TO: Maria Pallante, Register of the U.S. Copyright Office

FROM: Richard D. Kelly, Photographer, and Educator

This interest in photography and copyright has been parallel themes in my career; I have been practicing commercial photography since the mid-1980's working in Pennsylvania, Florida, and New York. I believe that artists are an important component to society. I do not subscribe to the starving artists ideal. I have learned about business strategy and developed programs designed to educate photographers and other creative. I have played an active role in the ASMP serving on the national board as well as chairing the board for two years. During that tenure, I worked to expand registration by creating programs that taught photographers to use the eCO system. Created a dialog called REGISTRATION COUNTS -conversations with the Copy Left organizations and worked behind the scenes with technology companies. I consider myself a progressive in the realm of copyright. My focus has been to promote free speech, creative expression, the celebration of creative works and better compensation for artists. I believe that technology and good laws can do this.

The issues facing photographers are much broader than copyright. However, The copyright laws do give us some central themes and tools for continuing to create and promote the art and science of photography.

I have been a student of copyright (and photography) since the last copyright update in 1976. I was a teenager learning photography at that time, and many of the photography publications wrote about the changes that the new copyright laws would bring to photography. These updates were needed and appreciated by the photography community.

There, was, of course, some disruption – to business as usual and photographers saw many of these newly acquired rights whittled away in contractual language and later during web 2.0 era in the terms of service that either broaden the end users right to photographers copyright or attempt to grab them all together. Many of these copyright equalizations have not been good for the professional photographer. The signing of the Berne Convention in 1989 lifted off some of the additional burdens facing photographers, that the Copyright Act of 1976 did not address, for example by no longer requiring the proper copyright notice, preventing works of photographs entering into the public domain. A high-stakes penalty on the author, and not the publisher, that failed to place the proper notice at the time of publication. The downside of Berne was that proper copyright notice – or attribution was no longer a must have in published works – creating a new problem additional orphaned works. There was clearly no anticipation that the digital revolution would have on photography, and the DMCA did little to benefit the photographer.

Digital capture, publishing and distribution of images have had such a positive impact on society at large, uniting our world with a universal language while creating an equally large negative disruption on professional creatives. I would like to highlight a few changes to copyright that maybe worth considering.

A. Attribution- at the very basis of copyright law, attribution should be required – with a penalty on the publisher or platform rather than the author, for non-compliance. Attribution in the form of linkages, Identifiers, or some other technology yet to be invented Attribution is at the core of why creators create. The public should have access to the author's credit of creative works at least the basic contact information. The benefits include building trust, for the public knowing the source, which is at the heart of a free press and free speech and compensation systems that allow for a vibrant and sustainable creative class.
B. All doctrines connected to the Copyright Act should require Attribution including Work Made for Hire, Fair Use, and Public Domain. I understand that Work for Hire is in itself a new author, but there is an argument that companies and organizations do not create photographs people do, and those creatives should connected to that work. As for Fair Use, The very essence of fair use should require both source and attribution. When works of the Government and works beyond their term of copyright entering the public domain, they to should have proper attribution and source links, for the same reason as fair use. Thereby eliminating part the Orphan Works problem and at least assisting in identifying legitimately orphaned works.
C. A publicly searchable online registry with attribution and linkages.
D. Term of Copyright connected to proper registration. The term of copyright, if registered, would be the maximum possible. If the work is not registered, the term would be the minimum, addressing the concerns for the burden of registration and a relief valve for those works that may not benefit from registration.
E. Clarify the Fair Use Doctrine with legislation. The conflict between circuit courts and the varying applications of Fair Use based on the opinion of an academic jurist (Level on Fair Use) leave too much interpretation to many unprepared judges.
F. Clarify the definitions of Published and Unpublished works.
G. Create an Alternative Dispute Resolution Tribunal, Arbitration or Small Claims option for Copyright infringements.

Summary:

A requirement for Attribution with a publicly searchable online image registry solves some many problems including Orphan Works, Innocent Infringement, reliable sources, and trust. It also adds value to social sharing platforms and may reduce the emotional toll on authors who have work that "goes viral." It creates a useful tool to locate authors potentially leading to both commercial and non-commercial licensing, thereby reducing infringement.

Clarifying Publication and Non-Published works will eliminate a burden that many authors have when registering and the fear of making a mistake that may impact their registration.

Creating an ADR or Small Claims Tribunal system will give some resolution to the many infringements that do not rise to the level of a federal case.

In the best possible world, we create a tracking or licensing system to compensate authors for digital uses. However, I will be happy just to bring the copyright act into the 21st century.