U.S. COPYRIGHT OFFICE

COPYRIGHT PROTECTION FOR CERTAIN VISUAL WORKS
[Docket No. 2015-01]

COMMENTS OF THE PPA

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INTRODUCTION

Professional Photographers of America (PPA) appreciates the interest and attention of the Copyright Office to the legal protection and marketplace realities for creators of visual works. It is no exaggeration to say that this subject is a matter of existential proportions. At the outset, we state our strong support and agreement with the substance of the comments filed by American Society of Media Photographers (ASMP), National Press Photographers Association (NPPA), Graphic Artists Guild (GAG), and Digital Media Licensing Association (DMLA).

Founded in 1869, PPA is the world's oldest and largest non-profit trade association for professional photographers and photographic artists from dozens of specialty areas including portrait, wedding, commercial, sport and event, advertising, and art. One of our most critical concerns is ensuring respect for the copyright interests of those members.

The vast majority of our members consider themselves portrait and/or wedding photographers. They are quite literally the copyright holders next door, giving us lasting images of the people dearest to us, at the most important times of our lives. Their works are not only enduring memories of special occasions for those who were there, but a tangible glimpse into who we are and where we are from; images of those who came and went before us, and of our parents and grandparents that one day we will share with our children and grandchildren to teach them their most personal heritage.

PPA's membership consists of more than 28,000 direct members and an additional 20,000 affiliated members through the more than 150 independent organizations that have elected to affiliate with PPA. In total, PPA's membership reach includes some 50,000 professional photographers. For more than 140 years, PPA has dedicated its efforts to protecting the rights of photographers and to creating an environment in which these members can reach their full business and creative potential.

PPA members live in every nook and cranny across the U.S. -- in cities, suburbs, and rural areas. Some work out of their homes, others have studios. Overwhelmingly they are small businesses with fewer than five employees. The average photographer works over fifty hours a week and makes about $35,000 a year.

Yet, photographers are among the most prolific creators in any industry. Every weekend as many of us relax and enjoy time with our family, PPA members are working to create the memories that we will cherish for generations. Wedding photographers can create up to a thousand images at a single event.

THE PRACTICAL REALITY FOR PHOTOGRAPHERS

Photographers continue to say that copyright is one of the things that keep them up at night. Through no fault of their own, photographers face a series of marketplace-distorting challenges that combine to render the designed functioning of the Copyright Act a far-off dream, and thereby endanger the continued viability of the profession.

We will discuss each aspect in more detail below, but in summary: photography is a low value/high volume profession, which creates barriers to copyright registration; even if a photographer registers their works, the cost of federal litigation is prohibitive; the notice and takedown system provided in the Copyright Act is not an effective tool; consumers have little understanding of the application of copyright to photos and little compunction about making unauthorized copies; and metadata that might help educate users is routinely stripped from photos.

ENFORCEMENT CHALLENGES FOR PHOTOGRAPHERS

America's copyright system is intended to work for all creators. Unfortunately, it is currently failing to achieve that goal. The vast majority of creators in the U.S. are small, mom and pop creators whose relatively low-value works cannot be protected from infringement through the high-cost forum of federal court. Our experience is that the vast

majority of infringement cases involving professional photography involve images with a combined value less than $5,000 – and certainly less than $10,000. With likely damages awards of this magnitude, it is difficult if not impossible to find an attorney willing to take the case. Even if one is available, the litigation expenses clearly far outweigh the possible damages and our members do not have the means to finance a case up front, regardless of whether attorney's fees and costs are likely to be awarded at the conclusion of the case.

While most of the conversation about copyright in America focuses on high-profile, big money cases, the reality is that thousands upon thousands of infringements take place each year involving claims of $500 to just a few thousand dollars. While this is hardly headline news, we believe these claims represent the largest class of copyright infringement in America. As we try to protect the rights of all creators, the quiet secret is that the current system does not, in fact, work for our relatively low value/high volume creators.

While some may snicker at such amounts, they are important to our members. Whether or not a photographer receives $2,000 in royalty payments to which they are legally entitled may be the difference between little league sports, piano lessons, a family vacation, or in some cases, food and shelter. The copyright system should work to protect ALL creators.

AN EFFECTIVE SMALL CLAIMS PROCESS IS PPA'S TOP PRIORITY

PPA continues to support the Copyright Office's efforts to create an effective process for adjudicating small dollar infringement claims and we support many of the conclusions and recommendations of the Office's 2013 report on that subject. We believe that offers the best hope for PPA members to have a viable means for vindicating their rights.

We fervently hope that Congress will act on a small claims process. As it does, we urge that it keep in mind three key components. First, while we recognize the constitutional

issues at stake, if there is no consequence for defendants to ignore or refuse to engage in a small claims process, it will be rendered irrelevant. It is foreseeable that defendants who recognize the practical limitations on a photographer's ability to bring a traditional federal suit will routinely refuse to participate in a streamlined administrative process on the (correct) assumption that there is no other practical way for them to be held accountable. The infringer can simply say, "So, sue me" at which point creators find themselves at the same unintended copyright dead end with which they are so familiar.

At the very least, a small claims procedure should be an opt-out process as described by the Office in its report. That way, defendants who simply ignore the notice will not benefit from their truculence. We also suggest exploring incentives for defendants to participate, along with penalties for refusals to participate without a good faith reason to do so. Seeking to avoid liability by increasing the costs of enforcement to plaintiffs may be a routine aspect of federal litigation, but it is not a good faith act and should not be permitted to undermine a small claims process in copyright. So, for example, a defendant that fails to state a good faith basis for its refusal of the small claims process could be subject to a default judgment. The defendant would then have the opportunity to have the judgment reviewed by an Article III court, as the Office noted in its report. Similarly, a defendant who refuses the small claims process and then loses in a federal suit should have an enhanced standard of an award of costs and attorney's fees, making it more likely that such defendants would be required to compensate the creator for the additional expense. As we have mentioned, PPA members can rarely resort to federal suits, but we believe such a provision would be a deterrent to frivolous refusals to participate in the small claim process and, in cases that do make it to court, would help protect creators from infringement of their rights and abuses of the process.

Second, it is equally critical that judgments generated through a small claims process be efficiently enforceable. As the Office has recognized, "A small claims tribunal will not mean much if its decisions can simply be ignored."[1] The Office recommended a procedure through which such judgments could be filed with federal district courts. So

[1] United States Copyright Office, "*Copyright Small Claims*," at 128 (September 2013).

long as that process is efficient and low cost, as are any necessary contempt proceedings, we believe that can work effectively. However, if it should come to pass that the only way to collect awards won in a small claims process is through a lengthy and/or expensive federal court process, it will defeat the goals of the small claims process.

Third, it is important that the small claims process remain as economical as possible. If parties are required to spend the time and money to travel to Washington, D.C., that alone will deter use of the system as the cost of the flights, hotel, and meals, plus lost work might well exceed the value of the claim. Nor does it seem feasible that a small claims tribunal will have the capacity to travel the country hearing disputes. We agree with the Copyright Office that the best format for a small claims process is a centrally located tribunal involving primarily, if not exclusively, paper submissions. To the extent proceedings are required, we also agree they can be conducted via Internet video or teleconference.

NOTICE AND TAKEDOWN

The notice and takedown procedure offered by section 512 of the Copyright Act is simply not an effective tool for photographers. The market for wedding photograhps, for example, is usually quite narrow – family, friends, and other guests of the wedding party. When a copyrighted photograph is posted online without permission or payment, it takes only a matter of hours or days for the entire market for that work to be consumed by the infringing use as the friends and family download the picture for themselves. While the sheer volume of infringing activity is of course far less than with works of popular entertainment, as a percentage of the market the piracy rate is much higher for photographers. In other words, our market is literally decimated by piracy, not just in the rhetorical sense, but in a very practical sense. A photographer who discovers such an infringement even after only a couple of days has already lost the income to which they were entitled as the infringer has often already extracted the economic value of the work.

Even in a case where a photographer seredipidously discovers an infringement within

hours of the posting and promptly sends a DMCA-compliant notice, they have too often been frustrated in their efforts when the *very same infringer reposts the exact same work on the same online platform*. No copyright owner should have to endure that type of insult to their rights. And for solo photographers scraping by on $35,000 a year, it is utterly impracticable to continue to chase the same infringement over and over.

Where compliance with a DMCA notice is not meaningful, the creator's only recourse is a federal suit that, for all the reasons discussed above, is not viable.

REGISTRATION CHALLENGES FOR PHOTOGRAPHERS

While photographers list copyright at the top of their list of concerns, only about 1% of photographers regularly register their copyrights. Indeed, 84% of professional photographers have never registered even a single image with the Copyright Office. When we consider both of these realities at the same time, it is apparent that our well-intended system simply doesn't work for professional photographers and other visual artists. Nor is it reasonable to expect the same systems and processes to work for extremely low-volume, high-value creators and at the same time, comparatively low-value, extremely high-volume creators. We are especially grateful that the current Register of Copyrights has shown great understanding for this point. With the review of Copyright in America underway, we believe it is time to address three particular problems with the current system:

1) The requirement to sort deposits as "published" and "unpublished;"
2) The requirement to sort registrations by year of publication; and
3) The mandatory deposit requirement.

We appreciate that the Copyright Office has made efforts to address the practical issues photographers have with registration, including the group registration rules. Even still, the sheer volume is overwhelming. In the most recent annual report posted on the

Copyright Office website, the Office reports processing 577,000 claims for registration.[2] If every one of PPA's 28,000 direct members were to register all of the 20,000 images they each create in a single year, the Office would be flooded with registration applications for ***560 million*** works. Even assuming those were submitted in groups of 750 photographs per registration, it would still be well over 700,000 registration applications. In other words, PPA members alone would file more registration applications than the rest of the world combined. Clearly, this is not a viable approach for either photographers or the Copyright Office.

One of the most burdensome aspects of registration for photographers is the requirement to separate out published from unpublished photographs. This is highly time consuming and serves no practical purpose.

The reasons for the published/unpublished distinction are grounded largely in a version of the Copyright Act that is over a century old and was superceded decades ago. Not surprisingly, the need for this is not apparent to photographers. Perhaps more importantly, the distinction is not significant in the modern marketplace – a point that the Copyright Office has acknowledged to us as well. While we appreciate the historic context, today this distinction serves little purpose in the law and is irrelevant in the market. Moreover, the legal status of publication is notoriously unclear; even experienced copyright lawyers cannot give clear legal answers for common practices. So, layered on top of the time needed to sort thousands of images into published or unpublished, photographers are confounded by the unclear legal status. This is the single greatest dissuading factor for photographers to register their works.

As the Copyright Office is also aware, registrants are also required to sort their applications by the year of publication. This exacerbates further the burden of sorting published from unpublished works, for similarly unproductive purposes. The date of publication of a work, while not entirely irrelevant, is far less significant in the law than it used to be. To the extent it is relevant, those facts can come out in the course of a

[2] U.S. Copyright Office Fiscal 2013 Annual Report at 4.

negotiation or resolution of a dispute. They need not stand in the way of successful registration of the work. PPA believes it is not worth the burden placed on independent creators to demand that they sort registrations by date of publication.

While the fees associated with routine registration by photographers would add up quickly, the deposit requirements are an even greater logistical problem. Granted, the advent of digital technology and the ability of the Office to receive soft copies for purposes of deposit have improved the situation from the analog, hard copy days. As we have described, PPA members can and do routinely create a thousand images in a weekend. Sorting and transmitting this volume of works even once, much less on a regular basis, is not practicable for independent, high-volume creators.

We recognize that there are important policy reasons for deposit requirements, including putting potential defendants on notice. But there are other ways to connect a registration to a particular work. Indeed, the Copyright Office's regulations already allow for identifying material in lieu of copies under certain circumstances.[3] Ideally, one day the Copyright Office will build an interoperable electronic system that can receive and process identifiers and metadata about photographs and other works of graphic art as they are entered into rights management databases by their creators as part of their normal workflow. As an initial step towards that laudible goal, we ask the Copyright Office to allow for identifying information in lieu of deposits as routine matter, at least in the context of photographs and other visual works.

We believe that removing the requirement to sort published versus unpublished, sort by date of publication, and a relaxation of the deposit requirement, along with a small claims option as stated above, would open the door to increased, if not universal, registration of copyright by photographers. We would appreciate the opportunity to discuss this proposal with the Copyright Office further.

[3] 37 C.F.R. §202.21.

CHALLENGES TO LICENSING AND OTHER MONETIZATION

To be sure, the greatest challenge to monetization is that the general public does not understand and respect the copyright protection afforded to photographers. The all-too-common reality is that people make unauthorized reproductions of professional photographs without a second thought. Consumers are equally likely to distribute unauthorized copies. This is especially true for wedding and portrait photographers, whose customers routinely misunderstand even basic distinctions in the law, such as the difference between ownership of a particular copy of a work and ownership of the copyright in the work. It is highly unlikely the photographer will ever know about most of the particular instances of infringement; they simply know that people do it as a matter of course.

Even an obligation for payment through some type of statutory system is unlikely to have a significant effect, as ordinary consumers will not know of such an obligation and the entity managing such a system would have no greater ability to learn of the infringing acts than the creators do today.

PPA remains highly skeptical of statutory licensing for three reasons. First, as just stated, we do not believe that compliance will improve with a statutory system; it will simply be a different aspect of the law that people don't know or ignore. Second, we believe that the loss of exclusive rights is a detriment to creators, who should continue to have the legal authority to control certain uses of their works. "Control" has been smeared as a dirty word by some, mostly those whose business draws income from others' creative works. To be clear, control does not mean opposition to new platforms and business models. It does mean that creators maintain the legal rights to insist they be partners in those new approaches, not victims of them.

The Copyright Office has recently proposed an extended collective license system in the

context of mass digitization. PPA appreciates the Copyright Office's efforts to help creators get paid for use of their works. We will join others in submitting a separate set of comments on that, but we note here that we do not believe such a system will succeed in generating the income due to creators. We recognize that the Copyright Office's proposal includes an opt-out. PPA has a fundamental concern with any proposal that requires creators to take affirmative steps simply to maintain their existing rights. A voluntary, opt-in system would be more appropriate.

A challenge that has been discussed in another context is the removal of rights management information, specifically metadata, from digital copies of photographs. Most photographers routinely apply metadata to their works, and most Internet platforms routinely strip that metadata right off, artificially creating apparent orphan works and undermining an avenue that might have educated users about the rights of the creator in the work. The common removal of metadata was even recently cited by a court as an element of its reasoning for why the Internet company in that case was not held accountable to the victims of horrendous crimes that were allegedly facilitated on the defendant's website.[4] If the Copyright Office can help convene discussions between photographers and key Internet companies with the goal of preserving metadata on digital photographs, that could go a long way towards improving licensing opportunities and reducing the orphan work issue.

MODERNIZING THE COPYRIGHT OFFICE

PPA would like to add that the improvements it seeks, including a small claims system and adjustments to the registration system, are not possible without a change in the structure of the Copyright Office. Specifically, the time has come for the Register of Copyrights to have the authority to run the office and administer the law. Quite simply, the Copyright Office's "customers" are operating in a fast-paced, competitive environment. We feel that reality mandates that the Office itself be given the opportunity

[4] *Doe v. Backpage.com, LLC*, 2015 U.S. Dist. Lexis 63889, 18 (D. MA. May 15, 2015)("The stripping of metadata from photographs is a standard practice among Internet service providers.).

and authority to become equally nimble. Correspondingly, it is time for the Copyright Office to be out from under the Library of Congress. PPA supports legislation to achieve that goal and appreciates the leadership shown by Representatives Marino and Chu in circulating their discussion draft.

CONCLUSION

PPA appreciates this opportunity to provide these comments. We commend the Copyright Office for its continued commitment to these important issues. PPA again notes its strong support and agreement with the comments filed by American Society of Media Photographers (ASMP), National Press Photographers Association (NPPA), Graphic Artists Guild (GAG), and Digital Media Licensing Association (DMLA). PPA is appreciative of the work of these associations in support of the photographic industry and other visual art professions. We hope that you find these comments helpful and we look forward to continuing to work with the Copyright Office and other stakeholders to improve the fairness and operation of the copyright system to preserve and promote the work of people who help preserve our most precious, personal memories for future generations.

Respectfully submitted,

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