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**14 May 2012**

## **LIBRARY OF CONGRESS**

**Copyright Office**

**37 CFR Parts 201 and 203**

**[Docket No. 2012-1]**

**Copyright Office Fees**

**Comments Submitted by the Graphic Artists Guild**

**by electronic filing**

**Re: Federal Register / Vol. 77, No. 60 / Wednesday, March 28, 2012 / Proposed Rules**

### **INTRODUCTION**

The Graphic Artists Guild is pleased to have the opportunity to submit our comments, opinions and suggestions to the US Copyright Office on the proposed adoption of new fees for the registration of claims, recordation of documents, special services, Licensing Division services, and processing of FOIA requests. These comments are submitted on behalf of visual artists, with a focus on illustrators and graphic designers (together “graphic artists”).

We are aware that the current registration fees don’t cover the administrative costs of processing registration claims and other requests, and this has been reported each year by the Copyright Office in its Annual Report. The number of registration claims continues to increase, and the Copyright Office has been updating computer technology. All of this adds to increasing operating costs. The Graphic Artists Guild appreciates that the Copyright Office recognizes the importance of encouraging registration of visual works, especially because of the growing orphan works problem. Most of the visual works considered to be “orphaned” because the creator could not be identified or located have been created by individuals or small businesses.

Graphic arts are integral to a broad range of industries, such as publishing (illustration, book design, graphic novels), advertising, educational and training materials, motion pictures and broadcasting, retail packaging, websites and online commerce, textiles, video games, apparel,



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home furnishings, computer graphics, stationery, posters, CD and DVD art, ceramics, and editorial illustration. Because graphic art is so integral to the American economy, the graphic art industry is uniquely vulnerable to copyright infringement. Protecting the creative works of illustrators and graphic designers must continue to be a necessary and integral part of U.S. law. We believe it is of vital importance to the professions of graphic arts for the Copyright Office to levy registration fees that are affordable to individual and small business creators as well as large corporate creative businesses.

The Graphic Artists Guild is concerned that the proposed registration fee increases would impose significant financial hardships on individual independent contractor creatives and small graphic art business.

### **OUR CONCERNS**

The proposed fee increases are the largest jump in fees ever. In some instances, the fee increase is nearly double. Current registration fees are a financial hardship for some individual creators and a significant deterrence to registration as it is, especially for artists and designers who create a large number of works. In a recent survey of graphic artists in 2012:

- 74 % said the current cost of \$35 for online registration prevents them from registering works they would like to register each year.
- 80 % said the proposed increase in fee to \$45 for “Basic Registration” online for single authors filing a single work that is not a work made for hire is too high.
- 62.5 % said they file registration by mail.

Of those graphic artists who file by mail, 90% said the proposed fee increase for paper filing from \$65 to \$100 is too high.

In the past two decades, fees earned for illustration and graphic design services have stagnated or declined. At the same time, the cost of working as a graphic artist has increased dramatically. The development of digital technology and the quick pace of technological advancements require graphic artists to incur greater overhead costs for computer hardware and software. Many graphic artists don't register their works as it is: they consider the current \$35 and \$65 fees too great a portion of their fee for the commission of the work. Licenses to use visual works for small and one-time uses to individual and small business users are often below the proposed fee increases.

The proposed fee increases proposed will surely be a financial hardship in this economy to even more independent contractor creatives and small studios. We believe that these fee increases will result in a decrease of registration by individual illustrators and graphic artists



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as well as small studio businesses.

Like photographers, illustrators and graphic designers typically retain the copyrights to their work while licensing exclusive or non-exclusive rights to our clients. This is an ideal business arrangement for both the artist and client. Nonexclusive licenses allow clients access to the art for a low fee while enabling the artist to earn the full value of the work through additional licenses. Exclusive licenses provide clients with the value and control of exclusive use in the marketplace. Registration makes this licensing arrangement legally enforceable for both the artist and our clients in the event of infringing use by a third party. If registration decreases as a result of increased fees, fewer businesses will be able to effectively enforce their licenses in the marketplace.

Most people are aware that a photographer creates many images for each job/project, and perhaps thousands of images each year. The Copyright Office has recognized this and accommodated the large quantity of works photographers need to register by establishing the registration category of “group” registration of photographs. However, people are unaware of how prolific most professional graphic artists are. Response to our survey documented that on the average, illustrators and graphic designers:

- Produce 57.16 (average) finished pieces of art/design in a year.
- Produce 201.71 (average) preliminary pieces (roughs, drafts, comps) in a year during the working process.
- Register 12.16 (average) of all those pieces.
- 49% of those responding register nothing. We believe that the registration rate has actually increased from past years as a result of copyright education, advocacy efforts, the availability of online registration, and the orphan works issue.

Illustrators and graphic designers create many rough drafts and revisions from the beginning of a project to the final, published illustration or design. Many of these drafts are provided to the client, either on paper (photocopies or fax prints) or as digital files. The client has copies of many versions along the way, not just the final art.

Clients often don't understand copyright or don't understand the limited usage rights they obtain for work created for their project. Under the licensing arrangement, clients receive rights only to the final art. It is important for graphic artists to retain rights to their preliminary works: it allows graphic artists to charge clients less for the project because the artists can repurpose some preliminary works for other projects. Some clients mistakenly



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presume that they own the copyright to all of the work created for a project, including preliminary drafts or alternative works that are not accepted for final implementation. Unfortunately, it is very common for clients to infringe illustration and graphic art by subsequently using preliminary drafts and rejected art for other projects. Sometimes such works are obtained and used by other businesses or individuals.

In many situations, the final art would qualify as “published,” and all other art created for the same project would qualify as “unpublished,” and therefore cannot be registered together. Accordingly, in order to cover all the copyrights for a client project, often at least two registrations are required.

It is legally and financially detrimental for illustrators and graphic artists to register all artwork produced for one professional job/project as an “unpublished collection.”

The frequency of publication of works online (e.g. blogs, online magazines, portfolio websites, online stores) has increased and will continue to increase.

- 75.5% responding to the survey said the proposed fee increase from \$65 to \$100 registration for a group of contributions to periodicals (Form GR/CP), published photographs, or database updates (paper filing) is too high.

The copyright to all original works created by any full-time employee on the job are owned by the employer as Work Made For Hire under copyright law. A small graphic art studio might register works as Work Made For Hire. Some individual visual creators have incorporated as an LLC for tax purposes and to shelter their personal property from liability. Their LLC owns the copyright to the works they create as a Work Made For Hire. Under the new proposal, those individuals would have to pay the same registration fee as large corporate creative businesses.

- 4.5 % responding to the survey said they register works by multiple authors.
- 6.7 % responding to the survey said they register works as WMFH.
- Of those illustrators and graphic artists who file this type of registration, 100% said the proposed fee increase from \$65 to \$100 is too high.

## **WE PROPOSE THESE CHANGES**

The Graphic Artists Guild would like to take this opportunity to propose some changes and modifications to the fee structure and classifications that we believe would create incentives for the registration of visual art, while at the same time allowing fee increases to cover the



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Copyright Office's costs.

**A. *Begin with a smaller fee increase at this time.***

Going forward, increase fees incrementally at future established dates at least one year apart.

**B. *Implement a tiered fee structure.***

Lower fees for individual authors/creators, LLCs or S corporations operated by a sole-proprietor creators, and small businesses that commission and/or register Works Made For Hire and works by multiple authors.

Large corporate rights holders can easily afford the proposed \$100 fee to register Works Made For Hire. Incorporated individual creators and small studios cannot afford the same fee as much larger business entities.

**C. *Offer clearer guidance for determining whether works are “published” or “unpublished,” specifically with respect to online use.***

Over fifty-six percent of those responding to our survey indicated that they found the registration definitions of “published” and “unpublished” confusing with respect to online works. The traditional definition of “published” is “the distribution of copies of a work to the public by sale or other transfer of ownership, or by rental, lease or lending” or “the offering to distribute copies to a group of persons for purposes of further distribution, public performance, or public display.” The Copyright Office has declined to provide guidance for determining whether works posted online qualify as “published.” See Circular 66. As the Copyright Office acknowledges, publication is an important concept, and there are significant consequences to making the wrong determination. Incorrectly designating a work as published when it was unpublished, or vice versa, can render the registration invalid. Unfortunately, the courts have not provided clear guidance on this issue.

Many visual creators are unclear as to whether posting/uploading digital images to an intranet or the Internet is considered publication within the context of the overall content. Some graphic artists consider the act of posting an image on the internet or uploading a website to be publication. However, other artists do not interpret posting their images on the Internet as publication because they still think of publication as traditional printing.

However, allowing one's image to be seen on numerous end users' computers could be considered more analogous to distributing multiple copies than to displaying a single work, especially if downloads or printing of the image is allowed. It would be very helpful if the



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Copyright Office would offer guidelines for registrants and the courts for determining when online works should be considered to be published works, including specific examples - online periodicals, web pages, catalogs, blogs, portfolio web sites, animated computer games (images considered separately from the software), CGI, low resolution image files intended for use only with electronic devices, etc.

In all of these instances, the opportunity exists for anyone to make an unauthorized copy and infringe the work. Artists would benefit from the legal advantages of registering their work and would be more likely to register if the existing instructions were more helpful in determining whether online works should be registered as published or unpublished.

***D. Add a new registration procedure and discounted fees for large volume registrations of visual art by single owners.***

It is more cost effective for the Copyright Office to process the online registration of multiple works from one author/creator at once than to process multiple individual claims for single works.

In order for this new procedure and category to be truly useful in practicality for illustrators and graphic designers and to incentivize registrations, some modifications to existing classifications would be necessary.

We propose a “pay-one-price bulk registration” option for an annual fee for basic registration for individual visual creators. We agree with the “bulk registration” yearly fee of \$300 proposed by American Society of Media Photographers. Visual artists would like to register multiple works together throughout the calendar year according to their production schedules. Artists would like to be able to choose this option each year depending upon their particular projects for that year.

On the average, the number of visual works illustrators and graphic artists create (including all roughs, comps/revisions, and finals) are...

- 14.91 For a logo design
- 9.27 For an illustration
- 7.77 For a website design
- 5.68 For other type of graphic design works
- Overall average of works created for each job/project = 9.4



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## ABOUT THE GRAPHIC ARTISTS GUILD

In the course of its 45-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 the Handbook: Pricing & Ethical Guidelines (now in its 13th edition), 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, 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 Guild activities, updates on advocacy issues, members' portfolios, individual chapters, and links to related organizations.

Thank you for your consideration.

Respectfully,

Tricia McKiernan  
Executive Director

Haydn Adams, President  
National President

Lisa F. Shaftel  
National Advocacy Committee Chair