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To: Julianne Cho
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**NEW YORK CITY BAR ASSOCIATION COMMENTS IN OPPOSITION TO THE
PROPOSED RULES RELATING TO PERMITS ISSUED BY THE MAYOR'S OFFICE
OF FILM, THEATRE AND BROADCASTING**

The following comments in opposition to the Proposed Rules Relating to Permits Issued by the Mayor's Office of Film, Theatre & Broadcasting (hereinafter the "Rules") are submitted by the New York City Bar Association.

The Rules would require permits for a broad range of photographic activity on City property such as parks and streets, and would subject significant numbers of artists using hand-held cameras and a single tripod to City regulation for the first time. Artists subject to the Rules would have to file detailed permit applications and provide proof that they have at least \$1,000,000 in liability insurance or obtain a hardship waiver. Rules § 9-03 (a) and (d). The types of artists who potentially would be affected include not only photographers shooting images with the ultimate objective of creating photographs, but also painters, sculptors, digital artists and others who use photographs as a basis for works in other media.

The Rules contain hand-held camera and single tripod exemptions, but these are extremely narrow and would leave a great deal of individual artistic activity subject to burdensome government regulation. Thus, a permit would still be required for photography involving the use of a hand-held camera if an interaction among two or more people at a single site for thirty minutes or more were involved. Similarly, a permit would be required for photography involving a single tripod if an interaction among five or more people at a single site was involved and the tripod was used for ten or more minutes. Rules § 9-01 (b)(1) and (2).

If these Rules are adopted, artists will be required to obtain permits for activities for which permits have not been previously required. For example, in the past, an individual artist has been able to use a camera, with or without a tripod, to photograph still images in the City's parks or on the sidewalks for significant periods of time. The amount of time involved has often

exceeded 10 or 30 minutes (the time limits in the Rules) because of such considerations as subject matter selection, lighting and composition of the image. Outdoor photography frequently involves groups larger than the exemption limits of two and five individuals, for example, when a group of friends is being photographed or is simply accompanying the artist.

Similarly, the Rules would appear to bar all spontaneous photography involving the use of regulated equipment even if such photography had been previously permitted. Permit applications would require “detailed identifying information about the applicant and the project” (§ 9-02(b)(2)), something which would not be available in a truly spontaneous situation. Under the Rules, an artist walking down the street with a friend would risk a fine if he or she stopped for too long a period to photograph a newly discovered interesting sight.

Despite the chilling effect which its new regulatory scheme would have on artistic expression, the City has not yet offered any justification for it. As the following language makes clear, the “Statement of Basis and Purpose” included in the publication of the Rules provides no information explaining why permits should now be required for previously exempt photographic activities:

The Mayor’s Office of Film Theatre & Broadcasting (“MOFTB”) has for many years issued permits in connection with various film production activities. With the recent increase in filming activities, it has become necessary to codify the process that has been followed over time. The purpose of this rule is to provide clear guidance to the persons and entities in the entertainment industry who seek to obtain such permits.

Section 9-01 of the rules describes their purpose

Regrettably, § 9-01 does not say anything about the purpose of the Rules. The only apparent explanation appears to be the language quoted above – i.e., to give guidance to the entertainment industry about permits which were issued in the past for “film production activities”. Clearly, this would not justify expanding permit requirements to activities for which permits were not previously issued. It also would not justify subjecting individual artists who are not involved in the entertainment industry’s film production activities to these requirements. The City’s failure to articulate the basis and purpose for expanding its regulatory scope to previously unregulated activities would appear to violate the New York City Administrative Procedure Act which requires that public notice of proposed rule-making “include a draft statement of the basis and purpose of the proposed rule”. New York City Charter §1043(b)(1).

The failure to explain the basis and purpose of the Rules also puts their constitutional validity in doubt. One can only guess as to what governmental interest is promoted by requiring an individual artist to go through a burdensome permit process every time he or she wants to take photographs in the park or on the sidewalk. Elimination of traffic congestion or hazards - a goal the City has relied on in other situations - would not appear to be the objective here given the limited amount of space which a photographer would occupy, particularly when compared to other non-regulated users of city space – e.g., groups of school children congregating on the sidewalk, stores receiving deliveries, groups of dogs being walked, baby carriages, groups of people sunbathing, painters using easels in the park, people playing catch, or bicyclers. The Notice of the Rules does not cite any evidence which would show that individual photographers

have negatively affected the use of public areas. Similarly, the City has failed to show what government purpose would be served by regulating single tripod use. This equipment does not occupy much space and is currently used both by amateurs and professionals in many common situations, for example, night photography, without any negative consequences.

The ambiguity of the Rules raises further constitutional issues. Artists could find themselves subject to sanctions because they engaged in conduct which they could not reasonably have known was prohibited. As discussed above, the Rules would require permits for the use of a hand-held camera or tripod “involving an interaction among” groups of “two or more” or “five or more” people, respectively. §9-01 (b). “An interaction” is defined to mean “conduct involving a communication between two or more people, whether verbal or otherwise, but shall not include conduct involving filming or photographing of a parade, rally, protest, or demonstration.” §9-01(b)(3)(ii). It is difficult to understand what is meant by “communication” in this context. Would this term cover a situation, for example, in which an artist photographed a group of strangers sunbathing if, during the course of photography, the photographer spoke to one member of the group? It is impossible to tell from the language of the Rules.

New York City is one of the artistic centers of the world and, as such, should be encouraging, not burdening, individual artists. The Mayor's Office of Film and Television was organized by the Lindsay Administration to facilitate and make hospitable film and television production in New York City. The office was never constituted to serve as a clearing house for photographers, videographers or other artists. If these Rules are adopted as written, they will curtail artistic creativity in this City, something which would be a serious loss for everyone. The administrative burden associated with a permit application combined with the cost of liability insurance would discourage large numbers of individual artists from applying for permits. They would either give up outdoor photography in the City altogether or risk the applicable penalties. As a matter of public policy, neither result would be desirable.

We urge, at a minimum, that sections 9-01(b)(1)(ii) and (iii); the clause “provided that such activity does not involve an interaction among two or more people at a single site for thirty or more minutes, including all set-up and breakdown time in connection with such activities in section 9-01 (b)(2)(i); and the clause “provided that such activity does not involve an interaction among five or more people at a single site and the use of a single tripod for ten or more minutes, including all set-up and breakdown time in connection with such activities” in section 9-01(b)(ii) be omitted from any finally adopted rules.

Respectfully submitted,

ASSOCIATION OF THE BAR OF THE
CITY OF NEW YORK

COMMITTEE ON ART LAW



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