

Linda Joy Kattwinkel
ljk@owe.com



OWEN, WICKERSHAM & ERICKSON, P.C.

455 Market Street, Suite 1910
San Francisco, California 94105
T 415.882.3200 F 415.882.3232
www.owe.com

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Reply Comment to Visual Works, Notice of Inquiry
U.S. Copyright Office
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Introduction

I am a visual artist, and an attorney practicing intellectual property and arts law with the law firm of Owen, Wickersham & Erickson in San Francisco. Before I became a lawyer, I worked as a professional graphic artist for thirteen years in editorial, corporate and advertising design and typography. I have designed many corporate and product logos, and have produced illustrations for advertisements, educational books and other publications. I also worked in-house as an art director. Since becoming a lawyer over 20 years ago, I have continued to create visual works for personal expression. My artwork has been widely published and shown in more than thirty-five museum and gallery exhibitions over the past several decades.

The focus of my law practice is visual artists, including designers, commercial illustrators, fine artists and photographers; as well as business clients who create and exploit intellectual property. I also serve as a mediator and early neutral evaluator of arts and intellectual property disputes for the U.S. District Court of Northern California and California Lawyers for the arts. I am a member of many visual artists' organizations, including the AIGA and the Graphic Artists Guild, and I publish an online column for AIGA's San Francisco chapter called "Legalities" (see <
http://aigasf.org/community/legalities/legalities_36_the_trouble_with_design_competitions >).

I am submitting the following comments on behalf of my clients and the visual arts community. My comments are based on my daily experience counseling visual artists with respect to copyright protection and infringement matters. I thank the Copyright Office for the opportunity to submit these comments and for focusing attention on these issues.

For the purposes of these comments, I am responding on behalf of professional graphic artists, namely, photographers, illustrators, and designers, who create and sell or license their works to clients for income. While there are many others involved in the creation and dissemination of images, such as amateurs and hobbyists who share their works without charge, they are not my focus here. Similarly, I am not focusing here on artists who work in the fine arts, who create photographs and visual artworks to be shown and sold through galleries, although to the extent such artists earn additional income by selling reproductions of their works, their interests align with professional graphic artists. Indeed, these categories are not mutually exclusive, as many photographers and visual artists work in both the graphic and fine arts.



1. Challenges related to monetizing and/or licensing photographs, graphic artworks, and/or illustrations

- **Online availability and the ease of digital copying have created a cultural devaluation of visual works that threatens the ability of visual artists to earn a livelihood.**

The pre-digital market for graphic art. Traditionally (before the internet and digital technologies), self-employed professional photographers, illustrators and designers (collectively, “professional artists”), earned their livings through a free-lance business model in which they were commissioned to create artwork specific to particular client projects. Potential clients (typically, advertising or design agencies, or in-house design departments of corporate entities, such as publishing houses), would review portfolios comprising printed pieces or photographic slides, which were delivered to the client’s office by the artists or their representatives. Clients would choose a photographer, designer or illustrator whose style impressed them as a good fit for their project. Typical client projects would include advertising campaigns for products or services, corporate identity and branding systems, annual reports, packaging design, exhibition design, and photos, images or cartoons for editorial and educational publications.

The selected artist would then be hired to create new images on a freelance basis, as an independent contractor. Depending on the nature of the project, the freelance contract would establish the scope of rights granted to the client in the commissioned work. For photographers and illustrators, typically this would mean an exclusive license to publish the work, with rights reverting to the artist at the end of the exclusive license period (for example, a photo or image commissioned to accompany an editorial article in a magazine would carry exclusive usage rights for the short period of time that the publication would be sold). After the license expired, the photographs or illustrations would be available for relicensing. While not all images are appropriate for a secondary licensing market (e.g., product photos for advertisements), others enjoyed a lucrative secondary market. In some cases, particularly photography, the artist would assign or license copyright in final images selected for use by the client, but retain ownership of alternative images from the shoot, which would then become part of the photographer’s secondary licensing library.

In some industries, such as publishing, the exclusive usage rights would be styled as an exclusive license or assignment with the time frame tied to the success of the project, and compensation to the artist would also reflect its longevity. For example, copyrights in illustrations for a book were typically assigned to the publisher for the life of the copyright, but with reversion rights if the book went out of print. Thus, if the book was successful, the artist would continue to receive royalties. But if it went out of print and royalties ended, rights would revert to the artist, who could then earn additional revenues from the images through secondary licensing.

In contrast to illustrators and photographers, graphic designers more often create artwork that is intended to be used by their clients over a longer life, for example, logo designs, corporate identity systems, and other works that will constitute branding for the client. In those cases, the freelance contract would include an assignment of rights in the work, without a secondary license opportunity, and accordingly, would carry higher fees. However, commissioned design work for short-term projects, such as a limited time advertising campaign, would include a limited usage license for a smaller fee.

Professional artists often present clients with several alternative directions, for example, 3 or 4 preliminary logo concepts. The client will choose one for development into the final logo. The artist maintains rights in the other alternatives, which may be reworked for other projects. Contracts typically will assign to the client rights only in the final designs.



In any event, in the pre-digital era, the primary market for photographers, illustrators and designers was for newly commissioned artwork. The secondary market was a supplemental enterprise. Portfolios were shared as tangible physical objects, and while some clients did illicitly make copies of portfolios, the available copying processes were cumbersome and costly, or produced low quality images (remember the grainy, black and white copies from early photocopiers), and accordingly, it was relatively rare for an unauthorized mechanical copy of a portfolio image to be commercially exploited. (This is not to say infringing copying did not take place; but rather that infringement typically happened by manual copying, not through mechanical means.)

(Although I am focusing on freelance artists, professional graphic artists also work in-house, as employees of businesses and educational institutions. Their pre-digital primary market was similarly to create new imagery for their employers' new projects. Since in-house artists do not own copyright in their works, they do not have a secondary licensing market. Instead, in-house artists receive the considerable advantages and benefits of employment.)

Once an image was published (for example, in printed publications such as magazines or books), the same constraints on unauthorized copying existed. While infringing copying certainly occurred, most people understood the ethics if not the legalities of unauthorized copying, and the costs of mechanical copying provided a further disincentive.

Internet culture changed everything. The internet, combined with digital image creation and copying technologies, has radically changed the realities for professional artists. It is now possible to immediately create perfect copies of images for little or no costs. Online copying is ubiquitous. Moreover, much of the copying is considered legally and ethically acceptable. Search engines copy, index, and re-post everything, and courts have determined that at least the use of low res copies of images by search engines are legal. Social media sites encourage digital copying, indeed, many rely on monetizing the posting and sharing of images. Their adhesive online "click-wrap" contracts impose terms and conditions on their users which give the sites unfettered free use of their images. Creative Commons also encourages free sharing of online content, including free licensing of images.

In this new digital environment, the distinctions between professional artists and hobbyists have become blurred. Everyone can create and post images, including photos, illustrations and graphic artworks, and are expected to freely share them. Many people, especially young people who grew up in the online culture, believe that "publicly available" means "public domain" which in turns means free to copy. Bloggers and other online sites believe they have fair use rights to freely copy images to illustrate their articles, even though analogous usage in traditional media is a professional artist's primary licensing market for editorial imagery.

Online stock imagery sites do not offer images for free, but they charge much lower licensing fees than pre-digital secondary markets. Crowd-sourcing sites, especially those based on a bidding model, are driving down the perceived value of commissioned artwork (some offer logo designs for as little as \$5). All of these sites perpetuate a public perception that images are mutually interchangeable cheap commodities, rather than customized solutions for specific situations.

Digital technologies have also made it possible for individuals to enter business markets, such as creating websites for others, without a sophisticated understanding of intellectual property rights. Many are launching businesses and creating content for their clients by copying online content from other sources, again under the impression that online images are free for the taking.

The internet has become the primary way to promote a business, and visual artists are no exception. Photographers, illustrators and designers have found it necessary to promote their work by posting their images in online portfolios. As soon as their images are posted, anyone with internet access can



make essentially free, perfect digital copies. Even if the artist includes metadata and copyright protection technology, and even if copyright notices are posted, the images are copied. Some sites routinely strip metadata from the digital image files as an automated part of the uploading process. Search services are providing full-size high resolution images in their search results, thus eliminating the need or incentive to go to the original source of the image. Instead of looking for the original sources, users are simply taking the images from these full-size search results.

Moreover, professional artists are now competing with huge volumes of readily available stock and low cost imagery in the online environment. Clients now share the general public's perception that all images should be easily and cheaply accessed. Instead of viewing professional artists' portfolios in order to commission customized imagery for their particular projects, clients are increasingly starting the process by searching for pre-existing images to fit their project. They expect to pay lower fees, even for commissioned artwork or exclusive licenses of stock images. As thoroughly discussed by other commenters, some potential clients have learned that there is very little risk if they decide to just take images without paying a license fee at all, and have adopted business strategies based on such conduct. *See, e.g., Response In Behalf of American Photographic Artists, Inc.* Thus, professional graphic artists are losing the ability to earn a living income from both commissioned and secondarily licensed images.

- **Clients are imposing work made for hire contracts at inadequate compensation**

Traditionally, as discussed above, the majority of freelance contracts, for both commissioned and pre-existing professional artworks, carried limited usage licenses. Fees were appropriately calibrated to the scope of the licensed usage. Where a secondary licensing market was anticipated for the imagery, the fees would be relatively lower to reflect the potential additional revenues the artist could expect from the secondary licensing market. As mentioned above, even when an assignment of the final works was appropriate, rights in alternative or preliminary works not selected for use by the client would be retained by the artist, and could be repurposed or relicensed for additional income.

In the digital environment, clients are increasingly demanding that all contracts be work made for hire (even when the work does not qualify under the 9 statutory categories). Even when clients have already agreed to an artist's traditional licensed usage terms, we are seeing clients attempting to impose work made for hire terms retroactively by including them on their purchase orders. In other cases, clients are imposing work made for hire language, or broad "licensing" terms that are essentially equivalent to a full buyout of all rights, often as a condition of accepting a commission or even as a condition of submitting a proposal to be considered for a project. Sometimes these terms are hidden in "Confidentiality/Nondisclosure" agreements.

Typically, the work made for hire language is not accompanied by a corresponding higher buy-out fee. Clients are treating an artist's original bid, which was tied to a limited usage license, as if it is the appropriate fee for a full buyout. Unfortunately, especially when an individual freelancer is dealing with a large corporate client, the freelancer has little or no bargaining power to challenge this trend.

Thus, professional artists are being deprived of the full value of their work. This is a particularly egregious situation for photographers, who rely on the secondary market for unselected images, as well as images no longer covered by an initial license, for a significant part of their income.

Work made for hire is appropriate only for actual employees, or industries such as motion picture production, where several independent contractors must collaborate on a joint work. Ideally, the Copyright Act should be revised to eliminate the availability of work made for hire contracts for independent contractors.



2. Enforcement challenges for photographers, graphic artists, and/or illustrators

- **The costs of filing a federal lawsuit are prohibitive, enabling users to pay little or no compensation for infringement**

I agree with the Copyright Office that there is a pressing need for a relatively inexpensive process similar to small claims court for copyright infringement claims. It has always been an expensive endeavor to file and litigate a copyright infringement claim in federal court. Now that so much more copying is happening in the online environment, there is much more infringement to deal with. Moreover, many users believe that they have not even infringed by copying online content, or even if they understand the legalities, they often ignore infringement cease and desist letters, relying on the economic inability of copyright owners to challenge them in court. In my own practice, I have dealt with many attorneys for admitted infringers who simply refuse to pay any compensation to my client, stating confidently (and accurately) that they know my client cannot afford to file a federal lawsuit. My clients end up paying my fees at a net loss just to stop the infringement. Such experiences discourage them from pursuing infringers at all.

- **The DMCA take-down process is misused and often ineffective**

The DMCA take-down procedure is a valuable tool for dealing with online infringements. However, the process is being abused and circumvented. Many sites that do not qualify as internet service providers under the DMCA nevertheless post DMCA policies and register DMCA agents with the Copyright Office, and then rely on this practice to deny liability. For example, print-on-demand sites (such as Cafe Press, Society6, DeviantArt, Print All Over Me) are not passive content hosts. They manufacture and sell articles bearing infringing designs, and retain large percentages of such sales revenues, in direct contradiction to the DMCA's requirement that eligible service providers may "not receive a financial benefit directly attributable to the infringing activity."

Other sites make it difficult to submit DMCA notices by burying their contact information or requiring more information than allowed under the DMCA, or by requiring submitters to create member accounts in order to use online DMCA forms (thus inappropriately mining and monetizing new user data through the DMCA process itself). Many sites hide their identities using proxy registration services.

Most sites I have dealt with do nothing to restrict re-posting of the identical content which has already been removed pursuant to a DMCA notice. All a user needs to do is create a new user account to repost the infringing listing. These sites routinely strip original metadata from images, but they also track images for their own monetizing purposes. It is not a matter of technological know-how, but a deliberate decision not to track and prevent the repeated posting of infringing images.

These practices place an untenable burden of policing infringements on copyright owners. The volume of online copying, including repeat postings, far outstrips the ability of even my large corporate clients to effectively combat infringements through the DMCA take-down process.

Ideally, I would like to see revisions in the DMCA to address these problems and abuses. For example, commercial websites, search services, and other online applications that monetize user generated content or images mined from other sites (either directly, e.g., by selling merchandise imprinted with the images, or indirectly, e.g., by selling advertising that appears alongside the images) should not receive safe harbor from liability, under the DMCA or other legislative solutions, unless they retain all metadata and file identification technology embedded in images that are uploaded to their platform; use image-tracking technology or other reliable procedures to identify and block



attempts to re-post images previously removed pursuant to a DMCA take-down notice; and/or post a prominent notice advising users of copyright issues.

Online users of other people's images, both authorized and unauthorized, are monetizing the appeal of such images without sharing any revenues with the creators, and often without adequately responding to infringement claims. Entire business models are based on the ubiquitous copying of online imagery. In addition to DMCA reforms, I would like to see legislation requiring all businesses who monetize online copying to pay a compulsory licensing fee, which could be collected and distributed to artists, and/or used to help fund image search capability for the copyright registry or other enforcement technologies.

3. Registration challenges for photographers, graphic artists, and/or illustrators

- **Online displays of artwork should be considered “published”**

Professional artists would be greatly helped if the Copyright Office would commit to an opinion that works shown online are properly understood as published.

The structure of the current Copyright Act requires a distinction between works that are registered as unpublished and those that are published. Most significantly, works registered as published receive a three-month retroactive grace period, meaning that if a published work is infringed within the three months before a registration was filed, the copyright owner is still entitled to seek the enhanced remedies afforded by registration (statutory damages and attorneys' fees). If the work is registered as unpublished, there is no such grace period. Any copies made before registration will not be subject to the enhanced remedies.

This system made sense in the traditional pre-digital environment. The primary way that artworks became accessible to the public and thus vulnerable to unauthorized copying was through publication, typically through distribution of printed copies. Once printed reproductions were circulated, physical or mechanical copying was more likely to occur. The Act recognizes the increased vulnerability to copying upon publication and provides a grace period in order to protect copyright owners in the event a published piece was immediately copied. Unpublished works were assumed to be shielded from public access and thus did not need a grace period.

The statutory definition of “published” is a distribution of copies of the work to the public. In the online context, this definition is not easily applied. In one respect, online images can be thought of as unpublished “displays” only, unless the site is offering authorized downloads. However, technically, each user's computer browser makes a “copy” of the online image in order to show it to the user. Moreover, and more importantly, unlike traditional displays (e.g., artwork shown in a gallery), online images are immediately accessible for digital copying, and as discussed above, are quickly and frequently copied.

To date, professional artists are left to decide for themselves whether images shown online, for example, in their online portfolios, are published or unpublished. The choice is difficult, and it carries significant consequences. If images are considered “unpublished,” there is no retroactive grace period for asserting enhanced remedies (which, as many others have commented, is often the only bargaining power an artist has in negotiating infringement settlements, and is often a prerequisite for getting counsel to represent them). However, if the images are considered “published,” under current registration policies, each image must be registered separately because they will have different publication dates. That can be economically prohibitive. If the designation is challenged in court (which is an attractive defensive tactic), some courts will invalidate a registration (and thus all of the



protections it affords, including the ability to bring an infringement claim in the first place) if they determine the published/unpublished designation was incorrect.

Intuitively, online images should be given the same protection against instant copying as traditionally published images. Indeed, many courts assume that online images are published works, most likely because posting works online is essentially the equivalent of public disclosure accomplished by pre-digital publication. However, I am not aware of a court decision squarely addressing the question. Courts give deference to opinions of the Copyright Office, but so far, the Office has refused to offer an opinion on this matter. Without an opinion from the Copyright Office, registrants remain vulnerable to having their registrations invalidated for incorrectly identifying their online images as published or unpublished, depending upon the whim of a particular court.

Ideally, I would like to see legislation that does away with the distinction between published and unpublished works, and that provides the same grace periods and the same entitlement to statutory damages and attorneys' fees for all registered works. This distinction is no longer useful nor necessary in the digital environment. Streamlined registration processes could then allow for the registration of published and unpublished images together, so that related preliminary works and final published works need not be separated. But in the meantime, we need the Office to issue support for treating all online postings of images as "published."

- **Group registrations of published works should be available for all graphic artwork**

The Office has already recognized the needs of photographers to be able to register together many works that were published on different dates. This practice reflects the business realities of photographers, who create high volumes of images annually, which in turn are published on many different dates (by the photographer's various clients for their various projects). Registering each published image separately was cost-prohibitive.

As described above, other professional artists, especially illustrators, face the same business realities. Over the course of a year, they create high volumes of images for many different clients, all of which will be published by their clients on different dates. It is equally cost-prohibitive for illustrators and graphic designers to register each published work separately. Especially as their work is undervalued and their incomes continue to shrink, it is imperative to provide to all professional artists the same opportunity to register groups of images published on different dates that is currently offered only to photographers.

Also, it is important to implement an online process for such group registrations as soon as possible. Presumably this would be more efficient for the Office as well as professional artists.

The exorbitant costs of registering large volumes of works generated by professional artists should also be addressed, perhaps by an annual fee pursuant to which several submissions of works could be made. Ultimately, professional artists would best be served if the Act were revised to eliminate the registration prerequisite to filing suit or collecting statutory damages and attorneys' fees.

4. Challenges or frustrations for those who wish to make legal use of photographs, graphic artworks and/or illustrations

- **The registry is not a viable resource for finding copyright owners of images**

I understand that the Office is concerned that registrations of large volumes of images make it difficult to find a registration for any particular image. However, I think this concern is based on an incorrect premise (reflected in this inquiry), namely, that potential users of images utilize the registry



to look for copyright owners. I understand this has been an intended function of the registry. Indeed, registration certificates include contact information for permissions. However, in practice the registry has never functioned as a primary resource for searching copyright ownership information with respect to photographs and other graphic artworks.

Unlike text-based works or other works that are distributed and popularized under specific titles (e.g., musical works), imagery is not an inherently text-based medium. Most professional artworks are not given titles in their published forms. They simply appear as unnamed photos, illustrations or designs which are published as part of the client's project. Many images are never given a title until one is required for the purposes of registration. Similarly, it is common practice for images to be published without accreditation to the artist, or with such accreditation located elsewhere in the publication (e.g., on the copyright page of a book or the bottom of a website). Thus, images are easily separated from any text-based identification. Even metadata is often separated from digital imagery, both by legitimate and unauthorized copiers. It is very easy, indeed, it is the norm, for a digital image to be disseminated without any text-based identifying information.

While new technologies are beginning to make image-searching a real possibility, such systems are not presently available (and as I understand it, are not being considered for future implementation) for the copyright registry. If a potential user of an image does not already have the name of the author or a title for the image, the registry cannot help him find it.

Today, if someone has an image but does not have a title or the name of the copyright owner, they will scan the image and run an image search via Google's reverse image or other online image search systems. If that does not yield hits that lead to ownership information, text-based searches of image databases, using guesses about the image title or description might work. If the user knows the context for the image, e.g., a product advertisement, searching for the ad heading might yield information about the publication in which the ad appeared or the agency that produced the ad, and those people can be contacted to discover the copyright owner. While these methods are not guaranteed to locate the copyright owner of an image, all of them have a better chance of doing so than attempting to search the copyright registry. Indeed, in my over twenty years of representing clients who wish to make legal use of photographs, graphic artworks and illustrations, I have never encountered anyone who attempted to discover the owner by first turning to the copyright registry, and for the reasons stated above, neither have I done so on their behalf.

Similarly, I have never encountered an infringer who first checked the registry to see whether an image was registered before deciding to copy it, nor have I counseled anyone to do so. (Indeed, for the reasons stated above, it would be futile to do so. Even if one knows the name of an author, a search of the copyright registry will not yield images and thus cannot with certainty identify a particular registered image.) Most laypeople are not aware of the registration system, and even fewer are aware of the enhanced remedies that would apply if the work was registered before they copied it. The question of registration usually comes up after an infringement has occurred. When caught, infringers (or more typically, their counsel) determine the registration status and then evaluate the economic risks of honoring or disregarding a cease and desist demand.

Accordingly, whether the registry functions as a viable resource for locating copyright owners of images should not be a significant concern and should not override the much more significant effects that policies and legislation will have for professional artists. Registration practices for images should focus on ensuring that professional artists receive adequate and economically feasible procedures for registering and protecting their works.



5. Other issues or challenges regarding photographs, graphic artworks, and/or illustrations

- **Orphan works legislation should not allow commercial use of images**

In the current inquiry and its June 2015 report on Orphan Works and Mass Digitization (the “Report”), the Copyright Office acknowledges that that visual artists are particularly vulnerable to having their livelihoods eviscerated by overly broad attempts to define the concept of an “orphan work” as any work for which the copyright owner cannot be found. As discussed above, it is quite common for copyright ownership information to be omitted or stripped from images, in the context of both authorized use by clients and unauthorized use by infringers. “Diligent searches” often will not find the copyright owner. However, the Report continues to assume that, even for visual works, when a “diligent search” does not find the artist, it means the artist has abandoned her rights in the works, and that the works have no further market value for the artist. This is wrong. Indeed, as established by the numerous comments previously submitted by and on behalf of professional artists, artists are constantly discovering and attempting to police unauthorized uses of their actively marketed works.

As currently drafted, the recommended orphan works legislation allows all commercial users of “orphan works”(any work for which a “diligent search” did not find the copyright owner) with one single exception: commercial use for fixations of visual works in or on commercially available useful articles. However, as discussed above, the primary and secondary licensing markets for visual works are not limited to decorative fixations on useful articles. Visual works are licensed and re-licensed for many other commercial uses, including for corporate branding and advertising campaigns which rely on the uniqueness of exclusively licensed imagery for their commercial value.

Allowing a new user to exploit an image simply because a “diligent search” did not reveal the copyright owner could violate not only the artist’s rights but those of an authorized licensee who is currently using ore developing use of the work for any of these other purposes, which do not fit the proposed “useful article” exception. If it becomes legally excusable to use imagery simply because it is not easy to find the artist, the value to clients as well as artists of exclusive licenses will be destroyed, and thus the primary market for unique images will be destroyed, and with it the ability of professional artists to earn a living from their artwork.

Moreover, there is no pressing public policy need to make pre-existing images widely available for commercial re-use. Unlike other types of works, in very few cases would there be an absolute need to utilize a particular existing photograph, illustration or graphic design for a new commercial project. Alternative images are easily obtainable. Graphic artists are easily found through their online portfolios and are ready and willing to produce new custom works on commission, or to license secondary uses of their existing images. Stock agencies offer thousands of images that are license-ready. In the very few instances where only one particular image will do (e.g., it is the only existing record of an historical event), fair use will likely excuse an unauthorized copy.

In the Report, the Office acknowledged that its belief that the orphan works problem is widespread rests on reports by libraries and other archivist entities who have had trouble locating owners of printed and published works in their specialized collections. These concerns are by definition limited to works that were created long ago and/or have long been out of circulation. Archivists, libraries and museums have a genuine and valuable motivation to reproduce and preserve such works in order to disseminate knowledge and maintain our cultural heritage. Such users cannot find alternative images in the current marketplace, and their archival and preservation activities would not violate existing rights of exclusive licensees nor displace the genuine secondary licensing market for graphic art.



Indeed, by affording them a safe harbor, the recommended orphan works legislation recognizes the unique potential contributions of such archivist users, and understands that they will not harm the creative incentives for professional artists. Unfortunately, the recommended legislation simultaneously encourages other, commercially-motivated users to inflict real harm on professional artists. (The Report suggests that it would be too difficult to distinguish between commercial and non-commercial uses. However, the proposed safe harbor for these types of uses does exactly that. If commercial uses can be distinguished from noncommercial uses for the purposes of a safe harbor, they can be identified for a complete exclusion.)

Visual works are a unique category of copyrightable works because they are frequently disseminated without accreditation or other text-based identification. Until there is a viable way to conduct a “diligent search” of images that will reliably and consistently identify the copyright owners of current commercially marketable images, no commercial uses of “orphan” visual works should be allowed. Visual works should be eligible for orphan work status solely for non-profit archival and preservation purposes.

(The Report suggests that the prospect of orphan works legislation may spur increased support for and investment in image search technologies and registries, apparently assuming that such developments could easily solve the “diligent search” problems. However, the Report does not acknowledge the extreme costs in time and money artists would be forced to incur in order to digitize their vast inventories of works, which would be prohibitive even if artists were able to record their images with such as yet nonexistent entities at “minimal cost.”)

- **If allowed, commercial users should pay an up front license fee**

The Report notes that in countries which require potential users to pay an upfront license to use orphan works, few such licenses have been obtained. The Report concludes that this means such systems are inefficient. To the contrary, these statistics show that licensing systems are quite efficient – they effectively ensure that potential “orphan” works users are acting in good faith. When a potential user must pay a license both to use work from a known source or to use an “orphan” work, the economic incentive to use an arguably “orphan” work is eliminated.

Given how easy it is to digitally copy images, how easy it will be to establish that an image is an “orphan” (simply because a “diligent search” will not find the copyright owner), and how difficult it is for artists to register and enforce their rights, orphan works legislation that allows users to take and use images without licensing fees will incentivize such behavior. When, on the other hand, the two choices carry equivalent financial costs, users will often find and license alternative images. The latter is the appropriate way to balance the interests of working artists with the public interest in accessing their works.

As the Office acknowledged in its notice of inquiry and as the many commenters have demonstrated, purloining of images, whether produced for use by multi-national corporations for advertising purposes, use on apparel, product packaging or reportage, has already become routine. We know this because artists recognize when their images have been misappropriated, and thus can report, as many have done in their comments, that up to 90% of online uses of their works are unauthorized. Accordingly, I must respectfully disagree with the Report’s stated assumption that, at least with respect to visual works, a system to collect fees would have “no one to distribute them to, potentially undermining the value of the whole enterprise.” When currently marketable visual works are used, the artists will show up and will collect their fees. Any unclaimed fees would not be wasted; they could be used to support the Notice of Use system and other administrative costs.



- **A Notice of Use must include an image**

The recommended Notice of Use process would require a potential user of an “orphan” work to submit a notice to the Copyright Office. Although the Report is noncommittal about public access to such notices, presumably the purpose of this notice would be to give copyright owners an opportunity to claim their ownership and stop a proposed use. However, the proposed notice would require only a “description of the work,” not an image. For the same reasons that a text-based search of the registry will not find a particular image, text-based descriptions of images in a Notice of Use will not provide meaningful notice to copyright owners. For example, thousands of images could fit a description: “photo of the statue of liberty at dawn.” For the notice procedure to have any effectiveness, notices regarding proposed use of a purported “orphan” work must include an actual image of the work.

- **Artists must have full recourse to infringement remedies**

The recommended orphan works legislation proposes that when an artist responds to a Notice of Use with a Notice of Claim of Infringement, the user must negotiate for reasonable compensation. Statutory damages and attorneys’ fees would not be available, and injunctive relief would not be available when a user makes a derivative work (meaning, the user adds a significant amount of his own creative expression), except where the derivative work would harm the artist’s reputation.

The rationale for these limitations on remedies is based on the same flawed assumption that, because a “diligent search” did not find the copyright owner, the work will not have been licensed for a long time, and thus there is little harm to the copyright owner’s market. For visual works, this assumption is wrong. As discussed above, the image may already have been licensed to another entity for exclusive use, which can include exclusive rights to create derivative works. Accordingly, injunctive relief should not be limited to instances where the use harms the artist’s reputation. An artist should have full rights to control all uses of her work to adequately protect the the market for professional artwork.

Final thoughts

Copyright exists not only to ensure public access to creative works, but also to sustain professional authorship. Professional artists are already struggling to survive in the new digital paradigm, in which their works are more easily copied and more easily disseminated without accreditation than other types of works. Registration and cost barriers prevent artists from enforcing their rights. There is no evidence of a strong public need to make the entire category of visual works completely available for appropriation as orphan works – and such legislation would create even greater harm to professional livelihoods. Instead, there is a strong need to improve the ability of artists to redress the already rampant infringements of visual works enabled by digital and online copying.

Respectfully submitted,

Linda Joy Kattwinkel