

Court of Appeals Docket No. 10-16771

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

TOM BEAN,

Plaintiff-Appellant,

vs.

HOUGHTON MIFFLIN HARCOURT PUBLISHING COMPANY,

Defendant-Appellee.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF ARIZONA, HON. DAVID G. CAMPBELL
USDC NO. CV 10-CV-08034

**BRIEF OF *AMICUS CURIAE* PICTURE ARCHIVE COUNCIL OF
AMERICA, INC. IN SUPPORT OF PLAINTIFF TOM BEAN'S
APPEAL SEEKING REVERSAL OF THE DISTRICT COURT'S
DISMISSAL OF HIS COMPLAINT**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* Picture Archive Council of America, Inc. hereby states that it does not have a parent corporation, and that no publically held corporation owns 10% or more of its respective stock.

Dated: New York, New York
December 13, 2010

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Pursuant to FRAP 29(a), all parties have consented to the filing of this brief by *amicus curiae*.

IDENTITY AND INTEREST OF THE *AMICUS CURIAE*

The Picture Archive Council of America, Inc. (“PACA”) is a not-for-profit trade association which represents the interests of entities who license images (still and motion) to editorial and commercial users. Founded in 1951, its membership currently includes over 150 image libraries in North America and internationally that are engaged in licensing millions of images, illustrations, film clips and other content on behalf of thousands of individual creators. Members include large general libraries, such as Getty Images, Inc., and smaller specialty libraries that provide the media and commercial users with access to in-depth collections of images on nature, science, art, architecture, history, culture among others.

PACA submits this *amicus* brief in support of plaintiff’s appeal because PACA members are directly and significantly harmed by the District Court’s decision. For the past fifteen years, PACA members have relied upon the instructions provided by the Copyright Office to protect the underlying photographs of their contributing photographers. The ability to enforce copyrights and secure licensing fees for the use of images is vital to the livelihood of all PACA members. PACA respectfully requests that this Court reverse the District Court’s August 8, 2010 Order dismissing plaintiff’s Complaint (the “Order”).

A. PACA’S Role in the Image Licensing Industry.

PACA’s mission is “To foster and protect the interests of the picture archive community through advocacy, education and communication.” In support of this mission, PACA has taken a lead role in educating its members about copyright law in general and the importance of registration as a method of protecting photographs. PACA has worked closely with the Copyright Office through the years to ensure that its member image libraries are aware of Copyright Office procedures and rules so they may effectively register and enforce the copyrights in their images. As many PACA members are small companies that do not have lawyers on staff, the guidance offered by PACA and its counsel on matters regarding copyright registration, copyright enforcement, and business practices is an important component of their membership.

The backbone of any enforcement effort is the copyright registration in the underlying image. Having a registration prior to infringement gives the image library the ability to claim full copyright remedies for infringing uses if an infringer refuses to pay a retroactive license fee. Infringers, when faced with a valid copyright registration are more likely to offer compensation, rather than risk liability for statutory damages and attorney’s fees should the matter be litigated. This generally leads to pre-litigation settlements and the preservation of judicial resources. If, as the District Court’s Order holds, image catalog registrations

obtained by image libraries do not protect underlying images, PACA members have lost a vital tool to protect and enforce their contributors' photographs.

B. The Copyright Office Instructs PACA Regarding Registration Procedures

1. Initial Meeting With The Copyright Office.

In June 1995, the undersigned as PACA's counsel, along with other executives of PACA's Board, met with senior officials of the United States Copyright Office, including Register of Copyright Marybeth Peters (the "Register"); Chief Examiner Nancy Petruzzelli; Head of the Visual Arts Section Examining Division Nancy Lawrence; and Assistant Chief Julia Huff. The purpose of the meeting was to discuss how image libraries could register large print catalogs containing thousands of photographs from hundreds of photographers, the method of marketing photographs at that time. The difficulty in protecting these published images was that under the then-current rules, to obtain copyright in individual photographs, each photographer would have to individually register his or her images and deposit two copies of the full catalog, a procedure that was burdensome and expensive for the photographer.

The Copyright Office provided instructions to PACA on how to register the catalogs in a manner that would protect the individual images in the collective work. By following a registration procedure used with registrations for serial works, the Copyright Office instructed that a temporary transfer of copyright

ownership from photographers to their image library would permit the image library, as copyright owner and claimant, to register in one application the catalog as a collection as well as the individual photographs depicted in the catalog. Thereafter, the image library could retain the copyrights or transfer them back to the respective photographers.

The Copyright Office further informed PACA that its members did not need to individually name each author/photographer on the application because the rights were all owned by the image library as copyright claimant. This procedure would satisfy the Copyright Office's regulations and was consistent with its longstanding practice in registering serial works. Based upon the instructions, the undersigned prepared a newsletter in 1995 (the "1995 Newsletter") for PACA's members describing the registration procedure prescribed by the Copyright Office. As a result, many PACA members revised their agreements with contributing photographers and filed copyright registrations for the image catalogs following the Copyright Office's instructions, with the understanding and expectation that the image catalog registration would protect the individual photographs.

2. As Distribution Technology Progressed, PACA Again Consulted With The Copyright Office to Ensure The Image Catalog Registration Procedure Was Still Valid.

As technology progressed, PACA members went from marketing their images to clients using print catalogs, to sending clients catalogs of digital images

on CD-ROMs, and finally to offering clients digital catalogs over the Internet. PACA remained in contact with the Copyright Office to ensure that the registration of the digital catalogs of its members would continue to protect the individual photographs of the contributing photographers. In 1997, when PACA members, such as Corbis, began offering digital catalogs online, the undersigned again contacted the Copyright Office, including the senior officials in the initial meeting, to confirm that PACA members could continue to register images on behalf of contributors in their digital catalogs. The Copyright Office confirmed that the same transfer language it previously recommended continued to be applicable.

The Copyright Office assigned a specific examiner, Virginia Giroux, Attorney Advisor, Examining Division, to review copyright applications for PACA and its members. Ms. Giroux instructed PACA members to follow the instructions published by the Copyright Office for online databases and register their digital catalogs as “databases”. All along, it was understood by the Copyright Office, PACA and the image libraries that the primary intent of these registrations was to protect the individual images and not the database as a compilation *per se*. Database registrations merely permitted image libraries to file a registration of digital images and thereafter only file updates of newly added images at regular intervals (pursuant to 17 U.S.C. § 412). Having to file new applications each time new images were made available to clients (which may occur daily for the largest

libraries) would be too time intensive and expensive for image libraries. The undersigned again prepared an article in the PACA newsletter advising PACA's members of the Copyright Office's instructions for online catalogs.

3. The Register Again Confirms the Image Catalog Registration Procedure is Valid.

In January 2002, the undersigned was questioned about the validity of PACA member Alaska Stock's copyright in CD-ROM catalogs that were registered pursuant to the Copyright Office's stated procedure. In late January 2002, the undersigned sent a facsimile to the Register requesting confirmation that the procedure followed by image libraries (as set forth in the 1995 Newsletter) was accurate, and that the copyright registrations previously filed by PACA members are still proper under the Copyright Office's Rules and procedures. On February 12, 2002, writing on behalf of the Register, Nanette Petruzzelli, Chief of the Examining Division, confirmed that the catalog registrations made by PACA members pursuant to the Copyright Office's instructions were appropriate under the Copyright Office's regulations and the Compendium of Copyright Office Practices, *Compendium II*. The Copyright Office further confirmed that the 1995 Newsletter accurately summarized its long-followed registration procedures for collective works such as image catalogs.

Following that correspondence in 2002 and only until earlier this year, the Copyright Office has consistently permitted image libraries to file copyright

registrations for their digital catalogs following the instructions it provided fifteen years ago. Throughout that time, the Copyright Office examined and accepted registrations for digital catalogs filed pursuant to those instructions, and image libraries relied upon those registrations to monitor and enforce rights in the hundreds of thousands, if not millions, of individual photographs contained in such digital catalogs. The District Court's Order has effectively eviscerated such rights and long-established Copyright Office practices.

4. The Harm Caused by the Order to Image Libraries and Their Contributing Photographers is Real and Serious.

Because of the Order, image libraries, and the photographers that those libraries represent, now appear to be left without any meaningful copyright protection in their individual photographs, which was the sole purpose of the image catalog registration procedure developed by the Copyright Office at PACA's request. Given the ease of copying and distributing photographs in digital form, the Order is likely to increase the already rampant infringement and piracy of photographs over the Internet. Infringers now have a technical defense against infringement with respect to unauthorized uses of individual images offered in online image catalogs and can avoid statutory damages or attorney's fees. As many image license fees are less than the cost to file suit in federal court, the expectation that image libraries or photographers can bring an infringement action without the benefit of statutory damages and attorney's fees is unrealistic and

tantamount to having no copyright protection. Likewise, having a compilation copyright in the arrangement of an image catalog is worthless to PACA's image library members because infringers do not copy entire catalogs; they generally copy only small numbers of images. The Order also will negatively impact the ability of image libraries and contributing photographers to settle infringement matters because without effective copyright registrations and access to statutory damages and attorney's fees, infringers will less likely to negotiate retroactive licensing fees to compensate photographers for unauthorized uses. Thus, we urge this Court to reverse the District Court's Order dismissing plaintiff's Complaint.

ARGUMENT

A. Courts Have Long Held That Copyright Registrations Should Not Be Invalidated for Technical Errors.

The Supreme Court has explained: “[t]he economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and the useful Arts.’” *Mazer v. Stein*, 347 U.S. 201, 219 (1954). To achieve that end, in enacting copyright statutes, Congress “grant[ed] valuable, enforceable rights to authors, publishers, etc. without burdensome requirements.” *Washingtonian Publ’g Co. v. Pearson*, 306 U.S. 30, 36 (1939) (emphasis added).

Courts, especially those in the Ninth Circuit, have generally refrained from invalidating copyright rights and registrations due to errors in an application if the applicant had substantially complied in good faith with the requirements of the Copyright Act, 17 U.S.C. § 101 *et seq.* (the “Copyright Act” or “Act”), and defendant has not been misled. As explained by this Court in *Urantia Found. v. Maaherra*, 114 F.3d 955 (9th Cir. 1997):

The case law is overwhelming that inadvertent mistakes on registration certificates do not invalidate a copyright and thus do not bar infringement actions, unless the alleged infringer has relied to its detriment on the mistake, or the claimant intended to defraud the Copyright Office by making the misstatement.

Id. at 963. *Harris v. Emus Records Corp.*, 734 F.2d 1329, 1335 (9th Cir. 1984) (where incorrect author was named in registration, rejected defendants’ assertion that work entered the public domain, holding: “[a]bsent intent to defraud and prejudice, inaccuracies in copyright registration do not bar actions for infringement.”); *Datastorm Tech, Inc. v. Excalibur Commc’n, Inc.*, 888 F. Supp. 112, 114-15 (N.D. Cal. 1995) (citing *Harris* and denying motion to dismiss based upon alleged insufficient answer on application).

Here, the Copyright Office instructed PACA and its members how to register their image catalogs pursuant to the Act and the Copyright Office’s rules and regulations, and PACA and its members complied with those instructions in good faith. Defendant nowhere claims that it was ever misled by the copyright

registrations at issue or by plaintiff's claim of rights. Indeed, defendant licensed plaintiff's photographs for a number of years before asserting its newly minted defense based solely on technical grounds. Defendant also does not claim the registrations at issue were not otherwise substantially compliant with the Act.

Moreover, plaintiff and other similarly situated photographers should not be penalized or prejudiced for following the Copyright Office's stated procedure, which the Copyright Office had to develop because image catalogs did not fit neatly into any other category of works, and which stood unchallenged for nearly fifteen years. The court in *Midway Mfg. v. Artic Intern., Inc.*, 547 F. Supp. 999, 1010 (N.D. Ill. 1982), refused to invalidate a copyright registration in video games where the "applications and procedures followed by [plaintiff] in registering its copyrights were not entirely clear or straightforward" because the plaintiff "was attempting to copyright new technology that the Copyright Office had never directly dealt with before." See *Societe Civile Succession Richard Guino v. Beseder Inc.*, 2006 WL 2917349, at *3-4 (D. Ariz. Oct. 6, 2006) (finding insufficient evidence of intent to defraud where there was correspondence between the Copyright Office and plaintiff concerning questions about the application, and the applications proceeded to registration), *aff'd*, 549 F.3d 1182 (9th Cir. 2008). Given plaintiff's reliance upon the Copyright Office's procedures, this Court should reverse the District Court's erroneous invalidation of plaintiff's rights.

B. The District Court Improperly Examined Section 409 Without Considering Its Place in the Copyright Act's Statutory Registration Scheme.

Reversal also is appropriate because the District Court did not analyze Section 409 with respect to the Copyright Act as a whole. In finding that plaintiff was not entitled to rely upon Corbis' copyright registrations as the basis of its copyright infringement claim, the District Court found that "[Corbis] failed to comply with the requirements of § 409 almost completely. It failed to provide the titles of any of the individual photographs, largely failed to identify the authors of the photographs, and failed to connect any author with any individual photograph." Order, p.6. The District Court however failed to examine Section 409 in conjunction with the registration procedure of the Copyright Act as whole.

As explained by this Court in *United States v. Daas*,

The purpose of statutory construction is to discern the intent of Congress in enacting a particular statute. The first step in ascertaining congressional intent is to look to the plain language of the statute. To determine the plain meaning of a particular statutory provision, and thus congressional intent, the court looks to the entire statutory scheme.

198 F.3d 1167, 1174 (9th Cir.1999) (citations omitted).

Reading the Copyright Act as a whole, it is clear that the application and registration procedure Congress created in Sections 408 through 412 as part of the 1976 Copyright Act was designed to be a flexible system in which the Register had

discretion to examine applications and determine whether they were properly submitted, and to provide authors the opportunity to correct inadvertent or minor errors so as not to divest an author of his copyright rights.

In Section 410(a), Congress gave the Register authority to examine applications and issue registrations after determining that the deposit constitutes copyrightable subject matter and that other requirements have been met. 17 U.S.C. § 410(a). Section 409 further grants the Register discretion to obtain whatever information she deems necessary to fully examine a copyright application. *See also* H.R. Rep. No. 94-1476, at 155-56 (1976) (“The various clauses of section 409 ... are intended to give the Register of Copyrights authority to elicit all of the information needed to examine the application”). Section 409 enumerates ten different categories of information which should be included in an application, and Section 409(11) permits the Register to request any other information needed to properly examine the copyright application. 17 U.S.C. § 409(1)-(11).

More importantly, the numerous provisions permitting the amendment, amplification and correction of registrations establish Congress’s clear intent to abandon the strict provisions of 1909 Copyright Act, under which there were no statutory or regulatory provisions permitting a copyright owner to amend information or correct mistakes in a registration. *See Harris*, 734 F.2d at 1335.

Section 408(c) authorizes the Register to specify administrative classes, but

“the administrative classification of works has no significance with respect to the subject matter of copyright or the exclusive rights provided under this title.” 17 U.S.C. § 408(c). Thus, an incorrect administrative classification will not divest the copyright owner of his rights. Section 408(d) grants the Register the authority to issue regulations to create formal procedures to correct or amplify information in a registration. 17 U.S.C. § 408(d); 37 C.F.R. § 201.5 (Corrections and amplifications of copyright registrations; applications for supplementary registration).

Moreover, Congress recently amended Section 411(b), under which even a registration containing inaccurate information will satisfy the registration requirements for Sections 411 and 412, unless the applicant **knew** it was providing inaccurate information **and** the Copyright Office would have rejected the application had it know about the inaccuracies. 17 U.S.C. § 411(b). Where there is a question of whether the Copyright Office would have rejected the application, Congress specifically directed courts “to request the Register ... advise the court whether the inaccurate information, if known, would have caused the Register ... to refuse registration.” 17 U.S.C. § 411(b)(2).

Finally, Congress contemplated situations where an author’s name will never appear in a registration. Section 409(2) only applies “in the case of a work other than an anonymous or pseudonymous work” (emphasis added) Under Section 101, an “anonymous work” is defined as “a work on the copies or

phonorecords of which no natural person is identified as author.” 17 U.S.C. § 101; see J. Hawes & B. Dietz, *Copyright Registration Practices*, § 4.4 at, pp. 4-7 (2009). Under such circumstances, Section 409(3) only requires disclosure of “the nationality or domicile of the author or authors.” 17 U.S.C. § 409(3).

Thus, when the Act is read as a whole, it becomes clear that Congress intended that authors and copyright claimants have the ability to obtain registrations for their works and that inadvertent and innocent errors should not divest such authors and copyright claimants of their rights. The District Court’s Order abandons that clear Congressional intent and penalizes photographers for relying upon the Copyright Office’s long-standing procedures.

C. The District Court’s New Requirement That All Constituent Works in a Collective Work Must Have Titles is Simply Unworkable.

Finally, PACA concurs with plaintiff’s analysis of Section 409 in that that section only requires identification of the author or authors and the title of the collective work, and not of each constituent part. (Appellant Br., pp. 12-15).

PACA and its members are especially concerned with the District Court’s determination that an applicant has to include the title of every single constituent work in order to be protected by the collective work registration because the requirement would be next to impossible to comply with. Notwithstanding the fact that titles in and of themselves cannot be copyrighted, *Arnstein v. Porter*, 154 F.2d

464, 474 (2d Cir. 1946), *cited by Shaw v. Lindheim*, 919 F.2d 1353, 1362 (9th Cir. 1990), most photographs are not given titles (which makes practice sense when photographers take tens, if not hundreds, of photographs at a time). Thus, it is impossible to include the title of a photograph when there is none, and impractical to require photographers to title their photographs in the future.

Further, even if a photograph is titled with a description of what it depicts, it would not assist anyone in determining what the image looks like. The Copyright Office's search system does not permit image searches. For example, titling a photograph "Grand Canyon" would not provide any information that would permit an individual to know whether his Grand Canyon photograph is substantially similar to any other registered image sharing that title.

Here, the collective work registrations at issue name the author, Corbis, and include the title of the collective work. This is all that is required. We are aware of no authority that would require the author of a collective work to identify every single title or author of every single element of a collective work. Thus, the District Court's "title" requirement should not be upheld.

CONCLUSION

For the reasons set forth above, PACA respectfully requests that this Court reverse the August 8, 2010 Order dismissing Plaintiff's Complaint.

**CERTIFICATE OF COMPLIANCE PURSUANT TO FRAP 32(a)(7)(C)
AND CIRCUIT RULE 32-1**

U.S. COURT OF APPEALS CASE NO. 10-16771

Pursuant to Fed. R. Civ. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached brief is proportionally spaced, has a typeface of 14 points and contains 3,418 words.

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CERTIFICATE OF COMPLIANCE PURSUANT TO FRAP 29(c)(5)

U.S. COURT OF APPEALS CASE NO. 10-16771

Pursuant to FRAP 29(c)(5), *amicus curiae* confirms that no counsel for any party authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person, other than the *amicus curiae*, its members or its counsel, contributed money that was intended to fund preparing or submitting this brief.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 13, 2010.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage pre-paid, or have dispatched it to a third party commercial carrier for delivery within three calendar days to the following non-CM/ECF participant:

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