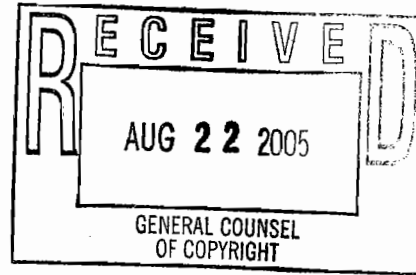


APA

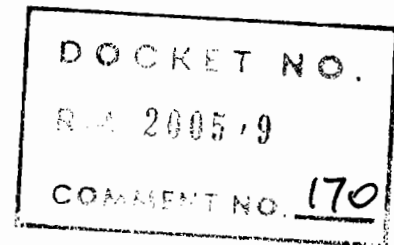
ADVERTISING  
PHOTOGRAPHERS  
OF AMERICA



August 22, 2005

DELIVERED BY HAND

Office of the General Counsel  
U.S. Copyright Office  
James Madison Memorial Building  
Room LM-401  
101 Independence Avenue, SE  
Washington, DC 20559-6000



Dear Mr. David Carson,

I am pleased to submit the attached comments of the Advertising Photographers of America in response to the Copyright Office's request for comments on pre-registration. Please feel free to contact me if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "George Fulton".

George Fulton  
President  
Advertising Photographers of America  
PO Box 250  
White Plains, New York 10605  
Phone: (800) 272-6264  
Fax 888.889.7190

Attachment

**COMMENT OF ADVERTISING PHOTOGRAPHERS OF AMERICA**  
**In Response to a Request for Comments**  
**70 Federal Register/Vol. 70, No. 140 (July 22, 2005)**

The Advertising Photographers of America (“APA”) submits this comment in response to the Copyright Office’s request for comments on pre-registration in volume 70 number 140, July 22, 2005. APA is the leading professional advertising photographer’s organization as well as serving a broad range of other professional photographers. APA’s goal is to establish, endorse, and promote professional practices, standards, and ethics in the photographic and advertising community. We seek to mentor, motivate, educate, and inspire in the pursuit of excellence. Our aim is to champion and speak in one common voice for advertising photographers and image makers to the advertising industry in the United States and the World.

Photographers continue to be at risk of infringement of copyrightable works, and APA seeks to have photographic works included as class that should be protected from infringement prior to their authorized commercial distribution, also defined as pre-release infringement. The eligibility of photographs for pre-registration is critical to fully and fairly protect photographers from infringements of their work.

Photographs are a mainstay of commercially distributed works, from newspapers to editorial magazines, product packaging, and advertising in all forms of printed and electronic material, as well as sales and marketing materials for products. For photographs produced on news deadlines the risk will be somewhat less than the longer lead times that exist in advertising and marketing photography. Yet, as we outline below, the risk in the editorial market still exists. For advertising and marketing photography, the production of photography for these uses must occur significantly prior to distribution and the announcement of products, and the risk as the photographs are passed from hand to hand in producing the materials is enormous not only in the loss to the photographer, but also for the commercial entity by whom the photographer was engaged.

Some sources of risk include:

A) the delivery via e-mail, an unsecured method, of photographs susceptible to capture in transit to the end recipient;

B) since photographers must often deliver all film or digital photographs to a client immediately following a shoot, copyright registration cannot occur prior to delivery to the client, and it is not until after a client’s editing, or often after publication, that the photographs are returned to the photographer, and it has been in many of these cases that infringements have occurred. In some instances, infringers have actually held film “hostage”, refusing to return them to photographers so as to prevent registration. As the result of this loophole, the Copyright Office has had many requests from photographers seeking to register their works without submitting a deposit of such works, and it is our understanding that the

Copyright Office has routinely rejected these requests, leaving photographers at the mercy of infringers, without hope or securing the enhanced protections available to other copyright owners upon registering their work. These same requests serve as a poignant example of just how photographers would benefit from being included as an acceptable pre-registration class, and the Copyright office may confirm these past requests by reviewing your records of requests for deposit waivers involving photography;

B) leaked photographs by client's employees outside of the scope of their job description;

C) leaked photographs by client's employees at the direction of the end client, to create buzz and excitement prior to a product announcement;

D) the unauthorized collection of printed materials at print shops and press houses by employees either to serve a competitor, or media outlets;

E) because of the need for pre-release materials to be in place at end user and other outlets in geographically disparate locations, materials containing photographs can be disseminated days before their authorized release, causing significant economic hardship to the photographer's client, and, in instances where a photographer will gain economically based upon a percentage of sales (i.e. limited edition art sales) to the photographer as well; and lastly

F) access by hackers into client's computer systems to gain a competitive advantage or to serve the ever-growing speculation industry of online newsletters and "blogs".

Photographs meet the conditions that would entitle them to pre-registration protection.

First Condition: *The work must be unpublished.*

Unlike a live audio or video broadcast, where the work is actually being commercially distributed as it is being created, photographs oftentimes travel a lengthy path from creation to commercial distribution and the delay opens up the possibility of infringement prior to commercial distribution.

Second Condition: *A work must be in the process of being prepared for commercial distribution.*

Photographs often undergo a lengthy process from initial creation to final image. One frequent path for a photograph to travel, in the instance of the production of an advertising image for a "business to consumer" company would be:

- 1) Creation of photograph in camera
- 2) Delivery of unprocessed film to processing lab, to the lab via a courier or overnight delivery service then delivery to client (whether advertising agency, design house, publisher, public relations or marketing firm, or direct to end client's creative department)
- 3) Client reviews photographs and scans in selected photographs for review
- 4) Client selects the final images, and delivers via courier, overnight service, internal company mail, or via email
- 5) Company passes images around to an unknown number of employees before company approves photographs for its advertising
- 6) The final photograph is often out-sourced for final retouching
- 7) Client finishes production and photograph is sent to printing service for reproduction
- 8) Printed materials are shipped around the country to retail outlets, where the material is not to be opened until a specific date printed on the outside of the cartons
- 9) On the date of the product announcement, the printed materials are now authorized to be distributed to the general public
- 10) The original film is finally returned to the photographer where it can now be registered.

The length of time between beginning and end, while quite short in the instance of breaking news photographs, can often be months for advertising as outlined above and other commercial work where there are not only multiple layers of approval within the creative process, but also reviews and approvals by corporate legal departments and, finally, management.

As it appears that the initial impetus behind the change in law was made in part by a push by the motion picture industry, there can become significant confusion whereby an infringing party takes a single "picture" from the "motion picture" and infringes the work. Since the infringing party is not infringing the "motion picture" but only a single still photograph, confusion could occur. Thus, there is a further argument that photographs should be included within the class of works eligible for pre-registration protection. APA submits that the works of a still photographer on the set of a motion picture production, whose responsibility is to capture a still image as close as possible to the image being produced by the motion picture camera, for the purposes of future promotion of the movie should be eligible for protection afforded the motion picture.

Photographs meet the two threshold requirements statutorily required to define the work as being prepared for commercial distribution.

First Statutory Requirement: *Preparation of the work must have commenced.*

Photographs are produced and have been created before they enter the stage where an infringement can occur en route to commercial distribution. They meet the

statutory definition from initial creation and at every step along the way to final commercial distribution as copyrightable material because the photographic photographs are fixed in a tangible medium of expression.

Second Statutory Requirement: *A contract must have been entered into for distribution of the work.*

Commercial photographers are principally engaged in the licensing of rights to their clients to distribute their work, and do not engage in production works for commercial distribution without a contract that stipulates what the fees are, and what the distribution rights for the works to be created will be. While some photographers may engage in verbal contracts most photographers enter into written contracts which specifically outline the extent of commercial distribution and the allowable timeframe for same. In both cases, there is an expressed intent for the photographs to be commercially distributed, and as such meet the requirement for a contract for distribution.

Question as to works by authors or performers who have had a track record of success or have had their works released for commercial distribution: Should works by these authors be eligible for pre-registration protection?

*Response:*

APA believes that authors who have previously registered works with the Copyright Office, or who have been engaged in the production of commercially distributed works in the past year, should be considered eligible for pre-registration protection.

In response to the request by the Copyright Office for examples of pre-release infringements, a notable example exists in the news within the past week. Vanity Fair, set to release a sensational story about the split between Hollywood superstar couple Brad Pitt and Jennifer Aniston, had an entire copy of their magazine in the hands of an infringer who then sought – and did – profit to the tune of thousands of dollars by the illegal distribution of the photographs and story prior to it's authorized distribution date. Pre-registration would have given the copyright holder enforcement remedies and protection they may not have otherwise had.

Prior examples include:

- 1) The unauthorized pre-release of photographs of the Microsoft Xbox 360 on or about April 22, 2005. The photographs were illegally leaked and were pre-registration available, both the photographer and Microsoft could have enforcement solutions and protection they may not have otherwise have had.
- 2) The unauthorized pre-release of a photograph on or about September 29, 2004, of a not-yet announced personal digital assistant – the PalmOne Tungsten T5. The photograph was published online on Amazon.com prior to the product's

announcement, and prior to authorized public commercial distribution. Pre-registration would have given the copyright holder enforcement rights and protections they may not have otherwise had.

3) The unauthorized publication by The Nation on or about February 9, 2004 of still photographs produced on the set of the Oliver Stone movie Alexander, prior to the motion picture's authorized release. Pre-registration would have given the copyright holder enforcement solutions and protection they may not have otherwise had.

These recent examples of infringement illustrate the increased value of photographs of celebrities and commercial products and the risk of theft prior to their authorized release date. Including photographs in the classes of material which may be protected under pre-registration, the Copyright Office would be protecting the commercial interests of copyright holders.

The APA recognizes that in undertaking to define which works may be allowed within the scope of pre-registration, the Copyright Office must be cautious in taking measures which are also consistent with obligations to the international community under the Berne Convention, as well as the World Trade Organization's agreements regarding the rights of intellectual property rights holders worldwide, as well as other international trade agreements. While options for the Copyright Office may be limited by these obligations to the international community, the APA does not believe that those obligations should preclude the consideration of the necessary steps to protect photographs, along with motion picture and sound recordings, and the inclusion of photographs as a protected class eligible for pre-registration is critical.

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