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Opinion No. 07-130

Copyright Status of Photographs Taken by Tennessee's Photographic Services Personnel

QUESTION

May the Tennessee Department of Tourist Development warrant that the State of Tennessee is the copyright owner of photographs taken by the State of Tennessee's Photographic Services personnel but not registered with the U.S. Copyright Office?

OPINION

Yes. The Tennessee Department of Tourist Development may warrant that the State of Tennessee is the copyright owner of photographs taken by the State of Tennessee's Photographic Services personnel but may not warrant that the State is the copyright registrant.

ANALYSIS

Article I, Section 8, Clause 8 of the United States Constitution forms the basis for copyright protection. It gives Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Congress has provided that:

> (a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:
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> (1) literary works;
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> (2) musical works, including any accompanying words;
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> (3) dramatic works, including any accompanying music;

> (4) pantomimes and choreographic works;
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> (5) pictorial, graphic, and sculptural works;
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> (6) motion pictures and other audiovisual works;
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> (7) sound recordings; and
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> (8) architectural works.

Copyrights (Copyright Act), 17 U.S.C. § 102(a) (2005). It is well-settled that photographs are afforded copyright protection as pictorial works. *See Rogers v. Koons*, 960 F.2d 301, 306 (2nd Cir. 1992); 17 U.S.C. § 101.

You have specifically asked whether the State of Tennessee Department of Tourism may warrant that the State of Tennessee is the copyright owner of photographs taken by the State of Tennessee's Photographic Services personnel but not registered with the U.S. Copyright Office. The Copyright Act states in relevant part:

> (b) Works Made for Hire. -- In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

17 U.S.C.A § 201(b). An employer owns the copyright in an employee's work when:

> (1) it is the kind of work the author is employed to perform; (2) the creation of the work occurred substantially within authorized work hours and space; and (3) the creation of the work was actuated, at least in part, by a purpose to serve the employer. This determination necessitates not only a case by case evaluation, but potentially a task by task evaluation.

Gilpin v. Siebert, 419 F.Supp.2d 1288, 1295 (D.Or. 2006). When an employer hires an employee to produce copyrightable work, there is a presumption that the work was made for hire, and the copyright belongs to the employer. *See Lin-Brook Builders Hardware v. Gertler*, 352 F.2d 298, 300 (9th Cir. 1965).

Title 4 of the Tennessee Code creates and establishes the State of Tennessee, Department of General Services. *See* Tenn. Code Ann. § 4-3-101(11). Within the Department of General Services, the statute has created the photographic division. *See* Tenn. Code Ann. § 4-3-1104(a)(4). As such, the State's Photographic Services personnel are state employees, and there is a presumption

that the State of Tennessee owns the copyrights of the photographs taken by these state employees in the scope of their employment.[1]

The Copyright Act defines "copyright owner" as the owner of any of the exclusive rights comprised in a copyright. *See* 17 U.S.C. § 101. Registration of a copyright is not required for copyright ownership:

> (a) Registration Permissive. -- At any time during the subsistence of the first term of copyright in any published or unpublished work in which the copyright was secured before January 1, 1978, and during the subsistence of any copyright secured on or after that date, the owner of copyright or of any exclusive right in the work may obtain registration of the copyright claim by delivering to the Copyright Office the deposit specified by this section, together with the application and fee specified by sections 409 and 708. Such registration is not a condition of copyright protection.

17 U.S.C. § 408(a). Therefore, the State of Tennessee need not register its copyrights for the Department of Tourist Development to warrant that the State is the copyright owner of photographs taken by the State's Photographic Services personnel in the scope of their employment. However, insofar as these photographs are not registered with the U.S. Copyright Office, the Department of Tourist Development may not warrant that they are.

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[1]While the federal government generally may not own copyrights pursuant to 17 U.S.C. § 105, individual states are not excluded from protection under the Copyright Act. *County of Suffolk, New York v. First American Real Estate Solutions*, 261 F.3d 179, 187 (2nd Cir. 2001).

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