



September 15, 2014

Maria A. Pallante  
Register of Copyrights  
U.S. Copyright Office  
101 Independence Ave., SE  
Washington, DC 20559-6000

**Re: The Right of Making Available: Response to Notice of Inquiry (79 F.R. 10571) (Docket No. 2014-2)**

This response is provided in behalf of American Photograph Artists, Inc., (“APA”), to the July 15, 2014 Copyright Office Notice of Inquiry regarding the “making available right.” APA (<http://www.apanational.com>) is a leading national organization run by and for professional photographers. With its culture that promotes a spirit of mutual cooperation, sharing and support, the APA offers outstanding benefits, educational programs and essential business resources to help its members achieve their professional and artistic goals. Recognized for its broad industry reach, the APA continues to expand benefits for its members and works to champion the rights of photographers and image-makers worldwide. The APA has a core value of advocacy for its members, as well as for the benefit of all photographers.

APA is interested in protecting the rights of their members in their intellectual property. This includes the protection of its members' rights to control the circumstances and terms pursuant to which the work of their members is made available to the public. This includes the protection of their members' rights as required by the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (“WIPO Treaties”). And it includes the protection of their members' rights under Title 17 of the United States Code, Section 106. APA is especially concerned with the preservation of these rights in the digital space. Thus, APA has been an active advocate of the rights of photographers and visual artists in connection with the exploitation of their work over the Internet and in digital media.

Title 17 expressly vests in authors the exclusive *right to authorize* others to reproduce and display their works. It provides in pertinent part:

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do *and to authorize any* of the following:



- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

APA believes that this section must be read consistently with the WIPO Treaties to protect the interests of Authors against others making their work available on the Internet. Specifically it must be read to preclude the usurpation of Authors' rights to authorize others to display their work; including authorizations which are effected by technological means of enabling displays both with and without direct copying. This would be the case where, for example, an Internet web site finds a means to permit the display of the work through technological means, in effect authorizing the display without the website itself simultaneously displaying and reproducing the work. Unfortunately, courts have failed to vigorously enforce this protection. See for example, *Perfect 10, Inc. v. Amazon*, 508 F.3d 1146, 1160 (9th Cir. 2007). *Perfect 10, Inc. v. Google, Inc.*, 508 F.3d 1146, 1160 (9th Cir. 2007) *Flava Works v. Gunter*, 689 F.3d 754, 758 (7th Cir. 2012),

The purpose of the copyright law is to provide Authors with the economic incentive to produce works, by securing to them the right to exploit their work. In the Copyright Revision Act of 1976, and prior versions of the law, this was done through copyright legislation that permitted Authors, among other rights, the right to make and to distribute copies. There can be little question that if Congress had then been facing today's technological advances, the statutory language that was adopted to protect the Author's control over the means by which their works were made publicly available would have clearly addressed, and would have precluded, the evasion of the Author's rights through the technological means now used to authorize the display of their work. That not being the case, courts, commentators, educators, and legislators have tackled the question of how to apply the compensation principles inherent in the copyright law, in the digital space, and in an era and economy that relies upon electronic transmissions. Unfortunately the focus has been



largely misplaced, turning on questions about whether or not there the Internet displays involve the making of a copy, whether the copy must be a material object, whether the description of a copy or material object fits the electronic form in which a work resides, and whether the transmission involves a distribution.

APA supports a legislative revision to the Copyright Act that makes clear that Authors' rights include the exclusive right to permit or to enable digital displays or transmission of their work through technological means, not merely the right to directly reproduce and directly display a work. Additionally, APA strongly supports the adoption of a statutory license scheme for secondary uses of visual art in the digital space, and for the digital transmission of work on the Internet. The purpose of the statutory license would be to properly and fairly address the compensation due to photographers and visual artists for the use of their work in the digital space. APA strongly urges that the "making available right" be addressed in the context of statutory licensing legislation and that such legislation provide for compensation to Authors when the "making available" right is being exploited.

Legal Counsel to  
American Photographic Artists, Inc.

James Lorin Silverberg, Esq.  
The Intellectual Property Group, P.C.  
1050 30th Street NW  
Washington, DC 20007  
Tel 202.466.2787 TF 888.749.2787  
[www.Artlaws.com](http://www.Artlaws.com)