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Register of Copyrights
U.S. Copyright Office
101 Independence Ave., SE
Washington, DC 20559-6000

Re: The Right of Making Available: Response to Notice of Inquiry (79 F.R. 10571) (Docket No. 2014-2)

Dear Register Pallante:

I. Introduction and Background

These comments are submitted on behalf of a number of visual arts trade associations including, PACA, Digital Media Licensing Association, Inc. (formerly known as Picture Archive Counsel of America, Inc.) ("PACA"), The National Press Photographers Association ("NPPA"), American Society of Media Photographers, ("ASMP"), Graphic Artists Guild ("GAG") name of organizations- (collectively "Associations") in response to the Copyright Office's Notice of Inquiry dated July 15, 2014 ("NOI") concerning the study on the right of making available.

Founded in 1951, PACA's membership includes companies worldwide that are engaged in the archiving and distribution of still images, footage, animation, and illustration (collectively, "images") for purposes of licensing, either directly or indirectly. PACA, through its members, collectively aggregates and handles the licensing of over approximately two hundred (200) images, a number that will continue to increase as new images are uploaded daily.

The NPPA is the "Voice of Visual Journalists." It is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's approximately 7,000 members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted and defended the rights of photographers and journalists, including intellectual property rights and freedom of the press in all its forms, especially as it relates to visual journalism.

The American Society of Media Photographers (ASMP) is a 501(c)(6) not-for-profit trade association, established in 1944 to protect and promote the interests of professional photographers who earn their livings by making photographs, both still and motion. It is one of the most active professional photographers' trade associations in the United States and is one of the oldest and largest organizations of its kind.

The Graphic Artists Guild (GAG) is a national union of graphic artists dedicated to promoting and protecting the social, economic and professional interests of its members and for all graphic artists including, animators, cartoonists, designers, illustrators, and digital artists.

Effective enforcement of copyright infringement coupled with the ability to license images is a vital concern of the Associations' membership. Image libraries and visual artists require a robust copyright system in order to obtain licensing fees for the use of those images. Of particular challenge, especially in the digital online environment, is maintaining control over the use of images through licensing. All members of the associations depend on their exclusive right to display their works on the internet in order to license them, along with a concomitant license fee. In order to sustain the licensing model that visual artists have come to rely on, it is crucial that they retain the exclusive right to display their works.

II. Subject of Inquiry

We submit this response on behalf of the Associations to amplify the issues PACA raised during the public roundtable on May 5, 2014. The inquiry requested any additional comments or suggestions regarding recommendations or proposals the Copyright Office might wish to consider as it concludes its study on the making available right.

We generally agree with the Copyright Office and with other public comments that making available right, as required by the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (the "WIPO Treaties"), is implicitly included in the bundle of exclusive rights provided in 17 U.S.C. § 106. Other public comments primarily focus on the distribution right. *See* 17 U.S.C. § 106(3). The Associations' interest is specifically focused on the making available right and communication to the public right in connection with displaying images on the internet. Accordingly, this comment will address the narrow topic of the display right. *See* 17 U.S.C. § 106(5).

A. Courts are Misinterpreting the Display Right

Some courts have misinterpreted the display right in such a way that effectively swallows up visual artists' making available right and communication to the public right online and is inconsistent with Congress' intent.

The "server test," established by the Ninth Circuit in *Perfect 10, Inc. v. Amazon*, errs by coupling the display right with the reproduction right. *Perfect 10, Inc. v. Amazon,* 508 F.3d 1146, 1160 (9th Cir. 2007). A series of court decisions adopting the server test, including *Perfect 10, Inc. v. Google, Inc.,* 508 F.3d 1146, 1160 (9th Cir. 2007) and *Flava Works v. Gunter,* 689 F.3d 754, 758 (7th Cir. 2012), misguidedly hold that a website only infringes the display right if the copyrighted image is stored on the website's server, and then displayed using that stored copy. Under the Copyright Act, however, the display right and reproduction right are independent and, as such, it is irrelevant whether the one possesses or controls the physical copy from which the display or communication is made.

This interpretation of the public display right is improperly narrow. The Copyright Act defines the term "display a work" as "to show a copy of it, either directly or by means of . . . any . . . device or process." 17 U.S.C. § 101. Further, to "display a work 'publicly' . . . means to transmit or otherwise communicate a . . . display of the work . . . by means of any device or process." *Id.* The drafters intended for the scope of the display right be broad, to include "[e]ach and every method by which the images . . . comprising a . . . display are picked up and conveyed," provided the image reaches the public. H.R. Rep. No. 94-1476 at 64 (1976). Despite this statutory language and Congressional intent, courts have limited the process by which a website displays a visual work to one of how it is stored on a particular server. Under this judicially constructed definition of the display right, posting a copyrighted image online only constitutes a "display" if a physical copy of the posted image is also stored on the website's

server. Not only is this an extensive and improper departure from the display right contemplated by Congress, but this narrow definition also fails to satisfy the U.S.' obligation to provide the robust communication to the public and making available rights under the WIPO Treaties.

B. Courts' Interpretation of the Display Right Eviscerates Visual Artists' Making Available Right

The courts' interpretation of the display right seriously undermines the ability of visual artists to control the use and licensing of their works online.

One of the unfortunate results of these recent decisions is that a website can circumvent the need to obtain a license to use a copyrighted image by implementing certain technological processes that enable a website to display an image without storing a copy on its server. As this technological slight-of-hand, used to circumvent licensing requirements becomes more prevalent, the loss of control by visual artists over their images increases exponentially. Also becoming less of a factor in image misappropriation is the previously poor display quality of the work. Using technology such as in-line linking or framing, a website can easily display high-resolution images without a license and without running afoul of copyright law. Those viewing the infringing images on the website are likely not aware that the use is unauthorized and, given the ease with which images can be reproduced, displayed, and distributed online, there is a high likelihood of secondary infringement.

The courts' interpretation of the display right eviscerates visual artists' right to make their images available online and their parallel right to prevent others from doing so. With this legal backdrop, websites have no incentive to license images from copyright owners, and visual artists have no incentive to create. Moreover, the Association members will have no choice but to compete with websites who obtain their images by infringement and use them for free. The consequences of the courts' misinterpretation of the public display right are significant, causing real economic harm to image libraries and individual creators who rely on the ability to license their works to earn a living.

III. Recommendations

The Associations recommend that the Copyright Office draft guidelines regarding the interaction between the rights of communication to the public and making available, on the one hand, and the exclusive rights set forth in 17 U.S.C. § 106, on the other. Specifically, the guidelines should

clarify that each of the exclusive rights are distinct – that there can be a violation of the public right to display without also having a reproduction. The guidelines should further articulate the definition of "display" to include new technological ways of displaying images online.

However, if the courts' misinterpretation of the display right for visual artists persists, Congressional action may be required. If and when we reach that point, the Associations recommend legislative changes to rectify this increasing problem. Such language must also clearly state that the display right can be violated by any process and is not contingent upon a reproduction residing on a particular server.

IV. Conclusion

The U.S. treaty obligations with respect to the communication to the public and making available rights of visual works online is not being met based on courts' interpretations of the exclusive rights under § 106. There are many approaches to solving this problem that would meet the Associations' approval, and we are open to discussing them with the Copyright Office. All Associations generally support the same goals, and encourage a system that provides for the communication to the public and making available rights implicit in the Copyright Act in a way that is fair, consistent, and in accordance with the WIPO Treaties. We all look forward to working together with the Copyright Office and Congress to achieve that goal.

PACA and the other Associations would like to continue to have a part in this discussion and representative would welcome the opportunity to meet with the Copyright Office, in person or otherwise, to discuss these issues in greater detail.

We thank you for this opportunity to present our initial ideas.

Respectfully submitted,

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PACA, Digital Media Licensing Association, Inc.