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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 KEN BROWAR,

12 Plaintiff,

13 vs.

14 PIXEL.COM, LLC., *et al.*,

15 Defendants.
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Case No. 2:24-cv-00772-RGK-PVC

**RESPONSE OF THE UNITED
STATES COPYRIGHT OFFICE TO
THE COURT'S REQUEST TO THE
REGISTER OF COPYRIGHTS
PURSUANT TO 17 U.S.C.
§ 411(b)(2)**

20 On January 28, 2025, pursuant to 17 U.S.C. § 411(b)(2), the Court requested
21 advice on the following question:

22 Would the Register of Copyrights have refused to register
23 Copyright Registration VA 2-034-616 if the Register had
24 known that Plaintiffs authorized dancers to upload copies
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1 of several of the photographs on social media for public
2 display prior to 2016?¹

3 The U.S. Copyright Office (“Copyright Office” or “Office”) submits the following
4 response.² Based on the legal standards and examining practices set forth below,
5 had the Office known prior to registration that certain photographs were published
6 prior to January 1, 2016, it would have refused registration for those photographs
7 as part of the group registration. The Office would have advised Plaintiffs to seek
8 separate registration for the excised works. The Office would have granted
9 registration of the remainder compliant photographs.

10 **BACKGROUND**

11 **I. Examination History**

12 A review of the records of the Copyright Office reveals that on September 7,
13 2016, the Office received an application to register a group of photographs titled
14 “The Art of Movement” (the “Works”). The application identified Ken Browar as
15 the author of the Works and Deborah Ory as the copyright claimant. It stated that
16 the Works were completed in 2016 and first published on January 1, 2016.³ The

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18 ¹ Req. to the Reg. of Copyrights Pursuant to 17 U.S.C. § 411(b)(2) at 3 (Jan. 28,
2025) (“Request”), ECF No. 57.

19 ² Requests under section 411(b) are directed to the Register of Copyrights as
20 director of the Copyright Office. 17 U.S.C. 411(b); *see id.* § 701. The Copyright
21 Office’s Office of Registration Policy and Practice “administers the U.S. copyright
22 registration system and advises the Register of Copyrights on questions of
23 registration policy and related regulations and interpretations of copyright law.”
37 C.F.R. § 203.3(e).

24 ³ In Plaintiffs’ initial application, they indicated that the first date of publication
25 was January 1, 2016. In follow-up correspondence with a registration examiner,
26 applicants clarified that the publication dates for the Works ranged from January
2016 to November 2016. Email from Deborah Ory to U.S. Copyright Office (Mar.

1 Office accepted Mr. Browar and Ms. Ory’s representations as true and accurate.
2 Therefore, on March 29, 2017, it registered the claim with an effective date of
3 registration (“EDR”)⁴ of September 7, 2016, and assigned registration number
4 VA 2-034-616 (the “Registration”).

5 **II. The Court’s Request**

6 Ken Browar and Deborah Ory (collectively, “Plaintiffs”) commenced this
7 action on January 29, 2024.⁵ Plaintiffs allege that Defendant Pixels.com, LLC
8 (“Pixels”) infringed their copyright in certain photographs of dancers included in
9 the Registration.

10 Pixels challenged the validity of the Registration, arguing that Plaintiff Ory
11 knowingly or with willful blindness submitted inaccurate publication information
12 to the Office. Pixels argued that Plaintiffs published the photographs at issue prior
13 to the 2016 date listed in the Registration by uploading them to social media sites
14 in 2014 and 2015.⁶ In the alternative, Pixels alleged publication occurred when
15 Plaintiffs distributed the photographs to the dancers “for their own separate
16 publications in 2014 and 2015.”⁷

17 On January 14, 2025, the Court found that while Plaintiffs’ earlier uploads
18 did not constitute publication, “Plaintiffs seemingly distributed copies to the
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20 28, 2017). Thus, the date of first publication was updated to January 1, 2016 in the
21 certificate of registration.

22 ⁴ The EDR is the date that the Office received a completed application, the correct
23 deposit copy, and the proper filing fee. 17 U.S.C. § 410(d).

24 ⁵ Compl. at 1 (Jan. 29, 2024), ECF No. 1.

25 ⁶ Def.’s Mem. and Points of Authority in Supp. of Pixels’ Mot. for Summ. J. at
26 6–10 (Dec. 10, 2024), ECF No. 40-1.

⁷ Def.’s Pixels’ Reply in Supp. of Mot. for Summ. J. at 2–3 (Dec. 30, 2014), ECF
No. 42.

dancers for their own public display or performance, thereby publishing the photographs” and potentially invalidating the Registration.⁸ Plaintiffs subsequently argued that merely providing “select” dancers “a limited right to display the photographs” does not constitute publication.⁹ Specifically, citing the Office’s guidance on distribution, Plaintiffs contended “[a]t most, [their] actions could be considered ‘limited’ publication” because “[i]t was mutually understood that Plaintiffs’ photographs of the dancers were only for the dancers to display.”¹⁰

The Court referred the matter to the Register, seeking advice on whether the Registration would have been refused if the Office had known that “Plaintiffs authorized dancers to upload copies of several of the photographs on social media for public display prior to 2016.”¹¹

ANALYSIS

I. Relevant Statutes, Regulations, and Agency Practice

An application for copyright registration must comply with the requirements of the Copyright Act set forth in 17 U.S.C. §§ 408(a), 409, and 410. Regulations governing applications for registration are codified in title 37 of the Code of Federal Regulations at 37 C.F.R. §§ 202.1 to 202.24. Further, the principles that

⁸ Order re: Def.’s Mot. for Summ. J. at 5 (Jan. 14, 2025), ECF No. 44; Request at 1.

⁹ Surreply in Supp. of Pls.’ Opp’n to Def. Pixels’ Mot. for Summ. J. at 2 (Jan. 21, 2025), ECF No. 54.

¹⁰ *Id.* at 2–3. Plaintiffs also cited an article in which an Office official reviewed scenarios and described when the Office would accept an applicant’s determination of publication. *What Makes an Image Published*, COPYRIGHT ALL., <https://copyrighthalliance.org/faqs/what-make-image-published-registration/> (last visited July 25, 2025).

¹¹ Request at 3.

1 govern how the Office examines registration applications are set out in the
2 *Compendium of U.S. Copyright Office Practices* (“*Compendium*”), an
3 administrative manual that instructs agency staff regarding their statutory and
4 regulatory duties and provides expert guidance to copyright applicants,
5 practitioners, scholars, courts, and members of the general public regarding Office
6 practices and related principles of law. The Office publishes periodic revisions of
7 *Compendium* to provide additional guidance where necessary and to reflect
8 changes in the law or Office practices; these revisions are made available for
9 public comment prior to finalization. Because Mr. Browar filed the registration
10 application in 2016, the governing principles the Office would have applied to
11 evaluate the applications are set forth in the version of *Compendium of U.S.*
12 *Copyright Office Practices, Third Edition* (“2014 *Compendium (Third)*”), that was
13 released in December 2014.¹² Any new or pending supplementary registration
14 applications are governed by the updated version of the *Compendium* released in
15 January 2021.¹³

19 ¹² U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES
20 (3d ed. 2014) (“2014 COMPENDIUM (THIRD)”), [https://www.copyright.gov/](https://www.copyright.gov/comp3/docs/compendium-12-22-14.pdf)
21 [comp3/docs/compendium-12-22-14.pdf](https://www.copyright.gov/comp3/docs/compendium-12-22-14.pdf). At the time the application was
22 examined, the regulation governing group registration for published photographs
23 was set forth in 37 C.F.R. § 202.3(b)(10), which was adopted in 2001 and later
24 amended in 2011. *See* Registration of Claims to Copyright, Group Registration of
25 Photographs, 66 Fed. Reg. 37142 (July 17, 2001); Registration of Claims of
26 Copyright, 76 Fed. Reg. 4072 (Jan. 24, 2011).

¹³ U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES
(3d ed. 2021) (“2021 COMPENDIUM (THIRD)”), [https://www.copyright.gov/](https://www.copyright.gov/comp3/docs/compendium.pdf)
[comp3/docs/compendium.pdf](https://www.copyright.gov/comp3/docs/compendium.pdf).

1 **A. Publication**

2 In pertinent part, the statutory requirements for copyright registration dictate
3 that, “if the work has been published,” an application for registration shall include
4 “the date and nation of its first publication.”¹⁴ The Copyright Act defines
5 “publication” as:

6 [T]he distribution of copies or phonorecords of a work to
7 the public by sale or other transfer of ownership, or by
8 rental, lease, or lending. The offering to distribute copies
9 or phonorecords to a group of persons for purposes of
10 further distribution, public performance, or public display,
11 constitutes publication.¹⁵

12 This provision identifies two types of publication: distribution and offers to
13 distribute. As the 2014 *Compendium (Third)* explains with regard to
14 “distribution,” “publication occurs when one or more copies or phonorecords are
15 distributed to a member of the public who is not subject to any express or implied
16 restrictions concerning the disclosure of the content of that work.”¹⁶ For example,
17 “[d]istributing copies of a motion picture through a retail service constitutes
18 publication of that work.”¹⁷

19 The Office does not consider a work to be published if it is merely displayed
20 or performed online.¹⁸ It does, however, consider a work to be published if it is

21 ¹⁴ 17 U.S.C. § 409(8).

22 ¹⁵ *Id.* § 101 (defining “publication”).

23 ¹⁶ 2014 COMPENDIUM (THIRD) § 1905.1; *see also* H.R. REP. NO. 94-1476, at 138
(1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5754.

24 ¹⁷ 2014 COMPENDIUM (THIRD) § 1905.1.

25 ¹⁸ 17 U.S.C. § 101 (defining “publication”) (“A public performance or display of a
26 work does not of itself constitute publication.”); *see* 2014 COMPENDIUM (THIRD)
§ 1008.3(C).

1 made available online and the copyright owner authorizes the end user to retain
2 copies.¹⁹

3 A critical element of publication is that the distribution of
4 copies or phonorecords to the public must be authorized
5 by the copyright owner. To be considered published, the
6 copyright owner must expressly or impliedly authorize
7 users to make retainable copies or phonorecords of the
work, whether by downloading, printing, or by other
means.²⁰

8 For instance, a work that is expressly authorized for download by members of the
9 public by including a “Download Now” button, is considered published.²¹

10 Additionally, if the website on which a work is posted contains an obvious notice,
11 including in the terms of service, indicating that a work may be reproduced or
12 retransmitted, the work is considered published if the copyright owner authorized
13 that distribution.²²

14 On the contrary, “a work may be considered unpublished if, in addition to
15 communicating a work to a definitely selected group and for a limited purpose, the
16 copyright owner imposed any express or implied restrictions concerning the
17 disclosure of the content of that work, such as placing a statement on the copies or
18 phonorecords indicating that distribution of the work is limited or restricted in
19 some way, such as ‘Confidential— these specifications are for internal office use
20 only.’”²³

22 ¹⁹ 2014 COMPENDIUM (THIRD) § 1008.3(B).

23 ²⁰ *Id.* § 1008.3(C).

24 ²¹ *Id.* § 1008.3(F).

25 ²² *Id.*

26 ²³ *Id.* at § 1905.1.

1 The second means of “publication” within the statutory definition is an
2 “offer[] to distribute” a work. Here, the mere “offering” of copies of a work to “a
3 group of persons” for “further distribution, public performance, or public display”
4 constitutes publication; distribution itself is not required.²⁴ For example, the 2014
5 *Compendium (Third)* advises that “the fact that a photographer offered a
6 photograph to multiple stock photo companies or websites for purposes of further
7 distribution or public display creates a reasonable inference that an offer to
8 distribute to a group of persons has been made and that publication has
9 occurred.”²⁵ By contrast, “[p]ublication does not occur when copies or
10 phonorecords are offered for any other purpose, such as offering them to a group of
11 persons for private use, private performance, or private display.”²⁶

12 The Office also considers a work to be published if the owner offers to
13 distribute it to multiple intermediaries for further online distribution, online public
14 performance, or online public display.²⁷ For example, the current *Compendium*
15 provides that published works include a sound recording that has been offered by
16 the copyright owner for distribution to multiple online streaming services or a
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20 ²⁴ 17 U.S.C. § 101 (defining “publication”); see 2 PAUL GOLDSTEIN, GOLDSTEIN ON
21 COPYRIGHT § 3.3.2 (3d ed. 2021).

22 ²⁵ 2014 COMPENDIUM (THIRD) § 1008.3(B).

23 ²⁶ *Id.* at § 1906.2.

24 ²⁷ *Id.* § 1008.3(B); see also H.R. REP. NO. 94–1476 at 138 (“On the other hand, the
25 definition also makes clear that, when copies or phonorecords are offered to a
26 group of wholesalers, broadcasters, motion picture theaters, etc., publication takes
place if the purpose is ‘further distribution, public performance, or public
display.’”).

1 photograph that has been offered by the copyright owner to multiple stock photo
2 companies for purposes of further distribution.²⁸

3 The offering of a work to a *single person* does not qualify as publication.²⁹
4 And offering a copy of a work to a group of persons is not enough: the offer must
5 also be made with the purpose of further distributing that work, publicly
6 performing that work, or publicly displaying that work.³⁰

7 **B. Group Registration of Published Photographs (“GRPPH”)**

8 The Copyright Act authorizes the Register to issue regulations permitting “a
9 single registration for a group of related works.”³¹ Pursuant to this authority,
10 Office regulations provide that a group of published photographs may be registered
11 with one application.³² Among other requirements, to use this registration option,
12 the photographs in the group must have been “published within the same calendar
13 year.”³³

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15 ²⁸ 2021 COMPENDIUM (THIRD) § 1008.3(B).

16 ²⁹ 17 U.S.C. § 101 (defining “publication”); 2014 COMPENDIUM (THIRD) § 1906.1.
17 Director of Registration Policy and Practices at the U.S. Copyright Office, Robert
18 Kasunic, provided examples of the above rule to the Copyright Alliance. *See*
19 *supra* note 10. However, as the Court noted, the statement is not binding and does
20 not seem to support Plaintiffs’ position. Request at 3.

21 ³⁰ *See NBC Subsidiary (KCNC-TV), Inc. v. Broad. Info. Servs., Inc.*, 717 F. Supp.
22 1449, 1452 (D. Colo. 1988) (“The offering . . . must be made to ‘a group of
23 persons *for the purposes of further distribution, public performance, or public*
24 *display*’. . . . Congress would have shortened the definition . . . had it not intended
25 to qualify the definition by requiring that the offering be made for one or more of
26 the specific purposes provided.” (internal citation omitted)).

³¹ 17 U.S.C. § 408(c)(1).

³² 37 C.F.R. § 202.3(b)(10) (reserved by Group Registration of Photographs, 83
Fed. Reg. 2542 (Jan. 18, 2018)).

³³ 2014 COMPENDIUM (THIRD) § 1116.1.

1 To register a group of published photographs, the applicant must provide
2 publication dates for each photograph in the group. “[I]f the applicant states that
3 the photographs were published over a period of two or more calendar years . . . ,
4 the registration specialist will communicate with the applicant.”³⁴ Any photograph
5 that does not satisfy the group registration requirements may be registered on an
6 individual basis with a separate application, filing fee, and deposit.³⁵

7 **THE OFFICE’S RESPONSE TO THE COURT**

8 Based on the foregoing statutory and regulatory standards and the Office’s
9 examining practices, the Office responds to the Court’s question as follows:

10 Had the Office been aware prior to registration that Plaintiffs authorized
11 dancers to upload copies of several photographs contained in the Registration to
12 social media for public display prior to 2016, it would not have registered those
13 photographs as part of the group.

14 As discussed above, “offering” copies of a work to “a group of persons” for
15 “further . . . public display” constitutes publication; actual distribution is not
16 required.³⁶ Therefore, publication occurred when Plaintiffs offered copies of the
17 photographs to a group of dancers to display on social media in 2014 and 2015.

18 In addition to the “offering,” publication may have also occurred when the
19 works were submitted to social media platforms at Plaintiffs’ direction, and posted
20 in accordance with the platforms’ terms of service if the terms indicated the
21 platforms were not subject to restrictions concerning the photographs. Because
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24 ³⁴ *Id.* § 1116.6(A)(4).

25 ³⁵ *Id.* § 1116.7.

26 ³⁶ 17 U.S.C. § 101 (defining “publication”).

1 “the distribution of copies . . .,” also constitutes publication³⁷ a work is published
2 “when one or more copies or phonorecords are distributed to a member of the
3 public who is not subject to any express or implied restrictions concerning the
4 disclosure of the content of that work.”³⁸ Indeed, when a copyright owner
5 authorizes a work to be submitted to a third-party platform, and the terms of
6 service for use of that platform indicate that the platform “is not subject to any
7 express or implied restrictions concerning the disclosure of the content of that
8 work,” the authorized distribution of that work constitutes publication under the
9 Act.³⁹

10 Thus, if the Office had known that certain photographs submitted with the
11 group application were published prior to 2016 with Plaintiffs’ authorization, it
12 would not have registered those previously published photographs as part of the
13 group. Because the group registration option for published photographs is limited
14 to photographs published within one calendar year, photographs published outside
15 of the calendar year identified in the application would not have been permitted to
16 be included in the group. The Office would have corresponded with the applicant
17 to amend the application. The applicant would have been permitted to submit a
18 separate application for the photographs that did not satisfy the calendar-year
19 requirement for GRPPH. This amendment would not have affected the validity of
20 the registration for the photographs published within the same calendar year. If the
21 applicant declined to amend the application, however, the Office would have
22 refused the entire registration.

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24 ³⁷ *Id.*

25 ³⁸ 2014 COMPENDIUM (THIRD) § 1905.1.

26 ³⁹ *Id.*

CONCLUSION

After review of the available facts in this action and application of the relevant law, regulations, and the Office's practices, the Office hereby advises the Court that had it been aware, prior to registration, that some of the photographs were published prior to January 1, 2016, it would have refused registration for those photographs and permitted the applicant to submit an application to register them separately.

Dated: July 25, 2025