limitations and exceptions. We believe that limitations and exceptions are not threatened by the rights of creators or by the licensing of photographs, graphic artworks, and illustrations. Licensing practices are a part of core Internet functionality and have always been the basis of Internet services. Licensing and copyright exceptions can coexist and thrive for the benefit of libraries and archives and educational institutions, among others. Libraries, archives, and educational institutions themselves would benefit from reasonable licensing practices for creative works that are now gridlocked by lack of such mechanisms.

Question 2.

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

The enforcement provisions in the law currently are ineffective. Safe harbor provisions introduced the Digital Millennium Copyright Act allow any entity to infringe repeatedly with no recourse for the rightsholder other than costly litigation. Takedown procedures are meaningless when works may be put back up online for endless repeated rounds of takedown, requiring constant monitoring by rightsholders, and where nothing can every truly be taken down once it is placed online and copied to other locations. In an environment where competition with free, unlawful access is allowed to flourish, copyright law is not effectively protecting works. When works are not sufficiently protected, even copyright limitations and exceptions that support the work of libraries, archives, and educational institutions lose meaning.

The safe harbor provisions of the DMCA currently provide too easy a mechanism for serial infringement that seriously disadvantage the interests of creative people. No one in society, including libraries and archives, benefits when creativity is diminished by unjust enrichment. Amending the safe harbor provision of the Digital Millennium Copyright Act would create a level playing field where all stakeholders could benefit from the commercial Internet. It would not disadvantage those engaged in lawful, non-commercial exchange of works online.

In addition, we need a nationally focused program on copyright education.

Question 3.

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

Registering works requires time, energy, and financial resources, and can easily turn into a part-time job for many professionals. Photographers, graphic artists, and illustrators are not always

able to register their works because the process is costly and time-consuming. Furthermore, they understand that registration is not a requirement for copyright protection and that making copyright registration a substitute for either adequate protection and enforcement or for the responsibility of Internet services and users is not fair and will not in itself be an adequate solution.

In a world that prefers simple and easy processes for digital exchange of content, the task of identifying visual works should not be made laborious, complex, and expensive for professional photographers, graphic artists, and illustrators. Furthermore, there is hardly an incentive to register works when the copyright system has so many gaps that compromise protections. A system that requires money and time to register, and then more money and time to litigate in when works are infringed because there is no other recourse, needs to be reexamined.

A simple, reasonably priced licensing system would provide an incentive to photographers, graphic artists, and illustrators to follow standards that fulfill the purpose of registration, by identifying works and providing copyright management information. It may be time to place some of the burden for development of such a system on the technology sector, and for this to be developed as a national resource through a new tax on commercial digital transactions. The function of registration is a challenge that should be shared by government, the technology sector, and by content creators.

Question 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?

In libraries and educational institutions, there is often little clarity as to whether one may make use of photographs, graphic art works, or illustrations lawfully, other than by exercising fair use, which also provides little clarity or certainty. This is partly due to inability to identify or locate copyright holders and partly due to the uncertainty of fair use.

The lack of certainty leads in some cases to a decision not to use works, even for limited uses, such as use of a documentary photograph in a Powerpoint presentation. More often, it leads to using the work anyway, which may or may not infringe copyright and may or may not align with the wishes of the unidentified and unlocatable copyright holder. In general, the public is functioning in an uncertain landscape where there is no opportunity for clarity.

Beyond that is the frustration that there is no benefit for complying with copyright law and no punishment for infringement, and copyright law itself to many people has become a source of frustration. People generally do not wish to study copyright law or to read complex licenses before making use of works.

Many members of the public would be willing to pay a small, reasonable fee for uses of works if that were possible and find themselves frustrated at not being able to. The availability of a simple, quick and easy licensing system at a reasonable cost would bring enormous benefits to creative people and would not unduly inconvenience the user public. It would not be harmful to copyright limitations and exceptions which can easily exist alongside licensing mechanisms. It could be as easy as paying for a book from an online distributor, involving a few clicks.

Question 5.

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

There are many different types of Internet sources for photographs, graphic artworks, and illustrations. Some charge money for "licenses" but have no legal relationship to rightsholders. Some offer content for free and operate under legitimate licenses on ad-based platforms, while others offer content for free and operate on the basis of ad-based piracy. Some apply Creative Commons licenses appropriately while others apply them inappropriately. Some purport to be public domain sites but are merely engaging in ad-based piracy, while others are merely engaging in ad-based piracy of copyrighted content. It is difficult for the ordinary user to understand what the legal framework for these sites really is, and such sites continue to be allowed to proliferate. This is not innovation, it is not creativity, it is not free expression or free speech. It is not justifiable as a function of digital commerce.

Furthermore, in libraries and educational institutions, we are bound by ethical standards and try to teach people how to correctly approach use of material on the Internet but that task is increasingly difficult. We would be able to exercise limitations and exceptions more effectively if the rights framework were more functional. We could exercise exceptions more clearly if the entire Internet were not itself so often functioning as an exception from the law and from lawful behavior. We would benefit from, promote, and be eager to participate in a new form of copyright education to serve a new generation.

Respectfully submitted on July 23, 2015 by:

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Copyright and Licensing Librarian