

U.S. COPYRIGHT OFFICE

**NOTICE OF INQUIRY
(MARCH 18, 2013)**

**TECHNOLOGICAL UPGRADES TO REGISTRATION
AND RECORDATION FUNCTIONS**

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**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 for this opportunity to provide comments on the Copyright Office's current systems of registration and recordation and how ASMP might like to see them operate in the future. We greatly appreciate the opportunity to contribute to the Copyright Office's process of building a system in and for the 21st century --- one that can take advantage of all of the benefits that a truly modern digital copyright registration system can provide to all of its stakeholders, including both owners and users of copyrighted works. ASMP has had many informal discussions with the Register and her staff (all of whom have been remarkably accessible to the public) concerning these issues in the past, and we welcome the opportunity provided by this Notice of Inquiry to broaden those conversations.

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.

In general, ASMP members rarely use the recordation services of the Copyright Office. Rather, almost all of their interactions with the Office regard registrations. Consequently, our comments will be confined to our members' experiences with the Office's current registration systems and our wish list for those systems as they will exist in the future.

Specific Responses

The Notice of Inquiry sets seeks comments on two broad areas:

- (1) how stakeholders use the current online offerings of the Copyright Office, especially with respect to registration and recorded documents, and how the current offerings meet, fail meet, or exceed user expectations; and*
- (2) how stakeholders would like to interact with the Copyright Office electronically in the future, or put differently, what online services, or aspects of existing online services stakeholders would like to see.*

In preparing our response to the Notice of Inquiry, we have found that many of our responses meld those two areas, so that the line between them tends to blur. For that reason, most of the following comments will tend to combine the two, rather than fall discreetly into one category of the other.

1. Hardware, Software, Expensiveware...

As professional photographers --- and most other businesses --- quickly learned after the use of digital technology was first embraced, the usable lifespan of any piece of equipment, operating system or program is only somewhat longer than that of a Mayfly. Virtually everything digital starts down the path of obsolescence the moment it is acquired, and as a practical matter, must be replaced within a few years (at most) for the owner to stay competitive in the business world. That fact becomes obvious when one asks how many people he or she knows who have a mobile telephone that is more than, say, three years old? Systems that once may have been desirable quickly deteriorate, both in absolute terms and relative to what new technologies have become available over time. The high costs of staying technologically relevant are an unfortunate reality for every person and entity using digital devices and applications.

The Copyright Office's eCO system is no exception, and there are many areas in which it needs to be upgraded to match the needs and expectations of all stakeholders in the context of today's available technology. The following are some examples that have been brought to ASMP's attention by our members:

A. The current system has been described as a digital version of the paper registration system. Given today's technologies, it can and should be upgraded to take advantage of the interactive nature of the digital environment by acting as a "wizard." I.e., instead of registrants having to figure out the sometimes difficult answers to fill into often legalistic blocks, the website could ask a series of simple questions in plain English. The answers would be provided in simple English, but would be translated by the wizard to fill in the necessary information in the registration forms.

B. Given the large numbers of images that professional photographers produce, and given the ever-increasing file sizes of those images and the increasing trend towards producing moving video images, ASMP members feel a pressing need to be able to submit larger deposits as part of the registration process than the system can currently accommodate. Similarly, capacity should be expanded so that submissions do not "time out" before they have been completed, which at present is a common problem.

C. The current system leaves a registrant somewhat uncertain as to how far along she is in the registration process and even whether the registration

has been successfully completed. Some sort of progress bar would be extremely helpful.

D. A huge issue for many, if not most, of ASMP's members is the fact that the current system is not compatible with all web browsers. This is a significant problem for an industry that relies heavily on non-PC based browsers, such as Apple's Safari, that seem to be problematic for the eCO system. There is a real need to upgrade the Copyright Office's system to incorporate cross-browser compatibility.

E. Most users of today's computers are accustomed to, and expect, almost instantaneous support, whether by telephone, instant chat, online FAQ's, or even user forums linked to the main website. The eCO system currently provides some telephone and tech support, but it is not anywhere near instantaneous, and it can take days or even weeks to resolve eCO registration questions and issues. Sometimes, that time lag can become crucial when deadlines are at stake. The creation of systematized tools for user support would be extremely helpful. Similarly, ASMP members have found that it is relatively easy to adapt to the system after some experience, but that first-time and infrequent users of the system would benefit greatly from the development of an easy-to-follow tutorial.

F. In recent months, there has been a lot of media coverage of vulnerability to cyberattacks, and security of data has become a major concern. Like almost every web-based application, eCO appears to need a significant upgrade in every security aspect in light of these recently apparent threats.

G. The ability of the system to allow the preservation, updating and searching of metadata is extremely important to maintaining all of the most important information relating to a visual image and its copyright. To the extent that the Copyright Office's database could be depended on to preserve that information, to allow the copyright owner to update it, and to allow the public to search it, the risks of future photographs becoming orphan works would be drastically reduced.

H. The Notice of Inquiry listed a number of examples as areas for improvement that had been provided to the Copyright Office over the course of discussions with various stakeholders, in the Discussion section. Rather than repeating all of them here, ASMP supports all of the suggested areas of improvement listed in Section II of the Notice. ASMP would be delighted to engage in further discussions of specific details of possible upgrades with the Register and her staff, and many of our members would be happy to serve as beta testers as changes are implemented for testing and development.

2. Two Keys to the Future

It seems to ASMP that there are two aspects of digital technology that must be incorporated into the Copyright Office's website and eCO system, or with which the Copyright Office's systems must be made compatible, for it to begin to utilize the advantages of digital technology. They are (1) the development of a compatible Application Program Interface (API) for registering digital visual images and (2) the ability to use image-recognition based technology to search the Copyright Office's database of registrations and deposit copies (and/or independent registries' databases linked to the Copyright Office website).

A. API

To understand how an API would work for photographers, one must first have a picture of how professional photographers work in a digital environment. The capture of an image, still or moving, is simply the beginning of a long and intricate process. Work that used to be done by third parties, such as retouchers and printers in a print world, is now usually done in-house by photographers and their staff in a digital environment. The captured image is just the starting point. From there, a process that is generally described as "workflow" begins, usually starting with the transfer of the image from the storage medium in the camera to a computer, to be processed through a program such as Adobe's Photoshop, Creative Suites or Lightroom, Apple's Aperture, etc. The images are then edited, and the images that make it through the editing process ("the selects") are then digitally corrected for aspects such as color balance, light and shadows, cropping, etc. Where appropriate, some image details are removed, moved, altered or even added (unless the use of the image requires strict adherence to an accurate reproduction of the actual scene, as is the case in photojournalistic uses). The images are organized and catalogued. Important metadata is embedded, providing detailed information about the image, any licenses granted for it, copyright notices and information, and, most importantly, contact information for the photographer.

In the context of this workflow, it is quite feasible to develop an API that would allow the image and its information to be automatically and instantly translated into the digital forms and formats necessary to register the image at the Copyright Office via an upgraded eCO system. All that would be needed would be for the photographer to input certain information into the API's template once, and then, when each image is ready for submission, simply to push a button. Such a system would virtually guarantee greatly increased numbers of copyright registrants and registrations. Because the registrations would be submitted before the images even left the photographer's computer to go to a client or the photographer's website, each image would, by definition, be unpublished, thereby eliminating one of the biggest impediments to registrations of photographs under the current system (for more about the "published/unpublished" issue, see §3 below).

Private companies, such as Adobe, Apple, Microsoft, etc. have already expressed considerable interest in developing such an API for photographers.

All that is needed is the ability for the Copyright Office's system to provide a seamless interface to accept registrations through the API.

B. Image-Recognition Search Technology

For those who are not familiar with image-recognition based programs, they are essentially computer programs that examine digital scans of images, create what are known as "digital thumbprints" for each image, and then go crawling the web to find images with matching thumbprints. Such programs are currently available through entities such as PicScout (now owned by Getty Images) and TinEye (owned by Idée, Inc.) and are sometimes referred to as "reverse image search engines." Currently, their most common use is by photographers and other owners of copyrights in photographs to find infringing uses on the internet. However, if the Copyright Office had a database of digital and digitized deposit copies of images, such search engines could be used by any member of the public to locate a matching image that had been deposited at the Copyright Office and to access the copyright information for that image. This would expedite the licensing and uses of copyrighted visual images and would eventually lead to the minimization and possible future elimination of orphan works. It could also eventually minimize the need to embed and search metadata by providing direct access to the image and contact information for the copyright owner.

As independent registries are developed, such as the PLUS Registry, they could be linked to the Copyright Office's website. To the extent that such registries had digital copies of images in their databases, those image files could be searched in addition to or instead of a Copyright Office image database, but they could still link to the Copyright Office's registration records.

The compatibility of the Copyright Office's systems with both registration API's and image recognition searches is crucial to the continuing usefulness of the Copyright Office as a resource of extreme value to all segments of the population and to the solution of many important problems, such as orphan works.

3. The Gordian Knot: Published v. Unpublished

No discussion of registration systems can be considered complete without examining barriers to increasing the numbers of copyright registrants and registrations. While the distinction between published versus unpublished works and the need to determine the date of first publication are not unique to electronic registrations, they have been cited to ASMP time after time by our members as areas of great challenge to them and as strong deterrents to registering their works. For that reason, we feel bound to raise this as an important issue in any revision to the Copyright Office's registration systems. We recognize that, under current law, when and whether a work has been published must be determined at some point as a statutory requirement, e.g. in litigation for purposes of determining whether a work is entitled to statutory damages under §504.

However, there does not appear to be any reason why this information has to be determined at the registration stage, and in a world where almost all photographs are born digital, the need of adding to the collection of the Library of Congress is easily met.

The difficulties for a photographer in determining whether and when a work has been unpublished cannot be exaggerated. There is currently no clear definition or real guidance as to what constitutes publication in the real world context of a photographer who delivers image files to a client, say an advertising agency or magazine publisher, with the hope and expectation that at least some of the submission will be published in some medium at some time. Or to a photographer who posts an image on her public website and is uncertain whether that image been published at that point. Even experienced copyright lawyers differ as to what constitutes publication in these and others of the various scenarios that comprise the everyday lives of working photographers. One has to ask, if the experts cannot agree on the correct answer, how can lay people be expected to decide accurately?

The distinction between published and unpublished photographs triggers different procedures, requirements and limitations for registration, especially when groups of images are being registered. Clients almost never notify their photographers whether images have been published, which of the submitted images have been published, or the dates on which they have been first published. Most working photographers, faced with the daunting problem of making legal conclusion for which they have no training or education, supplied with no practical guidance, and faced with the threat or risk of having a registration invalidated for having guessed incorrectly, throw their hands up in frustration and simply do not submit the registrations.

For these reasons, one of the first upgrades in the Copyright Office's systems that ASMP would like to see on behalf of its members is either the elimination of the distinction between published and unpublished images at the registration stage or the provision of clear and practical definitions, tests and guidance to help to determine accurately whether a given image would be considered published or unpublished by the Copyright Office.

Conclusion

ASMP thanks the Register and her staff for their constant desire to move the Copyright Office forward, to take maximum advantage of evolving technologies, and to make all of the Office's operations as user-friendly as its limited budget will allow. It is ASMP's hope that Congress will recognize the pressing need to upgrade the Copyright Office's digital systems and to make the same kind of continuing investment in digital technologies as working photographers and most businesses have to make in order to remain in business. ASMP looks forward to

a continuing dialogue with the Register and her staff in an effort to assist in the constant process of maximizing the Office's value to all of its users.

Thank you for your time and consideration.

Respectfully submitted,

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