



American Society of Media Photographers

Online Submission
May 30, 2019

The Hon. Karyn A. Temple
Register of Copyrights
U.S. Copyright Office
1010 Independence Ave., SE
Washington, DC 20559-6000

*Re: Draft of the Compendium of U.S. Copyright Practices, Third Edition (Compendium Draft)
released by the U.S. Copyright Office on March 15, 2019 {Docket No. 2019-3}*

COMMENTS OF AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS

The American Society of Media Photographers (ASMP) appreciates the invitation from the U.S. Copyright Office to respond to the revised draft of the Compendium of U.S. Copyright Practices, Third Edition (Compendium draft) released by the U.S. Copyright Office on March 15, 2019.

ASMP is a trade association made up of nearly 5000 members who work as independent commercial photographers and small business owners, producing images intended for publication in all forms of media. Our goal as a trade association is to advocate for the interests of our members, including advocacy, legal support, and education intended to facilitate career success. Our advocacy focuses a great deal on copyright and the use of the copyright system as a means to protect intellectual property. As an organization, we belong to the Copyright Alliance and work closely together to effect necessary changes to the copyright system and management of the U.S. Copyright Office. We believe strongly in engaging to develop the most robust system possible so that individual creators have the ability to continue doing work that contributes beneficially to the public good and to the growth and prosperity of creative output as a sector of the U.S. economy.

As a mechanism to provide guidance to our members about the Office and the system itself, along with being a roadmap for U.S. Copyright Office staff, the Compendium serves a vital function. We understand the challenges of maintaining the information contained in the Compendium in a clear, up-to-date fashion, and we appreciate the ongoing effort to do so. We see the request for comments as a clear signal of the intention to communicate transparently

about changes being contemplated and to ask for input to help sharpen the document's focus for the end user. It is helpful as an extension of similarly intended webinars designed to inform the public about the USCO's modernization plans.

We join in the comments from other related groups such as the Copyright Alliance about various concerns with the Compendium draft. We also specifically highlight several issues regarding the Compendium draft that are of special concern to our members, as discussed below.

Refusal of Applications without Explanation or Opportunity to Correct.

As we draft our response, we feel compelled to report on disturbing complaints we are currently receiving from our members regarding the application process. In particular, they are complaining about having their applications refused after months of waiting for adjudication of submissions, with the refusals resulting in lost time and a forfeiture of filing fees. These refusals are coming at a time when the costs of registration act already as a barrier to participation for many members who operate their businesses on very tight margins. Instead of providing information that enables photographers with registration mistakes to fix those mistakes, their applications are being refused and terminated without explanation, thus doubling the cost of registration potentially, and leading to delays in the ability to sue for infringements.

We are extremely troubled that the proposed Compendium revisions broadly seek to formalize this trend toward the summary denial of a broad range of applications without any listing of existing defects or any opportunity to correct such defects within a reasonable time frame. In some chapters, the draft Compendium would give examiners broad authority to deny applications without any explanation (See e.g. chapters 603.2 (C), 625.1), and in other chapters, would *require* denial without explanation. See e.g. 1105.3 (group registrations).

The change to handling of group registrations (such as for group registration of photographs) is especially troubling for many photographers in particular. Under the current Compendium guidelines, a registration specialist has discretion as to how strictly to apply registration requirements. When requirements are not met, the specialist may communicate with the applicant, explain why the works cannot be registered as a group, and explain how the claim may be amended. The registration specialist is thus authorized and even encouraged to work with the applicant to get a flawed application fixed and the works registered correctly.

The Compendium revisions, however, would force specialists to strictly apply group registration requirements and *require* refusal of the claim, without communicating with the applicant about the problems and how the claim can be amended. This language sends a clear message to registration specialists that registrations are to be discouraged and would shift their role from customer service representatives who work with applicants to get new works registered to merciless gatekeepers who simply deny applications without explanation.

Any such movement to a strict denial of applications without explanation and opportunity to correct problems is antithetical to the U.S. Copyright Office mission of encouraging the registration of creative works and helping ensure all such works are properly registered and publicly available. Regrettably, the new language will have the opposite effect. As more photographers and artists have their applications rejected without explanation, frustrations will rise and word will get out about how unfair and unforgiving the registration process is in actual practice. This will only drive more photographers and other artists away from registering their works.

The proposed changes cause one to wonder why this profound change in Office practice is being sought by the Copyright Office. We also hate to think that the removal of such assistance is being done as a mechanism to reduce application pendency times. The Copyright Office should make the registration process more efficient and effective so that registration numbers increase even as timeliness improves. Creating a transparent registration process, with reliable, available explanations of process requirements would go a long way in enabling the successful completion of timely registrations and a likely increase in the number of creators seeking to use the system to register their works. As important as pendency time reduction is as an outcome, it should not trump the other factors we are noting as goals for the registration process.

We broadly believe that (1) effective and timely assistance should be available to all applicants—especially those who may be new to the process or in need of guidance about specific aspects of the application process, (2) applicants with flawed applications should be informed as to the specific nature of the defects, and (3) applicants should have a reasonable amount of time in which to correct any curable defects before the complete denial of their application.

Published/Unpublished Distinctions

As we have repeatedly stressed in prior Comments, photographers are continually vexed by what photographic works should be categorized as “published” or “unpublished” for registration purposes. For example, the Coalition of Visual Artists listed a long list of situations that continue to confuse photographers and artists. *See Coalition of Visual Artists – Comments in Response to USCO NOI re Registration Modernization*, at 38 and Appendix C (Submitted January 15, 2019).

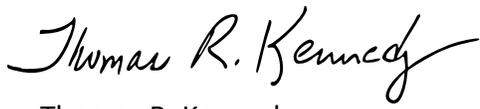
It is our understanding from prior conversations with the Copyright Office that the Office hopes to develop much more helpful guidelines as to when photographic and other works are considered “published.” We note that the draft Compendium, however, adds no new examples or guidance as to when various photographic works are considered “published” for registration purposes. Perhaps the plan is to do so through later updates, such as its Circulars, online FAQs and help buttons, etc. Regardless, we would like to see some clarification as to the Copyright Office’s plans with regard to issuing further guidance about publication criteria.

Fourth Estate v. Wall Street

Finally, we continue to see the ruling in the *Fourth Estate v. Wall-Street.com* as one that presents concerns to our members. Recognizing that a new Compendium must take a note of the ruling and its impact on future USCO registration activity, we'd respectfully ask for the opportunity to review and comment before those revisions go into effect.

We appreciate this opportunity to offer comments. Please let us know if we can provide any additional inputs or answer any questions you might have regarding our submission.

Respectfully Submitted,

A handwritten signature in black ink that reads "Thomas R. Kennedy". The signature is written in a cursive style with a long, sweeping tail on the letter "y".

Thomas R. Kennedy
Executive Director
American Society of Media Photographers