

420.0448

## Memorandum

To: Torrance – Audit (WVW)

Date: May 10, 1985

From: Headquarters – Legal (RLD)

Subject: REDACTED TEXT

This is in reply to your March 20, 1985 memo regarding the application of tax to charges by REDACTED TEXT for negative retouching. Your audit staff discovered the charges during an audit of REDACTED TEXT.

You noted that REDACTED TEXT's customers include in-state and out-of-state customers consisting of camera shops, portrait studios, and photographers. Inasmuch as photographers are considered as the consumer of the negatives which are used to make photographs, the auditor has asserted tax on REDACTED TEXT's charges for negative retouching.

REDACTED TEXT has taken the position that its charges are nontaxable charges for resale and bases its contention on an article published in *The Wedding Photographer*, a trade journal. The article reports that an attorney who specializes in wedding photography believes that, under the Copyright Act of 1978, "the customer is the 'owner' of the negatives except if there is an agreement to the contrary. The photographer, however, has the right to retain possession and custody of the negatives."

We understand that the article's reference to the Copyright Act of 1978 is to Title 17 of the United States Code as generally revised by P.L. 94-553, effective January 1, 1978. The article is apparently referring to Title 17, U.S. Code, Section 201, subdivision (b), which provides:

"In the case of a work made for hire, the employer or other person for whom 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."

Under the law, the "work for hire doctrine" applies when the relationship of the parties is that of the employer-employee, and it is equally applicable where the creator of the work is an independent contractor. (*Bernstein v. Universal Pictures, Inc.*, 379 Fed.Supp. 933.) Therefore, we agree that, under the Copyright Law, when a photographer takes a picture of a customer, the customer obtains a copyright interest in the image embodied on the photographer's film. However, Title 17, U.S. Code, Section 202 provides that:

“Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.”

The legislative history to P.L. 94-553 explains that:

“The principle restated in section 202 is a fundamental and important one: that copyright ownership and ownership of a material object in which the copyrighted work is embodied are entirely separate things. Thus, transfer of a material object does not of itself carry any rights under the copyright, and this includes transfer of the copy or phonorecord -- the original manuscript, the photographic negative, the unique painting or statute, the master tape recording, etc. -- in which the work was first fixed. Conversely, transfer of a copyright does not necessarily require the conveyance of any material object.

(5 U.S. Code and Congressional Administrative News 1976, p. 5739.)

It is our opinion that, for sales tax purposes, the fact that the customer obtains an intangible copyright interest in the image of a negative, when the customer's image is reproduced on the negative, does not transfer ownership of the tangible personal property to the customer.

Therefore, it is our opinion that, sales tax generally applies to REDACTED TEXT's sale of negative retouching in California. Tax does not apply to REDACTED TEXT's sales or retouching to out-of-state photographers where REDACTED TEXT retouches such negatives and does not use the negatives to make prints prior to shipping the negatives out-of-state in accordance with Section 6396, Revenue and Taxation Code. On the other hand, where REDACTED TEXT does use the negatives to make prints in California prior to shipping the negatives out-of-state, sales tax applies to REDACTED TEXT's sale of the retouching.

We hope this answers your question, however, if you need further information, feel free to write again.

RLD:ba