

Submitted  
January 15, 2019

# COALITION OF VISUAL ARTISTS - COMMENTS IN RESPONSE TO U.S. COPYRIGHT OFFICE NOI RE REGISTRATION MODERNIZATION

FR 2018-9, FED. REG. VOL. 83, NO. 201 (OCTOBER 17, 2018) 52337

AMERICAN PHOTOGRAPHIC ARTISTS, AMERICAN SOCIETY FOR COLLECTIVE RIGHTS LICENSING, AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, DIGITAL MEDIA LICENSING ASSOCIATION, EUGENE MOPSIK, GRAPHIC ARTISTS GUILD, NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, NORTH AMERICAN NATURE PHOTOGRAPHY ASSOCIATION, PLUS COALITION, PROFESSIONAL PHOTOGRAPHERS OF AMERICA, SHAFTEL & SCHMELZER



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## Submitted by Online Submission Procedure

January 15, 2019

The Hon. Karyn A. Temple  
Acting Register of Copyrights  
U.S. Copyright Office  
101 Independence Ave., SE  
Washington, DC 20559-6000

Re: Coalition of Visual Artists<sup>1</sup> -- Comments in Response to USCO Notice of Inquiry (NOI) re Registration Modernization, (37 CFR Part 201 and 202) [Docket No. 2018–9] *Federal Register Number: 2018-52336, Vol. 83, No. 201 (October 17, 2018)*<sup>2</sup>

### I. INTRODUCTION

The undersigned entities--who represent visual artists including photographers, videographers, illustrators, graphic artists and designers as well as their licensing representatives (collectively “Coalition of Visual Artists”) welcome the opportunity to share with the Copyright Office their views regarding the Office’s 2018 NOI re Registration Modernization. This Comment focuses in depth on issues of special importance to visual creators such as photographers and graphic artists. In particular, this Comment answers Questions A1, A4, B11, C12 and the general topics posed in C, D and E of the NOI.<sup>3</sup> To the extent there are specific questions raised in the NOI

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<sup>1</sup> The Coalition of Visual Artists includes the American Photographic Artists, American Society for Collective Rights Licensing, American Society of Media Photographers, Digital Media Licensing Association, Eugene Mopsik, Graphic Artists Guild, National Press Photographers Association, North American Nature Photography Association, PLUS Coalition, Professional Photographers of America, Shaftel & Schmelzer.

<sup>2</sup> Hereinafter “2018 NOI re Registration Modernization”.

<sup>3</sup> NOI Question A1 on new solutions for delivering application assistance, is discussed on 8-11, 38, and Appendix C. Question 4, on Dynamic Pricing or Registration Models, is addressed in detail on 15-25 and 26-35. Question B11, on Application Programming Interfaces, is addressed on 26-35. Topic C regarding how users engage and manage

that are not addressed here, such as in Questions A2-3, B5-10, C13-14, and D15-16, we adopt the responses in the Copyright Alliance’s Comment.<sup>4</sup> While we are in general agreement with the Copyright Alliance comments we also note several areas, such as dynamic registration options, where we have a different emphasis or approach to particular issues. We also highlight comments to the NOI submitted separately by the Professional Photographers of America, Graphic Artists Guild, and Shaftel & Schmelzer.<sup>5</sup>

The subject matter of this NOI—modernization of the outdated registration process—is a critical element of the Office’s overall efforts to create a vibrant and effective Copyright Office that is equipped to meet the daunting and formidable challenges posed by the demands of a digital world. As representatives of individual creators and small businesses who, for far too long, have been treated as outliers in both the registration process and the copyright act’s remedial provisions, we cannot overstate that the issues addressed by this NOI are but part of what must be a more comprehensive effort to modernize the Office and our copyright system.

Inherent in the use of any system is the presumption that it should work. In that regard we strongly believe there are very serious problems with the copyright registration system negating that premise, such as: its inefficiencies, dysfunctionality, usability, and unnecessary cost.

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Copyright Office records is broadly discussed at 13 and 26-35. Question C12 is addressed in footnote 45 of this Comment. Topic D on deposit requirements is discussed on 25-26. Topic E regarding what additional considerations should be taken into account to develop a robust registration system is addressed throughout this Comment, including discussion of broad goals that should guide modernization (8-15), how to solve the “published/unpublished problem” (9-11 and 35-41), other needed statutory changes (at 41), and how a next generation system could work (26-35 and Appendix D).

<sup>4</sup> Copyright Alliance, Comments in Response to 2018 NOI re Registration Modernization (January 15, 2019)

<sup>5</sup> Photographers of America, Comments in Response to 2018 NOI re Registration Modernization (January 7, 2019). Graphic Artists Guild, Comments in Response to 2018 NOI re Registration Modernization (January 15, 2019); and Shaftel & Schmelzer, Comments in Response to 2018 NOI re Registration Modernization, (January 11, 2019).

We believe that the Copyright Office must avoid the bureaucratic trap of simply making incremental improvements to the current, broken system. Instead it should act boldly and quickly to fix and shore up the most pressing problems, and then move more openly toward building a “next generation” copyright system that can serve the needs of our nation and its creators into the future.

More specifically, we believe that the Copyright Office should take the following steps:

- Adopt a provisional registration application process allowing visual creators to pay a discounted fee for a deferred-examination registration. In particular, this process will provide immediate and desperately needed relief to visual creators such as photographers and graphic artists who produce a high volume of work by allowing them to submit more works in one group registration at a much lower fee while also reducing the Copyright Office’s up-front burden of fully examining every such work submitted.
- Replace the current single, standard, and group applications with dynamic pricing models, including tiered and/or bulk subscription-based options that allow for simplified registration and payment processing, while producing a system that better fits the financial and practical needs of individual creators and small businesses.<sup>6</sup>
- Employ its regulatory authority to immediately reverse the Copyright Office practice of invalidating or refusing registrations which improperly differentiate published and unpublished works.

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<sup>6</sup> Such a fix will include revisiting and substantial modification of the Office’s recently adopted rule governing group registrations of photographs (83 FR 2542 January 18, 2018), as well as a significant revision of its proposed fee schedule for group registrations of photographs (Notice of Proposed Rulemaking, 83 FR 24054 (May 24, 2018)). It is also necessary to open group registrations to all works of visual arts, not just photographs.

- Urge Congress to pass appropriate legislation to statutorily clarify, or eliminate, the definition of published and unpublished works.
- Develop a next generation copyright system built squarely around the needs of its users and their daily workflow. This process will require an open discussion of the broad goals and objectives of such a system, and the development of robust API's to allow users to connect with the Copyright Office directly through the image management software they use in their everyday business.
- Provide critical technical support to assist the House and Senate in moving the CASE Act to enactment in the next year. Without the CASE Act, we fear that individual creators and small businesses will continue to be on the outside looking in at the copyright system.

Copyright registration is meaningless unless accompanied by effective remedies. As long as creators are left without effective, cost-efficient remedies to pursue infringements, they will have little incentive to register their work no matter what other changes the Copyright Office might undertake. Passage of the CASE Act is an indispensable part of any modernized copyright system.

## **II. WHAT IS A “MODERNIZED” REGISTRATION SYSTEM?**

### **THE CURRENT SYSTEM IS BROKEN FOR MANY INDIVIDUAL CREATORS AND SMALL BUSINESSES**

The copyright system is simply broken. The Copyright Act of 1976 was drafted in the pre-digital, analog age when technology and business practices used by creators were markedly different. Yet several of its outdated requirements linger, causing a cascade of problems that are continually compounded by that disparity.

A perpetually underfunded Copyright Office has struggled for decades to keep this system working with a patchwork of incremental tweaks and band-aids, to no real avail. As a result, registration rates by most creators<sup>7</sup> are embarrassingly low and overall registration rates are dropping. It takes the Copyright Office too long to process and record registrations—a problem that has existed for years at varying levels—and the Copyright Office’s goal of providing a robust, comprehensive public record is largely illusory. These are all markers of a system that is not working as it should.

For individual creators and small businesses such as photographers and graphic artists, this state of affairs is cruelly ironic. The digital age has created an enormous market for visual works, yet the inability to meaningfully protect their copyright has financially hammered small creators while simultaneously incentivizing others to infringe their work. And full participation in the copyright system is just a harsh illusion for many.

### **SEEING THE PROBLEMS THROUGH THE EYES OF CREATORS**

To fully modernize the copyright system, we believe it is crucial to see both the problems and potential solutions through the eyes of its users (or “consumers” in business language). This is especially true for some creators like photographers and graphic artists, who are completely disenfranchised from the system.

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<sup>7</sup> While our comment focuses issues pertaining to visual artists in particular, many of the issues raised—such as the legal expertise required to fill out an application, the ambiguities that exist in law, the inefficiency of the registration process and how the process works, the complexities of the process, the cost of registration, and the consequences of error—apply to all registrants, not just visual artists.

Many creators operate on razor thin margins while struggling to pay their bills and earn a living wage. Median pay for all photographers in 2017 was just \$32,490, with a decline in job outlook of 6% over the next ten years.<sup>8</sup> From 2003 through 2018, income for illustrators has likewise remained stagnant.<sup>9</sup> Income for graphic designers is likewise projected to increase by only 4% through 2026 – significantly lower than the projected national average for all jobs.<sup>10</sup> Over 80% of creators are also sole proprietors,<sup>11</sup> without employees or partners to help handle time-consuming administrative duties like registering images.<sup>12</sup>

At the end of the day, many creators simply do not have the time or money to invest in registering their images. In order for it to be a rational choice to do so, it must be quick, easy, affordable, and worth the time and money invested. Unfortunately, it is none of the above.

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<sup>8</sup> U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS. PHOTOGRAPHERS : OCCUPATIONAL OUTLOOK HANDBOOK, available at <https://www.bls.gov/ooh/media-and-communication/photographers.htm> (last visited January 15, 2019).

<sup>9</sup> THE GRAPHIC ARTISTS GUILD HANDBOOK: PRICING & ETHICAL GUIDELINES, 11<sup>th</sup> and 15<sup>th</sup> Editions. Income statistics adjusted for CPI inflation.

<sup>10</sup> U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS. GRAPHIC DESIGNERS: OCCUPATIONAL OUTLOOK HANDBOOK – JOB OUTLOOK, available at <https://www.bls.gov/ooh/Arts-and-Design/Graphic-designers.htm#tab-6>. (last visited January 15, 2019).

<sup>11</sup> Coalition of Visual Artists, *Survey of Visual Creators and Related Professionals Regarding the Copyright Office NPRM 2018 Proposed Fee Increase*, conducted August 17, 2018 to September 11, 2018 [hereinafter 2018 Coalition Survey], Q5. Relevant excerpts from the survey are attached hereto as Appendix B). The complete 2018 Coalition Survey is attached to Coalition of Visual Artists, Comments Submitted in Response to the U.S. Copyright Office’s May 24, 2018 Notice of Proposed Rulemaking re Copyright Office Fees (September 15, 2018) [hereinafter Coalition Comments on 2018 NOPR re Copyright Office Fees’], available at <https://www.regulations.gov/document?D=COLC-2018-0005-0160>.

<sup>12</sup> See e.g. CASE Act of 2017, Hearing on H.R. 3945 before the House Committee on the Judiciary, 115<sup>th</sup> Congress (September 27, 2018) (Testimony of Jenna Close) (“Like so many professional photographers, graphic artists, illustrators, videographers and other creators, [my partner] and I run a small business. We don’t have the luxury of lots of staff to help make our company run smoothly. That means we wear many hats. Our 60-70 hour-work weeks are made up of marketing our photography, negotiating and booking jobs, creating imagery, billing our clients and paying the bills.”), available at <https://www.youtube.com/watch?v=GuiQUasmxno> (testimony starts at 19 minute mark).

The registration process is unnecessarily complex, time consuming, confusing, and entirely alien from their everyday workflow and the software they use on a daily basis. Creators must navigate their way through a minefield of arcane legal and factual “gotcha’s” in which one false step can invalidate their registration and make all the invested time and expense a wasted effort. And sadly, pursuing infringers in federal court is simply too expensive and time consuming to justify from a rational business perspective. Passage of the CASE Act will help, but it is only one part of the solution.

**MODERNIZATION WILL REQUIRE AN OPEN PROCESS AND BOLD ACTION, NOT CREEPING INCREMENTALISM**

We applaud the Copyright Office for its modernization push and more specifically, for the questions posed in its NOI. They are good questions, and yet we remain uncertain and anxious about what the Copyright Office will do with the answers it receives from commenters and about the overall direction of modernization itself.

We say this mindful of the practical difficulties at hand. The Copyright Office does not have the luxury of either building the system from scratch or rapidly revamping it with unlimited resources. It is attempting to modernize an existing copyright system for a diverse range of users within the confines of outdated statutory requirements and underneath a towering hodgepodge of regulations, internal policies, and procedures built over the decades to keep the system functioning.

Some of our concern comes from a lack of information. Although we know in broad strokes what direction modernization might take, we have very few specifics about what the Copyright Office eventually intends to do or on what timetable. This lack of clarity inevitably creates skepticism, cynicism and even despair. Many of our member organizations have had extensive

conversations over the years with the Copyright Office on the questions raised in the current NOI (e.g. API, pricing schemes, subscription plans, etc.), and yet little has changed substantively.

While incremental and much appreciated improvements have been made in certain areas, such as the eCO Registration system, and group registration of photographs, the substantive changes needed remain but a dream. If the Copyright Office’s modernization efforts ultimately amount to more of such “creeping incrementalism” in which it simply tweaks an already broken system, what will it really achieve?

We believe it is time for the Copyright Office to act boldly. As Robert Brauneis suggested to the Copyright Office after an exhaustive analysis of how to navigate through modernization, “the best use of new technologies may not be to preserve old processes while trying to make them less expensive or faster; rather, it may be to change processes substantially.”<sup>13</sup>

## **BROAD GOALS AND PRINCIPLES OF A MODERNIZED REGISTRATION SYSTEM**

Several core goals and principles should guide the Copyright Office as it modernizes the copyright system. These goals should be developed openly, based on the needs of both the Copyright Office AND its users and then applied at every stage of a modernized system.

### **1. Simple and Easy**

Many individual creators and small businesses have little time and even less understanding of the intricacies of copyright. They stop their registration applications and walk away, often never to return, when confronted with convoluted registrations procedures and questions they don’t

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<sup>13</sup> ROBERT BRAUNEIS, TRANSFORMING DOCUMENT RECORDATION AT THE UNITED STATES COPYRIGHT OFFICE: A REPORT TO THE REGISTER OF COPYRIGHTS, at 8 (US Copyright Office, December 2014) available at <https://www.copyright.gov/docs/recordation/recordation-report.pdf>.

understand. A modernized system must be as simple and easy as possible to use for the end user. At every point where a system user engages with the system, the Copyright Office should ask both how it can make that engagement simpler and what the impact will be on potential registrants, including individual creators and small businesses.

The system should also provide users with substantive support at every stage of the process, from application to registration management. Throwing a few tips into application forms is not enough. The Copyright Office needs to approach this task like a business whose very survival depends on helping its customers understand, navigate and indeed “buy into” the copyright system. Users should have easy access to detailed instructions, useful help menus, pertinent FAQs and examples, as well as phone support and live chat support available at every stage of their interaction with the Copyright Office. It should also develop official video tutorials and instruction manuals for every type of registration service it offers. It could partner with associations that represent copyright owners to schedule periodic live webinars and copyright training with specific user groups, and even issue financial grants for those groups to create resources for users of the copyright system.<sup>14</sup>

## 2. Collect Facts and Avoid “Legal Gotchas”

We also believe that the current registration system contains a deeply embedded flaw. The current application process requires users to draw legal conclusions that they are often incapable of making and provide detailed factual information they may have difficulty remembering or in

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<sup>14</sup> For example, prior to recent changes in group registration of photographs, ASMP had a step-by-step guide to registering groups of images. Another complicated registration process that would benefit from a tutorial includes registering website design.

some cases provide information the user doesn't actually have. Incorrect answers to seemingly harmless questions can result in severe consequences, including subsequent invalidation of the registration and dismissal of infringement cases. Rather than proceed in the face of such uncertainty and confusion, many just walk away from any attempts at registration, feeling utterly frustrated.

The Copyright Office should diligently clear the registration process of such landmines by ensuring that the application process gathers the factual information needed to comply with the overall objectives of the copyright system without asking applicants to draw legal conclusions that they are unprepared to make and which could eventually come back to bite them in the form of a "legal gotcha".

A prime example of this problem relates to the published, unpublished distinction. This outdated statutory requirement, which is further complicated by the lack of clarity in the definition, is "public enemy number one" for many creators struggling to register their work.<sup>15</sup> The current process asks registrants to make potentially critical legal determinations as to publication status in the registration process in an era where the definition of "published" is anything but certain and creators don't always know what their clients have done with their work.<sup>16</sup> If they get it

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<sup>15</sup> While we recognize that for works created in earlier versions of the Copyright Act might require information on publication status, there is little to no reason for the inclusion in modern works and registrants whose applications are unnecessarily complex shouldn't be hamstrung by these outliers.

<sup>16</sup> For example, photographers must track what has been registered previously to avoid accidentally registering the same image twice. They must determine whether images are technically "unpublished" or "published" and if "published", when they were published, something that a photographer whose work has passed down the "stream of commerce" with broad usage rights might not know. During registration, they must make sure "published" images in a registration were all published in the same calendar year, unless they are being registered as part of an unpublished group registration which includes images "published" in the preceding three months. And they have to make sure not to mix published and unpublished images in the same submission (except in the case of images "published" in the prior three months before registration, in which case they can mix them together into a group registration of unpublished images, but otherwise that is a "no-no.")

wrong, a potential litigant in subsequent infringement litigation could get an entire registration thrown out over what in most cases should just have been a harmless error.

### 3. Build System Around User Workflow

A modernized copyright system should also be built around the everyday workflow of its users, including how they work, the tools they use, and how to fit the registration process into their existing workflow as efficiently as possible.

Many photographers and visual artists, for example, create tens of thousands, if not hundreds of thousands of images in a year. Managing the sheer volume of so many images is challenging enough on its own. Managing them to comply with the existing copyright registration process can be an absolute nightmare. Most of these creators use some sort of image organizing software to help manage their images (Adobe Lightroom or Bridge, Capture One, Photo Mechanic, etc.). A truly modernized copyright system would make it as easy as possible for them to use that same software to interface directly with the Copyright Office and help them manage the organizing, tracking and registration of their work. Ideally the workflow would allow for automated, “two-way” sync of key information back and forth between the photographer and the Copyright Office.

### 4. Make System Affordable and Efficient

The current system treats each group registration of photographs (GRPPH and GRUPH) from scratch, as a one-time transaction, with a set fee per registration and a limit on the number of images. The applicant has to re-enter their information with each application, export and transfer data from their system to the Copyright Office, and then wait many months for the Copyright Office to provide an examination and issue a certificate of registration. As the Coalition and

several of its signatories detailed in their recent comments to proposed fee increases, the Copyright Office's own examination process for visual works such as photography is hopelessly out of date and inefficient. This in turn causes the Copyright Office needless expense which it is currently trying to pass on to group registrants.<sup>17</sup>

Clearly this system is not working and is headed in the wrong direction. The Copyright Office recently estimated that it costs an average of \$284 per group registration, leaving a \$229 average loss per group registration based on the current \$55 registration fee.<sup>18</sup> In the past year alone, it has capped (despite fervent protest) the number of images per submission at 750<sup>19</sup> and proposed increasing registration fees by 82%,<sup>20</sup> again over fervent protest.<sup>21</sup> And without the adoption of measures like Provisional Registration, even sharper fee increases are a distinct possibility in the future as the Copyright Office moves toward its goal of recovering 60% of its costs.<sup>22</sup> For many

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<sup>17</sup> See generally Coalition Comments on 2018 NOPR re Copyright Office Fees, *supra* note 11, at 30-31 (discussing inefficiencies in the examination process that cause higher administrative costs).

<sup>18</sup> Copyright Office Fees, 83 Fed. Reg. 24054, 24058 (proposed May 24, 2018) (to be codified 37 C.F.R. pt. 201), [hereinafter 2018 NOPR re Copyright Office Fees], available at <https://www.govinfo.gov/content/pkg/FR-2018-05-24/pdf/2018-11095.pdf>.

<sup>19</sup> Group Registration of Photographs, 83 Fed. Reg. 2542, 2544 (37 C.F.R. PT. 201, 202) available at <https://www.gpo.gov/fdsys/pkg/FR-2018-01-18/pdf/2018-00687.pdf>. The Final Rule re group registration was effective February 20, 2018.

<sup>20</sup> See 2018 NOPR re Copyright Office Fees, *supra* note 18, at 24058.

<sup>21</sup> See generally Coalition Comments on 2018 NOPR re Copyright Office Fees, *supra* note 11 (arguing against fee increases for GRPPH and GRUPH group registrations).

<sup>22</sup> The fee for such GRPPH and GRUPH group registrations could rise considerably over the next few years –from the current \$55 to \$100 in 2019 (if the Office proceeds with its proposed fee increase) and eventually to \$170.40 per registration if the Office follows its stated cost recovery goal. The Copyright Office has set a general 60% cost recovery target for its various registration options. The Copyright Office estimates that their administrative cost to provide that service is \$284 per group registration, and to recover more of its costs, it has currently proposed increasing the current fee of \$55 per registration to \$100 (or 35.2% of costs). If it continues on this path to a 60%

individual creators and small businesses, group registration is no longer a cost-effective and time-efficient option.<sup>23</sup>

The Copyright Office needs to move away from this “one registration at a time”, *transactional approach* to registration, with its embedded inefficiencies and costs. Instead, it should boldly move toward an *agile customer service approach*, in which the Copyright Office treats its users as permanent and valued clients of Office services.

Such an approach would link users’ permanent online accounts (in which they can manage their registrations on an ongoing basis and process payments) to software APIs which hook the registration system directly into the software they use in their everyday business. And it would allow for bold new options like “provisional registrations” and subscription plans (discussed further below) to let users pay reduced fees for what they need, when they need it.

#### 5. Encourage Third-Party Innovation and Services

The Copyright Office cannot meet the objectives of the copyright system and the diverse needs of its users on its own. It must also enable and allow properly qualified third parties such as software providers and internet registries to interface freely with the registration system, allowing them to provide both registrants and the general public with additional services that the Copyright Office could never provide alone.

Enabling such third parties will require the Copyright Office to build secure APIs allowing authorized third-party software providers to efficiently transmit and sync data from users to the

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cost recovery, it would eventually raise the fees for GRPPH and GRPPH group registrations to \$170.40 per registration. See <https://www.geteasysolution.com/what-is-60-percent-of-284> (last viewed January 15, 2019).

<sup>23</sup> See Coalition Comments on 2018 NOPR re Copyright Office Fees, *supra* note 11, at 15-17. 27-30.

Copyright Office and back again within their overall workflow. And it will require APIs allowing authorized third parties to interface with the Copyright Office database to provide certain copyright information to the public at large in a secure manner.

We believe that this kind of system will also encourage beneficial competition and innovation among those third parties. An image management software that makes it easier to organize, manage, and register images will have a competitive advantage, which competitors will feel compelled to match and exceed.<sup>24</sup>

A public registry that helps certain users market their registered images would likewise offer a valuable service to both registrants and the general public, and again encourage third parties to provide innovative competitive services.

#### 6. Make the System Work for All Visual Artists

In our view, the copyright system should treat all registrants who create visual images and graphics similarly. This includes photographers, graphic artists, illustrators, designers, etc. All are in the business of creating visual works that need protection, and all deliver work in similar file formats, yet for some reason non-photographic works are currently treated much differently. For example, only photographers may submit group registrations in GRPPH and GRUPH group registrations, not graphic artists and illustrators. This is unworkable. A quick, interim step toward

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<sup>24</sup> One popular image management software provider, Photo Mechanic, has already stated that with an appropriate API, it would even develop a free Copyright Submission software along with integrating those services into its own paid product. *See* Comment by Dennis Walker, CEO of Photo Mechanic, on 2018 NOPR re Copyright Office Fees, [hereinafter Photo Mechanic Comment on 2018 NOPR re Copyright Office Fees], available at <https://www.regulations.gov/document?D=COLC-2018-0005-0098>.

modernization would be to simply include all such visual works in GRPPH and GRUPH group registrations, so long as applicants used eCO Acceptable file Types, which include .jpg, .gif, .pdf, .tif, and .psd, among others.<sup>25</sup> In the long term, the Copyright Office must craft a modernized system that truly works for everyone.<sup>26</sup>

### **III. DYNAMIC REGISTRATION MODELS**

#### **SPECIFIC GOALS FOR DYNAMIC REGISTRATION MODELS**

The Copyright Office NOI asks whether the Office should replace the Single, Standard, and group applications with a “*dynamic pricing*” model that scales fees based on the number and type of works submitted for registration. The Coalition and its individual members have consistently supported moving to dynamic pricing models in past comments and continues to believe that it is an essential part of a modernized system.

Referring to these as “dynamic pricing models” is a misnomer, however, as pricing is just one part of the overall equation. We believe a better way to describe them is as a “dynamic registration model.” In considering dynamic registration models, the Copyright Office should view itself as a service provider and ask what its consumers need. For visual creators in particular, we suggest the following broad goals:

1. Designed to Meet the Needs of its Users

Any dynamic registration system needs to be as simple and easy to use as possible and designed to meet user needs. For example, it must allow for easy ways to make payments with options to

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<sup>25</sup> See eCO Acceptable File Types, available at <https://www.copyright.gov/eco/help-file-types.html>.

<sup>26</sup> See Graphic Artists Guild, Comments in Response to NOI re Registration Modernization (January 15, 2019); Shaftel & Schmelzer, Comments in Response to NOI re Registration Modernization, (January 11, 2019).

pay by transaction or by deposit accounts tied to a credit or debit card, PayPal, electronic check etc. It would also allow for default and backup payment preferences, as well as the ability to match payment options to particular registration plans. It would avoid tricky and artificial time deadlines as well as artificial limits on the number of images submitted for registration. It would allow combined submission of “published” and “unpublished” work in the same registration. And it would let users who want to submit more works at a lower fee register provisionally (as set out below).

## 2. Provides Users with Cost Certainty

Many visual creators are running businesses with narrow profit margins. When those creators sit down at the beginning of their fiscal year and decide where to put their precious time and money, copyright registration is just one of many potential services competing for their resources. Creators should be able to forecast a yearly financial and administrative expense for copyright registration with some reasonable degree of certainty. Unfortunately, that is difficult or impossible for many, given their current registration options and the practical realities of their business.<sup>27</sup> A dynamic registration system that makes sure that individual creators and small businesses can register all the images they need, at a set price, will answer the prayers of many such creators (as well as their accountants and lawyers) by providing them with a degree of cost-

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<sup>27</sup> For example, high volume photographers today can use register up to 750 “published” images in a GRPPH group registration, or 750 “unpublished” images in a GRUPH group registration. Both registrations currently cost \$55 per registration. For many photographers, it is impossible to predict when they will be working, how many images they might take and need to have registered, what images are technically “published” and when, etc. This inevitably leads to hard and frustrating choices, such as where a photographer might have 800 images to register in one submission but doesn’t have the budget to do it in two separate submissions. Likewise, graphic artists such as designers and illustrators typically deliver to clients a set of sketches, revisions, and variations on a work as digital files. These works are ripe for infringement, but graphic artists elect to not register them, citing cost as a major factor.

certainty they do not have under the present copyright system. We also believe it will cause a dramatic increase in registrations by small, high volume creators in particular.

### 3. Help Lower Registration Fees

Any dynamic registration model should also be designed to lower registration costs for end-users through options such as “provisional registration” (which would defer a final examination and its attendant administrative costs), and through other options, such as tiered or subscription models.

### 4. Provide an Effective Date of Registration as Early as Possible

A dynamic registration model should ensure that the Copyright Office assigns an “Effective Date of Registration” or “EDR” as early as possible. The Copyright Office defines the EDR as “the day on which an acceptable application, complete deposit, and filing” have all been received.<sup>28</sup> These are currently three very different steps, each tracked separately.

Adopting new, dynamic registration models may require the Copyright Office to reassess how it determines the EDR, especially if the Copyright Office incorporates permanent advanced APIs allow users to interface their own software with a permanent online user portal. In such a system, much of the information the user adds to the current “application” (such as through an eCO submission) could be uploaded permanently to the applicant’s permanent user portal, and even within the images themselves, such as through IPTC metadata. In other words, there would be no separate “application” as there is now, just the transfer of all the needed information from the user to the Copyright Office. And there may be no “fee” payment accompanying the submission *if* the user opts for a subscription-type plan.

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<sup>28</sup> 2018 NOI re Registration Modernization, *supra* note 1, at 52341.

We would eventually like to see a dynamic registration system in which a photographer, for example, could press “register” from their organizing software, transmit all the needed image data to the Copyright Office embedded with the images, have any charges made automatically, and have the Copyright Office instantly assign an EDR.

## **PROVISIONAL REGISTRATION**

### **1. Provisional Registration Components**

The Coalition and its member associations have requested adoption of a “provisional registration” option in prior comments,<sup>29</sup> and we expand on our proposal here. The Copyright Alliance is proposing a similar option and named it “delayed examination registration”.<sup>30</sup> We believe that provisional registration is a critical component of any effective effort to modernize copyright registration and a key part of any dynamic registration system.<sup>31</sup> The overall concept is simple:

- Copyright owners would pay a discounted fee for a registration of works *without an immediate examination by the Copyright Office*. This would save the Copyright Office significant administrative expense while allowing it to offer that provisional registration at a much lower fee.
- The EDR for determining benefits under copyright law (such as eligibility for statutory damages and attorney’s fees) would be the date the Copyright Office received the

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<sup>29</sup> See e.g. Coalition Comments on 2018 NOPR re Copyright Office Fees, *supra* note 11, at 31-32.

<sup>30</sup> See Copyright Alliance Comments in Response to 2018 NOI re Registration Modernization (January 15, 2019).

<sup>31</sup> Provisional Registration should not be a way for the Copyright Office to avoid fixing its current inefficiencies. Rather, once those inefficiencies are resolved, Provisional Registration can open up a range of new dynamic registration options and alternative pricing models that fit with a more efficient system.

“Provisional Application” along with the required deposit copy and fee payment (provided that the Office later determines the application to be sufficient upon final examination).

- If a copyright holder subsequently wanted to bring an infringement suit, they would simply pay the Copyright Office 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, much like a provisional patent or intent to use registration for trademarks. When a party other than the copyright holder seeks a declaration of non-infringement or other legal proceeding that requires examination, they should likewise be permitted to pay the fee and have the Copyright Office undertake a final review of the provisional application.
- 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.), established from the date of the EDR.<sup>32</sup>

Before implementing provisional registration, the Copyright Office should engage in a deeper discussion with the copyright community on several issues.

- Litigation Issues. The Copyright Office should consider whether an application to finalize a provisional registration should be sufficient for filing a lawsuit,<sup>33</sup> or should be moved to

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<sup>32</sup> We disagree with any suggestion that the presumption of validity should not apply to a provisional registration once the deposit is examined.

<sup>33</sup> This is particularly important depending on the outcome of *Fourth Estate Public Benefit Corporation v. Wallstreet.com*, which is currently pending in the U.S. Supreme Court.

the “front of the line” for immediate processing. A several month-long delay could harm copyright holders waiting to file a copyright claim, particularly in cases where an injunction is needed or the statute of limitations is near.

- Fixing Registration Errors. If a user makes an error in their registration that results in refusal upon final examination, the user won’t find out about the error until the provisional registration is converted, which would be after the infringement. This could lead to the benefit of registration being eliminated. There should be a stop-gap that allows errors in registration to be fixed with the EDR being preserved and warns registrants of the risks.
- Examination Issues: While we believe that a provisional registrant should be able to finalize registration any time in the life of the copyright, some may disagree. The benefits of provisional registration would be lost if the time frame for filing for examined registration was unnecessarily limited. It is also critical that the Copyright Office set the second, separate fee at a reasonable amount so as not to discourage copyright owners, particularly individual creators and small businesses, from converting their registration from provisional to final status.

Provisional registration would incentivize registration by previously recalcitrant creators and the resulting increase in registration would generate a significant upsurge in the public record surrounding copyrighted works as well as deposits to the Library of Congress.

## 2. Provisional Registration is a “Win-Win” Solution

Provisional registration meets all the goals of a dynamic registration system, as expressed above, and represents a classic “win-win” solution for both the Copyright Office and its users.

Under a provisional registration system, the Copyright Office would eliminate the expensive and inefficient burden of examining all works in the initial registration while offering provisional registrants lower registration fees, faster processing, and drastically increased limits on the number of works in a single registration. New and existing users would respond by registering more works while still receiving the benefits of an early Effective Date of Registration in any subsequent litigation. And the public record would benefit from the increased registrations. Indeed, Coalition Survey results indicate broad and enthusiastic support for provisional registration, with *over 80%* of respondents indicating they would “definitely” or “possibly” register more works if such a system was implemented.<sup>34</sup>

### 3. Provisional Registration is Needed as Soon as Possible

We want to stress that we are not simply proposing Provisional Registration as a “down-the-road” part of a modernized registration system. The Coalition has previously outlined the serious problems it has with the current GRPPH and GRUPH group registration options in prior comments.<sup>35</sup> In light of those problems, we believe the Copyright Office can and should adopt a provisional registration plan *as soon as possible* as an option to existing GRPPH and GRUPH group registration plans. It would also work very well in combination with other types of plans that offer tiered pricing or “bulk” subscriptions, as discussed below.

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<sup>34</sup> 2018 Coalition Survey, *supra* note 11, at Q70-71.

<sup>35</sup> *See, e.g.* Coalition Comment on 2018 NOPR re Copyright Office Fees, *supra* note 11 (outlining problems with proposed fee increases and impact of 750 image limit in GRPPH and GRUPH group registrations). The GRPPH and GRUPH group registrations are in trouble precisely because they do not meet the specific goals of a dynamic registration system (e.g. they do not meet the needs of their users, they do not provide cost certainty, and they are not affordable).

## **TIERED OR “BULK” SUBSCRIPTION PLANS**

A truly modernized registration system would offer a variety of registration plans designed to meet the business and workflow needs of its users. Many creators have found that current group registration plans with “pay as you go” pricing and a strict cap on works submitted in one registration lack much-needed flexibility and other options must be adopted. There is no “one-size-fits-all” plan that meets the needs of all creators.

We believe several factors should be included beyond the mere matter of the number of images submitted at a certain price. For example, does the user want an immediate examination, or would they prefer to delay that in exchange for cheaper up-front fee? Does the user want to register images on a strict timetable, such as every quarter or every three months? Would they prefer to have an open account or subscription, without any calendar limitations? Or would they prefer the ability to register their images one at a time, within a subscription, for an overall yearly fee?

How the Copyright Office proceeds on several important issues will also impact how such plans might work. For example, whether the Office adopts provisional registrations or allows combined submission of “published” and “unpublished” works would significantly impact how such plans are structured and priced. How the Office determines the Effective Date of Registration under certain subscription plans will also need to be addressed to ensure that applicants receive the earliest EDR possible.

### **1. Alternative Plans**

Though not an exhaustive list, here are some possible alternative plans that would better serve the diverse needs of registrants:

- Tiered or Bulk Subscription Plan. A tiered or “bulk” subscription plan with lower fees for creators registering fewer works would help many creators keep their registration cost-per-work more reasonable and encourage more registrations. This would especially help lower-volume creators who do not routinely register 750 works at a time. Tiered pricing could be set at different levels (e.g. 1-50, 51-500, 501-1000, 1,000+, etc.).
- Yearly, Tiered Subscription Plan. A yearly, tiered subscription plan would help those who need cost-certainty budget their expenses with a set fee and avoid the uncertainty that comes with piecemeal single registrations. The lack of a need to “save up” images for group registrations would incentivize registration closer to the time the work was created, and prior to publication. If implemented in combination with an API, it would enable photojournalists, for example, to register their work prior to deliver to their client—something that is currently impossible under the tight deadlines and budget constraints they face. It would also let registrants include all works created for a single project or client in a single registration, rather than break them up over several registrations, as required by the current 750-image limits. This system would work very well if and when it becomes possible to register directly through software that photographers and other visual creators use every day. Critically, over 93% of respondents in the Coalition Survey indicate they would possibly register more of their works if such an option were available.<sup>36</sup>
- Provisional Registration + Subscription. The registrant would opt only to register provisionally, in exchange for a lower subscription fee. Because there is a deferred

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<sup>36</sup> 2018 Coalition Survey, *supra* note 11, at Q76.

examination, this option would ideally allow users to upload an unlimited number of images per year at a set fee.

Coalition Survey results indicate broad support for such ideas with over 90% of respondents indicating they would possibly use online, tiered subscriptions.<sup>37</sup>

## 2. Build Options After Extensive Surveys

As noted above, these alternative plans could take many different forms. The Copyright Office should lay out very broadly what it thinks is possible from its end, and extensive surveys of end-users should be conducted to find where the price, image submission limits, timetables and other factors meet the “sweet spots” that would entice more creators into registering their works while supporting the budget needs of the Copyright Office.

### **EXPLORE ADDITIONAL ALTERNATIVES**

The Coalition Survey also indicates broad support for exploring other creative and nontraditional alternatives. While not all members of the Coalition endorse these concepts at this time, we do advocate for exploring them further.

For example, over 96% of respondents in our Survey indicated that they would “definitely” or “possibly” participate in a “self-deposit” system in which the Copyright Office established a standardized metadata format with certain required information. In the event of infringement, the Copyright Office would simply determine if the creator had followed the requirements and if so, the work would be considered registered for determination of statutory damages.

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<sup>37</sup> See *id.* at Q69; See also Q67 (84% indicating interest in bulk registration, depending on the cost).

Likewise, 96% of respondents in our Survey indicated that they would “definitely” or “possibly” participate in a system where the Copyright Office assigned creators an ID number for inclusion in their image metadata and then paid an annual fee to the Copyright Office covering all works created that year.<sup>38</sup>

#### **IV. DEPOSIT REQUIREMENTS**

While the “two best-edition” requirement has been waived for registrations of 2 or more photographs, to the extent it is still in place for other works it is archaic, unnecessary and impractical and can be easily remedied by regulation.

In today’s digital environment, most visual creators produce their work in a final digital format. They generally manage their digital work on image management software and deliver their work to a client in a digital format. Usually, the visual creator does not know if or when their work is going to be “published.” Sometimes creators send the client many works and the client holds them until they are ready to use them, leaving the creator uncertain what was “published” by the client and when. Sometimes the client publishes the work and sends the visual creator a proof copy, such as a magazine tear sheet, but not always – often all the creator receives from the client is a check paying for the licensed work. Tracking down hard copies of the first published use of a particular image is often difficult or impossible. And purchasing two copies of a book, for example, unnecessarily increases registration expense.

With these realities, the “two best-edition” deposit requirement is simply unworkable and unnecessary. The digital image used in any “published” edition is the same as the digital file that

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<sup>38</sup> *Id.* at Q79-80.

the creator sent to the client and in most situations should serve equally well as the deposit copy the visual creator uses to register that work.

Considering that the Library of Congress doesn't want as part of its collections the vast majority of published works registered with the Copyright Office, and the Register has the ability to demand copies when needed, there is absolutely no reason to burden creators—or the Copyright Office itself—with the obligation, cost or administrative hassle of the “two best-edition” copies deposit with a registration of published work.

## **V. A NEXT GENERATION REGISTRATION SYSTEM**

### **DEFINING A NEXT-GENERATION COPYRIGHT REGISTRATION SYSTEM**

The Copyright Office's NOI raises a number of relevant questions about incremental improvements needed to modernize the existing registration system.<sup>39</sup> Incremental improvements to the existing, broken system, however, are not enough. The Copyright Office must act boldly and comprehensively if it is to build a “next generation” copyright registration system. To that end, we set out our vision of how such a system might look and how it might work.

As discussed above, a modernized registration system should meet several broad goals.<sup>40</sup> In order to meet these goals, the Copyright Office needs to embark on extensive discussions with its

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<sup>39</sup> We believe that improvements such as better application assistance, electronic payments, electronic certificates, as well as introduction of dynamic pricing models will all provide needed, albeit incremental improvements to the system. Likewise, the system will benefit from incremental changes to what information is requested on the application for registration and how they can be answered and modified.

<sup>40</sup> A modernized registration system should be (1) simple and easy for users to use, (2) built directly around the needs and workflows of its users, (3) help protect the validity of registrations by collecting the basic facts needed to meet the objectives of the copyright system without forcing users to unnecessarily draw legal conclusions that could be to their detriment, (4) be affordable and efficient, (5) encourage third-party innovation and additional services, and (6) provide solutions for all creators.

end-users about how to meet their particular needs and workflows. We greatly appreciate the outreach so far, but at this point we still have no clear idea what the Copyright Office has in mind, long-term. Is it merely planning needed but still incremental improvements to the current system, or is it working toward something more comprehensive and responsive?

### **CURRENT SYSTEM IS JUST A SIMPLE, ONE-WAY CONVEYOR BELT**

The present registration system is a simple, one-way conveyor belt moving files and information from users to the Copyright Office. When a photographer or graphic artist, for example, wants to register images, they feed those images, the application and their payment onto the conveyor belt and send it to the Copyright Office. The Copyright Office places those items into its own internal registration system for processing. The Copyright Office then separately moves some of that internal registration information to its public records. Each stage of this process is “simple” in that little is automated and no information syncs back and forth between the user and the Copyright Office. The photographer or graphic artist has no easy way to track what has been registered in the past or what registrations are in-process, and no way to sync that information back into their own software and workflow so they can manage their registrations more efficiently.

### **USING APIS TO BUILD A “NEXT GENERATION” REGISTRATION SYSTEM**

In contrast to the mindless conveyor belt system described above, a “next generation” registration system would be “agilely” built around what its users need and want and offer extensive integration with the software they use on a daily basis to organize their images. To do this, the Copyright Office will need to develop robust Application Programming Interfaces (APIs) that will allow third-party image management software to interface directly with the

Copyright Office’s registration system. Several overarching considerations should guide this effort:

- Software Agnostic. The API should be software agnostic in that it can be adopted and applied by any third-party software manufacturer that meets the Copyright Office’s requirements (while screening for bad actors).
- Encourage Innovation. The API should provide software providers with the ‘hooks’ they need to access the registration system and encourage them to craft a better copyright registration experience with its own software.
- Integrate Tightly with Copyright Office. The goal of the API should be to allow the user to work within that software to prepare and submit images directly to the Copyright Office without the need to export to data to an intervening step, such as a spreadsheet.
- Use of Embedded IPTC Metadata. The API should allow the user to submit certain necessary image information to the Copyright Office such as the image name, publication status, etc. by embedding the information within the embedded “IPTC metadata”<sup>41</sup> of submitted images. These IPTC Metadata fields are easily read and edited by a wide variety of operating systems and by the image management software visual creators use to organize and manage their image. Data embedded within the IPTC metadata is also

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<sup>41</sup> The IPTC (International Press Telecommunications Council) has set global, industry standards for administrative, descriptive and copyright information about images (as well text, video, audio, and other data) through the use of the standardized metadata fields that are embedded within a wide variety of images (raw files, tiffs, jpegs, etc.). *See* INTERNATIONAL PRESS TELECOMMUNICATIONS COUNCIL, [hereinafter IPTC], available at <https://iptc.org> (last visited January 15, 2019).

protected by anti-stripping laws, albeit imperfectly,<sup>42</sup> and easily extracted and parsed into spreadsheets or databases.<sup>43</sup> Current IPTC metadata standards already contain a number of copyright related fields that could be used to communicate certain registration information, and to the extent those are insufficient, software companies would be happy to work with the Copyright Office to develop any other specialized fields that the Office might require. In addition, such image metadata can work together with any schema developed by the Library of Congress and/or the Copyright Office for its own specialized usages.

- Provide for Two-Way Data Sync. A next-generation registration system would not simply provide easier transmission of images and information from the user to the Copyright Office. It would also allow for a “two-way sync” of key information from the Copyright Office back to the user such as through the use of a robust API, IPTC metadata, etc.<sup>44</sup>

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<sup>42</sup> Although the Digital Millennium Copyright Act (17 U.S.C. § 1202) prohibits the stripping of metadata, the law is not violated unless removal or alteration is done with the knowledge and intent to “induce, enable, facilitate, or conceal infringement.” Further, many online service and social media providers avoid that prohibition with “terms of use” agreements” allowing them to strip metadata for their users. And once the metadata has been stripped from one source it often propagates from there, throughout the internet, unprotected. *See* IMATAG, *State of Image Metadata in 2018*, (last visited January 15, 2019),

<sup>43</sup> For example, the Copyright Office can easily pull data from various IPTC metadata fields and instantly map them to their own internal spreadsheets and databases or to schema created by the Library of Congress or the Copyright Office.

<sup>44</sup> We also note that this is technologically quite feasible. Adobe Lightroom, a popular image management software, currently provides this type of feature for its users through a “Publishing Service” that can interface through separate software plug-ins with a variety of online services to allow two-way transfer and sync of images and data. A third-party service named ImageRights currently offers a Lightroom plugin that automatically syncs certain copyright information such as the copyright registration numbers directly back to the IPTC metadata of registered images within the user’s Lightroom catalog, thus making it much easier for the user to manage and track what images have

## **USING APIS TO INTEGRATE WITH EXTERNAL SERVICES SUCH AS IMAGE REGISTRIES**

After requirements for an Effective Date of Registration are met, certain relevant data from that registration could automatically sync to the Copyright Office's online Public Record.<sup>45</sup> From that point, certified and vetted third-party online registries such as PLUS Registry<sup>46</sup> could integrate with information in the Public Record as well as selected information in the registry, through the use of APIs. Users would have the option of determining whether they want to allow access to data outside the Public Record or embedded within the metadata of registered images to be allowed into such online registries. Users could also make additional, supplemental information available via outside registries that linked to the Copyright Office's registrations. In addition, users could allow the public to view their deposited images via outside registries. All of this results in a more complete, usable Public Record.

## **DEVELOPING APIS THROUGH WORKING GROUPS**

The Copyright Office must develop robust APIs that will work far into the future. In order to make certain that it is done right, we would suggest that the Copyright Office set up a working group composed of all the potential stakeholders and players who need to be in the room from the start. For example:

- Copyright Office Representatives (including USCO experts, Ernst & Young, the USCO's chosen software developer, etc.).

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been registered or might need to be registered in the future. *See* IMAGERIGHTS, *ImageRights Plugin for Adobe Lightroom*, <https://www.imagerights.com/plugins> (last visited January 15, 2019).

<sup>45</sup> The NOI asks in C12 whether the Office should expand the Online Public Record to include refusals, closures, correspondence and appeals. *See* 2018 NOI re Registration Modernization, *supra* note 2, at 52343. The Coalition does not believe that the Online Public Record should contain any such information.

<sup>46</sup> PLUS REGISTRY, [www.PLUS.org](http://www.PLUS.org). (last visited January 15, 2019),

- Users (photographers and graphic artists from industry associations, along with other users as appropriate).
- Operating System Developers. (Apple, Microsoft, Google, etc.).
- Third Party Software Providers. (e.g. Adobe, Capture One, Photo Mechanic, ACDSee, Extensis, Fotostation, Luminar, ImageRights, etc.).
- Image Registries (PLUS Coalition, etc.).
- IPTC Representatives.
- Others as appropriate.

The Working Group would be able to hash out the technical details of APIs and how to structure them for widest possible adoption. For example, Photo Mechanic recommends that the API “be a RESTful API using OAuth 2 authentication.”<sup>47</sup> The Coalition has extensive ties to most of these potential working group members and would be happy to help put the Working Group together.

### **HOW WOULD A NEXT GENERATION REGISTRATION SYSTEM WORK?**

Here is how a “next-generation” registration system might work for an average high-volume photographer. Let’s call her Jane.<sup>48</sup>

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<sup>47</sup> See Photo Mechanic Comment on 2018 NOPR re Copyright Office Fees, *supra* note 24. Walker explains that REST and other similar protocols are commonly used by online services. OAuth 2 is an industry-standard protocol for authorization because no passwords are stored by the application; only tokens are passed between the application and the online service through a “three-legged flow.”

<sup>48</sup> While “Jane” is a photographer, she could also be a graphic artist whose work is submitted in any of the eCO Acceptable File Types. Most of these files are compatible with the image management software being discussed in this section. See UNITED STATES COPYRIGHT OFFICE, *Help: eCO Acceptable File Types*, [hereinafter *eCO Acceptable File Types*], available at <https://www.copyright.gov/eco/help-file-types.html> (last visited January 15, 2019)

- Online Dashboard. Jane would set up a permanent, password protected online account with the Copyright Office and the Office would assign her a permanent ID, much like in the current system. She could log into her online “Dashboard” at any time. She would then enter certain standard information (such as contact, payment and sworn verification information) and that information could be automatically applied or “pre-populated” to all of her subsequent registrations, saving her time and helping her avoid inconsistencies (except where she might need to change it on a case-by-case basis). She would be also able to choose the type of dynamic registration plan that fits her needs (e.g., provisional registration plus a subscription plan). She could register images directly from the Dashboard or alternatively, through her image management software. She could monitor the status of her registrations through the Dashboard and track which images have been registered.
- Registering Images through Online Dashboard. Much like the current eCO system, Jane could log into her Dashboard, access a registration form, populate that form with relevant information about the images she is registering and upload her images into the system.
- Register Through One’s Own Image Management Software. Alternatively, Jane could instead choose to register her images from within the software she uses on a daily basis to organize, name, caption, keyword and export images. She would set up a link between her software and the Copyright Office allowing the software to log into the system automatically. From that point forward, Jane could transmit images to the Copyright Office and into her Dashboard for immediate (or near immediate) regular or “provisional” registration with the touch of a button from within her image management software. The software would automatically transmit her images at the formats, sizes and

compression settings specified by the Copyright Office. Jane could also use the IPTC metadata in her images to supply the Copyright Office with certain information the Copyright Office needs. The software would have specific IPTC fields that had to be populated before the images could be transmitted to the Copyright Office. She would then be taken directly to her Dashboard at the Copyright Office for any additional information or requirements needed before an Effective Date of Registration could be applied (such as a sworn verification). The Copyright Office software would also notify her of any missing or flagged data if there was something missing from the information transmitted.

- Two-Way Data Sync. Once the Copyright Office accepted her registration and provided Jane with an Effective Date of Registration, it would be able to sync certain helpful data for each registered image (such as the registration ID number applied by the Copyright Office) directly to her and to her software where it could be embedded within the IPTC metadata of the registered images in her image catalog. She would then be able to use her own image organizing software to easily search for and filter out, for example, which images she has or has not already registered, etc.
- 3<sup>rd</sup> Party Registries. At Jane's option, she could allow the Copyright Office to make most or all of the information she has embedded in the metadata of her registered images available to third-party registries, along with the information the Copyright Office makes available as part of the Public Record. She might be thrilled at this possibility if, for example, it helped users who wanted to use her images find and license them.

We believe that an overwhelming number of visual artists would embrace a system like this. In our 2018 Survey, for example, 78.67% liked the idea of using their existing software to upload

their work directly to the Copyright Office.<sup>49</sup> We have also prepared a flow chart illustrating how the system might work, attached hereto in Appendix D.

#### **NEXT GENERATION SYSTEM WILL WORK FOR MANY OTHER CREATORS AS WELL**

Although the Coalition is primarily composed of visual creators such as photographers and graphic artists, we also believe that the 'next-generation' copyright system we have proposed here could also work for many other types of creators who register works in digital formats, such as video, audio, music, and written word.

All such creators use software to manage their digital work and from within that software they can similarly add key copyright data to the embedded metadata fields of the same digital files they send to the Copyright Office. Ubiquitous digital formats such as PDFs,<sup>50</sup> Word “.docx” XML files,<sup>51</sup> video and audio files,<sup>52</sup> etc. are accepted by the Copyright Office<sup>53</sup> currently and are all based on metadata standards that can be utilized by the Copyright Office within a next-generation copyright system. To develop needed APIs and metadata standards, the Copyright Office should set up working groups for those users similar to the working group we have

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<sup>49</sup> 2018 Coalition Survey, *supra* note 11 at Q74.

<sup>50</sup> See ADOBE, *PDF Properties and Metadata*, available at [https://helpx.adobe.com/acrobat/using/pdf-properties-metadata.html#edit\\_document\\_metadata](https://helpx.adobe.com/acrobat/using/pdf-properties-metadata.html#edit_document_metadata) (last visited January 15, 2019).

<sup>51</sup> See MARTIN FENNER, *Metadata in Microsoft Word Documents*, available at <http://blog.martinfenner.org/2015/03/20/metadata-in-microsoft-word-documents/> (last visited January 15, 2019).

<sup>52</sup> See IPTC, *supra* note 41, at <https://iptc.org/standards/video-metadata-hub/> (last visited January 15, 2019).

<sup>53</sup> See *eCO Acceptable File Types*, *supra* note 47, available at <https://www.copyright.gov/eco/help-file-types.html> (last visited January 15, 2019).

proposed for visual creators such as photographers and graphic artists. Indeed, many of the same key players would be included.

## **VI. SOLVING THE PUBLISHED/UNPUBLISHED PROBLEM**

No issue frustrates and confounds visual creators more than the statutory requirement that the registration application include whether an applicant's works have been published, and if published, the date and nation of first publication. 17 U.S.C. § 409(8). The confusion surrounding publication status is highly consequential, at times even judges cannot agree on what constitutes "publication".<sup>54</sup> The Coalition reiterates the stance it has taken for many years and joins the Copyright Alliance and other associations who have advocated for elimination of this needless statutory anomaly.

But some important relief for creators need not await congressional action. The Copyright Office must act immediately to mitigate the issues caused by the "published/unpublished" problem while also advocating for statutory changes that eliminate the problem entirely. We suggest the following approaches:

### **PERMIT THE "PARTITIONING" OF REGISTRATIONS**

The proposed registration system must be able to deal with the uncertainties that surround the definition of a "publication" under copyright law. Those uncertainties should be dealt with on an

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<sup>54</sup> See, e.g., *Elliott v. Gouverneur Tribune Press, Inc.*, 7:13-CV-00055, 2014 WL 12598275, at \*3 (N.D.N.Y. Sept. 29, 2014) (highlighting several opinions—even some from the same district—that differ on the question of whether publication on the internet constitutes "publication" for the purposes of registering images as published or unpublished).

immediate basis through a modification of the Copyright Office practices concerning published and unpublished work.

Under the current system, a registration may be invalidated for improperly identifying the publication status of a work, particularly when a registration combines works that are published and those that are unpublished.<sup>55</sup> If a conflicting publication status is detected, that problem might be dealt with in the examining process, and the registration application might be amended. But if the problem is not detected during the registration process, invalidation of the registration may result at a later time, such as during the course of litigation. This may be the result even where the published and unpublished works would be separately entitled to registration. There is no reason to invalidate these registrations where the works are both copyrightable and where they would be entitled to registrations if separately made.

A better system would involve a Copyright Office “practice” revision which would permit the “partitioning” of a registration which was later found to involve both published and unpublished work, assuming each type of work would separately be entitled to registration under separate applications. Under this system, the Copyright Office would not invalidate or refuse registrations where the publication status was initially erroneous. The registrant would instead be charged a fee to request the partitioning of the application, based on the number of separate registrations that are involved. This practice would be followed both for provisional and for non-provisional registrations. The EDR would remain the date the application information, fees, and deposits, were originally received. Eligibility for partitioning would assume and require that the conditions

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<sup>55</sup> See, e.g., *Family Dollar Stores, Inc. v. United Fabrics Intern., Inc.*, 896 F. Supp. 2d 223, 236 (S.D.N.Y. 2012) (dismissing infringement claims related to a copyright registration that was invalidated by the court due to the mixing of published images in an unpublished collection registration).

of copyrightability have been met for each of the partitioned registrations. As in the case of a severability clause in the legislative context, the validity of any satisfactorily completed registration would not be invalidated if a partitioned component proved to be invalid.

The modernized registration system must be able to allow for, and be able to process, the partitioning of the registrations. This would prevent the harsh, and unnecessary, result where registrations are invalidated, when they merely need to be corrected. No statutory change would be needed to implement this procedure.

#### **ALLOW UNIFIED REGISTRATION OF PUBLISHED AND UNPUBLISHED WORKS**

As an alternative to the partitioning procedure above, the Copyright Office should also allow a hybrid unified registration of published and unpublished works in a single group registration with the published works marked as such and a regulation clarifying that an error does not invalidate a registration because the work would be accepted for the registration whether published or unpublished. In a unified registration, the EDR would be assigned to all of the images, whether originally classified as published or unpublished. If the publication status of a work within that registration needed to be corrected, it could be done quite easily and permitted without invalidating the registration and with no change to the original EDR.

Registrants would greatly prefer to register both published and unpublished works together in one registration as it would be easier, save them time and money, and result in far more registrations overall. Over 94% of respondents in the Coalition Survey indicated they might register more works if such an option was available.<sup>56</sup>

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<sup>56</sup> 2018 Coalition Survey, *supra* note 11, at Q73.

## **PROVIDE ASSISTANCE ON COMMON QUESTIONS PERTAINING TO PUBLICATION STATUS**

The NOI requests comments on the most common questions users have when filling out applications for registration. As noted by the Copyright Alliance in their Comment, no issue is more confusing to users than the distinction between published and unpublished work. Indeed, the Coalition has provided a sample list of questions pertaining to publications status which we have attached in Appendix C. We note that it is far from complete. Every time the issue is debated or posed publicly through surveys we come up with more questions. Exacerbated by the inability of the Copyright Office to offer conclusions that could be construed as legal advice, the published vs. unpublished question is a rabbit hole for which there is no bottom.

## **STATUTORY AMENDMENTS TO THE PUBLICATION DEFINITION AND STATUS**

The current statute defines “publication”, in its most reductive terms, as involving the distribution of copies or the offering to a group for further distribution and indicates that the mere public display of a work does not constitute publication. In practice, courts have struggled to apply this definition with any degree of consistency.<sup>57</sup> For example, the circumstances that accompany a distribution, offering or display all subject the definition to a confusing array of

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<sup>57</sup> In relevant part, the Copyright Act states that “Publication” is “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. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication. To perform or display a work “publicly” means--(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.” 17 U.S.C. § 101.

qualifiers and result in widespread legal confusion.<sup>58</sup> Courts can differ on even basic issues, such as whether posting on the internet constitutes publication.<sup>59</sup>

As a result, rights owners must become legal experts on the variables which render the release of the work a “publication” and must even reconcile conflicting opinions across different federal courts of appeal. Any missteps can be fatal. A mistake as to publication status at the time of registration, for example, can result in a complete loss of all registration benefits in a subsequent infringement claim.<sup>60</sup>

Given the obstacle that this confusing definition causes to the protection of valuable intellectual property, Congress should consider revising it and the Copyright Office should assist in that effort. Any definition should be clear, concise and able to stand the test of time as technology

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<sup>58</sup> See generally, *Archie MD, Inc. v. Elsevier, Inc.*, No. 16-CV-6614 (JSR), 2017 WL 3601180 (S.D.N.Y. Aug. 20, 2017) (discussing issues and holding that in that case, sending a copy of a work to a single client constituted “publication” even before the client distributed or published the work).

<sup>59</sup> Compare *McLaren v. Chico's FAS, Inc.*, No. 10-CV-2481 (JSR), 2010 WL 4615772, at \*4 (S.D.N.Y. Nov. 9, 2010) (holding that the “claim that images composing the Collection were posted on her website would not . . . suffice to plead “publication””), and *Einhorn v. Mergatroyd Prods.*, 426 F.Supp.2d 189, 197 (S.D.N.Y. 2006) (“merely posting a digital file” on the Internet does not amount to “publication” under the Copyright Act because it does not involve “sale or other transfer of ownership, or by rental, lease or lending”), and *Elliott v. Gouverneur Tribune Press, Inc.*, No. 13-cv-055 (MAD), 2014 WL 12598275, at \*3 (S.D.N.Y. Sept. 29, 2014) (whether posting images on the internet constituted publication was a fact-intensive inquiry that precluded summary judgment) with *Getaped.com, Inc. v. Cangemi*, 188 F.Supp.2d 398, 402 (S.D.N.Y. 2002) (holding that website was “published” when it “went live” because source code could be freely copied, but relying on cases in which files were posted on the Internet with some degree of intention that others would download them).

<sup>60</sup> See *Family Dollar Stores, Inc. v. United Fabrics Intern., Inc.*, 896 F. Supp. 2d at 230 (invalidating a registration when the work was published but registered as unpublished). But See *Archie MD, Inc.*, 2017 WL 3601180 (declining to invalidate a registration while determining that a work registered as unpublished was actually published). In *Archie MD Inc.*, the Copyright Office filed a *Response of the Acting Register of Copyright to Request Pursuant to 17 U.S.C. § 411(b)(2)*, available at <https://www.copyright.gov/rulings-filings/411/archie-md-inc-v-elsevier-inc-%20no-16-cv-6614-sdny-june-16-2017.pdf> in which the Office cogently lays out the issues.

evolves, encompassing a myriad of potential uses of copyrighted work.<sup>61</sup> Such a definition would eliminate the ambiguity that surrounds circumstance where an original is subject to third-party exploitation, where the status of a “Group” is unclear, and where a display has publication consequences recognized by the law but not clearly stated in the statute.

In addition to revising the definition of “publication,” Congress—once again aided by the Copyright Office—should consider deleting 17 U.S. C. § 409(8)<sup>62</sup> (the requirement to state whether the work has been published, along with the date and nation of its first publication). The cost vs. benefit of this requirement is severely unbalanced and should be reconsidered.<sup>63</sup>

## VII. MODERNIZING THE COPYRIGHT ACT

We have proposed a number of bold changes we believe are possible now, without any legislative action. These include provisional registrations, radically different interpretation of deposit requirements for visual works, and transforming registrant errors as to publication status and date into harmless error. If the Copyright Office feels that any of these proposals can’t be

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<sup>61</sup> While we decline to propose or endorse a specific definition at this time, without further exploration of the issue, one proposal was *distribution or display of a work or one or more copies of a work by or with the authority of the copyright owner, when the copyright owner has authorized the recipient of the work or copies of the work to subsequently exercise any of the rights of the copyright owner (whether or not the recipient actually exercises those rights.)*

<sup>62</sup> “The application for copyright registration shall be made on a form prescribed by the Register of Copyrights and shall include... (8) if the work has been published, the date and nation of its first publication”. 17 U.S. C. § 409(8).

<sup>63</sup> While publication status, and the facts surrounding publication might be important information in an infringement case, this kind of factual inquiry can be made as a part of the litigation process. For example, it has been said that this information is needed because a corporation’s term of copyright is tied to the date of first publication. But that information is not available when a work is registered as unpublished. Further, the term of copyright of an individual is tied to the date of their death, and that information is not required in the registration. There are many other facts related to a copyright that are not in the record.

implemented without congressional approval, we would ask for an opportunity to provide the Office with our views on the issue.

That said, building a next-generation copyright system will not be possible without substantial legislative changes. The CASE Act is a fundamental first step, but larger statutory reform will still be needed<sup>64</sup> and that will require strong leadership and support from the Copyright Office. We believe it is time for the Copyright Office to lay out not only what that next generation copyright system should look like from its perspective, but what specific statutory changes will be required to make it work.

### **VIII. ASSISTANCE FROM COALITION**

As we have argued here, we believe a next generation copyright system will require the Copyright Office to closely collaborate with its users to build a system that truly works for their needs and the way they work. When it comes to small visual creators, the Coalition can help. The Coalition is composed of a hugely diverse range of visual creators across the spectrum of photography and graphic arts, all of whom are current or potential users of the services the Copyright Office provides. As such, we are uniquely positioned to help the Copyright Office reach them, learn from them, educate them and guide them. We, and they, are ready to help however we can.

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<sup>64</sup> For example, legislation addressing problems with the publication requirement, modification of deposit requirements, better metadata protections, etc.

## IX. SUMMARY

The current copyright system is broken. While short-term changes and fixes will help, it will not address the larger problems. We believe that the Copyright Office must act boldly and quickly to fix and shore up the most pressing problems, and then move openly toward building a comprehensive “next generation” copyright system that can serve the needs of our nation and all of its many creators well into the future.

In summary, we believe that the Copyright Office should take the following steps:

- Adopt a provisional registration application process allowing visual creators to pay a discounted fee for a non-examination registration.
- Replace the current single, standard, and group applications with dynamic pricing models, including tiered and/or bulk subscription-based options that better fit the financial and practical needs of many individual creators and small businesses.
- Openly develop a next generation copyright system built squarely around the needs of its users and the workflow they use in their everyday business practices.
- Correct problems arising from “published/unpublished” requirements in the copyright system by employing its regulatory authority immediately<sup>65</sup> as suggested herein to immediately mitigate the problem.
- Analyze the statutory changes that will be needed to fix the copyright system and move it into the future, including providing Congress with continued support for the CASE Act and advice with respect to any additional statutory amendments that would be needed to

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<sup>65</sup> A fix will include revisiting and substantial modification of the Office’s recently adopted rule governing group registrations of photographs (83 FR 2542 January 18, 2018), as well as a significant revision of its proposed fee schedule for group registrations of photographs (Notice of Proposed Rulemaking, 83 FR 24054 (May 24, 2018).

eliminate existing problems (such as eliminating published/unpublished problems, modifying deposit requirements, better protecting user metadata, etc.).

Respectfully submitted,

**The Coalition of Visual Artists\***

including:

American Photographic Artists

American Society for Collective Rights Licensing

American Society of Media Photographers

Digital Media Licensing Association

Eugene Mopsik

Graphic Artists Guild

National Press Photographers Association

North American Nature Photography Association

PLUS Coalition

Professional Photographers of America

Shaftel & Schmelzer

*\* If the Copyright Office needs citation for authorship of this Comment, cite as “The Coalition of Visual Artists”.*

## **X. APPENDIX**

### **APPENDIX A: COALITION MEMBER INFORMATION**

#### **American Photographic Artists**

American Photographic Artists (“APA”) is a 501(c)(6) not-for-profit association for professional photographers. Recognized for its broad industry reach, APA works to champion the rights of photographers and image-makers worldwide. APA is a leading national organization run by and for professional photographers, providing essential business resources to help its members achieve their professional and artistic goals.

#### **American Society for Collective Rights Licensing**

The American Society for Collective Rights Licensing, Inc. is a 501(c)(6) not-for-profit collective management organization (CMO) for visual art authors and rights owners. ASCRL collects royalties and distributes them to members based upon representation agreements with other collecting societies around the world. ASCRL’s goal is to provide authors and rights owner with an ongoing revenue stream from reprographic funds derived from their own visual works.

#### **American Society of Media Photographers**

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 living by making photographs intended for publication. There are more than 5000 members of ASMP, organized into 38 local chapters across the United States, with members representing literally every genre of professional publication photography. ASMP photographers work in still and motion formats, providing visual imagery to clients in print, broadcasting, and digital media across the world. ASMP is the leader in promoting photographers' rights, providing education in better business practices, producing business publications for photographers, and helping to connect professional photographers with clients.

#### **Digital Media Licensing Association**

For over 60 year the Digital Media Licensing Association (“DMLA”), formerly known as PACA, has developed business standards, promoted ethical business practices and actively advocated copyright protection on behalf of its members. DMLA membership includes more than 100 companies representing

the world of digital content licensing. DMLA educates and informs its members on issues including technology, tools, and changes in the marketplace.

### **Eugene Mopsik**

Eugene Mopsik has a long and distinguished record as an advocate for photographers and other visual artists and served as the Executive Director of the American Society of Media Photographers (ASMP) from 2003 to 2014. He is a passionate supporter of artists' rights, earning him a high level of respect from artists' organizations, publishers, industry partners, lawmakers and government agencies in the US and globally.

### **Graphic Artists Guild**

Graphic Artists Guild, Inc. ("The Guild") has advocated on behalf of graphic designers, illustrators, animators, cartoonists, comic artists, web designers, and production artists for fifty years. The Guild educates graphic artists on best practices through webinars, Guild e-news, resource articles, and meetups. The Graphic Artists Guild Handbook: Pricing & Ethical Guidelines has raised industry standards and provides graphic artists and their clients guidance on best practices and pricing standards. The Guild also advocates for graphic artists on Capitol Hill on a wide range of legislative initiatives, as well as globally through active membership in international organizations.

### **National Press Photographers Association**

The National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit organization dedicated to the advancement of photojournalism in its creation, editing and distribution. NPPA's approximately 6,000 members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism community. Since its founding in 1946, the NPPA has been the Voice of Visual Journalists, vigorously promoting the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism.

### **North American Nature Photography Association**

Since its founding in 1994, the North American Nature Photography Association ("NANPA") has been North America's preeminent national nature photography organization. NANPA promotes responsible nature photography as an artistic medium for the documentation, celebration, and protection of our natural world and is a critical advocate for the rights of nature photographers on a wide range of issues, from intellectual property to public land access for nature photographers.

## Plus Coalition

PLUS is an international non-profit organization focused on simplifying the communication and management of image rights. In addition to industry standards for image licensing, the Coalition has developed the PLUS Registry, a global non-profit resource connecting images to rights holders and rights information.

## Professional Photographers of America

Founded in 1869, Professional Photographers of America (PPA) is the largest and longest-standing nonprofit photography trade association with a 150-year history. It currently helps 30,000+ pros elevate their craft and grow their business with resources, protection, and education, all under PPA's core guiding principle of closing the gap between what photographers do as artists and entrepreneurs and what consumers want.

## Shaftel & Schmelzer

Shaftel & Schmelzer is a consulting firm established in 2016, focused on serving the needs of artists' organizations to engage in advocacy on behalf of their membership. Shaftel & Schmelzer's mission is to advocate for the protection of economic and professional interests of visual artists through advocacy and education.



## **APPENDIX B: 2018 COALITION SURVEY – RELEVANT EXCERPTS**

The complete 2018 Coalition Survey is attached to the Coalition Comments on 2018 NOPR re Fee Increase, available at <https://www.regulations.gov/document?D=COLC-2018-0005-0160>.

# COALITION OF VISUAL ARTISTS

## SMALL CREATOR SURVEY

September 11, 2018

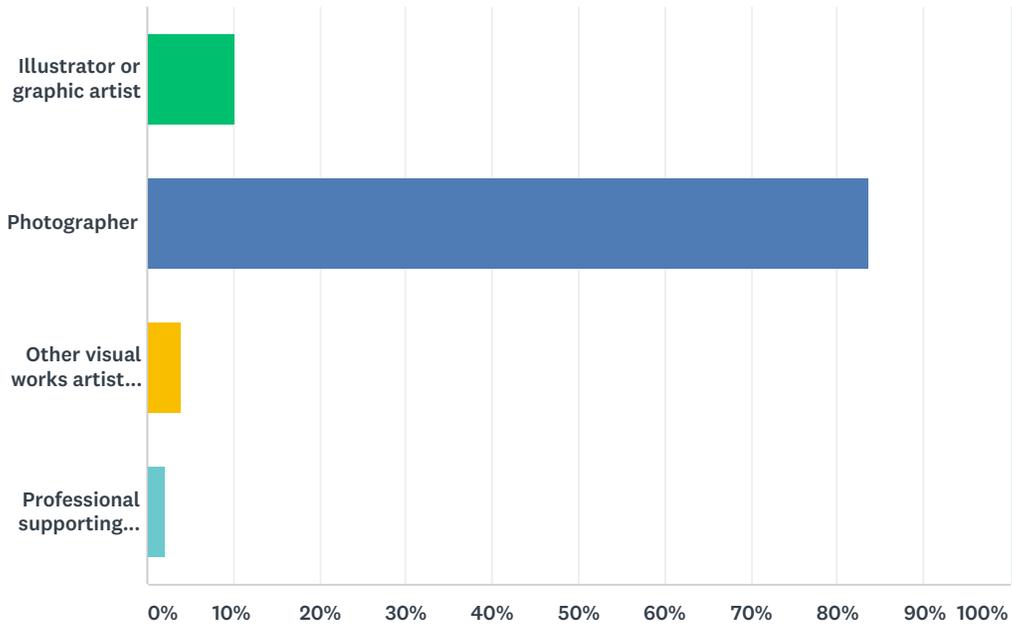


# SURVEY RESULTS FOR ALL SMALL CREATORS



# Q1 Which of the following terms best describes your profession?

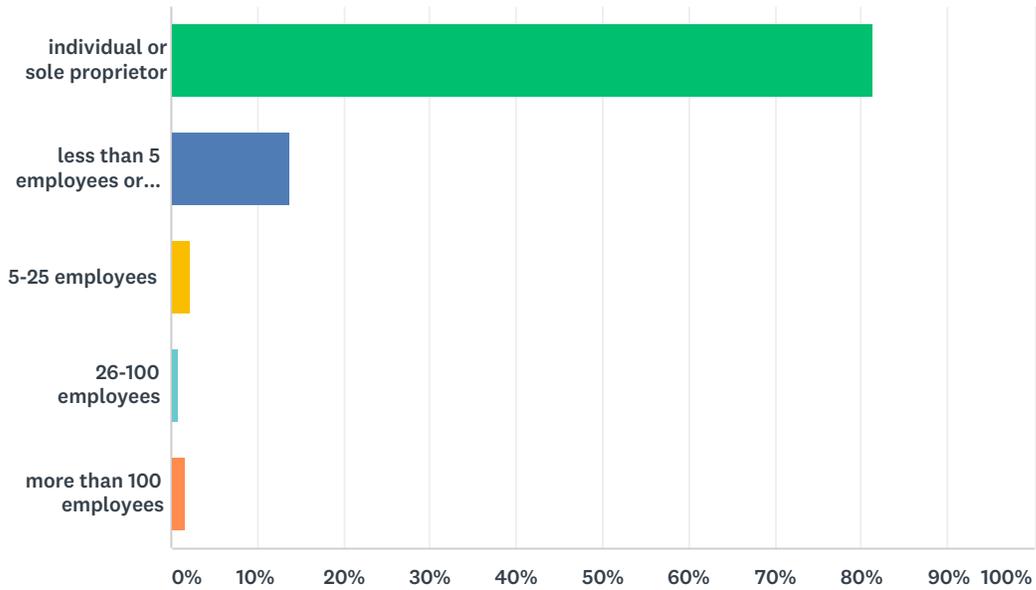
Answered: 3,353 Skipped: 0



ANSWER CHOICES	RESPONSES	
Illustrator or graphic artist	10.26%	344
Photographer	83.75%	2,808
Other visual works artist or creator	4.00%	134
Professional supporting visual arts	2.00%	67
<b>TOTAL</b>		<b>3,353</b>

## Q5 Describe the number of people in your business:

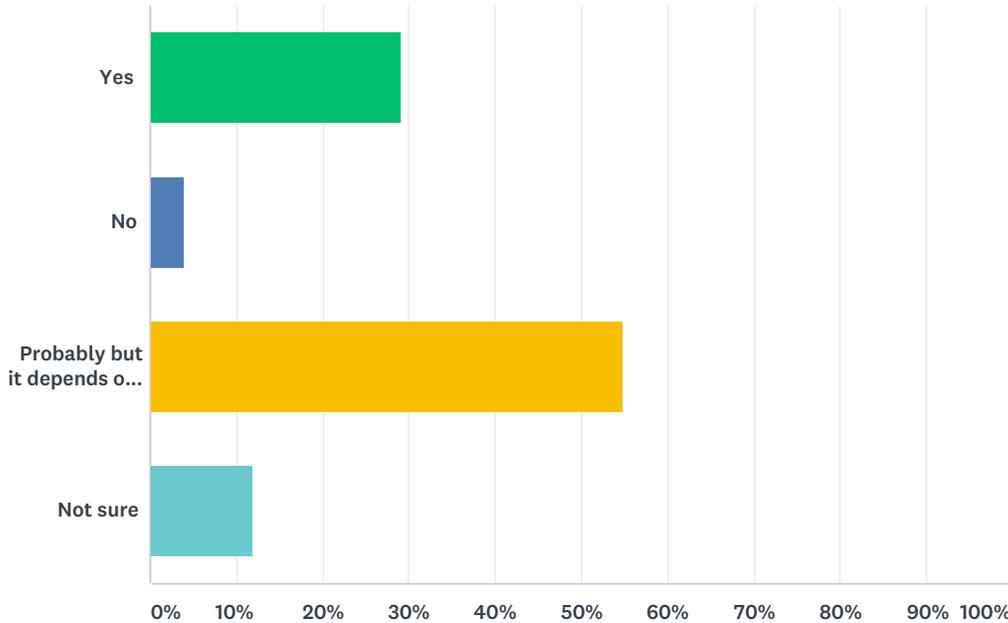
Answered: 3,319 Skipped: 34



ANSWER CHOICES	RESPONSES	
individual or sole proprietor	81.35%	2,700
less than 5 employees or partners	13.80%	458
5-25 employees	2.29%	76
26-100 employees	0.78%	26
more than 100 employees	1.78%	59
<b>TOTAL</b>		<b>3,319</b>

**Q67 Would you like a new registration option of online subscription “bulk registration” of multiple works by one author/creator for an annual tiered fee? For example, 1 to 50 works for \$w, 51 to 500 works for \$x, 501 to 1000 works for \$y, 1,001 to 10,000 for \$z.**

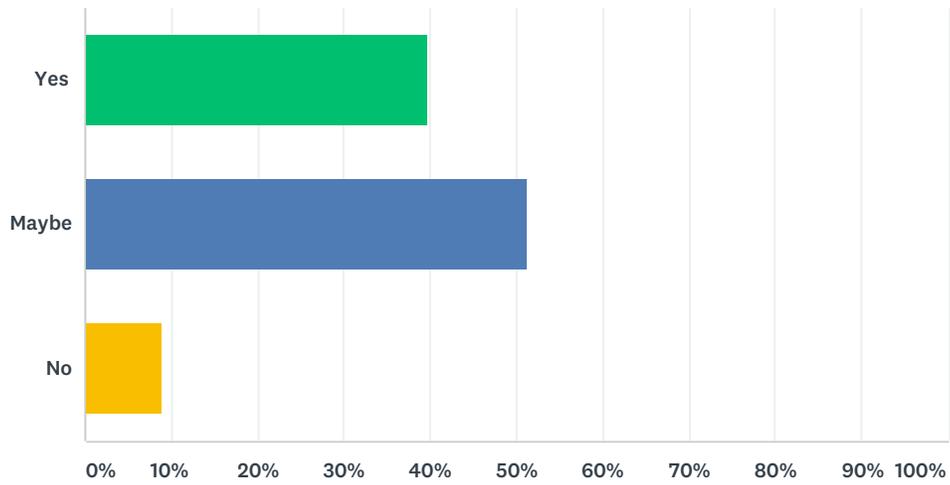
Answered: 2,819 Skipped: 534



ANSWER CHOICES	RESPONSES	
Yes	29.16%	822
No	3.97%	112
Probably but it depends on the cost	54.91%	1,548
Not sure	11.95%	337
<b>TOTAL</b>		<b>2,819</b>

### Q69 Would you personally use online registration as a subscription for “bulk registration?”

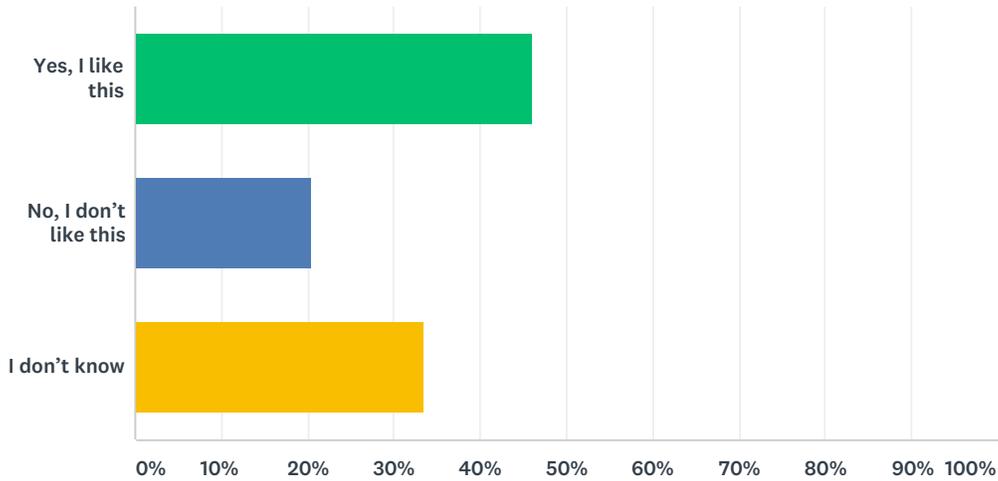
Answered: 2,819 Skipped: 534



ANSWER CHOICES	RESPONSES	
Yes	39.84%	1,123
Maybe	51.26%	1,445
No	8.90%	251
<b>TOTAL</b>		<b>2,819</b>

**Q70 Do you like this idea? Submit works to the Copyright Office for registration for partial fee \$x, receive documentation of receipt, date and ID number from the Copyright Office. At a later date, if a work is infringed or the author/creator/rights holder wants completion of Copyright Office examination and registration, file a request with Copyright Office and additional fee \$y for full processing of registration.**

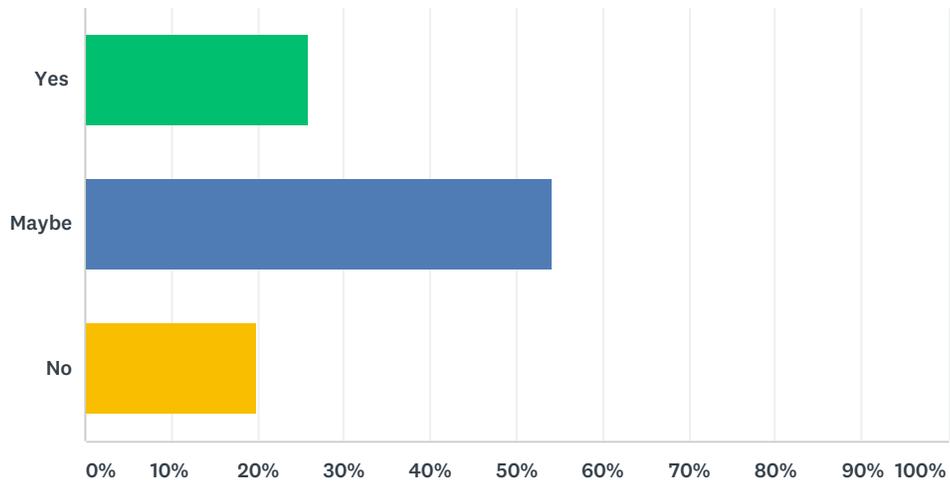
Answered: 2,821 Skipped: 532



ANSWER CHOICES	RESPONSES	
Yes, I like this	45.94%	1,296
No, I don't like this	20.52%	579
I don't know	33.53%	946
<b>TOTAL</b>		<b>2,821</b>

## Q71 Would you register more works if two-step partial registration was implemented?

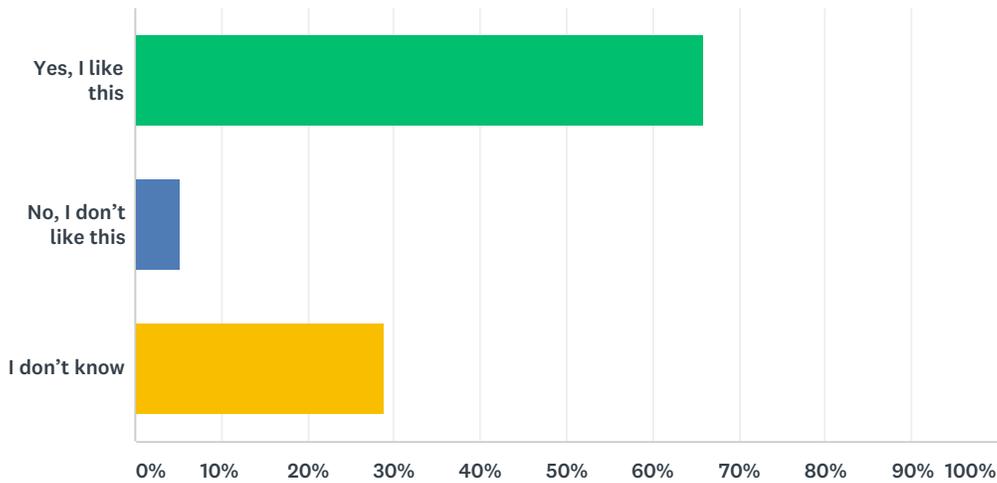
Answered: 2,813 Skipped: 540



ANSWER CHOICES	RESPONSES	
Yes	25.92%	729
Maybe	54.28%	1,527
No	19.80%	557
<b>TOTAL</b>		<b>2,813</b>

**Q72 Do you like this idea? Group registration or registration of multiple published and unpublished works in one registration, and designate publication status of each work in the registration form. Publication status of each work is a check box in the registration application with required info about publication. This would enable an author/creator/rights holder to register all images for one job/project/client together, including all roughs, comps, preliminary versions, alternative versions, colorways, views, derivatives, and finals in one registration**

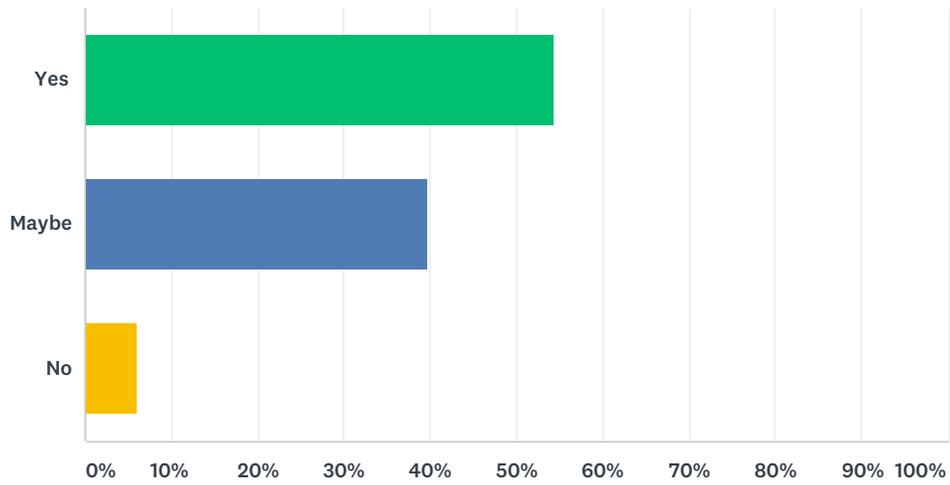
Answered: 2,793 Skipped: 560



ANSWER CHOICES	RESPONSES	
Yes, I like this	65.99%	1,843
No, I don't like this	5.23%	146
I don't know	28.79%	804
<b>TOTAL</b>		<b>2,793</b>

### Q73 Would you register more works if you could register multiple published and unpublished works in one registration?

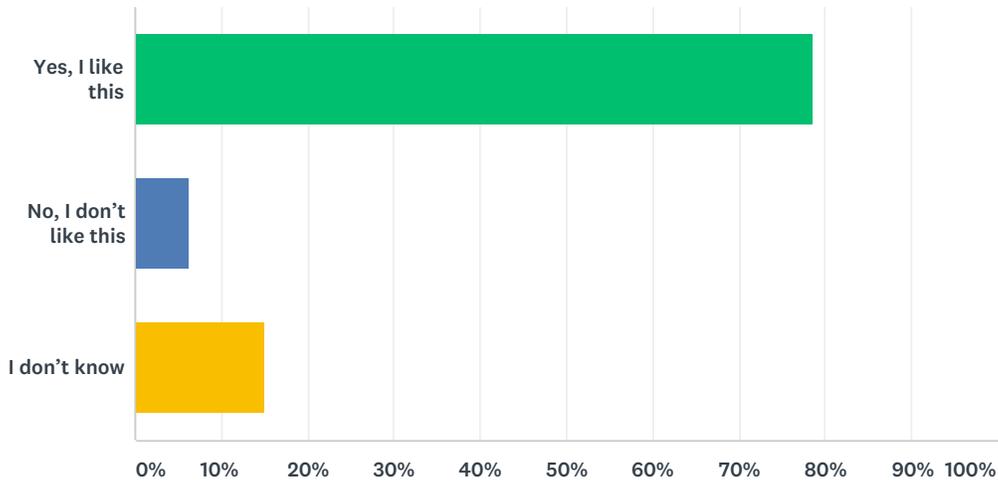
Answered: 2,804 Skipped: 549



ANSWER CHOICES	RESPONSES	
Yes	54.35%	1,524
Maybe	39.66%	1,112
No	5.99%	168
<b>TOTAL</b>		<b>2,804</b>

**Q74 Do you like this idea? Registration as a plug-in feature in graphic software, such as with Adobe Creative Suite (Photoshop, Illustrator, Bridge, etc), Adobe Lightroom or Camera Bits' Photo Mechanic. All necessary info would be entered in a dialog box for the image and then uploaded to the Copyright Office eCO.**

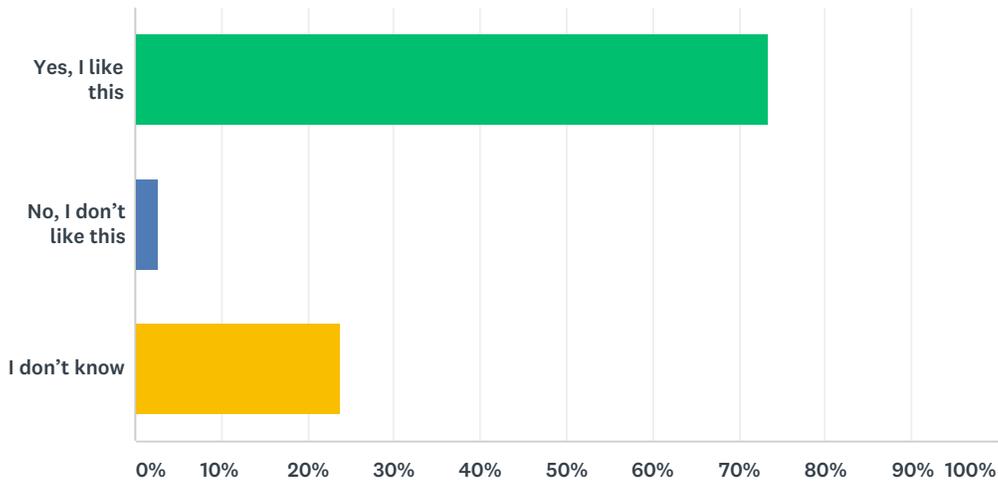
Answered: 2,803 Skipped: 550



ANSWER CHOICES	RESPONSES	
Yes, I like this	78.67%	2,205
No, I don't like this	6.21%	174
I don't know	15.13%	424
TOTAL		2,803

**Q75 Do you like this idea? To prevent the work from becoming orphaned, if you had the option of the registration and image also simultaneously being uploaded to a dedicated image registry, or to a registry such as PLUS (The Picture Licensing Universal System) for no additional fee.**

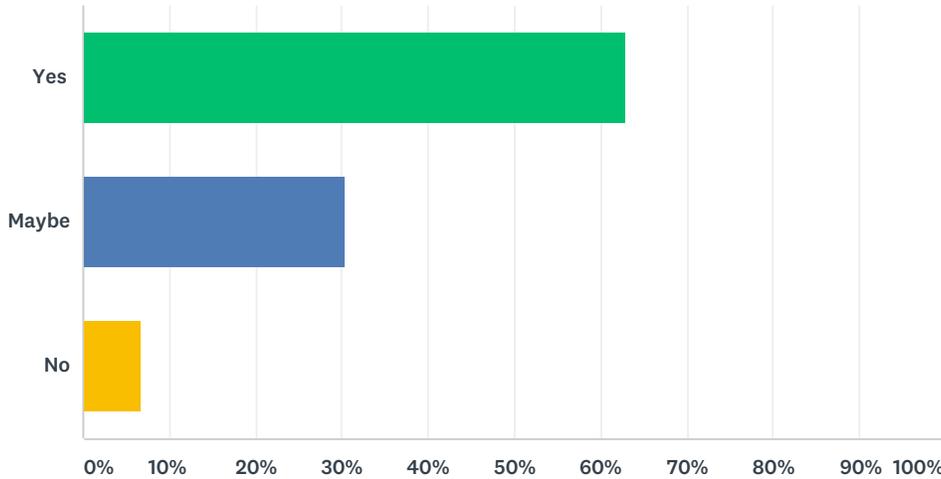
Answered: 2,795 Skipped: 558



ANSWER CHOICES	RESPONSES	
Yes, I like this	73.45%	2,053
No, I don't like this	2.79%	78
I don't know	23.76%	664
TOTAL		2,795

### Q76 Would you register more works if registration directly through graphic software (Adobe Photoshop, Lightroom, or Camera Bits' Photo Mechanic) was possible?

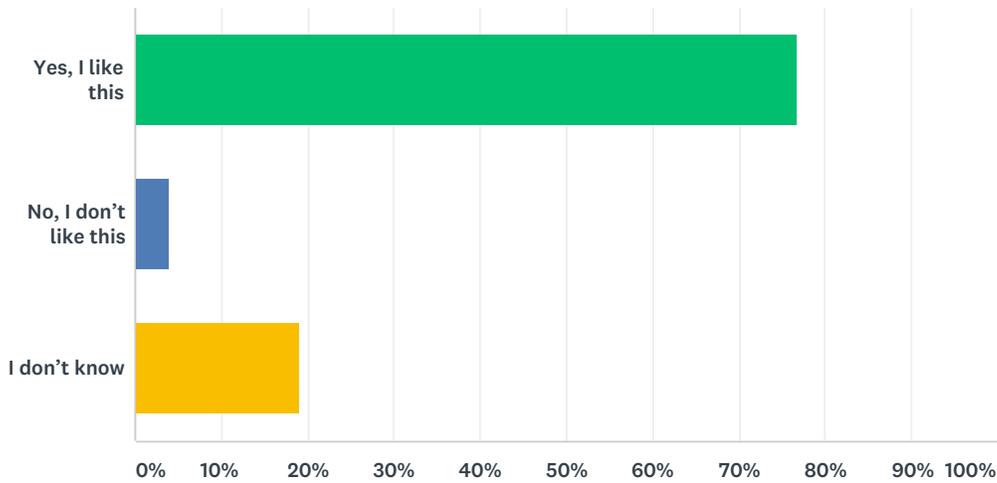
Answered: 2,805 Skipped: 548



ANSWER CHOICES	RESPONSES	
Yes	63.07%	1,769
Maybe	30.30%	850
No	6.63%	186
<b>TOTAL</b>		<b>2,805</b>

**Q77** The current registration process can be burdensome for many small creators and deters them from registering their images with the Copyright Office. This in turn decreases the amount of damages a creator can receive. Do you like this idea? What if the Copyright Office established a standardized format for metadata and file naming allowing each creator, or their agent, to add this information to their images, including date of creation? Then, if the work is infringed and the Copyright Office determines the creator followed the established metadata and naming format, the work would be considered registered for determination of damages.

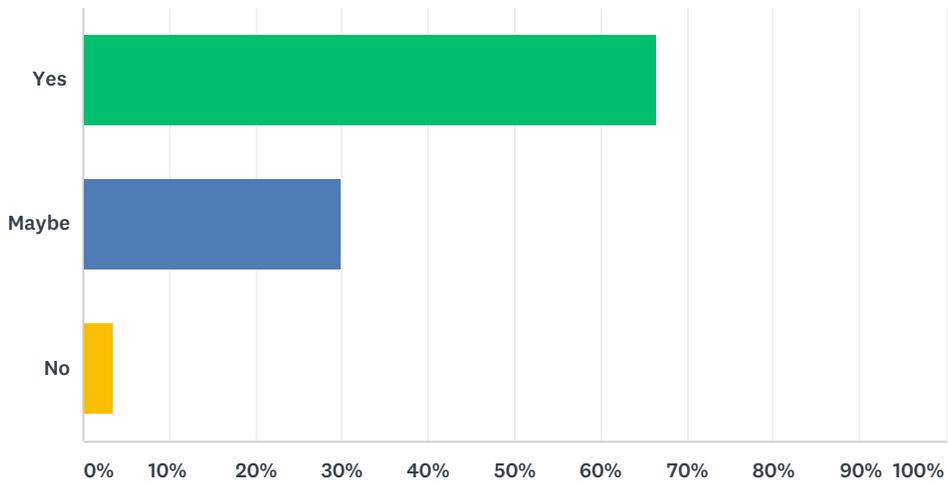
Answered: 2,802 Skipped: 551



ANSWER CHOICES	RESPONSES	
Yes, I like this	76.87%	2,154
No, I don't like this	4.03%	113
I don't know	19.09%	535
<b>TOTAL</b>		<b>2,802</b>

### Q78 Would you participate and add required metadata to your visual works if this Self-Deposit was implemented?

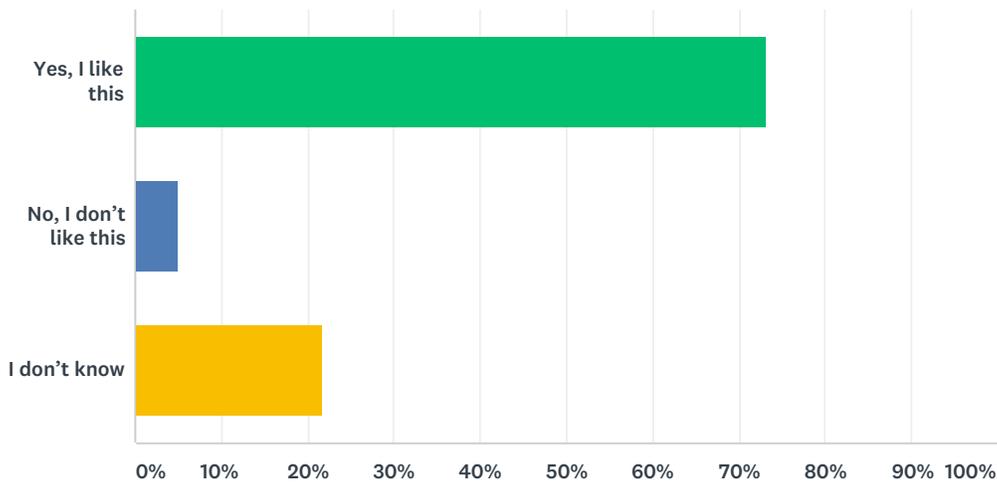
Answered: 2,793 Skipped: 560



ANSWER CHOICES	RESPONSES	
Yes	66.45%	1,856
Maybe	30.00%	838
No	3.54%	99
<b>TOTAL</b>		<b>2,793</b>

**Q79 Do you like this idea? Authors/creators register their names or businesses with the Copyright Office, instead of registering individual visual works. The Copyright Office assigns each author/creator/business an ID number. Each author/creator/business would be responsible for adding their ID number and date of creation to the metadata in the digital file of each image as registration, similar to how digital watermarking creates digital watermarks with a unique Creator ID. Authors/creators/businesses would pay an annual fee to the Copyright Office to include all works created that year.**

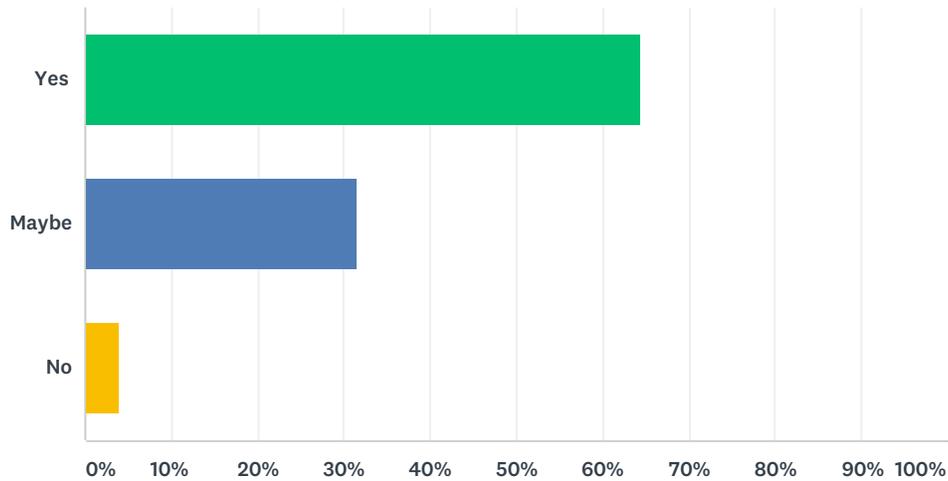
Answered: 2,790 Skipped: 563



ANSWER CHOICES	RESPONSES	
Yes, I like this	73.15%	2,041
No, I don't like this	5.02%	140
I don't know	21.83%	609
<b>TOTAL</b>		<b>2,790</b>

### Q80 Would you participate, register your name/business with the Copyright Office and add your Creator ID to the digitized images if this was implemented?

Answered: 2,791 Skipped: 562



ANSWER CHOICES	RESPONSES	
Yes	64.46%	1,799
Maybe	31.49%	879
No	4.05%	113
TOTAL		2,791

## **APPENDIX C: COMMON QUESTIONS USERS HAVE WHEN FILLING OUT APPLICATIONS**

The Coalition of Visual Artists submits the following sample list of common questions pertaining to the published/unpublished distinction.

### **Social Media**

- If a work is posted to a social media platform (Twitter, Tumbler, Instagram, Pinterest, Facebook, etc.), is it considered published? Does publication status depend on any particular factors?
- Does a general statement that “prints are available for sale” impact publication status?
- If a work is posted to a private or semi-private group or page on a social media platform, or if a work is posted to a social media platform in which sharing is limited to invited individuals (such as Ello), is it considered published?

### **Personal Websites**

- If a work is uploaded to an online portfolio or personal blog, is it considered published? Does publication status depend on any particular factors?
- If a work is posted to a website in which social sharing functionality (typically via icons) is enabled, is it considered published?
- If stock photos are uploaded to a personal website and the site mentions "for stock pricing, please inquire", is it considered published? Would publication status be affected by whether the pricing profile is currently active for visitors to purchase images directly?

### **Stock or Third-Party Websites**

- If a work is published to a third party portfolio site (such as a member association portfolio page, or a paid service, or a built-in service platform such as Adobe Behance or Photoshelter), is it considered published? Does publication status depend on any particular factors?
- Terms of Use Issues: If I place work on a website where I have agreed to "terms of use" that permit the redistribution or further transmission of my work by users of the website, is my work published?
- Does the posting of my work on a website that offers creative commons licenses constitute publication?

### **Work Supplied Directly to Client**

- If a work is supplied as a downloadable PDF – with the express purpose that a potential client may print out the work to see it in hard copy, bring to meetings when choosing an artist, etc. – is it considered published?
- If a work is delivered to a client and the client pays for the rights, but doesn't use the work (because the client has purchased the rights to sketches or variations, or the project is delayed or killed), is it considered published?
- If an image is licensed for one-time use in a publication, then sections of the image are used in other places in that publication OR as spot illustrations (more than one-time use), are the sections of that image or spot illustrations published or unpublished, and do they have to be registered separately?

### **Miscellaneous**

- If a work is exhibited in a gallery (not for sale), and images of the work from the gallery show are published on news blogs or in social media, is it considered published?
- If a visual work is used in displays in retail stores is it considered published?
- If original visual works are used for teaching; in person or online are they considered published?
- If artwork is used as a “campaign” or advocacy button or lapel pins, or on 3D promotional items is it considered published?
- If commissioned caricatures are created live at an event (e.g. a wedding, a business meeting, a street fair) are they considered published?

**APPENDIX D: NEXT GENERATION SYSTEM FLOW CHART**

