**From:** [redacted]
**To:** FN-OMB-IntellectualProperty
**Subject:** info@copyrightalliance.org, asmpmemberannouncement@asmp.org
**Date:** Monday, March 22, 2010 8:04:21 PM

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To the Honorable Victoria Espinel and
the Obama Administration:

American Society of Media Photographers (ASMP) and the Copyright Alliance have informed me of the welcome invitation from the Obama Administration to share my thoughts on my rights as a creator, referencing your blog posted on February 23, 2010 at 02:22 PM EDT, entitled "**Intellectual Property and Risks to the Public**." As a member of the ASMP, and a professional photographer based in West Palm Beach, Florida I have a vested interest in advocacy for positive increase and enforcement of Federal regulations governing business practices and contractual relations between creator and client in the photography industry. ***It is my hope and faith invested in President Barack Obama that he and his Administration hold, proclaim and promulgate that,***

***It is an inviolable truth that it shall and ought to be always regarded that in each and every instance of exercise of ownership of copyright in relation to the client, each creator of an original work shall retain an absolute and inseparably perfect state as an 'independent contractor' for each and every original work authored, preserving and retaining the lawful monopoly over each and every copyright in and the exclusive right to license each and every original work created by its author.***

***Pursuant to such exercise, each and every original work so authored shall retain the absolute and inseparably perfect state of an 'original work' defined as not subject to the transfer of copyright and/or commission in being a work-for-hire or work-made-for-hire.***

***And furthermore, pursuant to such exercise, in each and every instance of use of an original work so authored, such work shall retain the absolute and inseparably perfect state as expressed by its creator, with attribution to its creator, free from any and all affiliation with any and all corrupted versions derived therefrom; and, that these moral rights of paternity and integrity shall preserve in their original meaning and intent consistent with obligations defined under the Berne Copyright Convention of 1989.***

I hereby submit my response to your invitation, in good faith and appreciation of the Obama Administration's earnest approach to redressing the ongoing problem of the infringement of intellectual property rights of creators of original works, in particular – freelance creators of photographs.

Initially, I formed a Limited Liability Company designated to provide professional digital photography service on an freelance assignment basis, conceived upon the intent to have in place an apparatus upon which to fall back in the event I am laid off or separated from my current occupation with Palm Beach County Board of County Commissioners, West Palm Beach, Florida. From the beginning my focus has been fixed on thorough preparation prior to entering the small business market, researching what could be considered standard industry business practices, ethical business practice, determining what constitutes fair pricing for freelance photography service and the licensing of digital images I will create. As is inevitably the case in every instance one chooses to participate in commerce involving a much larger constituency greater than oneself, the responsibility for advocacy in the interest of and for the concerns common to each of its members falls upon one as compulsory and derived from the axiom that either all shall bear entitlement to fair and equitable business practices and pricing of intellectual property, or none shall have it. Thus, I am advocating for positive increase of Federal and international regulatory protections and enforcement of intellectual property rights promulgated upon the meaning and intent of the aforementioned proclamation on behalf of all creators of original works globally, as well as for those particular classes of creators known commonly as freelance assignment and stock photographers based in the United States.

The Copyright Act of 1979 in deed represents a noble advancement in protection of intellectual property rights of creators of original works or original works of art under the Carter Administration; however, it appears to have been imbued with a glaringly lesser dignity and consideration than that which was accorded the language in the Model Procurement Code approved by Congress and published by the American Bar Association (ABA) in 1979. The Code has been adopted, published in later editions, and generally recognized as the basis for the terms and conditions written into the contract language prescribing contractual relations between many government purchasing entities and suppliers of goods and services. The manual prescribes the relation of a goods and services supplier to a government entity to be that of an "independent contractor", and defines independent contractor as a person or firm whose members are not employees of the government entity with which it contracts. This is an extraordinarily prescient affirmation of the imperative for government entities and suppliers of goods and services to preserve and protect an irrefragable character, integrity and legitimacy in contractual relations, ***built into*** government purchasing codes across the nation, and for the clear benefit of all parties. At the present time, artists, creators of intellectual or intangible property considered works of art, which includes freelance photographers, are customarily not identified with such suppliers of goods and services in the manufacturing, construction and technology industries, and have not obtain an equal opportunity to participate in fair and equitable contractual relation in commerce. Consequently, the class of suppliers known as creators of original works or original works of art has not benefited from a degree of protections even remotely similar to those built into the statutory and code structures regulating government purchasing. Instead of irrefragable character, integrity and legitimacy, built into the Copyright Act of 1979 is a violation of the spirit and mandate for equal opportunity under the law.

***The very heart of the problem of the growing infringement of intellectual property rights of creators of original works or original works of art lies here in the initial failure of Congress to build into the statutory structure of the Copyright Act the clear line of distinction between creator and client.***

Today, in the United States a positive Federal intervention has become an inevitable necessity (and shall always be) to compensate for the continual permitted erosions over the last thirty years since the Reagan Administration to the present of the ownership of copyright protections subsumed in the corpus of intellectual property rights as enumerated and specified in Title 17 of the United States Code. The problem is absolutely and in no uncertain terms further related to the conservative led deregulation of industries and consumer markets nationwide favoring corporate and commercial buyers, which has resulted in a growing number of buyers using against creators of original works statutory laws originally intended to benefit creators of these works while participating in what has been declared a free and the open market.

***This has given strange impetus to the growing demand that creators of original works sign contracts based on copyright transfer and, most perniciously, work-for-hire or work-made-for-hire requirements, precluding attribution of original works to their creators and the potential for earnings through relicensing the usage of their original works, circumventing Federal statutory guidelines prohibiting willful infringement of intellectual property rights of creators in their works, and denying creators all further privileges of ownership of copyright in their works.***

Over the last twenty-two years photographers have recognized a growing trend toward clients successfully circumventing federal guidelines prohibiting the willful infringement of intellectual property rights. In his book, Selling Photographs: Determining your rates and understanding your rights, published in 1988, Lou Jacobs, Jr. documented early efforts of photographers and graphic artists in the United States to, in his words, "...influence the United States Congress...to prevent the work-for-hire section of the copyright law from being misused to pressure creative people to give up rights without gaining worthwhile benefits." The advertising industry had begun to rely heavily on the use of work-for-hire agreements on the basis of what was largely considered by photographers and graphic designers as a misinterpretation of copyright law, granting right to the advertising industry unsubstantiated in the language of the law. Jacobs continues, “Clearly, the law that was supposed to protect photographers has been misinterpreted by the courts, where work-for-hire decisions are not based on the actual law.”

In the 2008, 7th Edition of Professional Business Practices in Photography, a collected work by ASMP, Richard Weisgrau and Victor S. Perlman warn of the definite trend extending beyond 2013 by which more and more users of photography are demanding work-for-hire- or work-made-for-hire contracts in order to avoid being subject to the termination of copyright transfers in the future. Weisgrau and Perlman write, "...works made-for-hire are not subject to the termination right, clients have started to demand work contracts specifying work-made-for-hire arrangements more frequently and adamantly." By now experts within the photography industry recognize the ominous and pervasive fact that client misuses of Title 17, United States Code continue to proliferate, more photographers are being and will continue to be backed into corners where present revenues can only be earned at the expense of future revenues, the equity in their businesses, and the integrity of ownership in the original works authored, and of the freelance profession itself. The warrant for accepting the argument outlined herein is predicated on a firm conviction that a growing infringement network has existed within the confines of our own commercial markets, acting within the scope of Title 17:

***Conditioning the acceptance of a contract upon copyright transfer and/or a commission in being a work -for-hire- or work -made-for-hire ought to be judged willful infringement of intellectual property rights in an original work or original work of art, and unequivocally prohibited in accordance with Federal statutory guidelines. Creators of original works or works of art have by default of current Federal legislation been denied equal opportunity and equal protection under the law to participate in commerce with fairness, equity and integrity.***

***In the absence of a nationally recognized collective bargaining unit for creators of original works, the sole responsibility to negotiate with a buyer fair and equitable terms and conditions of a binding agreement default to the creator of an original work, as it should. Federal regulation which augments the definition of a creator of an original work to that of independent contractor as set forth herein will provide the negotiating leverage required by a freelance photographer to retain and preserve the earning potential vested in her or his work, and the privileges of ownership, namely, the exclusive right to license and relicense the use of the original work authored. No freelance photographer should ever have to feel pressured into literally signing away future livelihood and equity in her or his business.***

But, there is more; there are corollary problems squarely grounded in the first, the foremost of which is the manifest lack of any unitarily organized approach to specifically referencing or indicating, making easily accessible, and disseminating educational and empowerment resources with which newcomers to the business of photography (as creators of new jobs) may acquire the knowledge and understanding to actively protect, retain and enforce ownership of copyright in their original works, and learn to have longevity. It is a most nocent condition shared as well by some established freelance professional assignment and stock photographers who are currently finding their revenue bases eroding into non-existence, and the legitimacy of freelance photography as a profession in clear and present peril. It is my understanding that even most accredited universities and colleges in the United States providing art or photography programs do not currently have in place planned curriculum specifically designed to educate students about best business practices and the applications and pitfalls of copyright law in business photography.

It has been only through a rather remarkable persistence that I, through the course of rather intensive independent research navigating the cavities of a remarkably decentralized underground of source information, hit upon a vein of a faintly shimmering lead. Following this lead, reading a spate of books, scouring the Internet, and speaking to photographers and other artists, I eventually found my way to a reservoir of valuable information and much needed guidance, most significantly through my recent association with the ASMP, and visits to the websites of the Plus Coalition and the U.S. Copyright Office.

Furthermore, there is not to be found anywhere significant documentation of annually compiled national and regional statistical data evincing median standards for pricing photography services and licensing fees with which photographers may accurately discern market trends over time, and gauge what would constitute "standard business practices," "ethical business practice" and "fair pricing" along the

spectrum of industries, media, regions, durations, fees, and most importantly methods for licensing usage of photographs. As a prospective newcomer to professional business photography, I am overwhelmed at times by a pervading sense that existing local, regional and national market environments are made depressingly incomprehensible to the creators of original works seeking to earn a living from revenues generated solely upon their authorships.

What information I have found comes from the Bureau of Labor Statistics, a report published from the Occupational Outlook Handbook, 2010 - 2011 Edition forecasting employment trends in the labor market for photographers. The report projects a twelve percent positive growth nationally in the number of freelance and salaried photographers entering the labor market for the first time, over a ten year period from 2008 to 2018. By 2018, more than 85,000 photographers will be self employed freelance photographers, more than half the total number projected to be in the labor market. Although they will exercise a greater autonomy than their staff or salaried colleagues, their income and viability will be far more uncertain, variable and at risk of attrition. More than half of the total number of photographers in the labor market will engage in contractual relations with clients pushing them into work-for-hire or work-made-for-hire binding agreements. This, together with the facts that staff or salaried photographers by default have no copyright interest in the original works they create, the decentralized underground of scattered networks of information, and the lack of nationally recognized collective bargaining power, the outlook shows a rather depressingly dismal forecast for the state of intellectual property rights in the United States, if nothing is done in the present day to eliminate the trappings embedded in the Copyright Act as it stands.

Today in the United States it is clear that the markets for intellectual property remain largely unexamined and deleteriously underregulated. Stronger and more efficacious Federal regulations in the purview of promoting the general welfare will secure for creators of original works or works of art the protections long overdue and proven requisite. It represents an evolution of intellectual property rights for which there has existed for twenty-one years a precedent for executive leadership. ***A Model Code for Contractual Relations Involving Creators of Original Works and Intellectual Property,*** commensurate to the ABA's Model Code for Government Procurement and Purchasing should be firmly and permanently placed within the statutory structure of Title 17 of the United States Code, in which a creator is affirmed to be an independent contractor for all time***.***

***We cannot even begin to seriously address the infringement of intellectual property rights in the United States or anywhere else in the world until creators acquire firm legal, Federal statutory standing as the absolute owners of copyrights in the original works or works of art they author, from which they cannot upon any law or term or condition of a binding agreement be separated. Ownership of copyright should itself be recognized as an irrefragable right guaranteed by the highest law in the land.***

The outcomes are manifest and shall be realized immediately: creative Americans create new jobs, themselves; the amelioration of the market environment so that these jobs can be sustainable, profitable and recognized singularly legitimate profession over the long-term; and, creators retain uncontestably the natural and illimitable earning potential vested in the original works they author. And, all of this **the Obama Administration can ensure by simply bringing contractual relations between creators and clients up to the normalizing standard** such as that which is enforced when suppliers of goods and services contract with government entities, and thereby avail the protections of equal opportunity to all suppliers of goods and services, tangible and intangible alike.

Of the long-term outcomes to be realized is the Federal mandate to compile critically analytical and detailed annual national and regional statistical data accurately describing business practices, pricing and fees in each of the creative industries, market analyses, and authoritative information gathered from serious scientific surveys across the industries. This would be an invaluable aid for creators to access and use in preparing to enter the labor market, and for clients to use in procuring the use of intellectual property supporting Federal guidelines ensuring the offer of fair and equitable remuneration to creators for the original works they author.

Perhaps, the proposal outlined in this letter is beyond anticipation in response to your welcome

invitation; I recognize the provocative and extremely controversial nature of my appeal. I seem to never fail to be. Perhaps, everything proposed in this letter would have to be enacted through executive order; this is the kind of leadership the creative business community needs. But years of thought and contemplation have been given to the subject of civil rights and how individuals can come together to work together for the sustaining of the life of each and every individual. It can only be accomplished through an absolute commitment to non-violence as a way of life, and the proactive caring for the welfare of each and every individual. And, that this striving must carry out in every form of human relation, and as such, in commerce with one another. Each of us bears a responsibility for one another: It is axiomatic that either all shall benefit from the entitlement of equal protection under the law, or none shall have it. Building the political, economic, social, and cultural infrastructure of this Nation shall be an ongoing process hopefully linked in some way to human evolution. I typed this letter with fervent and steady hands, trusting that you, President Obama, and the rest of his Administration will find outlined herein a serious and reasoned argument warranting serious consideration, and further critical development of it and the working environment for creative Americans and artists all over the world. Wouldn't it be a wonderful thing if something I contributed here were to be a spark that helped change the world!

Submitted with the greatest respect and gratitude,

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