



THE KEY TO COPYRIGHT PROTECTION

by Jeff Schewe

“When it’s Created, it’s Copyrighted”, right? Well, yes and no.

Back in the 1980’s, APA as well as a host of other photographic trade associations banded together to promote copyrights and educate photographers about copyright laws. The phrase “When it’s Created, it’s Copyrighted” was coined. Do you recognize the phrase? It’s a simple, catchy explanation of copyright laws in the post 1978 era. There were major statutory revisions to copyright law in 1978 that broadened copyright protection and even eliminated (in 1989) the requirement for a copyright notice to be attached. We all were lulled into the belief that merely creating a work, such as a photograph, was sufficient to receive copyright protection. Technically, this is true.

A copyright without copyright registration is next to worthless.

But in reality, a copyright without copyright registration is next to worthless. Why? Well, to start off, you can’t even file a copyright lawsuit in Federal Court without actually filing a copyright registration. Secondly, if the copyright infringement that you are suing about occurred over 90 days prior to your copyright registration, you are denied two real big sticks in the copyright law - court costs - including attorney’s fees and statutory damages. These are very big sticks indeed.

The US Copyright Office explains registration as the following: “Copyright Registration is a legal formality intended to make a public record of the basic facts of a particular copyright. However, even though registration is not a requirement for protection, the copyright law provides several inducements or advantages to encourage copyright owners to make registration.”

Among these advantages are the following:

- Registration establishes a public record of the copyright claim.
- Before an infringement suit may be filed in court, registration is necessary for works of U.S. origin.
- If made before or within 5 years of publication, registration will establish prima facie evidence in court of the validity of the copyright and of the facts stated in the certificate.
- If registration is made within 3 months after publication of the work or prior to an infringement of the work, statutory damages and attorney’s fees will be available to the copyright owner in court actions. Otherwise, only an award of actual damages and profits is available to the copyright owner.
- Registration allows the owner of the copyright to record the registration with the U. S. Customs Service for protection against the importation of infringing copies.

What this basically means is that an “author” of a copyrighted work gets the full remedies under the law only if the copyrighted work is registered prior to an infringement. Otherwise, the best you can hope for is an award of actual damages or profits lost — both of which can be difficult to prove or may end up being less than the costs of mounting a lawsuit in the first place. Talk to an IP (Intellectual Property) attorney and one of the very first questions he will probably ask is “is it registered?”.

So, what’s the deal? The deal is that photographers were misled into thinking that copyright registration was just an unnecessary “legal formality”. The “Copyrighted when Created” slogan just didn’t go far enough in explaining the copyright laws to photographers. But, you better believe that “copyright infringers” know the implications full well. A copyright lawsuit on an unregistered work is really just a nuisance. At worst, if the suing party is really serious, the infringer will be forced to pay what they would have paid for a normal license. But, the odds are with the infringer because the author will need to front all the legal bills to file suit.

To this end, APA , in concert with other trade associations including ASMP, EP and PPA, is mounting an effort to re-educate photographers about the importance of the formality. Copyright Registration is really the key to copyright protection.

How to Register

So, how do you register your copyrights? Well, it's really very simple. To register a work, send the following three elements in the same envelope or package to: Library of Congress Copyright Office Register of Copyrights 101, Independence Avenue, S.E. Washington, D.C. 20559-6000

- A properly completed application form. Form VA for photographs.
- A non-refundable filing fee of \$30* for each application.
- A non-returnable deposit of the work being registered.

*Effective through June 30, 2002. After which registration fees are due to increase.

Online forms

Online forms are readily available in PDF format from the Copyright Office. These forms can be filled in online, and then printed. If you have a full version of Adobe Acrobat, they can also be downloaded and saved. There are two forms:

Short Form VA - Use this form when you are the only author/copyright owner and the work is new (unpublished).

- <http://www.loc.gov/copyright/forms/formvas.pdf> - Short-form VA, with instructions.
 - <http://www.loc.gov/copyright/forms/formva.pdf> - Same form without instructions
- Standard Form VA – For either published or unpublished works.

Published vs. Unpublished Works

But there is a rub (isn't there always?). You have to treat "published works" differently from "unpublished works". For published works, an author has to file a registration for each first published use. This can be a burdensome and costly effort. Not only is there the difficult proposition of actually getting copies from clients so you can register them, you will pay \$30 for each registration application. The limits and restrictions of mass registration of published works are rather publisher friendly, not photographer friendly. Additionally, the registration will only cover the actual published works, not variations or versions you may create.

An alternative to registering published works is to register all your work as "Unpublished Works". There are some tremendous benefits and cost savings because the Copyright Office allows the filing of a collection of works on one registration application. (see "Copyright Registrations of Photographs" Fact Sheet FL107 available from the Copyright Office).

The Copyright Office states "Two or more unpublished photographs may be registered as a collection if:

- The elements are assembled in an orderly form
- The combined elements bear a single title identifying the collection as a whole
- The copyright claimant in all of the elements and in the collection as a whole is the same
- All of the elements are by the same author."

It goes on to say, "Registration of a collection of photographs extends to each copyrightable element in the collection. There is no limit to the number of photographs that may be included in an unpublished collection."

What this means in practical terms is that an entire body of work can be registered as an unpublished collection. Each individual photograph will receive full copyright protection and the entire collection can be registered for a single application fee of \$30. There are some restrictions. Each "element of the collection" must be titled or otherwise identified.

The Copyright Office has stated that several types of media are acceptable. Each media has some specific requirements that must be met. Videotape with individual photos and titles can be used with a minimum of 15 video frames (1/2 second). Computer generated CD-ROMs with TIFF or JPGs images can also be used as long as each image meets a minimum size threshold and has a unique title or name.

As you can imagine, mass registration saves a lot of time and money. But there is still the logistical implications of registering each and every image you may produce. So far, very few photographers go through the trouble. However, those photographers who make the effort will be the ones who will reap the full benefits and remedies that the current US Copyright Laws provide. With the addition of the Digital Millennium Copyright Act of 1998, willful repeat infringers are liable for treble statutory damages-which can be a substantial financial amount.

Many efforts, most notably by ASMP, have been made to eliminate the registration requirements to copyright statutes and regulations. Ironically, Foreign Works now have the full remedies to US Copyright Laws without the registration requirements. But the effort to change laws is a long and very expensive process. Traditionally, publishers and others have fought efforts to remove registration requirements.

But since photographers, by and large, have NOT registered all their works in volume, there's very little motivation at the Copyright Office to remove or amend registration requirements. That's where APA and the other trade associations are taking the lead. If we, as a group, can muster our troops and actually mount a copyright registration campaign, the Copyright Office will potentially be swamped with photographers' copyright registrations. If this happens, we are certain the Copyright Office will be more willing to work with us towards registration requirement improvements.

What can you do? Well, register your copyrights! Work out a system for mass registration - ideally of your "unpublished works" and send in your registration forms. Doing this, on a regular basis will offer you two distinct benefits. First, you will be availing yourself of the full protection and remedies of the Copyright Laws potentially easing any infringement lawsuits while also giving the infringer considerable inducement to settle. Secondly, you will be helping the entire photographic industry in our efforts to bring positive change to the way copyright statutes and regulations apply to photographs.

Our new mantra should be:
Copyright Registration — The Key to real Copyright Protection.

Additional information about copyrights can be found at:
<http://www.loc.gov/copyright/>