



AMERICAN SOCIETY OF
MEDIA PHOTOGRAPHERS

U.S. COPYRIGHT OFFICE

**REQUEST FOR PUBLIC COMMENTS
(DATED FEBRUARY 20, 2014)**

STUDY ON THE RIGHT OF MAKING AVAILABLE

APRIL 4, 2014

**INITIAL COMMENTS
OF
AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS (ASMP)**

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INITIAL COMMENTS OF ASMP

Introduction and Background

ASMP wishes to thank the Register and former Representative Melvin Watt for this opportunity to provide comments on the Copyright Office's study on the possible need for legislation to clarify the existence of rights of "making available" and "communication to the public" as part of the bundle of exclusive rights that belong to copyright owners.

The American Society of Media Photographers' mission is to protect and promote the interests of professional photographers who make visual images --- both still and motion --- primarily for publication. ASMP is the oldest and largest trade association of its kind in the world and currently has approximately 7,000 members. ASMP's members are primarily commercial photographers, making images for publication in advertising, editorial, fine art and other commercial markets.

Specific Comments

1. Conflict in the Courts

As the Copyright Office detailed in its notice of inquiry, there is significant uncertainty within the federal courts as to whether the rights of making available and communication to the public, which are required for U.S. compliance with its obligations under international treaties, are already covered by §106 of the Copyright Act of 1976 as amended. In a perfect world, the simple addition of specific references to those rights to §106 would alleviate the problem and, thus, ought to be done. However, we believe that doing so would merely give rise to additional interpretation issues, and that, in turn, would create other uncertainties within the courts. If the difference of opinions within the various federal courts over whether these rights are already included in §106 becomes significant enough, eventually the issue will probably be resolved by future judicial action. For that reason, and because there are more important copyright issues that deserve legislative action, ASMP agrees with the Copyright Alliance, of which ASMP is a member, that current legislative action is not necessary, but that Congress and the Copyright Office should continue to monitor this issue and consider the need for possible legislation in the future.

2. Published or Unpublished?

The notice of inquiry stated that, "... If there are any other pertinent issues not discussed above, the Copyright Office encourages interested parties to raise those matters in their comments." ASMP wishes to take this opportunity to address an issue related to the enforcement of exclusive rights that is of extreme importance to photographers: the issue of publication.

There is extraordinary uncertainty in the digital world as to what constitutes publication and when a given act constitutes publication. While most people had a fairly clear idea of what constituted publication in the print world, the widespread use of the internet has created a brave new world of uncertainty as to when an image has been published where there is no print copy of that image created and distributed by a photographer. Is the simple act of posting an image on a web page sufficient to make it "published?" Must the image have been actually viewed by a user to transform it from unpublished to published? Must it have been downloaded? Must the web page on which the image appears be accessible to the public, or may it be in a password-protected part of a website? The questions go on ad infinitum.

3. The Importance of the Distinction Between Published and Unpublished

The reason that this issue is of such importance to photographers is that, under current law, published works are treated differently from unpublished works (relative to the dates of registration and infringement) for purposes such as eligibility for statutory damages and attorneys' fees under §412 and §504 of the Copyright Act. Because of this, the Copyright Office currently requires that works be identified as published or unpublished as part of the process of copyright registration. The practical effect of this distinction, combined with the uncertainty surrounding it in the digital environment, is that many, and probably most, photographers face a situation of paralysis by analysis when trying to register their works, and they end up throwing their hands up in frustration and not registering their works, at all. When an issue is so complex and uncertain that even experienced copyright lawyers do not have a definite answer, and when it affects the rights of so many copyright owners, it is time for Congress to take action.

4. Eliminating the Problem

The easiest way for Congress to eliminate this legal conundrum is for it to eliminate the distinction between published and unpublished works in §412 by simply repealing it. Alternatively, Congress could deal with the issue by providing clear definitions and bright line tests for publication, presumably after directing a study of the issue by the Copyright Office. While ASMP would strongly prefer the former approach, either one would provide certainty for both owners and users of

copyrighted materials. That, in turn, would eliminate one of the greatest barriers faced by photographers seeking to register their images, resulting in far greater use of the copyright registration system by professional photographers. This would benefit, not just the photographers, but the public, as well, by creating a significantly expanded public record.

Conclusion

ASMP thanks the Register and her staff and former Representative Watt for their interest in resolving these complex issues relating to the exclusive rights of copyright owners. ASMP looks forward to a continuing dialogue with Congress and with the Register and her staff in an effort to assist in the continuing process of refining the language of the Copyright Act for the benefit of all of its users.

Thank you for your time and consideration.

Respectfully submitted,

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