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### Via Electronic Upload

Library of Congress  
Copyright Office  
[Docket No. 2012-3]  
Copyright Office Fees

### Re: Comments of Picture Archive Counsel of America (PACA)

The Picture Archive Council of America, Inc. (“PACA”) appreciates this opportunity to comment on the Copyright Office’s Notice of Proposed Rulemaking (NPRM) proposing to amend the definition of “claimant” for purposes of copyright registration by eliminating the footnote in the definition of a “claimant” in §202.3(a)(3)(ii) (the “Footnote”).

### About PACA

PACA is a not-for-profit trade association whose members consist of entities and individuals of every size that are engaged in the archiving and distribution of images for purposes of licensing, either directly or indirectly. Founded in 1951, PACA’s membership includes 150+ companies worldwide providing photography, footage, animation, and illustration. PACA’s mission is to foster and protect the interests of the picture archive community through advocacy, education and communication. A primary purpose is to actively advocate copyright protection and copyright education.

### PACA’s History with the Copyright Office and Registration

In connection with its mission to advocate for copyright protection and registration, PACA, as well as individual members, have worked with the Copyright Office over the years to come up with manageable practices to effectively register catalogs of photographs on behalf of its members that will not only protect the catalogs as a whole but most significantly, the underlying images.

In connection with its registration practices, PACA and its members have received recommendations over the years from senior officials at the Copyright Office to incorporate language into member's contracts with its respective artists to include a transfer of rights to register copyright on behalf of the photographer consistent with the Footnote in order that PACA members can be a "claimant" in print and electronic catalogs pursuant to §202.3(a)(3)(ii). These are not naked transfers of only registration rights, but accompany exclusive rights to offer licensing in the images.

For example, in June 1995, in my role of counsel to PACA, I, along with other executives of the then PACA's Board, met with senior officials of the United States Copyright Office, including then Register of Copyright Marybeth Peters; Chief Examiner Nancy Petruzzelli; Head of the Visual Arts Section Examining Division Nancy Lawrence; and Assistant Chief Julia Huff. In order to encourage the registration of the stock photography catalogs and to protect the individual images that would otherwise not be registered, the Copyright Office provided instructions to PACA on how its members could register the catalogs in a manner that would be cost effective, administratively unburdensome, protect the individual images and at the same time, be in compliance with the regulations in place. By following a registration procedure used for registrations of "serial works," the Copyright Office instructed that a transfer of copyright ownership from photographers to their image library would permit the image library, as copyright owner and claimant, to register in a single application for registration both the catalog as a collection of photographs, as well as the individual photographs depicted in the catalog. Reference was specifically made to the Footnote as authority.

Accordingly, PACA members followed the instructions obtained beginning in 1995 and have structured contracts and filed applications for 17 years based on these instructions.

#### PACA Concerns with the Elimination of the Footnote

As noted in the NPMR, there is no definition of Claimant as part of the Copyright Act and the Interim Regulations published on January 5, 1978 included the Footnote that allows a person that has obtained, from the author, all the rights initially belonging to the author, the contractual right to claim legal title to the copyright in an application for copyright registration. Since 1978, the Copyright Office has been permitting applications by claimants who have obtained rights from the initial author. While there may not be any writings to explain the reasoning, there must have been a valid purpose for the Footnote at the time and the fact that the Copyright Office has relied upon this Footnote over the years demonstrates that such a purpose continues. For example, with

respect to PACA members, copyright in image catalogs would be very burdensome to register by each individual photographer, as each published photographer would have to file a separate registration and provide two deposit copies of the Catalog to the Copyright Office. Obviously it serves no registration purpose to deliver to the Copyright Office so many multiple copies of the same publication. The same is true once the catalogs became online searchable databases. This was one of the reasons that the Copyright Office came up with a practical way to both encourage registration of the catalogs by PACA members, yet not require overly burdensome registration practices for photo libraries that publish by necessity, the images created by many different photographers.

There may be many other industries in which business practices have encouraged the registration by an entity other than the initial author. This Footnote facilitates such registrations and there seems to be no evidence of harm over the years or evidence of a poor record of registration. Neither am I aware of any evidence to support that this Footnote is used by claimants who do not obtain, at least substantially, all the exclusive rights of the author. In many instances with PACA members, exclusive rights to distribute and license the images are granted to the photo library. However, other noncommercial and noncompeting uses are typically retained by the photographer in order for the photographer to use the photographs as professional samples in order to obtain more work and to enhance his or her reputation. These uses might include portfolio use, fine art prints, and books or articles about the photographer on his or her career. These uses all serve to increase the photographer's recognition and do not interfere with the exclusive rights granted to the photo library to license the work. If the Footnote is eliminated, it would require the alteration of a vast number of contracts, as the photo library would now need to obtain all rights initially belonging to the photographer, and the practice of permitting a photographer to promote his or her work could be restricted, to no one's benefit.

PACA also has concerns that the elimination of the Footnote, on the basis of a "clarification", could cause a cloud on past registrations and prevent PACA members from effectively enforcing copyrights in the many images now published in their online catalogs and licensed on behalf of their contributors. This fear is not unfounded as a string of lower courts have narrowly construed Section 409 of the Copyright Act to require the name of each author and the title of each photograph published in either a print or digital online catalog, giving no deference to the Copyright Office. While we believe these cases to be wrong, nonetheless, an elimination of the Footnote based on "clarification" could be misinterpreted by a court to mean that the registrations from claimants, such as the many PACA members who have filed applications as the claimant relying on this advice, is somehow inaccurate or worse, used to invalidate the registrations.

While we understand that the rule would only be in effect going forward, there is no guarantee that a court would not misinterpret the intent and purpose of the change. We recommend that any changes, if made, clearly support past practices based on the definition of “claimant” who qualify based on the Footnote.

### Suggestions

Before eliminating a footnote, merely because there is no written record of its basis, the Copyright Office should consider the unintended consequences and carefully weigh the benefits, if any, in eliminating the Footnote with the harm that might be caused to some authors. Fear is that there will be “naked grants”, where the claimant owns no rights under copyright, could be addressed without eliminating the Footnote. In addition, there may be ways to address the concerns of having a clear record of registrations that can also encourage registrations that are useful, practical and do not over burden those authors who create many copyrightable works in a lifetime, particularly in light of the proposed fee increase. While it is laudable that the Copyright Office wants to encourage a more accurate and meaningful record of authorship and ownership, when it comes to photographs, there is no real meaningful and accurate record under the current registration practices, as a written title of a photograph does not accurately describe the visual content.

Because photographs can be so easily distributed without the authority of the author or its representative, PACA does not recommend eliminating a Footnote that may encourage infringers to attack legitimate registrations as a way to avoid paying any money for the use of photographs.

PACA would like to continue to work with the Copyright Office to establish registration practices that are enforceable, practical and not prohibitively expensive.

Sincerely,



Nancy E. Wolff  
PACA Counsel