



VISUAL ARTISTS, THE COPYRIGHT OFFICE AND THE 118TH CONGRESS

WHO WE ARE

The undersigned entities represent visual artists including photographers, videographers, graphic artists, illustrators, designers licensing representatives, and other communities engaged in creating, distributing, using, or preserving visual artworks. Together we form the Coalition of Visual Artists (“Coalition”)¹ and represent the interests of these diverse creative communities before Congress, the Copyright Office (“CO”) and the judiciary.

The Coalition regularly participates in proceedings before Congress and the CO and works closely with the Copyright Alliance on issues of interest to visual artists. Coalition members recently worked tirelessly and successfully for the enactment of the CASE Act and implementation of a Copyright Claims Board (CCB) within the CO. While the CCB was a positive step, we now seek help with other aspects of the copyright system that are continuing to harm visual artists.

THE EXISTING COPYRIGHT SYSTEM FAILS HIGH VOLUME VISUAL ARTISTS

Many visual artists produce a high volume of works, are solo entrepreneurs or run small businesses, have a low annual income, and/or produce works with a relatively low economic value.² Many of their works are digitally transmitted to clients and displayed online where they are also easily stolen. Widespread copyright infringement has in turn corroded the value of their work and diminished their ability to make a fair livelihood.

While our copyright system should protect such creators against unauthorized use of their works, the reality is different. Even though timely registration is a precondition to filing a copyright infringement suit and recovering attorneys’ fees and statutory damages, few high volume visual artists register their works because the current registration process is expensive, time consuming and frustratingly difficult to navigate. Rather than protecting such creators, our current copyright system is failing them.

CONGRESS MUST ADDRESS THE REGISTRATION PROBLEMS HIGH VOLUME VISUAL ARTISTS FACE

The first problem is statutory. The Copyright Revision Act of 1976 was drafted for the analog era of paper and film and has not evolved to keep pace with how visual artists work in today’s digital world. Targeted amendments are long overdue. The second problem is regulatory. For years we have urged the CO to address the needs of such visual artists with specific changes to the registration process. The answer is usually that they can’t do it under current law or technology, that they will think about it, or that they may get to it eventually. This pattern has repeated for years and in some cases, decades. In the meantime, visual artists continue to suffer and fewer and fewer of them register their works.

High volume visual artists can wait no longer and it is up to Congress to act. Our Coalition thus urges Congress to pass the “Visual Artists Copyright Reform Act of 2024” (“VACRA”) to finally ensure that all visual artists are full and effective participants in our copyright system.

¹ Coalition member groups include the American Photographic Artists, American Society for Collective Rights Licensing, American Society of Media Photographers, Digital Media Licensing Association, Graphic Artists Guild, National Press Photographers Association, North American Nature Photography Association, Professional Photographers of America, PLUS Coalition, and Shaftel & Schmelzer.

² Bureau of Labor Statistics, *Occupational Employment and Wages: Photographers*, <https://www.bls.gov/oes/current/oes274021.htm> (May 2022).

KEY COMPONENTS OF VACRA

OVERALL GOALS

With narrowly targeted reforms to copyright law, VACRA would make it easier and less costly for high volume visual artists to register their visual works. Combined with the CO's new technological capabilities, these reforms would revolutionize the copyright system -- registrations would soar and a more complete public registry would result.

ESTABLISH GROUP REGISTRATION OPTIONS MATCHING HOW VISUAL ARTISTS WORK

The group registration options currently available to high volume visual artists do not meet their needs:

- *Photographers.* In 2018, the CO limited photographers to 750 images in any group registration at a cost of \$55 per registration. Many photographers routinely create thousands of images in a day and simply cannot afford the time and expense of registering their work at high volumes under the new limits imposed by the CO. As a result, most high volume photographers no longer register any of their work.
- *Graphic Artists and Illustrators.* While graphic artists and illustrators often create many drafts for a client, and multiple versions of final art for output, they are limited to an unreasonably low 10 works in a group registration of unpublished works and no group registration for published works. Because of the time and expense involved in registering their works, registration rates among graphic artists and illustrators have likewise plummeted. Despite our longstanding pleas, the CO has refused to implement a group registration that matches the needs of graphic artists and illustrators and the way they work in today's digital world. Instead of fixing the problem, they seem determined to double down -- the CO recently proposed a group registration option for up to ten published graphic art and illustrations and an unreasonably narrow 30 day grace period for doing so after the date of publication. The proposed limit of ten works per application is as inadequate for published works as it is for unpublished works and the thirty day limit is unrealistically narrow.

We thus urge Congress to do the following:

- **Provide all visual artists with realistic tiered options for group registration of greater quantities of visual works.** The current 750 work limit per group registration is unrealistic and unworkable, making registration prohibitively expensive and inefficient for many high volume photographers. The CO should be required to make additional group registration options available at various quantity tiers that accommodate real-world creative workflows.
- **Extend realistic group registration options to all visual artists.** Graphic artists and illustrators need registration options that affordably and efficiently match the way they work. Most graphic artists and illustrators should be able to register their works with group registration options essentially identical to those of photographers.
- **Mandate that the CO add subscription-based options.** The current registration system requires that claimants pay separately for each registration. This antiquated, inefficient procedure must be supplemented with options allowing visual artists to purchase a yearly or periodic subscription under which they can efficiently upload and register works they produce *before* they are sent to potential clients.
- **Require Development and Implementation of an API.** Visual artists have long asked the CO for an API (or Application Programming Interface) that would let visual artists use the digital asset management software they use in their daily workflow to connect directly with the CO and enable a simplified, efficient process for application, deposit, and registration of their visual works. For example, photographers, graphic artists, and illustrators could instantly send their work to the CO from the software they use to manage their works, such as

Adobe Lightroom, Bridge, or Photo Mechanic. Combined with other requested reforms like increased quantity tiers and a subscription option, visual artists could register their works quickly and efficiently and registration rates for visual artists would soar. And by registering their work before posting them publicly or sending them to clients, visual artists would avoid the current problems they often encounter in determining publication status under § 409(8), as discussed further below. Despite years of promises to develop and provide a registration API, the CO apparently no longer plans to do so. Congress must force the issue.

LOWER COST BARRIERS FOR REGISTRATION OF WORKS BY HIGH VOLUME VISUAL ARTISTS

As required under the current statute, the CO currently calculates fees based on their administration costs, regardless of ability to pay or the punitive impact of high fees on creators. The unfortunate result is that many high volume visual artists simply cannot afford to register their works. We offer the following suggestions for how to address the problem:

- **Adopt a Deferred Examination Option.** The CO cites the administrative cost of *examining* visual works as a primary reason why it cannot offer less expensive registration options for visual artists. The Coalition and the Copyright Alliance have thus asked the CO to create a “deferred examination” option for those who most need it – high volume creators such as photographers, graphic artists, and illustrators – and narrowly limit this option to group registrations submitted online. By deferring the examination until it is needed (such as to contest an infringement), the deferred examination option would allow for group registrations that are far less costly.³ Unfortunately the CO recently decided against any adoption of a deferred examination option, leaving us no choice but to pursue a legislative fix.⁴
- **Institute a Small Entity/Individual Author Fee Reduction.** Congress could also simply mandate that the CO adopt the approach taken by the Patent and Trademark Office which provides small and micro entities with significant fee reductions.⁵ Congress would specifically give the CO the authority to define the “small entities” and set the amount of reduced fees for both individual authors and small entities.

ADDRESS THE “PUBLISHED VS. UNPUBLISHED” WORKS PROBLEM FOR VISUAL ARTISTS

Sec. 409(8) requires that a registration applicant must include “if the work has been published, the date and nation of its first publication.” Unfortunately, providing publication status is easier said than done and this blanket requirement is another major reason why visual artists do not register their works. Determining whether and when a visual work such as a photograph has been “published” within the arcane nuances of copyright law and the often-conflicting legal precedents of federal courts is confounding even to copyright experts. Today’s world of instant online display, social media, and rapid digital delivery to potential clients makes the determination of publication status even more confusing. To make matters worse, the CO will not allow registration of published and unpublished works together.

³ Copyright owners would pay a discounted fee for a registration of works *without an immediate examination by the CO*. If a copyright holder subsequently wanted to bring an infringement suit, they would pay the CO a separate fee to have the “provisional registration” examined for originality and other formalities and converted to a regular registration. Until such request, the application would have provisional status. Once converted from a provisional registration to a regular registration, the registrant would have all the statutory benefits of a regular registration (e.g. prima facie evidence of validity, eligibility for statutory damages and attorney fees, etc.) and would retain the original effective date of registration.

⁴ See Letter from Register of Copyrights Shira Perlmutter to Senator Thom Tillis, August 1, 2022, available at <https://www.copyright.gov/policy/deferred-examination/Letter-on-Deferred-Registration-Examination-2022.08.01.pdf>.

⁵ See <https://www.mintz.com/insights-center/viewpoints/2231/2022-05-03-determining-entity-status-united-states-and-patent>.

To deal with the “published” vs. “unpublished works” problem, we suggest three narrowly crafted options:

- **Amend § 409(8).** We suggest amending §409(8) to make listing the date and nation of first publication (or declaration of publication status) voluntary for group registration of photographs, graphic art, and illustrations.⁶
- **Enable efficient group registrations of visual works.** The registration process for group registrations of visual works should be modernized by allowing claimants to (1) combine published and unpublished works on a single group registration, and (2) combine works first published in different calendar years in a single group registration. Such reforms would greatly simplify the registration process, lower costs to applicants, and minimize registration errors. While the CO has the authority to do so, it has refused to provide these simple reforms. A legislative solution is justified and overdue.
- **Allow efficient and free correction of application errors.** It is easy for high volume visual artists to make mistakes in their application for copyright registration. This is especially true for publication status, as discussed above. Unfortunately, it is never simple to correct those errors with a supplemental registration, which is costly (e.g. \$100 for electronic filings to correct a completed registration) and can result in loss of the original effective date of registration (EDR). We urge Congress to guarantee registrants the right to correct registration errors at any time without additional cost while still retaining the original EDR.

ENACT LONG-OVERDUE DEPOSIT REFORMS

Existing copyright laws governing the deposit of copyright works are outdated given the current goals and practical realities faced by the Library of Congress (LOC), CO, and copyright registrants. The following reforms would help:

- **Abandon the one size fits-all best edition system for visual works.** The Copyright Act requires that copyright owners deposit copies of the “best edition” of a work with the LOC and the CO. While the LOC has used such deposits to expand its collection, universally requiring the best edition of all works for deposit has been widely criticized as unnecessary and counterproductive and is especially problematic for graphic artists and illustrators.⁷ Requiring the deposit of “best editions” of works even for classes of work in which the LOC has no interest in adding to its collection places an onerous burden on many registration applicants for no substantive reason. In response to a congressional request to study this issue, the CO unfortunately decided not to recommend a statutory amendment⁸ and Congress must now force the issue. Our proposal would simply require that the LOC announce those works for which it mandates the deposit of best editions.
- **Prohibit destruction or disposition of all digital deposits.** Under current copyright law, the LOC has the discretion to destroy deposits of published works, and copyright owners are required to pay significant fees to prevent such unwarranted destruction of their deposits. While the destruction of *physical* deposits might be justifiable for space management, that justification is not applicable to *digital* deposits. Congress should mandate that the LOC and CO hold *all* digital deposits permanently, at no additional cost to registrants.

⁶ To accommodate certain complications of copyright law, including several historical quirks, this amendment would be limited to works authored by a named individual and first published in the USA after January 1, 2003.

⁷ The CO helpfully waived the best edition requirement for group registrations of published photographic works and allowed photographers to submit small jpegs as the examination deposit for all group registrations of photographic works. Unfortunately, the CO still maintains the best edition requirement for all works by graphic artist and illustrators.

⁸ See Letter from Register of Copyrights, Shira Perlmutter to Senator Thom Tillis, December 1, 2022, available at <https://www.copyright.gov/policy/best-edition/usco-best-edition-study-letter-12012022.pdf>.

- **Allow photographers to submit deposit copies of their works to third-party registries (TPR) authorized by the CO.** Allowing high volume visual artists to submit their deposits to third party registries rather than the CO would streamline the registration process for such artists while also benefiting the public and the overall goals of the copyright system. TPRs would work together with the CO as follows:
 - ***Efficient Registration within Artist Workflow.*** Many visual artists use third party services to display or license their work to the public or to their clients. Third party services could get qualified by the CO to act as a TPR and thus artists could efficiently satisfy the CO's deposit requirements through their normal course of business and client workflow.
 - ***Innovation through Competition.*** TPRs are not bound by the practical, legal, and budgetary constraints of the CO and would compete for the business of copyright applicants through innovation and the services they provide. For example, they could allow the designation of sensitive works as private while making other works widely available for the public to easily find and properly license.
 - ***Public Benefits.*** TPRs can provide the public with helpful information about each work (author, history, provenance, licensing offers, licensing history, etc.) with state-of-the-art search tools (image recognition, metadata, steganographic markers, etc.). TPRs could also implement technical measures such as recording copyright information on the blockchain to create an immutable copyright record.
 - ***Global Public Record.*** TPRs can be connected via a global network so that a registration or search at any one TPR is equivalent to registration or search at thousands of TPRs across the world.
 - ***Complement the CO and LOC.*** TPRs would allow the CO and LOC to satisfy their core missions with minimal disruption. For example, TPRs can provide access to deposit copies to the CO examiners for registration and to the LOC for expansion of its collection.

At the suggestion of the CO, the non-profit PLUS Coalition is currently developing the framework for the TPR system and legislation is now needed to authorize its use.