

Testimony of  
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on behalf of  
PLUS Coalition  
American Photographic Artists  
Jeff Sedlik Photography

for the Hearing  
*The U.S. Copyright Office: Customers, Communities, and Modernization Efforts*

before the  
Committee on House Administration

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I respectfully submit this written testimony for the record in the Committee on House Administration's hearing titled *The U.S. Copyright Office: Customers, Communities, and Modernization Efforts*.

I have been a professional photographer and filmmaker for 39 years, and am the president of the PLUS Coalition ([www.PLUS.org](http://www.PLUS.org)), a global non-profit organization in which diverse stakeholders from 140 countries are collaborating to develop a global registry for the identification of visual works. I previously served as president of the American Photographic Artists ([www.APAnational.org](http://www.APAnational.org)), a non-profit organization on a mission to advocate, educate, and elevate the professional photographic community. I submit my comments on behalf of PLUS Coalition, American Photographic Artists, and Jeff Sedlik Photography.

We appreciate the Committee's ongoing diligence and oversight focusing on the modernization efforts of the Copyright Office. We commend the Copyright Office for many years of steadfast dedication to supporting the success of creators, copyright owners, and the public in benefiting from creative works. We purposefully limit our testimony to a small but important subset of the Office's admirable efforts, for which we request the Committee's attention and action. Below we provide specific, constructive, achievable suggestions for modernization of the copyright registration system for visual artworks, none of which require revision to the statute.

#### **A. Application Programming Interfaces**

An Application Programming Interface (API) can allow certified, approved third-party applications to securely communicate with the copyright registration system, for purposes including submitting registration applications and searching Copyright Office records, in compliance with rules established by the Office. By allowing software companies to integrate copyright registration features in applications commonly used by creators and copyright owners to create and manage protected works from within their professional workflows, the Office would make registration more accessible to (and feasible for) creators and copyright owners. Competition in the private sector will drive rapid development of enhanced registration software solutions at no cost to the Library, while allowing the Office to control access and to ensure compliance with protocol established by the Office.

We first met with Copyright Office leadership to emphasize the importance of Application Programming Interfaces (API) twenty years ago, when the Office was in the early stages of planning for the development of the Electronic Copyright Office (eCO),

their first online registration system, under a Business Process Re-engineering project. The Office did not include APIs in eCO when launched in 2008, and never developed APIs for eCO.

In the ensuing 16 years, in dozens of meetings, hearings, NOI responses, roundtables and at every possible opportunity, representatives of the visual arts community and others have continued to emphasize the importance of APIs to the success of the Office's online registration system. For at least the last six years, throughout the development of the new registration system, these stakeholder groups have requested that the Office adopt an "API first" development plan, designing the APIs at the outset, instead of later developing APIs as an additional layer in a completed system, which is an unnecessarily expensive and time consuming endeavor.

The Office responded with enthusiasm to each such request, acknowledging the importance of APIs. But in developing the new registration system, the Office did not adopt an API-first development plan, and to our knowledge, has yet to design or develop APIs for the new registration system.

The Committee should ensure that the Office places appropriate emphasis on the development and launch of APIs, and provides the Committee with preliminary API specifications and an API development timeline.

#### **B. Registration of Greater than 750 Visual Works on a Single Group Registration Application**

Photographers and other visual artists are high volume creators, and face unique challenges when attempting to register their works. A photographer may create thousands of works in a single day. In 2018, the Office revised the regulations to limit group registrations of photographs to a quantity of 750 works. The regulations previously placed no limit on the quantity of works per registration, allowing photographers to submit all photographs created in one or more photo sessions on a single application, for a single registration fee.

By limiting the quantity to 750 works, the Office forces creators to submit multiple registrations for each session, and to pay a separate registration fee for each. For example, a photographer who creates and licenses 3000 photographs in a session in exchange for a fee of \$200 received from their client would be required to complete at

least 4 separate registrations, and pay \$220 in registration fees (\$55 per registration), then dedicate 3-5 hours to completing and submitting those multiple registrations, suffering both a financial loss on the project and a significant lost opportunity cost. The 750 quantity limitation imposed by the Office in 2018 has made registration impossible for many visual artists, and has discouraged others from registering their works.

In meetings, hearings, NOI responses, roundtables and at every possible opportunity, representatives of the visual arts community and others have asked the Copyright Office to modernize the regulations to allow registrants to submit any quantity of works on a single registration, and to implement a tiered pricing structure based on the quantity of works registered. In response, the Office has recommended that creators select a subset of their works for registration. This recommendation ignores real-world creative workflows, in which photographers provide clients with online access to all works created in a session, often in real time, while the works are being created. Creators are thus unable to adequately protect their works by registering only a selected subset of 750 works.

The Committee should encourage the Office to (1) allow creators to include any number of works on a single group registration (as was successful under the previous regulations); and (2) apply a tiered pricing system based on the quantity of photographs submitted, with nominal additional fees applied to cover the additional costs incurred by the Office in examining larger quantities of works.

### **C. Allow Illustrators and Graphic Artists to Register Reasonable Quantities of Works**

The Office recently launched a new registration form permitting illustrators and graphic artists to register up to ten works on a single registration application. Many illustrators and graphic artists create large quantities of works (dozens or hundreds per day), or have large archives of thousands of unregistered works. The limitation of 10 works is both unreasonable and unworkable for many illustrators and graphic artists, who cannot afford to separately register their works in groups of ten, paying a separate registration fee for each group, and suffering the lost opportunity cost of the time required to complete and submit separate registrations. This limitation places an undue burden on creators.

We request that the Committee encourage the Copyright Office to exercise its statutory authority to allow illustrators and graphic artists to register the same quantities of works allowed for groups of photographs.

**D. Registration of Unpublished and Published Works on a Single Group Registration Application.**

As discussed above, photographers and other visual artists are high volume creators, and face unique challenges when attempting to register their works. A photographer may create numerous works in a single session. Typically, only a small subset of these works is initially published by the photographer or their clients. The Copyright Office forces these photographers to submit one registration for the published works, and a separate registration for the unpublished works, paying two registration fees, and unnecessarily dedicating the substantial additional time required to complete and submit two registrations. Many creators do not register their works due to the cost and time requirements of separately registering their published and unpublished works.

There is no statutory basis for the separate registration of published and unpublished works. The statute only requires that certain information be provided by the registrant for unpublished and published works. For example, for published works, the registrant must provide the date and nation of first publication. The Office should allow registrants to provide information for published and unpublished works submitted on a single registration application, satisfying all statutory requirements. This information, provided on a single registration certificate, will ensure a clear and complete public record, and in the event of litigation, will allow the courts to make necessary determinations in the same manner as allowed by separately registered published and unpublished works.

The regulation requiring separate registration of published and unpublished works is a legacy issue, originating from the days of paper registrations, primarily to allow for organized filing of those paper documents. With online registrations, and with registration data stored in electronic databases, there are no such organizational concerns, and no justification for forcing creators to separately register their unpublished and published works.

In dozens of meetings, hearings, NOI responses, roundtables and at every possible opportunity, over a span of at least 16 years, representatives of the visual arts community and others have asked that the Copyright Office modernize the regulations to

allow registrants to submit published and unpublished visual works together on a single group registration application. In response, the Office has recommended that creators register their works before publication. This recommendation ignores real-world creative workflows, in which some but not all works from a photo session are published within days, hours, or even immediately upon fixation.

The Committee should ensure that the Office takes necessary action to revise the regulations, allowing creators to register their unpublished and published works together, on a single registration application form, in the new registration system currently under development.

#### **E. Registration Fee Reductions for Small Entities**

Many creators and copyright owners are unable to register their works, primarily due to the cost of registration.

We request that the Committee encourage the Copyright Office to adopt a pricing policy similar to USPTO's special reduced pricing for qualified small entities otherwise unable to afford the benefits of registration.

#### **F. The New Registration System Must Not Require that Applicants Organize Works by the Month of First Publication**

The current regulations require that photographers must organize and list their works by the month of first publication when submitting multiple works in a group registration of published photographs. As a result, a registrant may spend 3 to 4 hours (or more) completing a single registration of 750 works published in various months. The labor and lost opportunity cost required by this requirement places a significant, unnecessary burden on registrants. While the statute requires that registrants provide the date of first publication for each work, there is no statutory requirement for organizing, grouping, or listing the works by month of first publication.

We request that the Committee encourage the Copyright Office to allow registrants to submit group registrations of published photographs without organizing the works into groups by month of first publication.

**G. The Office Should Not Require Registrants to Submit Copies of Works As Published with Copyright Notice**

The Office has rejected copyright registration applications for works first published prior to March 1, 1989, when applicants are unable to provide the Office with a copy of the work as published with a copyright notice. This requirement is unreasonable, illogical, poses a significant hardship to creators, prevents some creators from protecting their works, and should be stopped.

On March 1, 1989, the United States enacted the Berne Convention Implementation Act of 1988. Prior to that date, a work published without a valid copyright notice fell into the public domain. When registrants indicate a date of first publication prior to March 1, 1989, Office examiners have routinely required that registrants provide one copy of the work as published with a valid copyright notice. This requirement defies logic, as a work may have been published on many different occasions prior to March 1, 1989, and as a single instance of publication of a work with a valid copyright notice does not establish that the work was *never* published before March 1, 1989 *without* a valid copyright notice.

Many artists never receive copies of their works as published. Even when artists receive a copy of a published work, that copy can be lost or discarded over the decades, when an artist relocates or periodically purges documents.

Given that the existence of a copy of a single instance of publication of a work with notice does not prove that the work was never published without notice, there is no reasonable justification for the Office's practice of rejecting registrations when a registrant is unable to produce a copy of the work as published with notice.

We request that the Committee encourage the Copyright Office to revise their policy of rejecting registration applications for works first published prior to March 1, 1989, when the registrant is unable to provide a copy of the work as published with notice.

**H. The Register Should Expand "Pre-Registration" Categories to Include Visual Works Made for Any Purpose**

Pre-registration is a service offered by the Copyright Office, intended for works that have had a history of pre-release infringement. Photographs have a long history of

pre-release infringement, in particular in the age of digital photography, in which photographers often provide clients with access to copies of photographs in real time, during a photo session. Thus, photographers' works are vulnerable to infringement upon creation – before registration and before publication. While the statute provides protection (in the form of enhanced remedies) of published works if unregistered at the time of infringement but registered within three months of first publication, there is no such statutory protection for unpublished works infringed prior to the effective date of registration.

The Register has the statutory authority to resolve this critical issue. The Register determines the categories of works that may be “pre-registered” with the Office without submission of deposit copies, and without examination.

While all photographers are vulnerable to infringement of their unpublished, unregistered works immediately upon creation, the Register prohibits pre-registration of any photograph that is not an “advertising or marketing photograph.” There is no basis for this prohibition, as all visual artworks are vulnerable to infringement immediately upon creation, before publication, and before creators have an adequate opportunity to register their works.

We request that the Committee encourage the Copyright Office to exercise its statutory authority to allow any photograph, illustration, or graphic artwork to be pre-registered at a fee affordable by small entities.

**I. Retain and Preserve Electronic Deposit Copies for the Full Term of Copyright, without Additional Fees.**

The Register has the statutory authority to destroy or otherwise dispose of deposit copies of published works registered by copyright owners, after a period considered “practicable and desirable” by the Register.

This is problematic for many copyright owners – in particular, for works of visual art. In the event of an infringement of a registered visual work for which the Copyright Office has disposed of the deposit copy, the plaintiff/copyright owner is left unable to provide visual proof that a particular work was registered, and the defendant is unable to confirm that a particular work was registered.



In response to concerns expressed by the creative community, the Copyright Office has advised that the Register has chosen to preserve electronic deposit copies of published works indefinitely. However, the Register has the authority to dispose of those deposit copies at any time. Copyright owners are left with a Hobson's choice: risk the loss of their deposit copies (and their copyright protections) at the whim of the Register, without advance notice, or pay the Office a \$220 "retention fee" to preserve each deposit copy. Few creators can afford or justify spending thousands of dollars in retention fees to preserve their thousands of deposit copies.

We request that the Committee encourage the Copyright Office to publish a notice in the Federal Register guaranteeing full term retention of all electronic deposit copies received to date by the Office, and all future electronic deposit copies received by the Office, for both published and unpublished works.

**J. The Register Must Identify and Correct "Unit of Publication" Errors (If Any) Made by the Office in Modernizing Registration of Groups of Published Photographs.**

As employed by the Copyright Office, the term "Unit of Publication" refers to a physical bundle of works, meeting certain criteria. While the Office's published description of Units of Publication was somewhat ambiguous in versions of the Compendium previous to Compendium III, the Office has made clear that the "physical bundle" has been a consistent, required characteristic of any Unit of Publication through the years.

In modernizing the registration of groups of published photographs during at least the period 2009 to 2018, the Copyright Office routinely instructed registrants of groups of published photographs to register their works as a "Unit of Publication," even when those works were never published as elements of a physical bundle. In addition, the examiners in the visual arts section routinely added a notation "*Basis for Registration: Unit of Publication*" to group registration applications submitted by photographers, even when the registered works were never published as elements of a physical bundle.

As a result, on information and belief, thousands of photography registrations include the "Unit of Publication" designation, when the registered works were never published as elements of a physical bundle and have never met the Office's definition of "Unit of Publication." In infringement litigation, we have increasingly seen defendants attempt to invalidate registrations based on incorrect "Unit of Publication" designations, in order to escape liability for infringements of the registered works. While these defendants may

or may not succeed in such efforts, the motions, replies, oppositions, hearings and orders required to resolve Unit of Publication challenges require significant time and expense by the copyright owner, and unnecessarily consume the time and attention of the courts.

We first brought this issue to the attention of the Copyright Office in 2009, and have met and corresponded with the Copyright Office – including successive General Counsels – for 15 years. As a result, we understand that in 2018, visual arts examiners at the Office were instructed against using the term “Unit of Publication” on group registrations of published photographs, where the photographs were not published as elements of a physical bundle. While appreciated by creators, this did nothing to resolve any Unit of Publication errors on earlier registrations.

We have repeatedly proposed that the Copyright Office (1) identify a representative sampling of “Unit of Publication” registrations of groups of published photographs in the registration database, and determine if there are instances in which the photographs were not published as elements of a physical bundle; and (2) If the Office identifies examples of Unit of Publication designations made in error, conduct a more comprehensive search of the registration database to identify all registrations that may include this error; and (3) Publish a notice of the error (if any) in the Federal Register; and (4) Notify all affected registrants (if any) of the error; and (5) Provide registrants with the opportunity to correct the error (if any) at no cost to the registrants. To our knowledge, the Office has not commenced a search of its records.

The Copyright Office defines a “Unit of Publication” as *“a package of separately fixed component works that are physically bundled together for distribution to the public as a single, integrated unit, and all of the works are first published in that integrated unit. See 37 C.F.R. § 202.3(b)(4).”* The Office provides these representative examples of Units of Publication in the Compendium III (1103.1):

- *A board game with playing pieces, game board, and instructions.*
- *A package of greeting cards.*
- *A CD packaged with cover art and a leaflet containing lyrics.*
- *A book published with a CD-ROM.*
- *A multimedia kit containing a book, a compact disc, and a poster.*
- *A multi-DVD package with multiple disks containing a motion picture, trailers, and deleted scenes from the motion picture.*
- *A box set of music CDs.*

- *A videogame stored on a disc packaged together with an instruction booklet and a pamphlet.*
- *A computer program stored on a disc packaged together with a booklet containing a user's manual.*

The Office provides these representative examples of works that do NOT qualify as a Unit of Publication (See Compendium III, 1103.1(E) )

- *Works first published online.*
- *Works that were first published on different dates.*
- *Works first published on the same date either separately or in different units.*
- *Works first published as separate and discrete works, even if they were subsequently distributed together in the same unit.*
- *Works that are initially offered to the general public both individually and as a set.*
- *Works created as part of the same collection, series, or set that have not been distributed together as a single, integrated unit.*
- *Works that share the same characters, the same theme, or other similarities that have not been distributed together as a single, integrated unit.*
- *Works offered to the public as a unit, but never distributed to the public.*
- *Multiple photographs taken at the same photo shoot.*
- *Multiple photographs posted on the same website.*
- *A catalog with photographs of copyrightable works offered for sale, either individually or as a unit.*

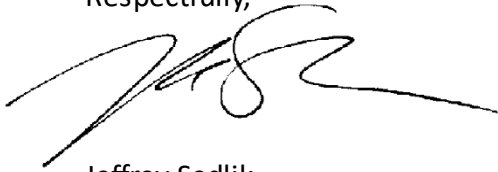
We have seen instances in which works that fall into the categories in the latter group of unqualified works have been deemed Units of Publication by the Office. We have seen instructions from the Copyright Office - including the instructions for the pilot program for groups of published works - to register groups of photographs as Units of Publication. We have also seen the term "Unit of Publication" appear in the regulations and in the Office's publications, in circumstances not involving a physical bundle of works.

We are concerned that thousands of copyright owners with potentially incorrect "Unit of Publication" designations on their registrations are unknowingly sitting on a ticking time bomb, and will only learn of this issue in the event of litigation months or years in the future.

We request that the Committee encourage the Copyright Office to investigate the Unit of Publication issue, and report back to the Committee.

We again applaud the work of the Committee, the Register and the entire team at the Copyright Office in ensuring that creative works are protected. Thank you for the opportunity to share our experience, perspective, and recommendations in this testimony for the record.

Respectfully,

A handwritten signature in black ink, appearing to read 'JS', with a long horizontal flourish extending to the right.

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