

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MUENCH PHOTOGRAPHY, INC.,

Plaintiff,

- v -

HOUGHTON MIFFLIN HARCOURT
PUBLISHING CO. and R.R. DONNELLEY &
SONS CO.,

Defendants.

Docket No. 09-cv-2669 (LAP) (JCF)

***AMICI CURIAE* PICTURE ARCHIVE COUNCIL OF AMERICA, INC. AND NORTH
AMERICAN NATURE PHOTOGRAPHY ASSOCIATION'S MEMORANDUM OF LAW
IN SUPPORT OF PLAINTIFF'S MOTION FOR RE-ARGUMENT AND
RECONSIDERATION OF THE COURT'S MAY 4, 2010 MEMORANDUM AND
ORDER GRANTING DEFENDANTS' MOTION TO DISMISS IN PART**

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The Picture Archive Council of America, Inc. (“PACA”) and the North American Nature Photography Association (“NANPA”) respectfully submit this Memorandum of Law as *amici curiae* in support of Plaintiff’s Motion for Reargument and Reconsideration of the Court’s May 4, 2010 Memorandum and Order (the “Order”) granting Defendants’ motion to dismiss.

PACA and NANPA also adopt the positions set forth in the Memoranda of Law of the other *amici curiae* Corbis Corporation and the American Society of Media Photographers submitted in support of Plaintiff’s Motion for Re-argument and Reconsideration.¹

I. STATEMENT OF INTEREST / DESCRIPTION OF *AMICI* PACA AND NANPA

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 approximately 90 companies in North America and over 30 international members. Members include large general libraries, such as Getty Images, Inc., and smaller specialty libraries that provide the media with access to in-depth collections of images on nature, science, art, architecture, history, culture among others.

PACA is joined by the North American Nature Photography Association (“NANPA”). Founded in 1994, NANPA is the first and premier association committed solely to serving the field of nature photography. NANPA’s 3,100 members include professional photographers who contribute images to PACA members, such as Animal Animals, Minden Pictures and Grant Heilman Photography, and other libraries specializing in licensing nature and wildlife images.

PACA members, as well the members of NANPA who relied on PACA members to protect their images by filing copyright registrations, are directly and significantly harmed by this Court’s decision. As described below, the registrations covering the individual photographs

¹ Pursuant to the Court’s direction, we have coordinated our response with the other *amici* and have used best efforts to avoid making duplicative arguments to the Court.

at issue were completed based upon instructions that PACA, as well as Corbis, received from the U.S. Copyright Office. For the past fifteen years, many other members have followed the same instructions provided by the Copyright Office to protect the underlying photographs of their contributing photographers, first to register print catalogs containing physical prints, and then to register CD-ROM or online catalogs of digital images. The ability to enforce copyright and secure licensing fees for the use of images is vital to the livelihood of all PACA and NANPA members. The *amici* respectfully submit that this Court should grant Plaintiff's motion for reconsideration, and deny Defendants' Motion to Dismiss in its entirety.

II. STATEMENT

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 images made available to users. 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.

PACA offers standard industry contracts for its members to adapt, including contracts between image libraries and contributing photographers that authorize image libraries to license images to clients and to share with the photographer a percentage of the license fees collected. These contracts provide that, if the photographer has not already registered his or her

photographs, the photographer assigns copyright in the photographs to the image library in order for the image library to obtain a copyright registration in the photographs. While photographers have always been encouraged by image libraries to register their own works, many photographers rely upon the image libraries to register images on their behalf because of the large number of images typically provided to an image library. These contracts also authorize the image library to seek compensation for and, when necessary, bring claims for unauthorized uses.

In order to discover unauthorized uses, many PACA members monitor for infringing uses, which until recently was performed manually, requiring individuals to review magazines and other published material to search for image uses. Now, many member image libraries use the services of companies that search websites and publications using image recognition technology and provide members with reports on image usage. Some PACA members have entire compliance departments devoted to copyright enforcement and to seek retroactive fees from companies and/or individuals that have used images without a license.

The backbone of all these enforcement efforts is the copyright registration in the underlying image. Having a registration prior to infringement gives the image library the ability to assert the right to obtain 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 Order asserts, 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. The 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; 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. Given the wide distribution of these catalogs, these images were most at risk for infringement. 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 would be consistent with the Office's longstanding practice in registering serial works. Based upon the instructions provided at this meeting, the undersigned prepared a newsletter in 1995 (the "1995 Newsletter") describing the registration procedure prescribed by the Copyright Office that was distributed to PACA's membership. 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 copyright registrations in the image catalogs would protect the individual photographs.

2. As Distribution Technology Progressed, PACA Again Consulted With The Copyright Office to Ensure The Image Catalog Registration Procedures Were 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.²

² The Copyright Office regulation concerning group registration of photographs, 37 C.F.R. § 202.3(b)(10), was unavailable at that time as it became effective August 2001, *see* Registration of Claims to Copyright, Group Registration of Photographs, 66 Fed. Reg. 37,142 (July 17, 2001).

The Copyright Office assigned a specific examiner, Virginia Giroux, Attorney Advisor, Examining Division, to review copyright applications for PACA and its member companies. Because there was no circular available at that time for copyrightable content delivered via a website, Ms. Giroux instructed PACA members to follow the instructions published by the Copyright Office for online databases and register their digital catalogs as “databases”. It was understood all along that the primary intent of the registration was to protect the 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 (usually every three months to remain compliant with 17 U.S.C. § 412). Indeed, having to file copyright applications on each occasion new images were made available to clients online (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 that was distributed to PACA’s membership advising them of the Copyright Office’s instructions for online catalogs.

3. The Register of Copyrights 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 of Copyright 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

When it was promulgated, image libraries could not utilize the group registration procedure because the regulation is limited to group registration of photographs by the same photographer. *See* 37 C.F.R. § 202.3(b)(10)(ii).

February 12, 2002, writing on behalf of the Register of Copyrights, 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* ("*Compendium II*"). The Copyright Office further confirmed that the 1995 Newsletter accurately summarized the Copyright Office's long-followed registration procedures for collective works such as image catalogs. Following that correspondence in 2002 and until the date of the Court's Order, the Copyright Office has consistently permitted image libraries to file copyright registrations for their digital catalogs following the instructions it provided fifteen years ago. Moreover, throughout that time, the Copyright Office has examined and accepted registrations for digital catalogs filed pursuant to those instructions, and image libraries have relied upon those registrations to monitor and enforce the rights in the hundreds of thousands, if not millions of individual photographs contained in such digital catalogs. Now, the 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.

Despite the Court's belief that millions of registrations will not be voided, image libraries, and the photographers that those libraries represent, now appear to be left without any meaningful copyright protection in their individual photographs, 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, this 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 in offered 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. This 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.

Finally, it is unclear how this decision will affect other collective works in which not all of the authors are named. Taking the Court's holding that "all" authors must be named on a collective work application to its logical extreme, there is a serious risk that any author, reporter, photographer, musician, etc. who relies upon a collective work registration for protection of his or her constituent work (and who has assigned all of his or her copyright rights to the copyright claimant) no longer has any protection in their individual work if their name is not specifically stated on the application. As this decision will have lasting repercussions that may affect millions of copyright registrations, we urge the court to grant Plaintiff's motion for reconsideration and ultimately deny Defendants' Motion to Dismiss in its entirety.

III. LEGAL ARGUMENT

A. The Supreme Court and Second Circuit 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 Second 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. *See Baron v. Leo Feist, Inc.*, 78 F. Supp. 686, 692 (S.D.N.Y. 1948) (refusing to find registration invalid where defendant failed to assert it was misled by plaintiff’s registration), *aff’d*, 173 F.2d 288 (2d Cir. 1949). In *United States v. Backer*, 134 F.2d 533 (2d Cir. 1943), the court rejected defendant’s claim that a registration was invalid for stating a publication date after the application date, holding that the Copyright Act “grants valuable rights to persons who create subject matter which is copyrightable and ... useless technicalities are not allowed to cut down the benefits conferred.” *Id.* at 536 (citing *Joe Mittenhal, Inc. v. Irving Berlin, Inc.*, 291 F. 714, 715 (S.D.N.Y. 1923) (“The purpose of the act of 1909 was to open a path for authors beside and not through the quagmire which had been created under the old act.... The policy of the act must be enforced, but it does not lie in purposeless technicality”) and *Freedman v. Milnag Leasing Corp.*, 20 F. Supp. 802, 804 (S.D.N.Y. 1937) (“it will not do to be overstrict as to the technicalities of the Copyright Act.... If the statute is substantially and in good faith complied with by a person seeking copyright protection and if others have not been misled into thinking that the work is not copyrighted it is enough.”). Similarly, 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

because the plaintiff “was attempting to copyright new technology that the Copyright Office had never directly dealt with before.”

The Copyright Office instructed PACA and its members how to register their image catalogs in line with the Copyright Act and the Copyright Office’s rules and regulations, and PACA and its members complied with those instructions in good faith. Defendants nowhere claim that they were ever misled by the copyright registrations at issue or by Plaintiff’s claim of rights. Indeed, Defendants licensed Plaintiff’s photographs for a number of years before asserting their defense that Plaintiff’s cannot rely upon the copyright registrations at issue to protect his images based solely on the technical ground that one section of the registration forms is allegedly incomplete. Defendants do not claim that the copyright registrations at issue were not otherwise substantially complied with pursuant to the Act. The Court’s unduly strict reading of 17 U.S.C. § 409(2) disregards the provision’s place in the statute as a whole and the Register’s central role in the registration process. Accordingly, the Court should reconsider its erroneous invalidation of Plaintiff’s rights based upon technicalities.

B. The Court’s Order Misinterprets Section 409(2).

1. Corbis’ Collective Work Registrations Are Effective Because They Name the Proper Author Pursuant to Section 409(2) – Corbis.

The image catalog registrations at issue were filed as “collective works”. The Act defines a “collective work” as “a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.” 17 U.S.C. § 101. As a collective work is separate and independent from its constituent works, to register a collective work, Section 409 should only apply to the collective work itself and the only information that need be included in the application is information about the collective work itself.

Congress' drafting of Section 409 supports this interpretation. By its terms, Section 409(2) requires that the "author or authors" of "a work" be included in an application form. 17 U.S.C. § 409(2). Subsections (3) through (8) similarly contemplate that the information provided will pertain to a single "work." See 17 U.S.C. § 409(3)-(8) (each referring to "the work" or "a work"). While there may be more than one author (through the use of "author or authors"), there will be only one "work" and it is the author or authors of that work that are to be included on the application. Thus, in the case of a collective work, Section 409 only requires that the author or authors of the collective work – here, the image library that selected and arranged the individual elements – be listed.

In addition, Section 409(9) provides that an application for a compilation work (which by definition includes collective works under 17 U.S.C. § 101) need only include "an identification of any preexisting work or works that it is based on or incorporates, and a brief, general statement of the additional material covered by the copyright claim being registered." It does not require the names of the "author or authors" of any constituent work. J. Hawes & B. Dietz, *Copyright Registration Practices*, §§ 10:9-10:10, at pp. 10-17 to 10-19 (2009).³ Thus, the

³ This interpretation of Section 409 is consistent with the widespread practice in registration of collective works such as periodicals, encyclopedias, and anthologies and other works with multiple authors such as motion pictures. The copyright in such works is registered in the name of the owner of the copyright in the collective work, such as the publisher or owner of a motion picture, but the registration applications almost never include the names of the individual contributors to such works, even where copyright in each part of the collective work has been transferred to the copyright claimant.

An instance of this is *Morris v. Business Concepts, Inc.*, 259 F.3d 65 (2d Cir. 2001), where Conde Nast registered the copyright in issues of its magazine *Allure*. See 259 F.3d at 68-69. There is no suggestion that Conde Nast listed the author of each article in the issue on the copyright registration application. As explained in Corbis' Amicus Brief, the Second Circuit was explicit that if the plaintiff had properly transferred copyright in her article to Conde Nast, then the registration in the collective work would have covered her article. Copyright Office records of registrations of *Allure* Magazine from the period at issue in *Morris* do not include any name other than that of Conde Nast, suggesting that the names of the various authors of the parts

Court's erroneous construction of Section 409(2) would render Section 409(9) duplicative and superfluous, a result that should be avoided. *See State St. Bank & Trust Co. v. Salovaara*, 326 F.3d 130, 139 (2d Cir. 2003) ("It is well-settled that courts should avoid statutory interpretations that render provisions superfluous.") (citation omitted).

This natural reading of Section 409 is consistent with the Copyright Office's reading of the statute. *Compendium II*, Section 615.06 states:

Where a collective work is being registered, the application should name the author of the collective work. The names of the individual authors of separate contributions being registered as part of the claim need not be given on the application. The registration may cover (a) the collective work authorship, (b) any contribution created by the employee or other party commissioned by the author of a work made for hire, and (c) any other contributions that the claimant of the collective work obtained by transfer.

As the copyright registrations at issue name the author of the collective work – Corbis – as required by Section 409 and are not required to identify the authors of the underlying works, 17 U.S.C. § 409(9), the Court should reconsider its holding that the application should have also included the names of all the photographers whose photographs are part of the image catalogs. At a minimum, the question of whether the author to be named in a collective work pursuant to Section 409(2) is solely the author of the collective work itself or whether all authors of the underlying works need to be named as well shows that the statute is ambiguous on this point, and the Court should have looked beyond the language of the statute to determine its meaning.

of the collective work at issue were not included in the collective work application. *See* http://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?v1=37&ti=26,37&SEQ=20100618154930&CHK=20353676&CHK=10233870&CHK=20353691&CHK=20353690&CHK=12967602&CHK=19455889&CHK=20353689&CHK=3282359&Search%5FArg=allure&Search%5FCode=TALL&CNT=25&REC=0&RD=0&RC=0&PID=uKWgmChPB_AEmmS3WmuZ50_k9AW7&SID=1 (last visited June 18, 2010).

2. The Order Improperly Examined Section 409 Without Considering Its Place in the Copyright Act’s Statutory Registration Scheme.

Further, reconsideration is appropriate because the Court did not analyze Section 409(2) with respect to the 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 Court held: “[a] plain reading of § 409 of the Copyright Act mandates that the copyright registrations at issue here contain the names of all the authors of the work.” Order, p. 20 (citing 17 U.S.C. § 409(2)) (emphasis added). However, the Order only examined Section 409(2) alone and did not examine it with reference to how it fits within the registration procedures of the Copyright Act as whole.

“Statutory construction begins with the plain text and, if that text is unambiguous, it usually ends there as well.” *United States v. Gayle*, 342 F.3d 89, 92 (2d Cir. 2003). However, “[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of that statute as a whole.” *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (emphasis added)

Reading the Act as a whole, it is clear that the application and registration procedure Congress created in Sections 408 through 412 was designed to be a flexible system in which the Register of Copyrights was granted the 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 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); *see also* 17 U.S.C. § 701(a) (“All administrative functions and duties under this title, except as otherwise specified, are the responsibility of the Register of Copyrights as the director of the Copyright Office of the Library

of Congress.”)

Section 409 further establishes that the Register of Copyright is charged with the discretion to obtain whatever information she deems necessary to fully examine a copyright application. Section 409 provides that “[t]he application for copyright registration shall be made on a form prescribed by the Register of Copyrights and shall include ...” ten different categories of information. Section 409(11) gives the Register of Copyright the discretion to request any other information needed to properly examine the copyright application. 17 U.S.C. § 409(11); *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 and to make a meaningful record of registration.”).

Numerous provisions address errors in applications. 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). Placing a work into the wrong 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 copyright registration (which it did). 17 U.S.C. § 408(d); 37 C.F.R. § 201.5 (Corrections and amplifications of copyright registrations; applications for supplementary registration). Congress recently amended Section 411(b), so 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. Where there is a question whether the Copyright Office would have rejected the application, Congress specifically directed courts “to request the Register ... to

advise the court whether the inaccurate information, if known, would have caused the Register ...to refuse registration.” 17 U.S.C. § 411(b)(2).

Congress also 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 Copyright Registration Practice, supra*, § 4.4 at p. 4-7 (2009). Where the work is anonymous or pseudonymous, Section 409(3) applies and 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 errors that would not have changed the Register’s decision to register the work should not divest such authors and copyright claimants of their rights. Accordingly, the Order’s hyper-technical reading of Section 409(2) in the Order is inconsistent with the purpose of the Act and requires reconsideration.

3. The Order’s Interpretation of Section 409(2) Violates the Rules of Statutory Interpretation by Inserting the Word “All”.

If the Court finds that it did consider the purposes of the Act in its interpretation of Section 409(2), the Court should still reconsider its decision because it read into Section 409(2) a word that is not in the statute. Section 409(2) states “in the case of a work other than an anonymous or pseudonymous work, the name and nationality or domicile of the author or authors, and, if one or more of the authors is dead, the dates of their deaths.” (emphasis added). By interpreting Congress’s inclusion of “author or authors” to mean that “all” authors must be named, the Court’s interpretation contravenes the basic rule of statutory construction that a court

should not read words into a statute that are not there. *Bates v. United States*, 522 U.S. 23, 29 (1997); *Ralph Oldsmobile, Inc. v. Gen. Motors Corp.*, 2000 WL 1459767, at *5 (S.D.N.Y. Sept. 29, 2000) (citing *Bates*); *see also United States v. Watkins*, 278 F.3d 961, 965 (9th Cir. 2002). This is particularly so “where addition of words could partially defeat the purpose of the statute.” Sutherland, *Statutes and Statutory Construction*, § 47:38 (7th ed. 2009).

Other courts agree that the word “all” should not be read into statutes in which Congress has not included the word and that the omission of the word “all” from a statute must be considered meaningful and significant. For example, the court in *In re Gillis*, 333 B.R. 1, 7-8 (D. Mass. 2005), held that in defining an “individual with regular income” as one capable of making “payments under a plan,” the Bankruptcy Code could not have meant “all” payments under a plan. The court’s rationale was simple: “[the Code] does not say ‘all payments under a plan,’” and other provisions indicated a less stringent Congressional intent. *Id.* at 8. *See also, Evans v. Walter Indus., Inc.*, 2006 WL 5670939, at *10 (N.D. Ala. Mar. 15, 2006), *rev’d on other grounds*, 449 F.3d 1159 (11th Cir. 2006) (interpreting Class Action Fairness Act and concluding “[h]ad Congress intended ‘all’ it could have said ‘all.’”); *Planned Parenthood Minn. v. Rounds*, 467 F.3d 716, 729 (8th Cir. 2006), *vacated and decided on other grounds sub nom.*, 530 F.3d 724 (8th Cir. 2008) (*en banc*) (rejecting dissent’s argument that “rests on reading the word ‘all’ into the text of the statute, a word which was not used by the . . . legislature”)

Here, the Court’s narrow interpretation of Section 409(2) to mean that “all authors” must be named similarly would defeat the intent of the Copyright Act to ensure that copyright registrations are not invalidated and an author’s ability to obtain statutory damages and attorney’s fees is not lost due to innocent or inadvertent errors that would not have led the Copyright Office to reject the application.

4. At Best, Section 409(2) is Ambiguous, and the Court Should Have Deferred to the Expertise of the Copyright Office.

When the improperly inserted word “all” is removed from Section 409(2), the “plain reading” of Section 409(2) is merely that an application for a work, other than an anonymous or pseudonymous work, should name “the author or authors.” As Congress did not speak to the precise question of whether “all” authors must be named in an application, the Court should have deferred to the Copyright Office’s determination as is it the agency charged with administering the Act’s registration provisions. *See* 17 U.S.C. §§ 410(a), 701(a); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (deferring to agency’s interpretation of meaning of statute; “agency charged with interpretation of the statute in light of everyday realities”); *accord, Asociacion de Compositores y Editores de Musica Latino Americana v. Copyright Royalty Tribunal*, 851 F.2d 39, 41-42 (2d Cir. 1988) (Copyright Office Royalty Tribunal’s interpretation of statutory term “corporation” reasonable and entitled to *Chevron* deference). The Supreme Court has upheld an agency interpretation of a statute even where the interpretation is arguably contrary to a literal reading of the statute. *Mourning v. Family Pub. Serv., Inc.*, 411 U.S. 356, 364-374 (1973) (agency rule requiring Truth in Lending disclosures by creditors who extended credit repayable in four or more installments, but did not expressly impose finance charge, upheld despite fact that statute expressly requirement disclosures where finance charge imposed).

However, even if the Register’s determination as to the information appropriate for registering digital catalogs as explained in the Petruzzelli letter citing the Copyright Regulations and the *Compendium II* is not entitled to *Chevron* deference, her determination should be entitled to *Skidmore* deference, in which “rulings, interpretations and opinions of the [agency] Administrator ..., while not controlling ... by reason of their authority, do constitute a body of

experience and informed judgment to which the courts and litigants may properly resort for guidance”. *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944); *accord*, *Sai Kwan Wong v. Doar*, 571 F.3d 247 (2d Cir. 2009) (interpretation in agency Medicaid manual entitled to *Skidmore* deference and interpretation of statute upheld in face of claim that it was contrary to statute).

The Copyright Office has determined that it does not need the names of all the authors in the case of a work with a voluminous number of authors in order to properly examine the application and make a record of registration. *See Compendium II*, Section 615.07(b)(3) (“If the work being registered was created by a large number of authors, the application will be considered acceptable if it names at least three of those authors, followed by a statement such as “and [number] others.”) Based upon its expertise in administering the Act’s registration procedures pursuant to its Congressional mandate, and given the ambiguities in Section 409(2), the Copyright Office’s determination warrants deference and the Court should not second guess the Copyright Office’s discretion in deciding to register a certain work.⁴

C. The Order Disregards Settled Law That the Failure to Name All Authors in a Copyright Application is Not Grounds to Invalidate an Author’s Rights.

Again, taking the Order’s holding to its logical extreme, if a copyright registration fails to name all co-authors for a certain work, that registration could never be used as the basis for an infringement action. That is not the law. In *Thomas Wilson & Co. v. Irving J. Dorfman Co.*, 433 F.2d 409, 411-12 (2d Cir. 1970), the court rejected defendant’s claim that a copyright application was deficient because plaintiff’s president was mistakenly identified as the “author” in the

⁴ Indeed, the Copyright Office explained in its *2007 Annual Report of the Register of Copyrights*, <http://www.copyright.gov/reports/annual/2007/ar2007.pdf> (last accessed June 18, 2010): “During fiscal year 2007, the Copyright Office received 541,212 claims to copyright covering well over a million works and registered 526,378 claims” p.11. Moreover, the 2007 Report reveals that it registered over 33 million copyrights from 1790 to 2007. *Id.*, p. 58.

application and because the application failed to refer to an earlier copyright. Section II.B.1. of Corbis' *Amicus* Brief cites numerous other cases supporting this proposition.

Finally, PACA and NANPA concur and join in Corbis' *Amicus* Brief for the proposition that the Court failed to properly apply the "innocent error" rule applicable either as a judge-created rule, *see eScholar, LLC v. Otis Educ. Sys., Inc.*, 2005 WL 2977569, at *7 (S.D.N.Y. Nov. 3, 2005) ("The Second Circuit, in particular, takes an expansive view of the [innocent error] defense, requiring that the person asserting the copyright to have knowingly failed to tell the Copyright Office about facts that might have required the office to reject the application") (citing the seminal Second Circuit case, *Eckes v. Card Prices Update*, 736 F.2d 859, 861-62 (2d Cir. 1984)), or as Congress defined it in 17 U.S.C. § 411(b).

IV. CONCLUSION

For the reasons set forth above, the *amici curiae* herein respectfully request that this Court reconsider its May 4, 2010 Memorandum and Order and deny Defendants' motion to dismiss in its entirety.

Respectfully submitted,

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