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23 March 2010

Request of the Intellectual Property Enforcement Coordinator for
Public Comments Regarding the Joint Strategic Plan

The PRO-IP Act of 2008 FR Doc. 2010-3539

Comments Submitted by the Graphic Artists Guild,

By electronic filing

Re: *Federal Register*, February 23, 2010 (pages 8137-8139)

Ms. Victoria A. Espinel
United States Intellectual Property Enforcement Coordinator
Office of Management and Budget, Executive Office of the President
intellectualproperty@omb.eop.gov.

Dear Ms. Espinel,

Thank you for the opportunity to contribute our experiences and opinions as professional visual creators regarding copyright infringement. We appreciate the Administration's request for recommendations to improve the Government's intellectual property enforcement efforts.

The Graphic Artists Guild is a national artists' union that embraces creators at all levels of skill and expertise, who create art intended for presentation as originals or reproductions. The mission of the Guild is to promote and protect the economic interests of its members, to improve conditions for all creators and to raise standards for the entire industry. Its core purpose is to be a strong community that empowers and enriches its members through collective action.

Along with our suggestions, we are including a White Paper written in 2007 about the economic impact of graphic art on the US Economy.

Graphic art and illustration is used commercially in virtually every industry in the United States, and in a wide variety of media. Hundreds of thousands of Americans earn their living as graphic artists and illustrators, working both full-time and part-time¹. Presently, 1,063 colleges, universities, technical and vocational schools have graphic design and illustration programs². The US Copyright Office reported a total of 89,265 "visual art" registrations in 2007³, and we know that only a small fraction of the visual works created in the US is registered with the Copyright Office. Graphic art and illustration are an integral part of the US economy and used on and with virtually every product sold and service produced in the country.

A number of existing problems and situations regarding copyright infringement need to be addressed. Some fall under the auspices of the federal government, some under state government,

¹ Sources; Dept. of Labor and IRS

² Source; US College Search www.uscollegesearch.org/graphic-design-colleges.html

³ Most recent data source; US Copyright Office 2007 Annual Report



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some under international agencies, and some can be addressed by the private sector and ought to be endorsed and encouraged by the federal government.

METADATA IDENTIFICATION

There is no way to prevent infringement of visual works. However, a lot of infringement happens because of ignorance of the law or difficulties finding copyright owners. We should improve the ability for all Americans to abide by copyright law and identify and locate rights holders so that they may ask permission for usage. If it is free and easy to identify rights holders, the public is more likely to do it and comply with the law.

Metadata identification technology already exists for digital works and has been used for some time. Software can embed metadata in the form of meta tags containing information about the rights holder in any digital file. (Of course, sophisticated users can remove this metadata, but most Americans can't.) Two examples that apply to image files are the PLUS licensing system (www.useplus.com/aboutplus/coalition.asp) and Digimarc digital watermarking (www.digimarc.com/solutions/images).

Currently, metadata tags with copyright, rights holder and licensing and contact information can be added to digital files within Adobe Photoshop. But a user must own the Photoshop program, know which command to use to find the PLUS license, and have the Digimarc plug-in with Photoshop to screen the image file for this information. Long ago, Adobe decided to release free software to the public to "read" digital documents created in their Acrobat program.

- Adobe or another developer could produce a simple software utility to "read" metadata in digital files, and distribute this free to the public. A metadata "reader" could be incorporated into an HTML editor or web browser. We endorse this endeavor, and ask the IPEC to encourage this development in whatever way possible.
- Adobe Photoshop CS digital editing software applications include a "counterfeit deterrence system."⁴ The applications are programmed not to print scanned American banknotes, the Euro and the Indian rupee, and will show the user a warning message and direct the user to a web site⁵ with information on international counterfeiting laws. Adobe voluntarily worked with the Central Bank Counterfeit Deterrence Group (CBCDG) to develop this detection technology. Beginning in 1996 with European banknotes, these notes are printed with EURion Constellation to prevent counterfeiting using color photocopy machines.

From the CBCDG web site: "A counterfeit deterrence system (CDS) has been developed by the CBCDG to deter the use of personal computers, digital imaging equipment, and software in the counterfeiting of banknotes. The CDS has been voluntarily adopted by hardware and software manufacturers, and prevents personal computers and digital imaging tools from capturing or reproducing the image of a protected banknote. The technology does not have the capacity to track the use of a personal computer or digital imaging tools." Hopefully, similar technology could be used to prevent users from printing encrypted digital files protected by copyright.

Americans do not understand copyright. Some Americans are aware that digital encryption exists in some digital media that will prevent them from copying copyrighted material. So, many Americans assume that when they are using their computer and they "save" or "copy" a file, or "right click" the

⁴ "Wired" online magazine www.wired.com/techbiz/it/news/2004/01/61890

⁵ The Central Bank Counterfeit Deterrence Group (CBCDG) www.rulesforuse.org/pub/index.php?lang=en



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mouse and are offered a menu that permits them to "save" or "copy" a file, that no copyright protection or limitation exists for the file they are using. They believe that if their computer allows them to "save" or "copy" the digital file, it must be legal.

- There are three major operating systems in use in the world today; Windows (Microsoft), Apple (Macintosh), and Red Hat (Linux). It is entirely possible for program code to be added in the operating systems to the "save" and "copy" commands that would produce a pop-up or window that displays the metadata in the file (or the option to display that information), identifying the rights holder and copyright status. We request that these software companies make this change to their operating systems, and we would like the federal government to encourage and work with these private companies to facilitate easy compliance with copyright law by their consumers.

DETECTION USING IMAGE SEARCHES

Image search software already exists, produced by companies such as TinEye (www.tineye.com) and PicScout (www.picscout.com). We suggest the IPEC consider establishing a federal copyright infringement detection service for rights holders by utilizing image search software to locate infringing uses on the Internet if requested by a rights holder, and then aid the rights holder in enforcement action against the infringer.

THE U.S. COPYRIGHT OFFICE

Most visual creators do not register their works with the US Copyright Office. Either they cannot afford the fee, they don't know how, or they aren't even aware of the registration process. Most Americans don't know that Copyright Office records can be searched to locate the rights holder of a registered work. The federal government and Congress can and should improve the operations of the Copyright Office to better serve the public.

- Visual creators would be more likely to register their works if group registration for multiple works of illustration and graphic art were permitted, regardless of their respective publication dates, just as group registrations for photography are currently available under current Copyright Office rules.⁶
- The US Copyright Office now has online registration. Rights holders are encouraged to submit a digital file as their deposit copy with their online registration. However, shortsightedness and cost issues prevented the Copyright Office from taking the database one step further to the most potentially useful functionality for the 21st Century. The online registration system was not set up to include the image file as a viewable and searchable part of the record of registrations for visual works, and, currently the Office resists the idea of building a searchable image database. This is particularly discouraging given the fact that the Office does not keep most deposit specimens as hard copy. We respectfully request that IPEC support funding for the US Copyright Office to establish a searchable image database of registered visual works.
- We respectfully request that IPEC supports funding for the US Copyright Office to develop a faster, simpler, low-fee or no-fee means for the public to search registration records to locate rights holders.

⁶ See <http://www.copyright.gov/fls/fl124.pdf>



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PROSECUTION AND LEGAL ACTION

Copyright infringement is rampant, especially the copying of digital works and scanning visual works into digital format. Infringing robs rights holders - both businesses and individuals - of licensing income. As a practical matter, except for large corporate copyright owners, our current copyright laws are virtually unenforceable when it comes to the infringement of visual works. Too often when infringement is discovered, there is little or nothing a rights holder can do to stop the infringement or recoup financial damages. Domestic litigation is too costly, and completely impractical for damages under \$30,000 or so.

We hear from our organization's members and other visual creators that most infringement of their images results in actual damages of less than \$15,000. That's not much to big business, but to self-employed independent contractors and small studios this is a significant loss of income. Attorneys will not take on these infringement cases even if the work is registered, particularly if it's clear that the infringer would never be able to pay actual damages, statutory damages or the rights holder's legal fees. We also hear from visual creators that often their work was not registered prior to the infringement, making legal action completely impractical economically. This relatively "small-value" infringement happens to virtually every professional illustrator and graphic artist during his or her career, causing economic harm to small businesses and families.

- The Graphic Artists Guild endorses the creation of a small-value copyright infringement court within the federal district court system so more rights holders can take action against infringers. The Copyright Office began to study this a few years ago; and has endorsed the concept in connection with proposed solutions for orphan works issues. We respectfully ask the IPEC to facilitate the establishment of a practical alternative to the current Federal District Court system, which is really only viable for large-value infringement cases.

Most visual works are not registered, and the unscrupulous business sector is aware of this. Many businesses take a calculated risk when they deliberately infringe an image, presuming that the image has not been registered, and that in the event that the visual creator discovers the infringement she/he will not take legal action. Currently, if a work is not registered before the infringement occurs, the copyright owner may recover only actual damages, and that typically would not even pay the visual creator's legal fees.⁷

For example,

- Another illustrator discovered hundreds of illustrations published in her book had been illegally scanned and are presently offered for unauthorized sale on a web site hosted by an American who refuses to remove the images and has threatened to sue her.
- The Graphic Artists Guild endorses changing copyright law to permit statutory damages to all rights holders. This would make the penalty of infringement of all works protected by copyright much more significant, and thus would be a strong disincentive to infringers.

Foreign infringers are unresponsive and generally untouchable by American rights holders. International copyright treaties are unenforceable for individual rights holders. International litigation is cost prohibitive to all but large corporate rights holders. Artists have reported a variety of deliberate international infringement to the Guild.

⁷ See 17 U.S.C. § 412



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For example,

- Several American illustrators had their images swiped from their portfolio web sites and published in China in a book that was later imported and sold in the US. The artists were unable to take legal action against the Chinese publisher.
- An American illustrator attended the SURTEX licensing trade show in New York City, where she met the British owner of an online stock illustration business. He took the CD of her entire collection of illustrations with the promise of a licensing deal. Instead he uploaded her collection of over 100 images to his stock web site hosted in England, and refused to remove them. She cannot afford the extensive international legal action against this infringer.
- Many illustrators have discovered unauthorized display and uses of their images on web sites hosted in foreign countries and have been unable to get the foreign ISP to remove them.
- We urge the Administration and WIPO to enact real and practical cooperation with foreign governments to establish a practical procedure for rights holders to remove infringed images from the Internet, including on web sites of foreign hosts. Perhaps this requires procedural coordination with the copyright authorities of other governments, as well as changes to international copyright treaties to clarify how member countries shall combat copyright infringements on the Internet. ICANN's Universal Domain Name Dispute Resolution Policy, and network of domain name dispute arbitration providers, is an example of how international cooperation can work (www.icann.org).

EDUCATION

Our last, but certainly not least important, recommendation is education. As we stated, Americans do not understand copyright law. Americans are not taught about copyright law, and people of all ages in most professions know little or nothing about it. Infringement usually occurs out of ignorance, or a misconception of copyright law. Our best efforts for enforcement will not stop rampant copyright infringement in this country unless both the creators and users of copyrighted works understand their rights and obligations. Copyright is a constitutional right. As a nation we ought to educate the public, beginning in grade school, about copyright as part of basic Civics curriculum. Some European countries already teach grade school children about copyright in public schools. Educating the public is the only realistic means to alter infringing use stemming from ignorance of the law and misconception. We would like to see the Secretary of Education facilitate and distribute consistent and accurate educational materials to state departments of education. Educational materials already exist.

For example,

- The CSUSA (Copyright Society, www.csusa.org) has already created an educational module online called "Copyright Kids" (www.copyrightkids.org).
- The Copyright Alliance Education Foundation has free curricula for K-12 schools, including "Copyright in the Classroom" (http://www.copyrightfoundation.org/library_of_classroom_curricula).
- The IFRRO (International Federation of Reprographics Rights Organizations,



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www.ifrro.org) Working Group on Copying of Visual Material produced a marvelous publication in 2006 titled "The Art of Copying"
(<http://www.ifrro.org/show.aspx?pageid=library/publications&culture=en>).

ABOUT THE GRAPHIC ARTISTS GUILD

In the course of its 43-year history, the Graphic Artists Guild has established itself as the leading advocate for the rights of graphic artists on a wide range of economic and legislative issues, from copyright to tax law. Through its publication of its Handbook: Pricing & Ethical Guidelines (13th edition to be published in fall 2010), the Guild has raised ethical standards in the industry, and provides an invaluable resource on pricing information that is relied on by both artists and clients. The Guild's newsletter, the "Guild News," provides lively, provocative, and useful coverage of developments in the visual communications industry for its readers.

The Guild also provides a wealth of services and benefits for its members, including educational programs, employment opportunities, discounts on a multitude of products and services, a legal referral network, and grievance handling. The Guild's website offers up-to-date information on what's going on with the Guild, updates on advocacy issues, members' portfolios, individual chapter web sites, and links to related organizations.

The Guild also has a blog, All Things Copyright (www.allthingscopyright.com) that posts relevant and pertinent information regarding copyright related issues and how they impact the visual arts.

Thank you for your consideration.

Respectfully submitted,

John P. Schmelzer, President
Lisa Shaftel, Advocacy Chair
Colleen Doran, Advocacy Committee Member
Linda Joy Kattwinkel, Esq., Advocacy Committee Member
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The Economic Impact of Graphic Artists and Their Work in the United States

From the moment you get up in the morning, your day is influenced by graphic artists. A graphic artist's job is to translate society's ideas and messages from the market to you. Your sheets were designed by a textile artist; so are the fabrics you wear. Your morning paper or TV news program was formatted by a graphic designer or broadcast designer. The book or magazine you read as you commute to work has a title design and illustrations created by artists or photographs shot by a photographer. The logos, letterheads and brochures you see at work present a visual image that adds to the messages you are receiving and were created by a graphic artist. Every product of our society is dependent upon the work of a graphic artist in order to convey its message to you.

The irony is, despite the high public visibility of the works of graphic artists, the actual artist is invisible and seldom acknowledged for what he/she contributes to the economy at large.

Virtually all areas of commerce and communications use the graphic arts. Graphic Artists often specialize, focusing their talents to serve particular markets within the communications industry such as magazine or book publishing, or they work for corporations, manufacturers, retailers, advertising agencies, broadcasting companies, or for-profit and nonprofit institutions. Clients may be individuals, small companies, or conglomerates.

Graphic artists include two primary groups of visual communicators: illustrators and graphic designers. Illustrators create the entire spectrum of commercial artwork for reproduction, and graphic designers create all types of visual communication in print and digital media.

According to the US Department of Labor (DOL), artists held 218,000 jobs in 2006 and 63% of that number were self-employed, or 137,340. That number includes not just illustrators, but also multi-media artists, animators, art directors, fine artists, craft artists and other artist related workers.

Also according to the DOL, graphic designers held 261,000 jobs in 2006 with 25% of that number being self-employed, or 65,250.

The economic contribution by graphic artists is felt every industry in the United States. For example, the licensing industry generated \$59.08 billion in revenue in 2008 for all 18 product categories tracked, according to The Licensing Letter. Those product categories include accessories, apparel, home furnishings, publishing, stationery, toys, and videogames/software. Graphic artists contributed to those categories in one form or another, whether it was the product's package design and/or artwork, or textile design for home furnishings or apparel.

The Economic Census defines graphic design services as follows:



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541430 Graphic Design Services

This industry comprises establishments primarily engaged in planning, designing, and managing the production of visual communication in order to convey specific messages or concepts, clarify complex information, or project visual identities.

These services can include the design of printed materials, packaging, advertising, signage systems, and corporate identification (logos). This industry also includes commercial artists engaged exclusively in generating drawings and illustrations requiring technical accuracy or interpretative skills.

According to the 2007 data, this category generated \$8.4 billion dollars in revenue for that year. This is based on 16,369 establishments, or businesses, which employed approximately 57,113 people. These numbers do not take into consideration the number of solo practitioners, or freelancers, a section of the industry that is growing larger each year. Some estimates put that number at 48,168 generating approximately \$5 billion in revenue. This number would seem to be significantly higher if one takes into consideration the numbers from the DOL cited earlier.

Graphic art, and the artists who create it, is a vital, necessary, integral part of the economic fabric of this country. Protecting that creativity should be a vital, necessary, integral part of the law.

Given the phenomenal expansion of the global economy, which will only continue to grow, it is essential to protect the copyrights of those who create American intellectual property. Graphic artists' livelihoods depend on their ability to claim authorship of the work they produce. The ability to sell or license limited usage, or limited rights, to a creative work for a fee is not only an issue of basic fairness; it is the economic essence of copyright law that sustains the productivity of American creative professionals.

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