



The Register of Copyrights of the United States of America

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The Honorable Lindsey Graham
Chairman, Committee on the Judiciary
U.S. Senate
290 Russell Senate Office Building
Washington, DC 20510

The Honorable Dianne Feinstein
Ranking Member, Committee on the Judiciary
U.S. Senate
331 Hart Senate Office Building
Washington, DC 20510

January 18, 2019

Re: *Copyright and Visual Works: The Legal Landscape of Opportunities and Challenges*

Dear Chairman Graham and Ranking Member Feinstein:

Throughout the House Judiciary Committee's recent review of U.S. copyright law,¹ the United States Copyright Office was honored to provide testimony and legal and factual analysis on a number of important matters. Many of these issues touched on the interaction between copyright and visual works.² From a small claims tribunal³ to moral rights⁴ to section 512 notice

¹ See *Copyright*, U.S. HOUSE COMMITTEE ON THE JUDICIARY, <https://judiciary.house.gov/issues/copyright>.

² For purposes of this letter, references to visual artists relate only to photographers, illustrators, and graphic designers, whose work often is distributed far and wide, presenting a distinct set of copyright-related issues. Similarly, mentions of visual works relates only to the photographic, illustrative, and graphic works produced by these artists. These references do not relate to the definition of a "work of visual art" set forth in section 101 of the Copyright Act. Additionally, fine artists too are faced with a variety of copyright-related issues, some of which overlap with more commercial artists. The Copyright Office focused on issues of fine art both in its 2013 Resale Royalty report and its pending study on moral rights, and does not address these issues in this letter.

³ See U.S. COPYRIGHT OFFICE, COPYRIGHT SMALL CLAIMS (2013) ("SMALL CLAIMS REPORT"), available at <https://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf>; see also Copyright Alternative in Small-Claims Enforcement Act of 2017, H.R. 3945, 115th Cong. (2017) (incorporating several of the Copyright Office's recommendations).

⁴ See Study on the Moral Rights of Attribution and Integrity, 82 Fed. Reg. 7870 (Jan. 23, 2017).

and takedown concerns,⁵ visual artists repeatedly have cited areas in which they face challenges in creating, enforcing, and licensing their works. In light of the importance of these issues, the Office undertook a holistic analysis of the copyright landscape in which visual artists must work, soliciting public comment to identify the most challenging issues faced by both visual artists and those who seek to use their images.⁶ Here, we present our findings.

The Copyright Office's review both reinforces the importance of visual works to this nation and identifies common obstacles that the Copyright Act of 1976 (Title 17 of the U.S. Code) and the Office itself may be able to alleviate. The analysis underscores how vital visual works are to our nation. They supply the country's visual memory and contribute immeasurably to our journalism, culture, and commercial enterprises. From Joe Rosenthal's emblematic photograph *Raising the Flag on Iwo Jima* and Norman Rockwell's iconic illustrations to the immediately recognizable graphic artwork depicting Uncle Sam beckoning recruits for the U.S. Army, visual works have captured the heart of America and have told the story of our nation in a truly unique manner.

Against this impressive backdrop, a number of stakeholders, including photographers, graphic designers, illustrators, and licensees, raised specific issues they face on a regular basis regarding current copyright law and practices. These challenges fall within three general categories: (1) difficulties in the registration process; (2) challenges in licensing generally and monetizing visual works online in light of the nascent online marketplace; and (3) general enforcement obstacles.

Specifically, there are a number of registration issues that the Office is addressing through its technological modernization process as well as by updating regulations and reviewing practices. There also are a number of licensing challenges that could be reduced by greater education and legislative attention to issues such as orphan works. Finally, we recognize that enforcement obstacles are particularly difficult, and we repeat our call for the creation of a copyright small claims tribunal that could significantly lessen the financial burden that visual artists face in enforcing their rights.

The Copyright Office understands the serious nature of these concerns and already has taken steps to address some of them where it can. For other issues, however, Congress may want to consider if there are any statutory changes that could assist visual artists in their ability to create works of authorship and simultaneously benefit the public at large. The Office will continue to

⁵ See Section 512 Study: Notice and Request for Public Comment, 80 Fed. Reg. 81,862 (Dec. 31, 2015).

⁶ See Copyright Protection for Certain Visual Works, 80 Fed. Reg. 23,054 (Apr. 24, 2015); see also *Visual Works*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/policy/visualworks/>.

examine its own practices to assess whether it can take additional steps to help allay some of the visual artists' serious concerns.

A. Registration

Visual artists rely on the U.S. copyright registration system to be accessible and enable them to register their works. Though registering works with the Copyright Office is voluntary (eligible visual works are protected by copyright law from the moment of creation and fixation⁷), registration provides a number of crucial benefits. Owners of U.S. works must register them (or the Copyright Office must have refused registration) before owners can bring infringement lawsuits,⁸ and all copyright owners must timely register their works to receive certain presumptions regarding the validity of copyright information⁹ and to pursue statutory damages or attorney fees in litigation.¹⁰ Additionally, the registration system creates searchable public records of copyright claims, facilitating licensing opportunities by making information relating to the work and ownership more readily available to prospective licensees.

Because of the importance of registration, visual artists understandably are interested in finding efficient and cost effective ways to use the Copyright Office system. The high-volume nature of visual artists' works—for example, photographers might take over one thousand photographs in a single session—puts them in a unique position regarding how they submit works and the associated financial costs of registration. Visual artists are concerned that the current online registration system, initially launched in 2007 and known as eCO, does not sufficiently support them. They noted that “[e]xisting registration procedures are not optimized for visual imagery”¹¹ and “work[] better for small volume, large profit producers than for those who

⁷ Works must be original and fixed in a tangible medium of expression for more than a transitory duration to warrant copyright protection. See 17 U.S.C. § 102(a). Note that works of authorship governed by the 1909 Copyright Act are subject to formalities and copyright protection was not automatic.

⁸ *Id.* § 411(a).

⁹ *Id.* § 410(c). If made before or within five years of publication, registration will establish *prima facie* evidence in court of the validity of the copyright and the facts stated in the certificate. The evidentiary weight of the certificate is left in the court's discretion.

¹⁰ *Id.* §§ 412, 504, 505. To claim statutory damages or attorney fees in a copyright infringement lawsuit, registration must occur either prior to the infringement or within three months after the work's first publication. Other registration benefits include satisfaction of the Library of Congress' mandatory deposit rule that requires two copies of the best edition of a published work be deposited with the Library. *Id.* §§ 407, 408(b). Owners also can record registrations with U.S. Customs and Border Protection for protection against the importation of infringing copies into the United States. 19 C.F.R. §§ 133.31–53.

¹¹ Copyright Alliance, Comments Submitted in Response to U.S. Copyright Office's Apr. 24, 2015 Notice of Inquiry at 2 (“Copyright Alliance Initial Comments”).

create dozens if not hundreds of works over a short period.”¹² Concerns largely focused on technical aspects of registering a work as well as the registration procedure in general, with the process described as “time consuming, complicated and expensive.”¹³ From a technical standpoint, visual artists described the Office’s registration system as “somewhat incompatible with the current technological environment” because it does not keep pace with how “visual content is created, posted, and shared online.”¹⁴

The Copyright Office wholly agrees that a modern and fully-functional registration system is critical to U.S. copyright law and to all in the copyright ecosystem. The Office is undertaking a comprehensive modernization process that will streamline the application process and improve both the user experience and the resulting public records.¹⁵ The process focuses not only on technology but also on the Office’s regulations and practices, marrying the technological and legal aspects of copyright law.

1. Modernization and Technological Improvements

The Copyright Office spent several years conducting in-depth studies and developing plans (including the most recent 2017 Modified IT Plan developed in conjunction with the Library of Congress Office of the Chief Information Officer)¹⁶ to lay the foundation for a wholesale technological upgrade. One major focus of this effort is the registration portal, including a

¹² Kernochan Center for Law, Media and the Arts, Columbia University School of Law (“Kernochan Center”), Reply Comments Submitted in Response to U.S. Copyright Office’s Apr. 24, 2015 Notice of Inquiry at 4 (Oct. 1, 2015) (“Kernochan Center Reply Comments”).

¹³ Mark Stout Photography, Comments Submitted in Response to U.S. Copyright Office’s Apr. 24, 2015 Notice of Inquiry at 2 (May 5, 2015). One commenter explained that she avoids registration altogether because “[a]s an independent, self-employed artist, my time is better spent on creating new work or utilizing current work into ways of making a living.” Leann Johnson, Reply Comments Submitted in Response to U.S. Copyright Office’s Apr. 24, 2015 Notice of Inquiry at 1 (Sept. 2, 2015).

¹⁴ American Intellectual Property Law Association (“AIPLA”), Comments Submitted in Response to U.S. Copyright Office’s Apr. 24, 2015 Notice of Inquiry at 3 (July 23, 2015) (“AIPLA Initial Comments”).

¹⁵ The Copyright Office already has invested significant time and resources analyzing modernization efforts. The Office identified the need for upgrading the registration system in its *Priorities and Special Projects of the United States Copyright Office: October 2011–2013*, and continued its review with *Transforming Document Recordation at the United States Copyright Office* (2015), *Report and Recommendations of the Technical Upgrades Special Project Team* (2015), *Provisional Information Technology Modernization Plan and Cost Analysis* (2016), and *Modified U.S. Copyright Office Provisional IT Modernization Plan* (2017). More information on the Office’s modernization plans is available online at <https://www.copyright.gov/copyright-modernization/>.

¹⁶ See U.S. COPYRIGHT OFFICE, MODIFIED U.S. COPYRIGHT OFFICE PROVISIONAL IT MODERNIZATION PLAN: ANALYSIS OF SHARED SERVICES, SUPPORT REQUIREMENTS, AND MODERNIZATION EFFORTS (2017) (“MODIFIED IT PLAN”), available at <https://www.copyright.gov/reports/itplan/modified-modernization-plan.pdf>.

simplified user interface and enhanced workflow tools. These improvements, once implemented, will address a significant number of visual artists' concerns.

One of the most visible challenges of eCO is the online system's interface to external users. Criticized by visual artists as "visually unattractive, limited in its options and opaque in its explanations" and "clumsy and counterintuitive to use,"¹⁷ eCO is based on an outdated paper-based system.¹⁸ Indeed, the Modified IT Plan recognizes eCO's unfriendly interface as a severe limitation that requires attention.¹⁹ To remedy this situation, the Copyright Office is in the process of completely overhauling the user interface. The Office already has begun this work by contracting with a third party vendor to conduct research on user needs and to develop a new user interface. The research included sixty-eight interviews with stakeholders in four different cities (Washington, D.C., New York, Los Angeles, and Nashville) and a review of over 10,000 survey responses. Interviews covered a cross section of users, including those in the visual arts such as photographers. Based on this research, a third party vendor developed an early version of a potential interface, still in the testing and development phase, with over forty usability tests completed nationwide so far. The Office is continuing this process and taking all of the feedback to build a user interface that is efficient, easy to use, and results in more reliable and error-free data.

Additionally, visual artists voiced concern over the lack of "workflow tools" for eCO that could make the registration process seamless. For example, "[c]urrent digital photography workflow tools such as Adobe Photoshop,...[and]Photo Mechanic" are not integrated into eCO, increasing the amount of time spent registering works because applicants must reenter and sort data a second time.²⁰ Many visual artists suggested as a solution that the Copyright Office incorporate

¹⁷ Daniel Abraham, Comments Submitted in Response to U.S. Copyright Office's Apr. 24, 2015 Notice of Inquiry at 2 (July 23, 2015); *see also* Graphic Artists Guild ("GAG"), Comments Submitted in Response to U.S. Copyright Office's Apr. 24, 2015 Notice of Inquiry at 14 (July 20, 2015) ("GAG Initial Comments") ("The Guild has been told by graphic artists, Web designers and illustrators that eCO is badly designed and confusing to use."); National Press Photographers Association ("NPPA"), Comments Submitted in Response to U.S. Copyright Office's Apr. 24, 2015 Notice of Inquiry at 20 (July 23, 2015) ("NPPA Initial Comments") (quoting NPPA member Rick Majewski, "I say the hardest thing about copyright is the Copyright Office website. I wish it was just more intuitive I would file more often if that was the case").

¹⁸ *See Oversight of the U.S. Copyright Office: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 43 (2014) (statement of Maria A. Pallante, Register of Copyrights and Director, U.S. Copyright Office) (elaborating "the paper [based] system was transposed into an electronic interface. We have yet to go to the next generation of really having the real advantages of a 21st century digital system").

¹⁹ *See* MODIFIED IT PLAN at 26–27.

²⁰ American Society of Media Photographers ("ASMP"), Comments Submitted in Response to U.S. Copyright Office's Apr. 24, 2015 Notice of Inquiry at 14–15 (July 23, 2015) ("ASMP Initial Comments").

application programming interfaces (“APIs”)²¹ into the registration system to create a “low-friction, low-cost, integrated, automated registration and licensing platform.”²² The Office’s modernization plan envisions APIs for just this purpose, and seeks to incorporate this critical technology into the new registration system.²³ In addition to making the application process more efficient, APIs also could open up the possibility of bulk registration submission as well as the creation of mobile applications for the submission of applications on smart phones and tablets.²⁴

In addition to these targeted efforts, the Copyright Office also issued a Notice of Inquiry asking for public input on a wide variety of issues relating to modernizing registration.²⁵ The Notice identified a number of key areas for consideration, touching on everything from the application process to deposit issues and the public record. For example, the Notice asked for input on how to improve the application process; whether the Office should move fully to electronic applications and payments; whether the Office should move towards issuing electronic registration certificates; ideas on dynamic pricing models such as subscription or sliding scale options; possible changes to the authorship statement and administrative classifications; how to handle derivative authorship; possibly simplifying transfer statements; using APIs; the types of data the Office should collect; and what additional types of data should be publicly accessible. The Office is excited about this Notice, which allows the public—including visual artists—to provide their views on the development of the modernized registration system. The Office anticipates that the Notice will yield a wealth of information to help frame registration modernization issues and to further address visual artists’ concerns.

²¹ APIs are used to enable data exchange between two entities and would allow an organization to emulate copyright registration functions within the Copyright Office’s specifications while allowing the Office to maintain control over the records and data. See Paul Goldstein, et al., *Low-Cost Licensing of Photographs in the Digital Age: Options and a Proof of Concept*, STAN. L. SCH. COPYRIGHT LICENSING POL’Y PRACTICUM, 2015, at 69 (submitted with Stanford Law School Law and Policy Lab (“Stanford Law School”), Comments Submitted in Response to U.S. Copyright Office’s Apr. 24, 2015 Notice of Inquiry (July 23, 2015) (“Stanford Law School Initial Comments”).

²² Stanford Law School Initial Comments at 2; see also Digital Media Licensing Association (“DMLA”), Comments Submitted in Response to U.S. Copyright Office’s Apr. 24, 2015 Notice of Inquiry at 9 (July 23, 2015) (“DMLA Initial Comments”); Getty Images (“Getty”), Comments Submitted in Response to U.S. Copyright Office’s Apr. 24, 2015 Notice of Inquiry at 5 (July 21, 2015) (“Getty Initial Comments”); PLUS Coalition (“PLUS”), Comments Submitted in Response to U.S. Copyright Office’s Apr. 24, 2015 Notice of Inquiry at 1–2 (July 22, 2015) (“PLUS Initial Comments”); Canadian Association of Professional Image Creators (“CAPIC”), Comments Submitted in Response to U.S. Copyright Office’s Apr. 24, 2015 Notice of Inquiry at 5 (July 23, 2015) (“CAPIC Initial Comments”).

²³ See U.S. COPYRIGHT OFFICE, REPORT AND RECOMMENDATIONS OF THE TECHNICAL UPGRADES SPECIAL PROJECT TEAM 7, 71 (2015) (“TECHNICAL UPGRADES REPORT”), available at https://www.copyright.gov/docs/technical_upgrades/usco-technicalupgrades.pdf.

²⁴ *Id.* at 69–72.

²⁵ See Registration Modernization, 83 Fed Reg. 52,336 (Oct. 17, 2018).

The Copyright Office is optimistic that its modernization efforts will address many technical concerns regarding the online registration system, including those raised by visual artists. The Office will continue to keep Congress up to date on the progress of modernization and how it could alleviate many technological concerns that impact visual artists and others throughout the copyright community.

2. Registration Regulation and Practice Improvements

In addition to purely technological concerns, visual artists seek changes in how they can group together multiple copyright claims in a single application and would like additional guidance regarding the definition of “publication.”

a. Grouping Works in Applications

Many visual artists face the conundrum of “high volume, low value” works, meaning that they create a large number of works but each individual work is of relatively small economic value.²⁶ This presents a unique problem for visual artists who contend that the registration system is “cumbersome” when registering large amounts of works.²⁷ Some visual artists are frustrated about the amount of time it takes them to apply to register their works, finding it to be “wasted valuable time . . . that could have been spent on paid work, marketing, or any other aspect of business.”²⁸ The Copyright Office recognizes the effort and financial burden photographers would confront if required to register each image individually and has created certain group applications to address some of these issues for photographers. For example, in November 2017, the Office issued a final rule modifying the procedure for registering groups of published photographs and establishing a similar procedure for registering groups of unpublished photographs.²⁹ Photographers registering groups of up to 750 published or unpublished photographs must use a new online application specifically designated for such registrations, and deposits of the works must be submitted in digital form.³⁰ This provides an avenue for registering both types of work, published and unpublished, which should cover the vast

²⁶ See Copyright Alliance Initial Comments at 6.

²⁷ CAPIC Initial Comments at 4.

²⁸ Alexandra Rena Feehery, Comments Submitted in Response to U.S. Copyright Office’s Apr. 24, 2015 Notice of Inquiry at 2 (July 20, 2015); see also Amy Kirkpatrick, Comments Submitted in Response to U.S. Copyright Office’s Apr. 24, 2015 Notice of Inquiry at 2 (July 19, 2015) (“Creating art is time consuming. Finding buyers is time consuming To register with the Copyright Office is simply another expense in time and money.”); Amy Willmuth, Comments Submitted in Response to U.S. Copyright Office’s Apr. 24, 2015 Notice of Inquiry at 1 (stating that “registering my work takes away from the time I feel is best for creating art”).

²⁹ See Group Registration of Photographs, 83 Fed. Reg. 2542 (Jan. 18, 2018).

³⁰ *Id.* at 2543–44.

majority of photographers' submissions.³¹ The Office believes that eliminating paper applications for these group registrations will increase the efficiency of the registration process, and the updated deposit requirement should not impose a significant burden on photographers, the majority of whom already use digital cameras. The Office realizes that there has been some resistance to the 750 limit in the group registrations,³² but determined the limit based on the amount of time required for Office staff to examine claims, as required by the Copyright Act. Importantly, the Office's Notice of Inquiry regarding registration modernization also provided an opportunity for ideas about new avenues for registration. The Office believes that the modernized system will be flexible enough to further accommodate visual artist needs.

One common recommendation was to allow online group registration for all visual works, instead of only for photographs.³³ The Copyright Office will continue to look for new ways to improve its application process, including possible new group options, supplemented by the technological modernization efforts already underway and discussed above.

b. Publication

Another registration issue of concern to visual artists is how to determine whether a work is "published" under the Copyright Act. Applications to register copyright claims must differentiate between published and unpublished works for a variety of reasons. For example, section 408 of the Copyright Act mandates that applicants submit two copies of the "best edition" of published works, but does not include a "best edition" requirement for unpublished works, for which only one copy of the work must be submitted.³⁴ Another example is the fact

³¹ *Id.* at 2545 ("The [Copyright Office] estimates that 75% to 80% of the applicants who register their works using the pilot program include fewer than 750 photographs in each claim. Thus, the final rule will not have an adverse effect on the vast majority of applicants.").

³² See Copyright Alliance, Comments in Response to U.S. Copyright Office's Dec. 1, 2016 Notice of Proposed Rulemaking at 2–3 (Jan. 30, 2017); ImageRights International, Inc. ("ImageRights"), Comments in Response to the U.S. Copyright Office's Apr. 24, 2015 Notice of Inquiry at 2 (July 23, 2015) ("ImageRights Initial Comments"); cf. A Collective of National Geographic Photographers, Comments in Response to the U.S. Copyright Office's Apr. 24, 2015 Notice of Inquiry at 3 (stating that limiting the number of unpublished images in an application would be a "huge financial burden" and would "slow down the registration process for photographers and create a substantial amount of work").

³³ See ImageRights Initial Comments at 2 (pointing out that "deposit copies for 2-D artwork can be submitted as digital files just like photographs, it is unclear why [painters, illustrators and other graphic artists] must be faced with this constraint" of not having access to a group registration option); PLUS Initial Comments at 2; CAPIC Initial Comments at 4–5; Stanford Law School Initial Comments at 3; DMLA Initial Comments at 9; GAG Initial Comments at 9.

³⁴ Applicants registering an unpublished work are required to submit one complete copy of the work, while those registering a published work generally must submit two complete copies of the work's "best edition." 17 U.S.C. § 408(b). The "best edition" is defined as "the edition, published in the United States at any time before the date of

that the Act ties certain remedies, such as attorney fees and statutory damages, to timely registration—but that time frame varies depending on whether or not the work is published.³⁵ Mixing published and unpublished works in one application would substantially confuse that analysis under current law, and the Copyright Office thus does not allow applications to include both published and unpublished works together. Whether or not a work is published therefore has “significant consequences” in the registration process.³⁶

While the importance of determining a work’s publication status is clear, determining whether a work actually has been published is not always easy. Visual artists contend that the question of publication, especially in the online context, is “[o]ne of the most burdensome aspects of registration for photographers.”³⁷ The Copyright Act does provide a high-level definition of publication. It defines “publication” as “the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending”;³⁸ it also states that the “offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication,” but that “public performance or display of a work does not of itself constitute publication.”³⁹ This definition has perplexed many visual artists, especially “in the digital age of self-publication with restricted access options” in which visual artists may only provide limited access to

deposit, that the Library of Congress determines to be most suitable for its purposes.” 17 U.S.C. § 101; 37 C.F.R. §§ 202.19(b)(1), 202.20(b)(1). Detailed criteria used to determine the best edition for a particular class of work are listed in the Office’s regulations. For example, the preferred best edition of a published photograph is the most widely distributed unmounted edition on archival quality paper. If the most widely distributed edition is unavailable, the Office will accept an 8x10 inch glossy print, and if that is unavailable than another size or finish. See 37 C.F.R. § 202 app. B(II). If a work was first published in both hard copy and digital format, then the Library’s requirements for hard copy formats apply. See 37 C.F.R. § 202.20(b)(1); see also 37 C.F.R. § 202 app. B(IV) (best edition requirements for other graphic matter).

³⁵ The availability of certain statutory benefits afforded to registered works depends on the timing of registration, with the time frame calculated from the publication date for published works. For example, a copyright owner may elect to seek statutory damages and attorney fees in an infringement lawsuit if the work was registered before the infringement began or, if the work has been published, if the registration was made within three months of its first publication. Similarly, a registration certificate constitutes *prima facie* evidence of the copyright’s validity and of the facts on the certificate as long as the work is registered before or within five years of first publication. See 17 U.S.C. §§ 412, 504(c), 505, 410(c).

³⁶ Linda Joy Kattwinkel (“Kattwinkel”), Reply Comments Submitted in Response to U.S. Copyright Office’s Apr. 24, 2015 Notice of Inquiry at 6 (Oct. 1, 2015) (“Kattwinkel Reply Comments”).

³⁷ Professional Photographers of America (“PPA”), Comments Submitted in Response to U.S. Copyright Office’s Apr. 24, 2015 Notice of Inquiry at 7 (July 22, 2015) (“PPA Initial Comments”); see also ASMP Initial Comments at 13 (noting that “[t]he most vocal complaint about the current system is the time-consuming and expensive process of distinguishing between published and unpublished works in the registration process”).

³⁸ 17 U.S.C. § 101.

³⁹ *Id.*

works.⁴⁰ Applicants are helped only so much by the courts, which have struggled to apply the definition of publication in the online context where the display of a work on a website is clear but where it may be less evident that the work was offered for distribution to a group of persons for further distribution or public display. For example, though some courts have held that merely posting a work on a publicly accessible website constitutes publication under the Copyright Act,⁴¹ others have taken a more fact-specific approach or have stated that the posting of a digital file on the internet does not in itself constitute publication⁴²

With this lack of statutory or judicial clarity, visual artists want guidance from the Copyright Office. As a general rule, the Office considers a work published when it is made available online if the copyright owner authorizes the end user to retain copies of that work or if the owner makes copies available online and offers to distribute them to intermediaries for further distribution or public display.⁴³ But the Office does not consider a work to be published if it is merely displayed online.⁴⁴ Nor does the Office provide case-specific advice to applicants on whether or not a particular work is published because the applicant, not the Office, is in the best position to make that determination. Thus, visual artists grapple with this question, finding that the definition of publication “is not easily applied [in the online context],”⁴⁵ and that the published versus unpublished distinction can be difficult to apply to the various ways visual

⁴⁰ NPPA Initial Comments at 8.

⁴¹ See, e.g., *New Show Studios, LLC v. Needle*, No. 2:14-cv-01250-CAS(MRWx), 2016 U.S. Dist. LEXIS 129077, at *21 (C.D. Cal. Sept. 20, 2016); *William Wade Waller Co. v. Nexstar Broad., Inc.*, No. 4-10-CV-00764 GTE, 2011 U.S. Dist. LEXIS 72803, at *6–7 (E.D. Ark. July 6, 2011); *Getaped.Com, Inc. v. Cangemi*, 188 F. Supp. 2d 398, 402 (S.D.N.Y. 2002).

⁴² See, e.g., *Rogers v. Better Bus. Bureau of Metro. Hous., Inc.*, 887 F. Supp. 2d 722, 731–732 (S.D. Tex. 2012); *McLaren v. Chico’s FAS, Inc.*, No. 10 CIV. 2481 JSR, 2010 U.S. Dist. LEXIS 120185, at *12 (S.D.N.Y. Nov. 9, 2010); *Moberg v. 33T LLC*, 666 F. Supp. 2d 415, 422 (D. Del. 2009); *Einhorn v. Mergatroyd Prods.*, 426 F. Supp. 2d 189, 197 (S.D.N.Y. 2006).

⁴³ See U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 1008.3(B) (3d ed. 2017) (“COMPENDIUM (THIRD)”). The Office also discussed the issue of online publication in a 2010 Federal Register Notice promulgating an interim rule on mandatory deposit of published electronic works available only online. After reviewing case law settling that electronic files meet the “copies” requirement for distribution and publication, that publication can take place by means of electronic transmission, and that online transmissions constitute distribution, the Office concluded that “it follows that the electronic transmission of copies of a work to the public...constitutes publication of that work.” Mandatory Deposit of Published Electronic Works Available Only Online, 75 Fed. Reg. 3863, 3868 (Jan. 25, 2010). The Office has more recently stated in a 2016 Notice of Inquiry on mandatory deposit of electronic books and sound recordings available only online that “[o]nline-only works’...encompass works that are not published in physical formats and are made available via a live internet connection or downloaded from the internet onto a device and viewed, heard, or used offline. In this regard, it should be noted that the interim rule covers only works that are *published* online, not online works that are only publicly displayed or publicly performed online.” Mandatory Deposit of Electronic Books and Sound Recordings Available Only Online, 81 Fed. Reg. 30,505, 30,506–07 (May 17, 2016).

⁴⁴ See COMPENDIUM (THIRD) § 1008.3(B).

⁴⁵ Kattwinkel Reply Comments at 6.

artists choose to exploit their work. Because they are faced with making the decision themselves, visual artists have asked the Office to establish a clear and specific publication definition for all uses, including online uses.⁴⁶

The Copyright Office understands that publication is of considerable concern to visual artists. While the Office is not the arbiter of publication generally, it may be able to provide more certainty in the realm of registration. The Office therefore is planning to issue a Notice of Inquiry in 2019 on issues relating to online publication as they relate to registration requirements. The Office expects that this will help alleviate visual artists' challenges regarding publication, at least in the registration context.

B. Licensing

Many visual artists earn a substantial part of their living from licensing their works.⁴⁷ Traditionally, freelance visual artists were commissioned to create tangible works for specific clients who often received an exclusive license to publish the works, and licenses would have both geographical and time limitations.⁴⁸ Now, works can be created via digital mediums and distributed instantly over the Internet. This transition away from print mediums and traditional licensing models has drastically altered visual works licensing models.⁴⁹ Visual artists must navigate a new online system that provides both incredible opportunities and a number of challenges in connecting with potential licensees.⁵⁰ Obstacles include widespread infringement⁵¹ (discussed in more detail in part C below) and the difficulty in linking potential

⁴⁶ See GAG Initial Comments at 15; PLUS Initial Comments at 2.

⁴⁷ See Alex Wild Photography ("Wild"), Comments Submitted in Response to the U.S. Copyright Office's Apr. 24, 2015 Notice of Inquiry at 1 (July 21, 2015) ("Wild Initial Comments"); CAPIC Initial Comments at 1; Kevin Schafer Photography, Comments Submitted in Response to the U.S. Copyright Office's Apr. 24, 2015 Notice of Inquiry at 1 (July 8, 2015).

⁴⁸ See Kattwinkel Reply Comments at 2-3; ASMP Initial Comments at 8.

⁴⁹ See AIPLA Initial Comments at 1 (detailing that the online community's desire for "an ever-shortening news cycle demand[s] posting and sharing of content at an extremely fast pace, which has rendered more traditional licensing mechanisms in the online environment very difficult, if not obsolete"); ASMP Initial Comments at 3 (stating that "print publishing has declined and the licensing models formerly supporting independent photographers as small business owners have been altered, perhaps irrevocably"); American Photographic Artists ("APA"), Comments Submitted in Response to U.S. Copyright Office's Apr. 24, 2015 Notice of Inquiry at 2 (July 22, 2015) ("APA Initial Comments") (stating that "visual artists . . . continue to experience declining revenues, particularly in the digital space, as new media increasingly supplants their financial opportunities in analog and print communication").

⁵⁰ See, e.g., Digital Media Licensing Association ("DMLA"), Reply Comments Submitted in Response to U.S. Copyright Office's Apr. 24, 2015 Notice of Inquiry at 1-2 (Sept. 30, 2015) ("DMLA Reply Comments"); Kernochan Center Reply Comments at 1; Copyright Alliance Initial Comments at 2-3.

⁵¹ See DMLA Reply Comments at 1.

licensees and licensors due to the common online practice of third parties stripping identifying metadata.⁵² Visual artists thus have not found it easy to capitalize on the possibilities of the internet.

It can be very difficult to identify the rightsholder in the online environment.⁵³ There is substantial frustration among users and artists over this growing number of “orphan” works—those works that are still within copyright term but for which the rightsholder is very difficult or impossible to find and contact.⁵⁴ Many visual artists are concerned about the risk that their works will be orphaned—that is, that people will be unable to identify or locate them as the owner of rights in their visual works. Users also are frustrated by the lack of certainty about how an orphaned work can be used.⁵⁵ The issue is twofold: (1) orphan works discourage potential beneficial uses by putting a user at risk for infringement and possible statutory damages; and (2) copyright owners will not be compensated by users who would be willing to license works if the owner could be found but instead use the work and hope that an unauthorized use will go unnoticed. It is almost impossible to license an orphan work, which is problematic for everyone—owners, users, and the public at large. Visual works are especially vulnerable to the orphan works conundrum because ownership information often is not evident from the face of the work itself, and works such as photographs can be in deteriorated condition or donated to museums without any attached documentation.⁵⁶

Visual artists have noted that the orphan works problem is exacerbated when origin or attribution-related metadata is removed from works, or not included in the first place. Often, works are orphaned when they have been mass-reproduced and distributed online without

⁵² See Columbia University Libraries (“Columbia Libraries”), Comments Submitted in Response to U.S. Copyright Office’s Apr. 24, 2015 Notice of Inquiry at 2 (July 23, 2015) (“Columbia Libraries Initial Comments”); DMLA Reply Comments at 2 (stating that “[i]t is clear that some of the monetary challenges would improve if the ability to locate and find rights holders were easier”).

⁵³ See Getty Initial Comments at 5 (“For those who understand the need to license and wish to seek permission, it can be challenging to identify the owner or licensor of an image, especially when many platforms strip metadata as a matter of course when images are uploaded.”); see also DMLA Initial Comments at 9.

⁵⁴ The Copyright Office has defined an orphan work as one that is still within its copyright term but whose author a good faith, prospective user cannot readily identify or locate. See U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS 1 (2006) (“2006 ORPHAN WORKS REPORT”), available at <https://www.copyright.gov/orphan/orphan-report-full.pdf>.

⁵⁵ For example, libraries and educational institutions often house collections where the copyright ownership information is not easily discernable. These organizations’ missions may be impeded when they are unsure of how and if they can use the works in their collections. See Library Copyright Alliance, Comments Submitted in Response to U.S. Copyright Office’s Apr. 24, 2015 Notice of Inquiry at 1–2 (July 23, 2015); Rutgers University Libraries, Comments Submitted in Response to U.S. Copyright Office’s Apr. 24, 2015 Notice of Inquiry at 3–4 (July 23, 2015).

⁵⁶ 2006 ORPHAN WORKS REPORT at 24–25.

metadata.⁵⁷ Some creators may be unaware of the value of metadata in assisting future authorized uses of their works,⁵⁸ and some might be cost-averse due to the expense of using measures such as digital watermarking.⁵⁹ Likewise, the common practice of stripping out rights metadata not only makes it difficult for owners to actively monetize their works, but also frustrates prospective licensees' efforts to locate the owners of images they seek to utilize.⁶⁰

The Copyright Office has studied orphan works for over a decade. Most recently, in 2015, the Office issued a report that provided a number of recommendations and potential legislative language that would limit infringement remedies for those who engaged in a good faith and diligent yet fruitless search for the copyright owner, among other things.⁶¹ While a number of visual artists expressed concern over the proposals, the Office continues to support the idea of a legislative solution to this thorny issue.

Additionally, improving the public record through Copyright Office modernization will alleviate some of these issues by better connecting owners with potential licensees. For example, the Office considers improvements to its recordation process—that is, the process to note a transfer of ownership rights in a work with the Office—a top priority, and “not something that can wait.”⁶² Indeed, the Office recognizes that the effectiveness of the registration record is directly intertwined with that of the recordation system, which currently serves as a barrier for users attempting to locate accurate rights information for works that they may want to license.⁶³ For instance, recordation documents must be submitted on paper through the mail, rather than online.⁶⁴ The documents are scanned and retained digitally, but

⁵⁷ See generally U.S. COPYRIGHT OFFICE, ORPHAN WORKS AND MASS DIGITIZATION: A REPORT OF THE REGISTER OF COPYRIGHTS (2015) (“2015 ORPHAN WORKS AND MASS DIGITIZATION REPORT”), available at <https://www.copyright.gov/orphan/reports/orphan-works2015.pdf>; see also Copyright Alliance Initial Comments at 9 (“One of the more significant challenges for those wishing to make legal use of visual works is finding copyright ownership information. Visual works do not generally have visible authorship information, and online platforms routinely delete attribution and metadata containing such information.”); Kernochan Center Reply Comments at 2–5 (summarizing the “Orphan Works” issue, as it pertains to visual works and visual artists); Columbia Libraries Initial Comments at 2; AIPLA Initial Comments at 1.

⁵⁸ See Goldstein, et al., *supra* note 21, at 47.

⁵⁹ See *id.* at 48–49.

⁶⁰ See Columbia Libraries Initial Comments at 2.

⁶¹ This report follows the Copyright Office’s earlier 2006 orphan works report. See generally 2015 ORPHAN WORKS AND MASS DIGITIZATION REPORT.

⁶² Maria A. Pallante, *The Next Generation Copyright Office: What It Means and Why It Matters*, 61 J. COPYRIGHT SOC’Y 213, 230 (2014).

⁶³ See TECHNICAL UPGRADES REPORT at 57.

⁶⁴ See U.S. COPYRIGHT OFFICE, TRANSFORMING DOCUMENT RECORDATION AT THE UNITED STATES COPYRIGHT OFFICE: A REPORT OF THE ABRAHAM L. KAMINSTEIN SCHOLAR IN RESIDENCE 15–16 (2014) (“TRANSFORMING DOCUMENT

only as graphics, and are therefore not searchable.⁶⁵ For a prospective user to access the recordation database to assess the chain of title in a work, he or she must come to the Office in person to conduct a search.⁶⁶ Further, because recordation is voluntary, not all transfers are recorded with the Office.⁶⁷

The Copyright Office understands the importance of ensuring that the public record of copyright transactions is timely, complete, and as accurate as possible. In 2014, the Office released a report on recordation that recommended building an electronic recordation system to parallel the Office's registration system.⁶⁸ The 2017 Modified IT Plan further lays out the need for a reengineered recordation system that will be developed from the ground up in collaboration with the Library of Congress' Office of the Chief Information Officer.⁶⁹ In the interim, the Copyright Office is making headway on providing additional information to the public regarding copyright ownership. The Office holds the most complete and accurate collection of copyright records in the world, and its card catalog is the principle means for locating information about registrations, transfers, and assignments of pre-1978 copyrights. While the collection is vast, currently, only registration records for works registered after 1977 can be searched through the Office's online public catalog.⁷⁰ Many records from 1870 through 1977 can be accessed only in the Office's physical card catalog, limiting its usefulness to licensees and others looking for copyright information. Understanding these limitations, the Office is working hard to modernize and to make records more accessible.

To this end, the Copyright Office completed digitization of pre-1978 records and is now working towards presenting them to the public in a way that is easily accessible and searchable. In January 2018, the Office reached a major milestone in this effort with the public launch of the Virtual Card Catalog ("VCC") proof of concept.⁷¹ The VCC allows users to browse full-color scans of cards in the Office's catalog from 1955–1977 with the purpose of providing the public with a glimpse of the digitized card catalog and to solicit feedback that will provide valuable

RECORDATION"), available at <https://www.copyright.gov/docs/recordation/recordation-report.pdf> (noting that recordation documents may either be sent in the mail, or hand-delivered to the Office).

⁶⁵ *Id.* at 28.

⁶⁶ *Id.*

⁶⁷ Pallante, *supra* note 62, at 228.

⁶⁸ See TRANSFORMING DOCUMENT RECORDATION at 57–59.

⁶⁹ See MODIFIED IT PLAN at 24–25.

⁷⁰ See *Public Catalog*, U.S. COPYRIGHT OFFICE, <https://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?DB=local&PAGE=First>.

⁷¹ See *Virtual Card Catalog (Proof of Concept)*, U.S. COPYRIGHT OFFICE, <https://vcc.copyright.gov/>. The proof of concept is not a final version of the Virtual Card Catalog, and it contains a feedback link and an optional survey for members of the public to provide input.

information for future modernization efforts. Since its initial launch, the Office has enhanced the VCC by providing new browsing functionality, among other things. The proof of concept and, eventually, the full release of the VCC, will make the Office's records more accessible and useful to users located around the world.

C. Enforcement

Visual artists have new online channels through which to distribute their works, but the internet also presents significant enforcement challenges. Visual artists identified two broad categories of enforcement challenges: (1) issues stemming from the digital environment and new technologies in general; and (2) the high cost of enforcing their rights.⁷²

1. Digital Environment and New Technologies

a. Unauthorized Copying, Framing, and Embedding

Visual artists are deeply concerned about online infringement for a number of reasons, including its serious adverse impact on possible licensing opportunities.⁷³ Confusion is rampant about when online users must get permission to use visual works. This makes legitimate competition in online markets difficult because licensees who do obtain permission—including by paying licensing fees—are economically disadvantaged vis-à-vis those who disregard copyright and use works for free.⁷⁴

This confusion is apparent by the widespread use of online “disclaimers” intended to protect against infringement claims. Many internet users seem to believe that disclaiming copyright infringement (generally by including a “disclaimer” of “no copyright infringement intended” somewhere near their uses) will immunize them from liability; as of 2011, about 489,000 YouTube videos included such a disclaimer, and about 664,000 videos had a “copyright disclaimer” citing the fair use provision of the Copyright Act.⁷⁵ Some of these users may be

⁷² There was a lot of interest and concern among visual artists about section 512 of the Copyright Act. Section 512 provides safe harbors from infringement liability for online service providers that are engaged in qualifying activities and that also meet certain eligibility requirements. See 17 U.S.C. § 512. Subsequent to the Office's Notice of Inquiry on visual works, the Office initiated a section 512 study that garnered more than 92,000 public comments. Multiple public hearings were held in New York City and San Francisco with dozens of participants. Accordingly, the 512 study is tackling many of the issues brought up by visual artists. For more information on the study and to review public comments and public hearing transcripts, see *Section 512 Study*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/policy/section512/>.

⁷³ See AIPLA Initial Comments at 1.

⁷⁴ See Getty Initial Comments at 5 (“The value of a licensee's investment in licensed content is diminished by those who freeload.”); see also ASMP Initial Comments at 16–17.

⁷⁵ Andy Baio, *No Copyright Intended*, WAXY (Dec. 9, 2011), http://waxy.org/2011/12/no_copyright_intended/.

unaware of how copyright works—including that intent does not immunize them against civil liability—and may not understand the role of copyright in encouraging the creation of expressive works.⁷⁶

There have been some online education efforts by companies to alleviate this confusion. For example, some company websites include basic copyright concepts that are easy to understand.⁷⁷ Nevertheless, misunderstanding proliferates and online infringement—even if inadvertent—continues. This confusion undermines licensing opportunities for visual artists and frustrates the ability to distribute and market their works online. The ease of unauthorized copying and the “increasingly prevalent perception that visual works are and should be freely available” devalues works and makes licensing challenging.⁷⁸ Users who would otherwise license a work now have the more attractive option to “perfectly cop[y] and re-use[]” a digital image without compensation to the owner.⁷⁹ Exacerbating the problem, an unauthorized digital copy is often identical to the original, and subsequent copying does not degrade the quality.⁸⁰ Creators concerned about these practices may also be dissuaded to distribute their works online, harming their ability to “establish a presence, a brand and a reputation.”⁸¹

The Copyright Office itself has undertaken significant efforts to educate the public, updating its website and updating its informational literature (including information on visual works) since 2017. The Office also is planning additional educational efforts to inform online users about copyright and how to obtain permission to use works legally and is in the process of developing online videos to help in this program.

⁷⁶ See David Pogue, *The Generational Divide in Copyright Morality*, THE NEW YORK TIMES (Dec. 20, 2007), <https://pogue.blogs.nytimes.com/2007/12/20/the-generational-divide-in-copyright-morality> (for an anecdotal narrative on millennial conception of sharing and copyright).

⁷⁷ See, e.g., *What is Copyright?*, MICROSOFT, <https://www.microsoft.com/en-us/legal/copyright>. YouTube has a “Copyright” page with information and tools to help users “manage [their] rights on YouTube” and “respect[] the rights of others” and a Copyright School page offering a five-minute cartoon on copyright law with a short copyright quiz. See *Copyright on YouTube*, YOUTUBE, <https://www.youtube.com/yt/copyright/>; *Copyright School*, YOUTUBE, https://www.youtube.com/copyright_school.

⁷⁸ AIPLA Initial Comments at 1.

⁷⁹ DMLA Initial Comments at 3; see also Karen EA Swartz, Comments Submitted in Response to U.S. Copyright Office’s Apr. 24, 2015 Notice of Inquiry at 1 (“If potential customers are able to acquire prints and reproductions of my work for free, why would they pay me?”).

⁸⁰ See GAG Initial Comments at 11.

⁸¹ Jonathan Hunt, Comments Submitted in Response to the U.S. Copyright Office’s Apr. 24, 2015 Notice of Inquiry at 3 (July 20, 2015); see also Maurie Manning, Comments Submitted in Response to the U.S. Copyright Office’s Apr. 24, 2015 Notice of Inquiry at 2 (July 4, 2015) (stating that in response to “the dangers of creative works being shared online, . . . [m]any have opted out of selling digitally, gone out of business all together”).

In addition to general confusion, many users still rely on so-called “right-click licensing.” As one commenter wrote, “once [an] image is used online, it is only a right-click away from a high quality reproduction of the image being used by someone else without permission.”⁸² Visual artists attributed the prevalence of right click licensing to two factors: the ease with which images can be copied and reused, and the obscuring of ownership information by image search engines.⁸³ Such copying would be a relatively clear infringement of the right of reproduction but, due to the “inefficiency and difficulties of copyright enforcement,”⁸⁴ rightsholders can do little to counteract this practice.

Visual artists also identified the prevalence of “framing” and “embedding” or “inline linking” as a significant problem. These closely-related techniques display digital content that resides on one website on a different website, without downloading or reproducing that content.⁸⁵ Framing and embedding both result in loss of advertising revenue because, when users view digital content through embedding instead of through traditional linking, the website hosting the content does not receive advertising revenues, revenues that accrue instead to the embedding or framing site.⁸⁶ So far, courts have differed regarding the ability of copyright owners to control the framing and embedding of their works through the exclusive right of public display set forth in section 106(5) of the Copyright Act, leaving creators with less certainty over how their works can be used.⁸⁷

⁸² CAPIC Initial Comments at 2.

⁸³ DMLA Initial Comments at 2–3; CAPIC Initial Comments at 2.

⁸⁴ DMLA Initial Comments at 3.

⁸⁵ A traditional hyperlink on a website connects the user to the linked website, in the process either leaving the original website or opening the linked website in a completely new browser window or tab. Through “framing,” however, the original website retrieves the content and displays it within a “frame” on the same page instead of opening the linked page. “Embedding” or “inline linking” follows the same technical process as framing, but gives users the impression that the digital content belongs to the linking site: the linked content is immediately visible on the website, and embedding does not require the user to click on the link to see that content. See U.S. COPYRIGHT OFFICE, *THE MAKING AVAILABLE RIGHT IN THE UNITED STATES* 48 (2015), available at https://www.copyright.gov/docs/making_available/making-available-right.pdf; Emanuela Arrezo, *Hyperlinks and Making Available Right in the European Union – What Future for the Internet After Svensson?*, 45 INT’L REV. INTELLECTUAL PROP. & COMPETITION L. 524, 526–27 (2015); see also *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1155–56 (9th Cir. 2007) (defining “in-line linking” and describing the technical process of linking and framing); Dawn Leung, *What’s All the Hype About Hyperlinking?: Connection in Copyright*, 7 INTELLECTUAL PROP. BRIEF 59, 62–63 (2015) (differentiating “framing” and “embedding”).

⁸⁶ See ASMP Initial Comments at 5; CAPIC Initial Comments at 2; DMLA Initial Comments at 3; Getty Initial Comments at 1.

⁸⁷ An early analysis of whether framing and embedding implicate the public display right was provided by the Ninth Circuit in *Perfect 10, Inc. v. Amazon.com, Inc.* The case concerned Google Image Search’s use of both thumbnail images as well as an image displayed through inline linking when the thumbnail image was clicked on. The Ninth Circuit relied on the “server test,” under which “a computer owner that stores an image as electronic information and serves that electronic information directly to the user . . . is displaying the electronic information in violation of a copyright

b. Rights Management Information and Metadata

Rights management information (“RMI”)—also known as copyright management information (“CMI”)⁸⁸—and metadata connect works to authors and facilitate licensing opportunities. While section 1202 of the Copyright Act prohibits the attachment of false CMI and the removal or alteration of CMI in some situations,⁸⁹ it is common practice, for both users and online service providers, to strip CMI and metadata from digital files.⁹⁰ Comments indicate that stripping CMI from works is widespread, and this renders visual works “more easily infringed online than any other type of work.”⁹¹ For instance, when a photographer posts a work on a social media platform, metadata and CMI may generally be stripped away automatically as part of the uploading process, “making rights to images difficult to track.”⁹² And sometimes the stripping is intentional where “infringers who post to such sites deliberately strip out metadata containing rights holder identification and other rights management information embedded in photographs” “nullif[y]ing the major benefit of such platforms to visual artists: exposure to very

holder’s exclusive display right,” but “the owner of a computer that does not store and serve the electronic information to a user is not displaying that information, even if such owner in-line links to or frames the electronic information.” 508 F.3d at 1159. Applying the server test, the court found that while Google’s use of the thumbnail images was a *prima facie* infringement of Perfect 10’s exclusive right of public display, the inline linking to the full sized images was not. *Id.* at 1159–60. Following *Perfect 10*, some courts have relied on the Ninth Circuit’s analysis to bar direct infringement claims for instances of inline linking or framing, or have declined to directly rule on the issue. See *Leveyfilm, Inc. v. Fox Sports Interactive Media, LLC*, No. 13 C 4664, 2014 LEXIS 92809, at *13–18 (N.D. Ill. July 8, 2014); *Flava Works, Inc. v. Gunter*, 689 F.3d 754, 757–58 (7th Cir. 2012); *Righthaven LLC v. Choudhry*, No. 2:10-CV-2155 JCM (PAL), 2011 LEXIS 48290, at *5–6 (D. Nev. May 3, 2011).

Additionally, the Southern District of New York in *Goldman v. Breitbart News Network, LLC* declined to follow *Perfect 10*’s server test and found that embedding did implicate the copyright owner’s display right. 302 F. Supp. 3d 585, 586, 593 (S.D.N.Y. 2018). The New York court questioned the soundness of the server test, noting that the “plain language of the Copyright Act, the legislative history undergirding its enactment, and subsequent Supreme Court jurisprudence provide no basis for a rule that allows the physical location or possession of an image to determine who may or may not have ‘displayed’ a work.” *Id.* at 593.

⁸⁸ See S. REP. NO. 105–190, at 11 n.18 (1998) (stating that “[r]ights management information is more commonly referred to in the U.S. as copyright management information (CMI)”).

⁸⁹ See 17 U.S.C. § 1202(a), (b). Section 1202 defines CMI broadly to include a work’s title, author, copyright owner, terms and conditions of use, performers in non-audiovisual works, and writers, performers, and directors credited in an audiovisual work. See 17 U.S.C. § 1202(c).

⁹⁰ See The British Photographic Council, Comments Submitted in Response to the U.S. Copyright Office’s Apr. 24, 2015 Notice of Inquiry at 1 (July 23, 2015) (“British Photographic Council Initial Comments”); Goldstein, et al., *supra* note 21, at 47. This is compounded by the reality that visual works clients often prefer images without embedded watermarks, copyright notices, or attribution lines. See also Pat Thomas Medical Illustration, Comments Submitted in Response to U.S. Copyright Office’s Apr. 24, 2015 Notice of Inquiry at 1 (July 9, 2015) (“Pat Thomas Medical Illustration Initial Comments”).

⁹¹ Copyright Alliance Initial Comments at 2.

⁹² Stanford Law School Initial Comments at 2; see also Getty Images Initial Comments at 5.

large potential audiences.”⁹³ Whether intentional or not, the practice of stripping the identifying information makes it difficult for creators to track the uses of their works, frustrates users who would otherwise seek to obtain a license to use works, and “artificially” adds to the growing number of orphan works,⁹⁴ as discussed above.

The Copyright Act does provide important protections to visual artists regarding CMI. Section 1202(b) specifically prohibits the unauthorized (1) intentional removal or alteration of any CMI; (2) distribution or importation of CMI with the knowledge that the CMI has been removed or altered; or (3) distribution, importation for distribution, or the public performance of works with the knowledge that the CMI has been removed or altered.⁹⁵ The three actions violate section 1202 if they are done with the knowledge that such action will “induce, enable, facilitate, or conceal”⁹⁶ copyright infringement.

The Copyright Office currently is reviewing issues regarding CMI and section 1202 in the context of its study on the moral rights of attribution and integrity.⁹⁷ Many of the issues discussed there will be of interest to those in the visual works community, as representatives of this community filed comments in that study.

2. High Cost of Enforcement

Many visual artists create a large volume of work, and the compensation for any one individual work can be relatively modest. As such, often the resources a visual artist must invest in enforcing rights to a single work may not produce an appropriate remedy corresponding to the amount of effort that went into the work’s creation. Copyright owners must bring infringement lawsuits in federal court,⁹⁸ which deters many visual artists from enforcing their rights due to the burdens and “prohibitively high” costs associated with federal litigation.⁹⁹ The “high

⁹³ ASMP Initial Comments at 6; *see also* APA Initial Comment at 2–3.

⁹⁴ PPA Initial Comments at 10; *see also* Stanford Law School Initial Comments at 2 (“Social media sites have a standard practice of stripping out metadata, making rights to images difficult to track.”); British Photographic Council Initial Comments at 1 (“Metadata is a critical economic driver and needs to be understood as widely as possible. Removing it creates orphan works, often unintentionally or unnecessarily.”); GAG Initial Comments at 4.

⁹⁵ *See* 17 U.S.C. § 1202(b).

⁹⁶ *Id.*

⁹⁷ For more information on the study, and to review public comments as well as the public symposium transcript, *see Study on the Moral Rights of Attribution and Integrity*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/policy/moralrights/>.

⁹⁸ *See* 28 U.S.C. § 1338. District courts are given original jurisdiction over civil claims arising under acts of Congress, including the 1976 U.S. Copyright Act.

⁹⁹ The Illustration League, Comments Submitted in Response to the U.S. Copyright Office’s Apr. 24, 2015 Notice of Inquiry at 3 (July 22, 2015); *see also* Getty Initial Comments at 4 (“The most significant enforcement challenge for

volume, low value nature” of most visual works makes it difficult for visual artists to invest the resources necessary to enforce their copyrights, especially when an infringement claim is likely to be for a single image.¹⁰⁰ Most individual visual artists earn \$50,000 or less per year,¹⁰¹ and it is common for infringement claims to be worth only \$500 to a few thousand dollars.¹⁰² The overwhelming majority of relevant infringement cases involve far less money than is cost effective to litigate over as “the costs of bringing a claim in federal court will almost always exceed the expected licensing revenues and damages which might be recovered.”¹⁰³ According to a Graphic Artists Guild 2012 survey, 44.9% of creators declined to pursue legal representation for a copyright infringement lawsuit because the legal costs would be more than the anticipated damages.¹⁰⁴

The cost of pursuing claims puts the federal court system out of reach for many visual artists. Perceived as “a David and Goliath situation,” the fees for filing, service, discovery, and transcripts can be “devastating” to a small business.¹⁰⁵ A 2015 American Intellectual Property

photographers is the cost of filing a federal copyright lawsuit.”); DMLA Initial Comments at 6 (“[T]he high cost and difficulty of enforcing copyright in federal court acts as a nearly absolute barrier to enforcement.”); Kattwinkel Reply Comments at 5 (“The costs of filing a federal lawsuit are prohibitive.”).

¹⁰⁰ See PPA Initial Comments at 3 (“[T]he quiet secret is that the current system does not, in fact, work for our relatively low value/high volume creators.”); see also Copyright Alliance Initial Comments at 6 (“Visual works are, by their nature, a high volume-low individual value enterprise, meaning that most individual licensed uses are of relatively small economic value.”).

¹⁰¹ According to a 2013 survey of Association of Medical Illustrators members, the median net income for self-employed medical illustrators in 2013 was \$58,384. See Association of Medical Illustrators, Comments Submitted in Response to U.S. Copyright Office’s Apr. 24, 2015 Notice of Inquiry at 11. American Photographic Artists found that most sole proprietor photographers earn \$50,000 or less a year. See American Photographic Artists, Comments Submitted in Response to the U.S. Copyright Office’s Oct. 27, 2011 Small Claims Notice of Inquiry at 3 (Jan. 17, 2012). Similarly, the median pay for photographers in 2016 was \$32,490, while the median pay for graphic designers was slightly higher at \$48,700 annually. See BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK (2017), available at <https://www.bls.gov/ooh/> (to find median pay for photographers, follow “Media and Communication” link; to find median pay for graphic designers, follow “Arts and Design” link.).

¹⁰² See PPA Initial Comments at 3. One scientific illustrator commented that it was rare for her image reuse licenses to exceed \$250. See Kalliopi Monoyios, Comments Submitted in Response to U.S. Copyright Office’s Apr. 24, 2015 Notice of Inquiry at 2 (July 22, 2015). Another artist noted that she licenses her illustrations for \$50 to a few thousand dollars. See Emily Damstra (“Damstra”), Comments Submitted in Response to U.S. Copyright Office’s Apr. 24, 2015 Notice of Inquiry at 2 (July 22, 2015) (“Damstra Initial Comments”).

¹⁰³ Copyright Alliance Initial Comments at 6; see also Alan Bamberger, *Art Copyright Infringement and Your Creative Health*, ART BUSINESS, <http://www.artbusiness.com/copfringe.html> (pointing out that “[h]iring a lawyer and fighting an infringement case in court is all about money. . . . [T]he overwhelming majority of infringement cases involve far less money than is cost effective to fight legal battles over”).

¹⁰⁴ Graphic Artists Guild, Comments Submitted in Response to U.S. Copyright Office’s Aug. 23, 2012 Small Claims Notice of Inquiry at 27 (Oct. 18, 2012).

¹⁰⁵ Pat Thomas Medical Illustration Initial Comments at 2.

Law Association (“AIPLA”) survey found that that the median cost in 2015 for a party to litigate a copyright infringement lawsuit with less than \$1 million at stake was \$250,000.¹⁰⁶ Even mediating a dispute with less than \$1 million at risk was \$40,000.¹⁰⁷ More than two-thirds of litigation costs, about \$150,000, accrue before the parties enter a courtroom in the form of preparation and pre-trial motions,¹⁰⁸ and some estimate that the discovery process amounts to between 50% and 90% of the total litigation costs.¹⁰⁹ The parties can spend many hours in depositions, constituting considerable losses in time for small businesses.¹¹⁰ Exacerbating the issue, demands on federal courts can result in copyright suits facing potentially long waits to be heard, often times more than twenty-five months.¹¹¹ In light of the “tedious, costly, and time consuming” nature of federal litigation, many visual artists associate “little overall benefit” with attempts to enforce their rights.¹¹² Indeed, some visual artists note that they “are routinely unable to enforce those rights because of the costs and complexities of bringing a lawsuit in federal court—the only place to bring a copyright infringement suit today.”¹¹³

One solution to this problem would be an alternative venue to resolve disputes that have a relatively small monetary value. Many visual artists support the creation of a small claims tribunal to adjudicate smaller dollar infringement cases as an effective alternative to federal

¹⁰⁶ See AM. INTELLECTUAL PROP. LAW ASS’N, REPORT OF THE ECONOMIC SURVEY 2015 39 (2015) (“ECONOMIC SURVEY”). The cost of defending a copyright infringement action is roughly the same as asserting one. *Id.* According to federal judiciary statistics, about one in every 100 federal civil cases is a copyright infringement case. See *Statistical Tables for the Federal Judiciary: Table C-2.*, U.S. COURTS, http://www.uscourts.gov/sites/default/files/data_tables/stfj_c2_630.2017.pdf.

¹⁰⁷ See ECONOMIC SURVEY at 39.

¹⁰⁸ See *id.*

¹⁰⁹ See John H. Beisner, *Discovering a Better Way: The Need For Effective Civil Litigation Reform*, 60 DUKE L. J. 547, 549 (2010); see also Shyamkrishna Balganes, *Copyright Infringement Markets*, 113 COLUM. L. REV. 2277, 2289 (2013) (noting that copyright litigation is especially fact-intensive, therefore “[d]iscovery costs thus form a large part of copyright litigants’ expenses”); ASMP Initial Comments at 10 (pointing out that the “discovery process alone can easily cost more than potential recovery, and a variety of procedural tactics can be employed to make pursuit of such claims uneconomic”).

¹¹⁰ See Kevin M. Lemley, *I’ll Make Him an Offer He Can’t Refuse: A Proposed Model for Alternative Dispute Resolution in Intellectual Property Disputes*, 37 AKRON L. REV. 287, 313 (2004).

¹¹¹ According to federal judiciary statistics, the median time from filing to disposition for civil trials in federal courts is than twenty-six months. See *Statistical Tables for the Federal Judiciary: Table C-5.*, U.S. COURTS, http://www.uscourts.gov/sites/default/files/data_tables/stfj_c2_630.2017.pdf.

¹¹² NPPA Initial Comments at 5.

¹¹³ *Copyright Alternative in Small-Claims Enforcement Act of 2017: Hearing on H.R. 3945 Before the H. Comm. on the Judiciary*, 115th Cong. 3 (2018) (“*Copyright Alternative in Small-Claims Enforcement Hearing*”) (statement of Jenna Close, Commercial Photographer, on behalf of the American Society of Media Photographers).

litigation.¹¹⁴ Congress took note of the obstacles that creators of lower economically valued works face as far back as 2006,¹¹⁵ and in 2011 asked the Copyright Office to study challenges for resolving small copyright claim disputes.¹¹⁶ The Office released its findings in 2013's *Copyright Small Claims*, recommending the establishment of an alternative voluntary system of adjudication that would be housed within the Copyright Office.¹¹⁷ The Office's Report has garnered significant support,¹¹⁸ and importantly, legislation previously introduced in Congress incorporated many of the Office's suggestions.

Specifically, in the past several years Congress has shown interest in developing a small copyright claims tribunal. The House Judiciary Committee emphasized its commitment to establishing a small claims tribunal when it released the first policy proposal regarding its 2013–2015 comprehensive review of U.S. copyright law. That proposal promoted the creation of a small claims mechanism within the Copyright Office and maintained that the Register should be given the authority to promulgate regulations, ensuring the system's efficiency.¹¹⁹

¹¹⁴ See Wild Initial Comments at 1; Richard D. Kelly, Comments Submitted in Response to U.S. Copyright Office's Apr. 24, 2015 Notice of Inquiry at 2–3; Damstra Initial Comments at 2; Todd Bigelow, Comments Submitted in Response to U.S. Copyright Office's Apr. 24, 2015 Notice of Inquiry at 1 (July 22, 2015); Melissa Broussard, Comments Submitted in Response to U.S. Copyright Office's Apr. 24, 2015 Notice of Inquiry at 1 (July 25, 2015); Taina Litwak, Comments Submitted in Response to U.S. Copyright Office's Apr. 24, 2015 Notice of Inquiry at 3 (July 22, 2015).

¹¹⁵ See *Remedies for Small Copyright Claims: Hearing Before the Subcomm. on Courts, the Internet, & Intellectual Prop. of the H. Comm. on the Judiciary*, 109th Cong. 1 (2006) (statement of Lamar Smith, Chairman, Subcomm. on Courts, the Internet, & Intellectual Prop., H. Comm. on the Judiciary) (noting that “the Copyright Act does not take into account an important issue for all copyright owners, the practicality of pursuing an infringement case when the infringer refuses to pay damages and the damage amount is likely low”).

¹¹⁶ See Letter from Hon. Lamar Smith, Chairman, U.S. House of Representatives Judiciary Committee, to Hon. Maria A. Pallante, Register of Copyrights and Director, U.S. Copyright Office (Oct. 11, 2011) (reprinted in *SMALL CLAIMS REPORT*).

¹¹⁷ The Copyright Office's proposed tribunal would focus on claims valued at no more than \$30,000 in damages, and copyright owners would be eligible to recover either actual or statutory damages up to the \$30,000 cap. All types of copyrighted works would be eligible for protection through the system, and eligible claims would focus on infringement matters under the Act's exclusive rights. Respondents would have access to all available defenses under the Copyright Act and would be able to bring limited related counterclaims. The process would be accessible remotely, with proceedings being administered online and through teleconferencing facilities. Parties would not be required to make personal appearances, cutting down on travel costs. The determination could be appealed to the tribunal for material error or technical mistake, and a party denied reconsideration may further appeal to the Register of Copyrights, who would then have the discretion to deny the appeal or remand the proceedings back to the tribunal. To ensure enforceability, relief awarded by the tribunal could be filed and confirmed in federal court. See *SMALL CLAIMS REPORT* at 4, 102, 104–07, 117, 128–29.

¹¹⁸ See PPA Initial Comments at 3 (“We believe that [the Copyright Office's efforts to create a small claims court] offers the best hope for PPA members to have a viable means for vindicating their rights.”); CAPIC Initial Comments at 4; Getty Initial Comments at 4; DMLA Initial Comments at 7; AIPLA Initial Comments at 2.

¹¹⁹ *REFORM OF THE U.S. COPYRIGHT OFFICE*, HOUSE OF REPRESENTATIVES JUDICIARY COMMITTEE (2016).

Additionally, several bills addressing the challenges associated with enforcing small claims were introduced in Congress in recent years. For example, most recently, the Copyright Alternative in Small-Claims Enforcement Act of 2017 (“CASE Act”) was introduced in the 115th Congress.¹²⁰ The CASE Act would have amended Title 17 by adding a new chapter that established, and provided procedures for, a copyright small claims tribunal “to provide a simple, quick and less expensive [enforcement] forum” aimed at assisting “the creative middle class who deserve to benefit from the fruits of their labor.”¹²¹ Adopting many of the Copyright Office’s recommendations, the bill laid out a voluntary opt-out adjudication process centralized in the Office.¹²² Tracking the Office’s recommendations, recoverable damages would be capped at \$30,000; eligible claims include claims of infringement, declarations of non-infringement, as well as certain section 512 takedown disputes; proceedings were to be administered remotely; decisions were to be binding only to the parties; and requests for reconsideration were to be permissible to the tribunal and subsequently to the Register.¹²³

In September 2018, the House Judiciary Committee held a hearing on the CASE Act and small claims issues.¹²⁴ Mirroring many of the comments the Copyright Office received in response to its general visual works inquiry, the hearing included overall support for a small claims tribunal from the visual artists sector.¹²⁵ Many in the copyright community applaud Congress’ efforts in establishing a small claims tribunal and support “a practical and realistic means of seeking redress for infringement.”¹²⁶ Not only would such a solution assist artists who struggle

¹²⁰ See Copyright Alternative in Small-Claims Enforcement Act of 2017, H.R. 3945, 115th Cong. (2017); see also Copyright Alternative in Small-Claims Enforcement Act of 2017, H.R. 5757, 114th Cong. (2016); Fairness for American Small Creators Act, H.R. 6496, 114th Cong. (2016).

¹²¹ *Democratic Rep. Hakeem Jeffries & Republican Rep. Tom Marino Propose Copyright Claims Board to Help Artists Protect Their Life’s Work*, U.S. CONGRESSMAN HAKEEM JEFFRIES (July 15, 2016), <https://jeffries.house.gov/media-center/press-releases/democratic-rep-hakeem-jeffries-republican-rep-tom-marino-propose>.

¹²² See Copyright Alternative in Small-Claims Enforcement Act of 2017, H.R. 3945, 115th Cong. § 1401(a) (2017).

¹²³ See *id.* §§ 1403, 1405.

¹²⁴ See H.R. 3945, the “Copyright Alternative in Small-Claim Enforcement Act of 2017,” U.S. HOUSE COMMITTEE ON THE JUDICIARY, <https://judiciary.house.gov/legislation/hearings/hr-3945-copyright-alternative-small-claims-enforcement-act-2017-0>.

¹²⁵ Compare, e.g., ASMP Initial Comments at 3–4; DMLA Initial Comments at 7; GAG Initial Comments at 10–11, 32; ImageRights Initial Comments at 1; NPPA Initial Comments at 12–13; PPA Initial Comments at 3–5; Kernochan Center Reply Comments at 6, with *Copyright Alternative in Small-Claims Enforcement Hearing* at 6 (statement of Jenna Close, Commercial Photographer, on behalf of the American Society of Media Photographers) (“[T]he CASE Act is our best shot at ensuring that visual artists for the first time will be full participants in the copyright marketplace.”); *id.* at 6 (statement of Keith Kupferschmid, Chief Executive Officer, Copyright Alliance); *id.* at 1–2 (statement of David P. Trust, Chief Executive Officer, Professional Photographers of America on behalf of A Coalition of Visual Artists).

¹²⁶ *Motion Picture Association of America Submission to the House Judiciary Committee Regarding the Copyright Review Proposal on Copyright Office Modernization*, MOTION PICTURE ASS’N OF AM. 13 (Jan. 31, 2017), <http://www.mpa.org/wp->

to enforce their copyrights, but it also would “combat the all too common public perception” that “creative works are free for the taking” in the digital world and that copyright law is only for big content providers and not individuals or small businesses.¹²⁷

The Copyright Office continues to strongly support the idea of a small copyright claims tribunal, located within the Office, to help allay the significant costs and time required for federal court litigation. In addition to serving visual artists who are seeking to pursue infringers, an alternative tribunal also could allow visual artists (and others) to pursue declaratory judgment actions if they believe they are being unfairly targeted as infringers.

* * *

The Copyright Office recognizes the incredible contributions that visual artists make to this nation’s creativity and culture. Visual artists deserve a copyright system that works, both to enable them to continue working as well as to enrich the public at large. The Office is striving to improve its services and practices to assist in this effort, and hopes that this letter and subsequent initiatives will assist visual artists. The Office will support Congress’ continued efforts to ensure the protection of the rights of visual artists.

Please do not hesitate to contact me should you require any further information on this subject.

Respectfully,



Karyn A. Temple
Acting Register of Copyrights and Director,
U.S. Copyright Office

content/uploads/2017/02/MPAA-Copyright-Office-modernization-submission.pdf; see also *Bill Introduced to Establish a Small Claims System within the Copyright Office*, NAT’L PRESS PHOTOGRAPHERS ASS’N (Dec. 8, 2016), <https://nppa.org/news/bill-introduced-establish-small-claims-system-within-copyright-office>; *Copyright Alliance Issues Statement on Small Claims Legislation*, COPYRIGHT ALL. (July 13, 2016), http://copyrightalliance.org/wp-content/uploads/2016/08/Small-Claims-7_13_16.pdf.

¹²⁷ AMERICAN PHOTOGRAPHIC ARTISTS ET AL., VISUAL ARTISTS GROUPS: SUMMARY RECOMMENDATIONS OF KEY COMPONENTS OF A COPYRIGHT SMALL CLAIMS TRIBUNAL BILL 3 (2016), available at <https://www.asmp.org/wp-content/uploads/VisualAssociationsSmallClaimsTribunalPaper.pdf>.