



**Written Testimony of
Professional Photographers of America**

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

**U.S. House of Representatives
Committee on House Administration**

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OVERVIEW

Professional Photographers of America (“PPA”) was founded in 1868 at the dawn of the age of photography. Today, the 35,000 members of PPA comprise world’s largest nonprofit photography association organized for professional photographers. Possibly the largest class of copyright holders in America, photography is unique among the creative sectors, distinguished by the volume of creative output and the broad variety of business models within the professional photographic industry. Professional photographers are part of America’s fabric, participating actively in community, school, and local business events where they live. Our members often produce well over 50,000 copyrighted works annually, while working on average more than 50 hours per week. The average income of these hard-working creators is \$38,000 per year. In a world that becomes more confusing every day, photographers have emerged as the keepers of what is real. They highlight our greatest achievements, celebrate our communities and our families, and when necessary, shine a bright light on our worst social injustices. In short, photographers are a critical cog in the American and world ecosystems.

It is important to note that because the barrier of entry is relatively low when compared to other industries, professional photography has emerged as one of our nation’s most diverse groups of business owners – in fact, precisely as diverse as the country itself. That said, life is difficult for America’s professional photographers. Now more than ever, they need the support of a robust, understanding, and cooperative copyright system. Unfortunately, that currently does not exist for small business, high-volume creators.

Paradoxically, it is U.S. copyright system processes that often stand in the way of copyright protections for many creators. That is not to say the cause for those issues rests exclusively with the U.S. Copyright Office (USCO) as it can't be ignored that the USCO is under the purview of the Library of Congress.

PPA's members are among the creative professionals who rely on our copyright system for protection against the theft of their works. We are greatly appreciative of the Committee's specific invitation for this written testimony. We hope that this hearing will signal a new attitude towards needed reforms to America's copyright registration process.

No civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title.¹

We believe the Committee's attention to the subject of today's hearing should begin with an understanding of this burdensome feature of American copyright law: photographers' ability to enforce their rights is conditioned on the bureaucratic requirement to register each photograph with the Copyright Office.² No other country requires this. Even the United States does not require it of foreign authors; to do so would violate the treaties and agreements that provide for protection of American works abroad. In this way, the United States' double standard discriminates against its own creators to preserve the copyright registration system.

PPA's goal is not the abolition of the registration system, although a holistic and open-minded rethinking is long past due. Rather, our goal is to illustrate to the Committee how

¹ 17 U.S.C. §411(a).

² This title and sole witness for this hearing shine the spotlight exclusively on the Copyright Office. PPA is keenly aware that the Library of Congress has decision-making authority over all Copyright Office technology needs and services, and that every action of the Register of Copyrights is subject to "the general direction and supervision" of the Librarian. Thus, unless specified otherwise, this testimony is directly jointly to the operations of the Library of Congress and the Copyright Office ("LOC/USCO").

critically important it is to photographers that the registration system be workable. At present it is not.

Professional photographers are not merely stakeholders in the copyright system. They aren't just users or applicants. They aren't simply USCO customers. They represent more than 200,000 Americans whose legal rights have been granted³ and then effectively whisked away, subject to an outdated and arcane registration system. Imagine if every American had to file a document with a government agency for every piece of furniture, every article of clothing, and every other possession, and without that filing, they would have no legal recourse to prevent someone from taking what is theirs. That's the reality of every professional photographer trying to protect her or his business. It is hard to imagine how the current system came to be, though we want to believe most of it was the simple result of inaction when change was needed. That we have let it continue long after realizing the realities it presents to small creators is inexcusable. If America is going to impose a registration system on its creators as a prerequisite for protection, then those responsible for administering it are obligated to create a system that works for all creators. This should be non-negotiable for any fair-minded society.

THE EFFICIENCY AND EFFECTIVENESS OF THE USCO'S REGISTRATION PROCESS

The Committee has asked for PPA's views on the efficiency and effectiveness of registration processes for the average small business owner. We begin to answer that by outlining what the registration process involves for high-volume photographers. Notable facets of LOC/USCO regulations that should be considered in this discussion include:

- Group registrations of photographs once allowed unlimited images in a single registration, but have been capped at 750 images since 2018;
- Photographers must submit a digital copy of every photograph in an approved file type;
- Photographers must submit a spreadsheet with the title of each photograph and the name of the corresponding file;

³ 17 U.S.C. §102(a).

- Published and unpublished photos cannot be registered in the same group, even though the Copyright Office admits it's unclear what is published and what isn't;⁴
- Published photographs must all have been published in the same year and must be sorted by the month of publication;
- The titles of each photo must be entered, separated by commas, into the eCO portal in a field that accepts no more than 1,995 characters at a time; and
- The fee for group registration of photos is \$55 and it is nonrefundable.

Based on surveys of PPA's members, we estimate it takes up to 2 hours for the average photographer to sort their images, prepare all the materials, and submit an application for registration. This is significantly longer than the estimate given by the USCO which does not take into account the number of images a photographer has to evaluate and prepare.⁵ Struggling over what might be considered published or unpublished (which cannot be registered together) is particularly time-consuming. Considering that the average photographer can produce 50,000 – 100,000 images each year, even assuming maximum efficiency of 750 images per application, ensuring protection could easily require more than 100 registrations annually. This real-world scenario suggests that the time cost for photographers to protect their work could reasonably be the equivalent of multiple work weeks. By comparison, the Internal Revenue Service estimates the average American spends 13 hours each year preparing and filing tax returns.⁶ In other words, for photographers, the copyright registration system is far, far more burdensome than the IRS.

Of course, the time required to create a deposit must come from somewhere, which means participation in the USCO's outdated registration process will cost either family time or time away from the necessary responsibilities required to run a high-volume small business. The message is clear: our copyright system is disconnected from the realities of life outside of Washington D.C.

⁴ The Copyright Office's "guidance" on the subject is fourteen pages long and does not answer the question: <https://copyright.gov/comp3/chap1900/ch1900-publication.pdf> See below for a further discussion of publication status and the registration requirement.

⁵ As an illustration of how complicated the application process is, the tutorials on the Copyright Office website on submitting group registrations of published and unpublished photos combine to about 33 minutes – more than six times the usual time to present testimony at a Congressional hearing. <https://www.copyright.gov/eco/tutorials.html>.

⁶ <https://www.irs.gov/pub/irs-pdf/i1040gi.pdf>

and the level of participation on the part of small creators is proof. Creators are the USCO's "consumer." When it comes to the Office's effectiveness, its consumers are voting with their feet.

The complications, the time involved, and the cost add up to exactly what you would expect: our member surveys show that less than 3 percent of professional photographers register their work. Using that as the most basic trailing indicator, PPA's answer to the Committee's question about the efficiency and effectiveness of registration processes for the average small business owner must be that the USCO's registration system is less than 3 percent effective. In our opinion, there is no other answer. How can you consider your process to be effective, if those you serve don't participate?

THE RESPONSIVENESS OF THE USCO TO CREATORS' NEEDS AND INQUIRIES

In fairness, we have appreciated the Copyright Office's willingness to meet with us over the years. While the turnover has been frequent, the Registers have been particularly engaged and respectful. Thus, it must be said that when it comes to taking meetings, the Office has been responsive, and that responsiveness is appreciated. When it comes to action beyond a meeting, responsiveness has been scarce. However, one shining example of collaboration and help for small creators is the recently formed Copyright Claims Board. For many years, small creators proactively pushed for a small claims process, an effort that immediately gained momentum after it was endorsed by the Register of Copyrights and the USCO's small claims study.⁷ Those acts were important for the eventual successful enactment of the CASE Act.⁸ We greatly appreciate the USCO's work on the legislation and implementation of this important resource for small creators.

However, when it comes to the key issues with the registration system, there has been neither collaboration nor change. Instead, the needs of photographers remain unmet and our requests for improvements to the registration system go unfulfilled. We have presented proposals and information regarding barriers to registration dating back to 2002. Though PPA and its members represent a significant portion of U.S. creators, there has been no relief for this community. Thus, in the area of essential copyright registration processes discussed during more than 20 years of meetings, the USCO has been historically unresponsive.

⁷ <https://www.copyright.gov/docs/smallclaims/>

⁸ <https://www.copyright.gov/legislation/copyright-small-claims.pdf>

CHALLENGES OR OBSTACLES OUR MEMBERS HAVE ENCOUNTERED WITH THE USCO

The primary reason the copyright system was placed within the Library of Congress was not to help copyright owners or the copyright system; it was, and is, to build the collection of the Library of Congress through the free copies sent by virtue of the deposit requirement.⁹ So, when PPA seeks the changes required to make the system workable, the obstacle it has encountered is the perspective of the LOC/USCO that the registration system and the deposit requirement are ends unto themselves. That is, these government bodies place a higher priority on their institutional interests than on serving creators. That may be business as usual inside the beltway, but to our members – the photographers who live and work in every Congressional district – that is not acceptable. Especially not when the enforceability of their legal rights has been made contingent on compliance with a registration system that works for itself, first and foremost.

SUGGESTIONS FOR IMPROVEMENTS TO ENHANCE USCO OPERATIONS AND SUPPORT

We are grateful for the opportunity to respond to this request by the Committee and would like to highlight a few key changes that we have sought for decades. Each of these could make the registration system more workable for photographers.

a. Deposit requirement

Perhaps more than any other aspect of the registration system, the most burdensome is the deposit requirement. As the smallest of small creators, professional photographers are responsible for everything in their businesses, including:

- Training
- Marketing
- Production
- Creation
- Editing
- Sales

⁹ John Y. Cole, *Of Copyright, Men & A National Library*, 28 Quarterly Journal of the Library of Congress at 15 (1971)(available at <https://copyright.gov/history/125thanniversary.pdf>).

- Finances & taxes
- Equipment maintenance
- Purchasing

At any given time, they are editing a past job, preparing to deliver work to customers (which often involves going into their homes and installing images), meeting with potential customers, creating marketing materials for an upcoming trade show, photographing an event, and keeping up with the marketing and the money. In the real world, a photographer returning home at 11:00 pm after photographing a wedding will still need to check data cards, prepare a recent job for delivery, and call about a missing shipment of frames. Somehow, she needs to work in time for family and self. It's reasonable to see how creators can become frustrated when the Copyright Office explains how easy it should be to create the three separate deposits needed to protect the 1,950 wedding images she just created. It is here that we feel the need to offer our foundational belief about copyright processes in America: If our system is going to require copyright registration as a prerequisite to protection, then it must create a system that works for all creators.

In the real-world scenario above, the U.S. system of copyrights becomes a roadblock to creator rights rather than a source of protection. With a sincere desire to answer the Committee's question, the USCO's profound lack of understanding of the American creator presents challenges for hundreds of thousands of small creators.

Interestingly, the USCO's deposit requirement seems to encourage less participation on the part of the U.S. creative communities, a reality we can only assume is not lost on the USCO. Let's look at the realities of some of the numbers (we have presented these to the USCO on multiple occasions):

- 1) If only half of the 2,240,000 weddings held in the U.S. this year hire a professional photographer (in reality it will be more), resulting in 1,120,000 wedding events...
- 2) And if those photographers create 1,950 images -- the average number of images created at a wedding based on our survey of our members...
- 3) And if conservatively, only one-third of those photographers choose to register their images...

- 1) And if each of those wedding registrations with the USCO would produce a minimum of three registrations (the USCO reduced the number of images in a registration from unlimited to 750 in 2018)...

Then the number of resulting registrations created this year by wedding photographers would be 1,108,000 – nearly 12 times the total number of visual works registrations for 2018, the highest year on record. One should note that this only includes the registrations that would be produced by wedding photography and does not consider other high-volume types of photography, including:

- Portraiture / pets
- School, sports & events
- Nature / wildlife
- Commercial
- Underwater / aerial / biological

Should the USCO's systems be made more customer friendly, encouraging even low-to-moderate participation by all types of photographers, the result could more than double the scenario offered above, potentially matching the total registrations for the last century combined, and causing the copyright registration system, which already operates on a two-month backlog, to grind to a halt. It is impossible for us to imagine a scenario where the USCO is not aware of the impact of these numbers. In other words, the U.S. copyright system only appears to work because the majority of its potential users (who deserve protection) don't register. Based on the USCO's unwillingness to collaborate, and change, one would have to make the assumption that it is content with the minimal engagement in the American copyright system, despite the potential marginalization of creators who produce content in large quantities. Senior USCO staff have told us on more than one occasion that they lose money on high-volume registrations because of the time it requires to examine the work, essentially blaming the creator rather than resolving to refine its one-size-fits-all registration system. That might be the single most concerning thought we offer today: the possibility that the USCO is aware of these numbers and is intentionally keeping the needs of high-volume creators at bay because it doesn't want to make the changes required accommodate the load. While there may be little that a single association representing small creators can do, we know that there is much that a fair-minded Congress can do to correct this age-old problem.

The LOC/USCO routinely asserts the “benefits” of registration.¹⁰ Aside from the “benefit” of returning to copyright owners the ability to actually enforce their rights, it is asserted that the registration system “compile[s] a public record of copyright claims, and the deposited copies provide definitive evidence of what the work was at the time of registration.”¹¹ But if the registration system is so burdensome that it isn’t being used at all by more than 97% of photographers, then it is not achieving any purported goals. When photographers don’t register, the Library doesn’t get copies, there is no public record, and photographers are deprived of their ability to enforce their rights. It is a lose-lose-lose proposition.

PPA, both itself and along with other visual artist organizations, submitted comments to the Copyright Office in the past with numerous suggestions about how to make the deposit requirement less burdensome and more workable.¹² Among those is a deferred examination process in which creators would have the ability to reclaim their rights with a very inexpensive up-front filing, and only if needed, spend the time and money to finalize that registration with full examination. Another option is a self-deposit system in which the creator would provide a description of clients and job types and would have to perfect the registration later to gain the presumptions that flow from registration.

The LOC/USCO has not moved forward on any of these, citing among other factors negative impact on the public record and the Library’s collections. We are at a loss to understand how the LOC/USCO believes that the miniscule fraction of photographs that are currently registered is a system worth preserving. Their response is even more baffling in light of the reality that many if not most of the photos submitted as deposit copies are disposed of by the Library. They are maintaining a system that isn’t working so they can collect a relative handful of copies of works they don’t want.

It is worth pointing out that in today’s world where almost every meaningful work of any sort is already online in some form, there are almost countless ways for the Library of Congress to achieve its objectives and dramatically increase the number of works it currently receives. We have pledged on multiple occasions to work with the LOC/USCO, along with other organizations, to

¹⁰ Letter to Senator Tillis (Aug. 1, 2022)(available at <https://www.copyright.gov/policy/deferred-examination/Letter-on-Deferred-Registration-Examination-2022.08.01.pdf>).

¹¹ *Id.* at 3.

¹² <https://www.regulations.gov/comment/COLC-2021-0008-0012>;
<https://www.regulations.gov/comment/COLC-2022-0003-0010>.

identify new systems for acquiring a more robust and meaningful collection for the Library of Congress. We would argue that more thought should be given to that problem, and less to maintaining a failed system that only works because it alienates the largest classes of America's creators.

b. Publication status

Prior to the 1976 general revision of the Copyright Act, publication was a defining point under the law. However, court decisions muddied the waters as to when publication had actually occurred. And with the advent of the internet, whether and when posting a work online constitutes publication is even less clear. A dispute over the publication status and the validity of copyright registration went all the way to the Supreme Court in 2022.¹³ Yet, the law still requires registration applicants to indicate the publication status of their works and LOC/USCO regulations add further complexity with reference to publication status.

The Copyright Office published a Notice of Inquiry on the meaning of publication in 2019.¹⁴ PPA filed comments showing how the importance of publication status has diminished immeasurably since the 1976 Act and urging reform of the requirement for registration applicants to indicate publication status as part of the registration process.¹⁵

The Copyright Office's report took the form of a letter to Senator Tillis in which the Copyright Office acknowledged, "a broad range of copyright stakeholders find the current statutory definition of publication insufficiently clear, particularly with respect to online works."¹⁶

The Copyright Office also asked whether it should amend its regulations to allow group registrations of published and unpublished works together. "Commenters overwhelmingly supported this proposal," the Copyright Office reported. But the LOC/USCO still refused to do so, because that

¹³ *Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, 595 U.S. ___ (2022).

¹⁴ <https://www.govinfo.gov/content/pkg/FR-2019-12-04/pdf/2019-26004.pdf>.

¹⁵ <https://www.regulations.gov/comment/COLC-2019-0003-0023>.

¹⁶ Copyright Office Letter to Senator Tillis at 14, available at <https://www.copyright.gov/laws/hearings/Letter-on-Publication-Study-12-1-2021-FINAL.pdf>.

would “require extensive changes to the existing regulations, technological systems, applications, and deposit retention requirements, which would be costly and time-consuming.”¹⁷

This is precisely what we mean by our observation that the LOC/USCO places its institutional interests ahead of the interests of creators. Having recognized that the definition of publication is unclear to everyone and having received “overwhelming” support to allow group registrations of published and unpublished works together, they still said “no” because it would be too hard for THEM. Meanwhile, the unworkable system prevents photographers and other high-volume creators from being able to enforce their rights.

As taxpayers, as voters, and as professional creators, this is unacceptable to PPA members. If Congress and the LOC/USCO insist on maintaining a registration requirement that conditions our rights on registration, then they owe creators a workable registration system. Otherwise, there is merely a catch-22 that offers illusory rights with no practical method of enforcement.

c. Fees

Payment of a \$55 processing fee is required for each application to register a group of photographs. When the rule capping such applications at 750 images was issued, the LOC/USCO expressed the view that even with the new limit there is still “a significant value...[a]n applicant who submits the maximum number of photographs effectively would pay \$0.07 to register each work...”¹⁸ No doubt, from the perspective of the LOC/USCO, this is very reasonable. Of course, as expressed, it is only one side of the equation.

Seven cents per work sounds great until it is multiplied by [50,000], the average number of photos created every year by a professional photographer. That turns into over \$3,600 in copyright registration fees every year if the photographer is able to register the minimum number of times. In reality, the sorting of published or unpublished makes that impossible. And that number is ever more burdensome in the context of the average annual income of professional photographers – just

¹⁷ *Id.*

¹⁸ *Group Registration of Photographs Final Rule*, 83 Fed Reg. 2542, 2545 (Jan. 18, 2018)(available at: <https://www.govinfo.gov/content/pkg/FR-2018-01-18/pdf/2018-00687.pdf>).

\$38,000. So, the other side of the equation is that photographers have to spend 10% of their gross income just to have enforceable copyright rights. Not such a bargain, after all.

d. IT Modernization

Others will have more to say than PPA about the mechanics and delays in the IT modernization process. From our perspective, much of what makes the registration system so burdensome is baked into the regulations of the agency, as we have outlined in the foregoing sections. PPA continues to hope that “modernization” is an opportunity to do more than upgrade hardware and interfaces. It is a chance to evolve.

IT ALL CHANGED IN 1995 – OUR RELATIONSHIP WITH THE USCO

It is worth mentioning the single greatest technological advancement that forever changed the relationship between the USCO and professional photographers – the transition from film to digital photography. Prior to 1995, photographers were cautious about the number of images they created. Film was expensive, and printing copies of unretouched images for customers to review increased the financial exposure associated with film. Registering a large commercial job, portrait sitting, or wedding, could result in the submission of just a few images (on the low end) to 200 images (on the extremely high end). The task of reviewing those images was reasonable for USCO examiners.

The transition from film to digital that began about 1995 changed that. While originally expected to take two decades, the transition to digital photography was, for all practical purposes, complete by 2002. Which means photographers began creating 500 images... 750 images... 1,000 images... and then 1,500 images at an event. As discussed earlier in this document, today the average number of images created at a wedding is 1,950. This is a problem for both creators and the USCO. As a side note, we use wedding photography to illustrate our points because it is easily understood.

From the creators’ standpoint, the additional number of images significantly increases the time required to sort images as published or unpublished. It also increases the time required to review

the deposit, and the size of the deposit itself. From both a time and financial standpoint, the move to a world of digital photography increased the number of registrations required for a single job.

For the USCO, the transition to digital photography increased the size of the deposits so dramatically that it had to make choices:

- 1) Welcome the deluge of professional photography with open arms, effectively grinding copyright registration to a halt for every other class of creator, or
- 2) Put limits and barriers on professional photography that don't exist for other creators by requiring separate applications and application fees, while maintaining the onerous requirement of sorting images as published or unpublished (which would have a limiting effect on a single class of copyright holder).

That this is thought to be a problem for a government agency charged with the protection of America's creators is concerning. As stated above, reasonable solutions for provisional registrations or a self-deposit system have been summarily rejected. In the meantime, the Copyright Office and the Library of Congress continue to miss out on the important works that could be part of the collection.

PPA cannot help but observe that the changes brought on by digital technology generated intense attention and many changes to other areas of the copyright system, but not for professional photographers. Among these changes, sound recordings received added protection for digital transmissions,¹⁹ the No Electronic Theft Act provided updated criminal copyright provisions for the digital age,²⁰ and of course the Digital Millennium Copyright Act provided for a wide range of specialized, digital-era adjustments to the copyright system.²¹ There were even changes specific to the registration system – the addition of a new “preregistration” option – to address problems for

¹⁹ Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104- 39, 109 Stat. 336 (Nov. 1, 1995).

²⁰ No Electronic Theft (NET) Act, Pub. L. No. 105-147, 111 Stat. 2678 (Dec. 16, 1997).

²¹ Digital Millennium Copyright Act, Pub.L.No.105-304,112Stat.2860,2887 (Oct. 28, 1998).

particular creative sectors.²² The copyright system has always evolved to address new technologies and developments in the marketplace.²³ Professional photographers seek nothing more than the same consideration so many others have rightly received. And we should be expected to accept nothing less.

CONCLUSION

Our copyright system is broken for high-volume small creators. The reality is that most American professional photographers are forced to live in the harsh badlands outside of the protections they were offered in the Constitution, and later extended by Congress. When surveyed about the issues most important to their small businesses, photographers place protecting their work at or near the top of the list. Yet less than three percent of American photographers register their work with the U.S. Copyright Office. Those opposing realities reveal an unfortunate truth: the U.S. copyright system has been broken for decades and appeals to rectify the issues that stand as barriers between small business, high-volume creators and their protections have been ignored. It is our hope and belief that now is the time, with the leadership at the USCO, that we can work together to finally remedy this decades long injustice.

We are deeply grateful to the Committee for holding this hearing. If we have learned anything over the last two decades, it is that bringing necessary change to the copyright system is not change that small creators can effect on their own. We need your help. Complaining about the world without presenting possible solutions has never been the MO of visual artists. In fact, working closely as a visual arts community, we have collectively created a pathway for change that we hope can be embraced by the USCO and Congress. “Visual Artists, The Copyright Office and the 118th Congress” is a plan for change. We are attaching a copy as part of this submission.

Our current copyright system has raised a generation of professional photographers who are practically unable to enforce their rights and who have become disenfranchised from the copyright system. We look forward to working with all parties to produce the kind of change that will bring America’s high-volume creators fully under the umbrella of protections that was intended for all.

²² Artists’ Rights and Theft Prevention Act of 2005, Pub. L. No. 109-9, 119 Stat. 218 (April 27, 2005).

²³ <https://blogs.loc.gov/copyright/2017/05/copyright-law-and-new-technologies-a-long-and-complex-relationship/>

