DATE: 7/23/15

FROM: Mike Pascale

TO: U.S. Copyright Office

RE: Comments on Notice of Inquiry as requested

Hello—
I am a freelance writer, artist, storyboardist, cartoonist, comic-book creator/former publisher and award-winning copywriter and former advertising agency senior art director. (I've worked both for myself and in work-for-hire environments.) I registered my first copyright with the Copyright Office in 1978 (for a comic strip in a self-published fanzine) when I was 14 years old, soon after the revised law went into effect. I have since followed the copyright law and issues for artists and creatives with great interest and concern.

In answer to your Inquiry, I have pasted your questions below in bold, with my answers following. Thank you for listening and inviting comments. (I will apologize in advance for any typographical or grammatical errors, as I came upon the Inquiry late and did not have enough time to properly compose this.)

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

—The commoditization of my skills and abilities. This is in no small part due to the ubiquitous availability of images on the Internet to be downloaded without permission and used in countless ways without either my (the copyright owner's) knowledge and/or approval. Aiding this illegality and immorality is various software which allows those with little to no skill to combine images or parts of same into "new" works without credit. (Often taking something created by an artist and merely adding text to produce a "meme.")

Because many of these "new" (stolen) images are shared via social media across numerous sites and platforms, there is no money to be made. It's bad enough having individuals performing this unethical practice; but companies doing this are the lowest form of theft.

I understand the desire to share artwork (I do it myself). I normally wouldn't

have an issue with someone sharing a post of mine featuring my (properly credited) work. However, the original artist is almost never credited on the shares.

Furthermore, the cumulative effect of this mass commoditization is to unfairly devalue the services professional artists and other creatives perform. Just cobbling together a "meme," bad logo or other item with others' (unethically/illegally obtained) work does not make one a professional, no more than balancing a checkbook makes one an accountant, applying first aid makes one an M.D., or changing the oil in one's car makes one a mechanic. But when everyone thinks he/she is an "artist", the fact is *no one* is an artist. This serves to denigrate and devalue the worth of *all* art and design, as overall public tastes are lowered and standards of quality subsequently debased.

Only by paying for the experience, knowledge and skill of professionals can standards be maintained which (as the history of art and design has shown) will ultimately benefit the populace and commerce (encouraging us to develop, hone and improve our skills to meet the high standards of our clients). By reducing art and design to free commodities, it is both logically and practically impossible to maintain, let alone increase, public and commercial standards.

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

—As mentioned above, the biggest challenge is proper attribution as well as protection of intellectual property. While I do sign my works and add the proper copyright symbol and date, it is often easy for thieves to remove that information or crop it out. To combat this practice, I often watermark my images, but that is a) not always possible, and b) often unsightly or obscuring, when trying to display the extent of my skills and accomplishments or (especially) telling a story with comics or storyboards.

The ability to search via images on sites like Google has helped, in that I can plug in an image of one of my characters and see where it has ended up. (I have found at least one infringer that way, who was producing and selling

stickers of my character and artwork without permission. While I did not sue for damages due to his being out of state, I did secure a cease and desist.)

However, considering the thousands of images created over the course of a 30-plus year career, this method of policing the Internet is impractical and partly effective at best. The technology itself is limited as well. It's simply impossible to upload and search for every character and image I've created.

Adding to this frustration is the anonymity of the Internet. Even on "registered" sites like Facebook, Instagram, Pinterest and Twitter, it is easy to build a faux profile, and harder to go after an infringer. Some even allow them to block others, so that the y can continue to infringe while the copyright owner has no way to even contact the guilty party.

(While these sites do boast of an infringement policy, the practical fact is that they hardly have the manpower to properly police their millions of members and trillions of uploaded images. Many of these "protections" are performed with software which is imperfect, and the staffers following up on complaints are often uneducated and disinterested regarding the law, our rights and their responsibilities. Many times, they even do not acknowledge complaints, or simply say they're unable to "verify" the proper owner, despite all properly submitted/documented proof.)

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

—Most significant is the cost. First, the cost of registration has increased dramatically as you know (up over 50% just this century). Second is grouping; for my weekly webcomic, "Game BUZZ" (published during NFL season), I usually have 18-20 strips in a regular season, plus several in the off season and preseason. I have tried to submit each regular season of strips under a group registration (it is, after all, a periodical, no different than a newspaper strip), but the Copyright Office has not responded and will not offer a definitive answer. At the current rate of $55, it would cost me $1,100 per y ear of registrations, which is significantly more than any revenues I make from the strip itself.

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?

As a creator of original works, that is not within my sphere of experience, but I do know several publishers, educators and librarians for whom that is an issue. From my experiences with them, I'd venture their greatest issue is tracking down the owners/creators of the images they wish to use. This is due both to the massive amounts of copies of the same images on the Web (unlike print, a digital copy is often indistinguishable from the original, making it extremely difficult to discern the original source of an image) and the afore-mentioned practice of cropping/covering any attribution of the artist/copyright owner.

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

The most important issues are the following:
A) Keeping the "copyright granted upon creation and fixed into tangible form" provision, as well as the current definitions within the current act. (§101 and §102 (a).) This is paramount to individuals.

B) Maintaining the current ownership definitions as presented in §106 as well as §201. Again, integral in maintaining an ethical and fair system for both individuals as well as companies.

C) Clarifying further the Fair Use doctrine in §107 to limit the extent of "transformitiveness" that has recently and substantially loosened the definition of Fair Use (Re: Cariou vs. Prince). There should be more effort/greater original additions or modifications required for "transformation" of a copyrighted work into a new work than exemplified in that landmark (damaging to creators) case. A similar methodology/standard as that involving right to publicity/privacy could apply here: As obscuring an individual enough so a friend or relative cannot easily or reasonably recognize the person (note the popular black bars placed over a person's eyes in photographs, or digitally blurring substantially enough to

hide his/her identity), so too would a test be whether the average individual could recognize the original source for the "transformed" work. (Notwithstanding parody, of course, which is already covered by Fair Use.) As an example, changing the color of Batman's costume or his bat symbol would not be enough to constitute a new character. Taking a panel or panels from several comic strips or known characters from several famous paintings and putting them together into a new strip or painting would not be enough to constitute a new work. There has to be a measure of technical (human) skill and individual creativity applied.

D) Regarding the Registrar's report on Orphan Works and recommendations of ECL and CMOs (http://copyright.gov/orphan/reports/orphan-works2015.pdf): While I appreciate and understand the initial impetus for such recommendations, the specifics and logic behind such concepts and their implementation leave me befuddled and skeptical at best. To wit:

A) the organizational, legal, ethical and bureaucratic hurdles that would have to be overcome to establish such a system are Herculean at best and unsurmountable at worst. Who sets up the CMOs? Why? Who decides their composition? What's the criteria? Why them? Who decides on membership? How are costs covered? How are they equitable (does a world-famous artist pay the same "dues" as an aspiring amateur)? Who decides the royalties? How are they fairly and efficiently distributed? How many employees? Volunteers? Where are the headquarters? How many satellite offices would be needed? Who pays the rent/leases? Who performs the vetting of "members"? Who validates copyright ownership and how?

Every one of those and more questions would not only have to be answered, but those answers ethically and legally justified.

There are so many issues to address and challenges to solve in such an endeavor that creation would take years, and judging from recent history with the President's healthcare overhaul and government department creation, no one would be satisfied with the outcome. The vast majority of responses would be complaints and confusion. There would be myriad unseen consequences and problems, and addressing and fixing them would take as long or longer than establishing the organizations in the first place.

B) In the report, the Registrar mentions the music organizations ASCAP and BMI as corollary examples. But ASCAP was formed in 1914, BMI in 1939. The professional music and entertainment worlds were absurdly different back then, as was the nation itself. To create those entities from scratch today would bring more trouble than most anyone would want to deal with.

C) The biggest hurdle to surmount is explaining, simply, "Why?" The report casually mentions the "obvious" need for ECL and CMOs but never justifies it. Why does every image *need* to be digitized in the first place? Why are we assuming every person on the planet wants every image on an electronic device? Why are we assuming that digitization will remain a valid format for generations and centuries to come? (No single electronic format has remained valid or universal for more than a couple decades, unlike marble and paper which have endured for centuries. All humans, even those living in the street, the jungle or in the wilderness, can make something out of wood or stone or paint. Who honestly assumes they'll all have Photoshop and an iPad too?) What's the benefit for both copyright owners and consumers, ultimately? To answer, one must address the constitutional reason for copyright law's existence in the first place.

Article I, Section 8 (Powers of Congress) states that Congress shall have the power… "[8.] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." This is to help promote and advance said sciences and arts, and to benefit our culture.

Well, let us look at history. The greatest achievements of Art in the last 20,000 years of human civilization have arguably occurred without any digitization. The art of ancient Egypt, Greece and Rome, the Renaissance, the birth of sculpture, painting, print and film, all occurred long before the "digital age." Yet people still found out about Laocoön and His Sons, The Last Supper, Venus, Michelangelo, Picasso, hieroglyphics, Impressionism, Leonardo, Superman, *Citizen Kane*, the Pyramids, *Star Wars* and every other major artistic achievement without "digitization" and were influenced and inspired by them to advance the arts without a problem.

I certainly understand the desire and need to make certain images and works available digitally, but there has been no logically satisfying or reasonable argument to do so with everything from everyone, other than “we can.” And that is no reason any reasonable or logical person can accept as valid.

The United States was formed and established with great regard for the rights of the individual citizen, first and foremost. Government of the People, By the People and for the People—not of Google, Microsoft, Facebook or other conglomerates. Nor are we a socialist nation, where everyone shares everyone’s efforts, skills and time for free.

We need to preserve, encourage, and most important, protect and reward the creativity, imagination and skill development of our true artists and creative people first, not the myriad ways their work can be exploited by others without their knowledge, permission or remuneration.

Again, thank you for listening and considering my answers and suggestions.

Best,
Mike Pascale