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LIBRARY OF CONGRESS  
Copyright Office

Docket No. 2018–9 (FR Doc. 2018–22486)

## **NOTICE OF INQUIRY: REGISTRATION MODERNIZATION**

### **Comments Submitted by the Graphic Artists Guild, Inc.**

#### **INTRODUCTION**

The Graphic Artists Guild welcomes the opportunity to comment on the Copyright Office’s Notice of Inquiry, Registration Modernization. We are a member of the Coalition of Visual Artists, and have joined in their comments<sup>1</sup>, which we support. We are also a member association of the Copyright Alliance and have joined and support their comments<sup>2</sup> as well.

We appreciate that the Copyright Office is seeking to address greatly needed changes to the copyright registration system, including legal and policy changes, and has asked stakeholders for their feedback. This is an opportunity to address holistically the registration and deposit process, facilitating copyright registration and communications with the Office, and bringing more individual creators and copyright holders into the system. A modernized copyright registration system will ultimately benefit the US public and the economy.

However, we agree with the negative assessment expressed in the Coalition of Visual Artists comments. Copyright registrations are low, steadily declining since 2011 (despite a small upturn 2017)<sup>3</sup>. The processing time for the simplest online copyright registrations, requiring no communication, averages six months<sup>4</sup>. While copyright registration fees rise steadily, with increases

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<sup>1</sup> Coalition of Visual Artists – Comments in Response to the US Copyright Office NOI re Modernization. Submitted January 15, 2019.

<sup>2</sup> Registration Modernization: Comments of the Copyright Alliance. Submitted January 15, 2019

<sup>3</sup> United States Copyright Office Fiscal 2017 Annual Report, <https://www.copyright.gov/reports/annual/2017/ar2017.pdf>

<sup>4</sup> Registration Processing Times, <https://www.copyright.gov/registration/docs/processing-times-faqs.pdf>

occurring every six years or so, the income levels for graphic artists remain stagnant<sup>5</sup>. That loss of income is exacerbated by rampant online infringement and the resulting loss of licensing income.

And yet the individual graphic artists we represent remain disenfranchised from the registration system, deterred by confusing procedures, inadequate instruction, high registration fees, and the high cost of enforcing their copyrights. An effective modernization effort would bring high volume/low value copyright holders into the system rather than merely serving the needs of high value/low volume copyright holders.

Historically we and other visual artist associations and stakeholders have been diligent in responding to the Copyright Office's requests for feedback from stakeholders. We've described the issues our members have had with the registration system; we've proposed alternate registration models; we've conducted surveys to provide the Office data to assist in its decision making. We hope to continue engaging with the Copyright Office on developing a truly forward-thinking plan for modernization. We do not want this modernization effort to proceed in a piecemeal fashion, without substantive changes to a system that for individual visual artists is broken.

The comments submitted by the Coalition of Visual Artists and the Copyright Alliance largely reflect our views. We're focusing our comments below on certain questions raised by the NOI, reflecting the interests of graphic artists.

### **NEW SOLUTIONS FOR DELIVERING APPLICATION ASSISTANCE:**

We recognize that the differing levels of familiarity and expertise users have with copyright registration need to be addressed. A multi-tiered support option as described in the NOI, providing different levels support for novice and experienced users, could meet those different needs. However, unless such a system is intelligently designed to allow for user behavior (and error), a multi-tiered support system could cause confusion, discourage novice users, and result in error-ridden applications and registrations. While we support the idea of a multi-tiered support system, we caution that the development of such a system will need to incorporate robust user testing from sample audiences similar to the targeted users. Indeed, the development of a modernized registration system will need to follow best practices for usability testing. The system will also need to address pervasive problems copyright holders have in understanding the specific terminology used by the Copyright Office. This is a particular problem when addressing more complex concepts, such as correctly identifying derivative works.

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<sup>5</sup> *The Graphic Artists Guild Handbook: Pricing & Ethical Guidelines*, 11<sup>th</sup> and 15<sup>th</sup> Editions. From 2003 through 2018, income for illustrators has remained stagnant. Income statistics adjusted for CPI inflation. U.S. Department of Labor, Bureau of Labor Statistics. *Graphic Designers: Occupational Outlook Handbook – Job Outlook*, available at <https://www.bls.gov/ooh/Arts-and-Design/Graphic-designers.htm#tab-6> Income for graphic designers is projected to increase by only 4% through 2026 – significantly lower than the projected national average for all jobs, and with large variations in earning potential as industries which traditionally have employed graphic artists are disrupted by emerging industries.

The comments submitted by the Coalition of Visual Artists raise a valuable point: that the Copyright Office needs to approach the development of the registration system as would a corporation seeking buy-in from its users. They offer several ideas for rich support materials: detailed instructions, help menus, FAQs and examples, live chat, video tutorials and instruction manuals. We would like to stress that the support materials must be current with new technologies to address questions raised about the registration of websites, apps, software, and the like.

### **Integrate registration information into the online registration process**

The Copyright Office has asked for feedback on the most frequently asked questions users have about the registration system, and in their comments, the Copyright Alliance has provided a list. Answers to many of these questions are currently provided on the Copyright Office website, but they are scattered across different circulars and the FAQs page. We suggest that these frequently asked questions and answers be incorporated throughout the registration application stream (possibly within an interactive widget that won't clutter or obstruct the interface). This will provide guidance without forcing the user to interrupt the application process to search out an answer elsewhere on the site.

### **The published/unpublished dilemma**

As we've raised in previous comments, one of the largest sources of confusion for copyright owners is the distinction between published and unpublished works. The traditional understanding of "published" causes confusion when applied to works posted online. That confusion exists even in the courts, where different assumptions are made regarding whether online works have been properly registered as published or unpublished. This results in what the Coalition of Visual Artists refers to as a "gotcha": copyright holders are penalized for failing to register a work correctly when even the courts are not of the same opinion in interpreting the legal definition of terms such as "published". Courts defer to Copyright Office opinions, and yet the Office has declined to offer an opinion on published versus unpublished in the online environment.

The Coalition of Visual Artists comments include a number of suggestions to address the published/unpublished problem, including a change to the statutory definition of "published" (with the Copyright Office advising Congress), or the removal of the statutory requirement to list publication status, date and nation. Until and unless Congress makes such changes to the statute, it would be most helpful to both copyright owners and the courts if the Office could issue an opinion and guidelines on distinguishing between published and unpublished online works. This guidance should be included in the registration application support system.

We support the Copyright Alliance's suggestion that the requirement for listing the publication status and first date of publication be eliminated or made optional on the registration application. While the statute requires the distinction under 17 U.S.C. § 412, applying a 90-day grace period to published works, it isn't necessary at the registration stage. The court can consider whether a work is published or unpublished and apply the statutory grace period, if applicable, if and when a copyright owner brings an infringement lawsuit.

## **PAPER APPLICATIONS:**

We feel strongly that paper applications should continue to be accepted for the benefit of copyright owners who cannot afford or are unable to use a personal computer or an internet connection. While it is true that many communities offer computer access at local libraries, there will always be a certain portion of the population who, for various reasons (such as disability, distance from libraries, time constraints, etc.) are unable to avail themselves of those resources. These creators should be able to participate in the registration system through paper applications. Paper applications can also fill in the gap when a system outage or government shutdown make the eCO system unavailable. We understand that the Copyright Office will need to charge a higher fee for registrations made with paper applications, reflecting the increased labor costs incurred by those applications, but we don't agree that applicants electing to use paper applications should pay an additional fee if they don't meet certain requirements. Those using paper applications are already paying a higher fee, and the relative ease of using the eCO system, particularly if the system is redeveloped with robust support features as described in the NOI, should suffice to incentivize users who are able to do so, to use eCO without an additional penalty.

## **ELECTRONIC CERTIFICATES:**

We agree with the Copyright Office's proposal that registration certificates be supplied as electronic documents with validating watermarks, etc. We also support the Copyright Alliance's proposal that the Office permit users to purchase certificates printed on special paper for an additional fee, which would provide the Office with a revenue stream. However, we would like to confirm that the electronic certificates will be supplied as PDFs or some other format suitable for desktop printing, which copyright owners could use as a physical proof of registration.

## **DYNAMIC PRICING MODELS:**

We welcome the Copyright Office's discussion of dynamic pricing models. Over the years, we've suggested such models in discussion with and in comments submitted to the Copyright Office. We support the proposals for dynamic pricing models – or, as the Coalition of Visual Artists more accurately names them, dynamic registration models – submitted in their comments. The proposed provisional registration system, tiered or bulk subscription plan, and self deposit schemes would revolutionize the registration process for individual copyright holders.

## **Provisional Registration**

The comments submitted by the Coalition of Visual Artists provide a clear description of the proposed provisional registration: copyright owners pay a reduced fee for a provisional registration which is not examined by the Copyright Office; if the copyright holder subsequently wanted to

bring an infringement suit, they would pay a fee to have the provisional registration examined and converted to a regular registration; once the registration is converted to a regular registration, the copyright owner would then have all the statutory benefits of a regular registration, with the effective date of registration being the date the Copyright Office received the provisional registration. The provisional registration conversion process will need to be expedited if the copyright holder requires the registration for pending litigation, and can't accommodate a lengthy processing period. The Coalition suggests two options: 1) allowing the application to convert a provisional registration to suffice for bringing suit, or 2) bringing the conversion applications to the "front of the line" for examination.

We agree with the Coalition that the provisional registrant should be permitted to convert the registration at any time during the life of the copyright. In the course of a project, graphic artists deliver to clients a large number of works (sketches, revisions, colorways, etc.) to which the client does not own the rights and which should be registered. Since that work is usually provided in digital format, it can be stored indefinitely. That work can be infringed at any time – by an unscrupulous client, by an unwitting client who either doesn't remember or doesn't realize they don't own the work, by individuals such as co-workers or new employees who come across the files and don't know the provenance, etc. Much of that work is evergreen and would have a value to an infringer beyond the scope of the original project, and software makes it easy for works to be refreshed for new use. Infringement can and does occur years (and even decades) after files are delivered.

Additionally, we agree that the additional fee to convert a provisional registration to a regular registration should be reasonable. Our members already cite registration fees as a barrier to registering their work. Setting a time limit or too high a fee for the conversion of a provisional registration would compromise the purpose of such a registration option: to provide individual copyright holders an affordable means to effectively register their works and avail themselves of the protections of registration.

### **Group registration options for all works of visual art**

In advocating for a provisional registration system, the Coalition of Visual Artists points out that the group registration options currently available to photographers, GRPPH and GRUPH, do not meet the needs of photographers: they are unwieldy, expensive, and make it difficult for photographers to budget adequately. However, graphic artists are in an even worse position than photographers, having only two options to register groups of works: the unpublished collection and GR/CP, group registration of contributions to periodicals. This is despite the fact that, as described above, graphic artists generate and deliver to their clients a large volume of work which should be copyrighted: sketches, revisions, alternate designs or illustrations, large series with different

colorways created by surface and textile designers, etc. These works – between 50 to 500 works per year<sup>6</sup> – are ripe for infringement by unscrupulous or unwitting clients and others.

In 2017, the Copyright Office proposed eliminating the unpublished collection option, and replacing it with GRUW, Group Registration of Unpublished Works. We objected to this proposal<sup>7</sup> since the GRUW option would limit the group to five works, a number severely inadequate to the needs of graphic artists. Increasing the number of permitted works to 10 or 25 or 50 ignores the fact that graphic artists work across a wide number of disciplines and projects, some of which require the creation of many preliminary works for each final project, and some which generate few. Additionally, the GRUW option does not meet the needs of graphic artists who create large volumes of published works which do not qualify for GR/CP.

Instead, we support expanding the GRPPH and GRUPH group registration to all visual works, creating new group registration options that encompass photography, graphic works, three-dimensional works, etc. Being able to avail themselves of the protection afforded by the GRPPH and GRUPH group registrations would provide graphic artists an affordable means to protect their works. The Coalition provides an extensive discussion on ways to solve the published/unpublished group registration problem in their comments, including the proposed expansion of the GRPPH and GRUPH group registration options.

#### **AUTHORSHIP STATEMENTS AND ADMINISTRATIVE CLASSES:**

We agree with the Copyright Alliance that the current registration application system, requiring users to indicate both what elements are included in their claim and what elements are excluded, is confusing. However, we're concerned that a solution suggested in the NOI, consisting of a drop-down menu of choices which identify the work as a whole, may also prove ill-fitting for copyright owners. Eliminating this process and permitting copyright owners to submit a general description of the work, as suggested in the NOI, would resolve this problem. Permitting the examiner rather than the copyright holder to describe the work isn't an acceptable solution for the reasons submitted by the Alliance – increased workload for the Copyright Office and increased application processing time – as well as the greater chance that the examiner (particularly a new examiner) will make a mistake in describing the “nature of authorship” and “author created”. Copyright owners are in the best position to accurately describe the nature of their works and their own authorship.

We agree with the NOI that the administrative classes are confusing for copyright owners. Assigning the correct administrative class is particularly difficult for graphic artists who create works that incorporate elements that fall within multiple administrative classes, e.g., text and imagery,

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<sup>6</sup> Survey of Visual Creators and Related Professionals Regarding the Copyright Office NPRM 2018 Proposed Fee Increases, Coalition of Visual Artists, p 14. Of the graphic artists responding to the survey, 55% answered that they produce up to 50 works per year, and 42% answered that they produce up to 500 works per year.

<sup>7</sup> Notice of Proposed Rulemaking: Group Registration of Unpublished Works, Comments by the Graphic Artists Guild. Submitted Nov. 23, 2017.

such as children’s books, websites, and graphic novels. The comments submitted by the Copyright Alliance clearly describe the confusion copyright owners have when selecting from administrative classes that make sense to the Copyright Office examiners, but don’t track to how creators and copyright owners classify their work. Adding additional fields for administrative classes won’t solve the problem, since the difficulty lies not with the quantity of choices, but rather with how the administrative classes are understood by lay people. We agree with the NOI’s suggestion of having copyright holders provide a general description, which the Copyright Office would use to route the application to the correct administrative class. This would relieve the copyright holders of the responsibility and risks of assigning their work to a particular administrative class, and reduce the number of applications which require communication between the Copyright Office and copyright holders.

## **DERIVATIVE WORKS**

The NOI asks if users of the online registration system should be required to identify whether or not the work submitted for registration is a derivative work. We agree with the Copyright Alliance that novice users might be confused by that requirement. In fact, we can confidently assert that novice users (and even experience users) are often tripped up in interpreting whether a work is derivative. As the Alliance points out, part of the confusion stems from the fact that the terms “transformative” as applied in fair use and “transform” as applied to derivative works are often confused, and even disputed within the courts. Rather than requiring copyright holders to identify whether a work is derivative, a registration application asking whether preexisting works have been used, and if yes, what those works are, should suffice.

We’d also like to point out that if a multi-tiered support system is implemented, with one gateway for experienced users and one for novice users, a particular point of concern would be a step where applicants are asked to identify whether a work is derivative. Less experienced users who entered the registration application process after selecting the experienced users tier might sail through the first steps of the registration, only to be thwarted by a step requiring a more nuanced understanding of terminology. The support system will need to anticipate trouble areas in the application process where users will be challenged by confusing or easily misunderstood terminology.

## **TRANSFER STATEMENTS**

We do not recommend replacing “other” with “by operation of law” on the list of acceptable transfer statements. We feel that this will cause confusion since, to lay people, there is overlap between the statements. For example, a copyright owner who inherited a copyright could select either “by inheritance” or “by transfer of law” – either statement would seem to apply. Should “by operation of law” be included as a catch-all option to “by inheritance” or “by transfer of law”, then

the purpose of that choice (when neither of the other options suffice) will need to be clearly defined for applicants.

## **ADDITIONAL DATA**

We don't believe that additional data, such as ISBNs, etc. should be mandatory. Information not required by statute should always be voluntary, and requiring additional data will create a barrier to registration and enforcement. However, we do support permitting other optional data to be included in the Online Public Record, and the uploading of thumbnail images into the Record. Those will help prevent the misidentification of works as orphan works.<sup>8</sup>

## **APIs**

While we don't have any additional observations to add to the Coalition of Visual Artists and Copyright Alliance's comments on APIs, we want to express our whole-hearted support for integration of APIs into the registration system so that registration becomes part of a creator's workflow. By integrating copyright registration into the workflow of graphic artists, APIs will encourage graphic artists to register their works. APIs will also ensure that the accompanying metadata is included in the Copyright Office Online Public Record, to the benefit of visual artists. We've long advocated for development of APIs to facilitate registration and believe it to be a necessary step in creating a copyright registration system which truly meets the needs of modern creators.

## **DIGITAL FIRST STRATEGY**

We agree that the mandatory deposit requirement should be eliminated, so that applicants may submit digital copies for all types of works. However, applicants should have the option to submit physical deposits if unable to use an electronic deposit system – because of lack of access to online systems, physical disability, the nature of the submission, etc. Where applicants are able to submit digital deposits, physical deposits should only be required if the copyright owner receives a written demand from the Copyright Office based on the Library of Congress' determination that they are needed for the Library's collection. We share the Copyright Alliance's concern with security, particularly with cyberattacks that would make electronic deposits vulnerable to theft.

We also share the Copyright Alliance's concern that the file format of electronic deposits should not be limited. While file size is a concern for both the transmission and the storage of electronic deposits, and while the submission of low resolution, compressed images and files should be

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<sup>8</sup> In our response to the Copyright Office NOI, "Information Technology Upgrades for a Twenty-First Century Copyright Office (Docket No. 2016-2), we also advocated for search capabilities to assist the general public in searching visual works.

encouraged, a file size limit should not be imposed upon all electronic deposits. Many works, such as publications with many images or complex vector graphics, currently create files sized well over 50 MB. Additionally, programs which embed images (such as PowerPoint and Illustrator) rather than displaying a preview to a linked image can generate very large file sizes. A modernization effort will need to take into consideration the need for a secure, fast file transfer system as well as the secure storage of deposits.

## **OTHER CONCERNS**

### **Support for a Copyright Small Claims Tribunal**

Key to a healthy copyright ecosystem, in which the interests of all stakeholders are balanced, are means for the enforcement of copyrights. Unfortunately for most small copyright holders – including the individual graphic artists and small studios who comprise our membership – enforcing our copyrights is out of reach. The high cost of bringing an infringement lawsuit, difficulties in finding a lawyer who will accept a low-value infringement lawsuit, and challenges in proceeding with a court case pose significant obstacles for low value/high volume copyright holders such as graphic artists. The creation of a copyright small claims tribunal will go far to balance the scales. We appreciate the Copyright Office's past support for The CASE Act. We hope that the Office will continue to provide leadership in counseling Congress on the need for copyright small claims legislation.

Respectfully submitted:

Rebecca Blake, Advocacy Liaison  
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### **About the Graphic Artists Guild**

For 50 years, the Graphic Artists Guild has advocated on behalf of our members: graphic designers, illustrators, animators, cartoonists, comic artists, web designers, and production artists. We educate graphic artists on best practices through webinars, Guild enews, resource articles, and meetups. *The Graphic Artists Guild Handbook: Pricing & Ethical Guidelines* has raised industry standards, and provides graphic artists and their clients guidance on best practices and pricing standards. We also advocate for graphic artists on Capitol Hill on a wide range of legislative initiatives, as well as internationally through active membership in global organizations.