

U.S. COPYRIGHT OFFICE

**NOTICE OF INQUIRY
(August 29, 2012)**

**STUDY ON REMEDIES
FOR COPYRIGHT SMALL CLAIMS**

OCTOBER 16, 2012

**SECOND COMMENTS
OF
AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS (ASMP)**

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SECOND COMMENTS OF ASMP

Introduction and Background

The following comments were set forth in ASMP's Initial Comments, but bear repeating. ASMP wishes to thank the Register and Chairman Smith for this opportunity to provide comments regarding the desperate need of professional photographers for some sort of structure that will give them the practical ability to enforce their copyrights, something that they do not possess under the current legal system. I cannot think of any other issue that is of potentially greater importance to or impact on professional photographers. ASMP's long-term interest in this issue is evidenced by the fact that I was fortunate enough to be invited to testify on this subject in the "Small Claims Hearing" held by the House of Representatives' Subcommittee on Courts, the Internet, and Intellectual Property in March, 2006.

The American Society of Media Photographers' mission is to protect and promote the interests of professional photographers who make photographs primarily for publication. ASMP is the oldest and largest trade association of its kind in the world and currently has approximately 7,000 members.

Freelance photographers create vastly larger numbers of copyrighted works than any other class of creators (according to a recent survey, they average making 2,822 photographs and 13.6 videos every month), yet they are the group that is the least able to access the protections theoretically afforded by the Copyright Act. The primary reasons for that sad fact are the extremely high cost of federal court litigation; the frequently low (when compared to the costs of litigation) amounts in controversy; the fact that most freelance professional photographers have extremely limited resources; the ease and speed of infringement in a digital/internet environment; and the fact that many infringers are aware of this situation and use it to their advantage.

Freelance professional photographers are primarily small businesspeople who are typically sole proprietors. Their training and education often extend beyond college, and with the constant and meteoric changes occasioned by developments in technology, their costs of and need for continuing training are a demanding fact of life.

Those same changes in technology also make the investment necessary to become and remain a professional photographer a staggering and constant burden. Where once a few camera bodies, lenses and strobes might be enough to get started, now multiple computers, monitors, scanners, and storage devices are absolute requirements, in addition to cameras, lenses and lights. Further, while a professional camera body used to cost a thousand dollars or so, new professional quality, digital camera bodies now cost many thousands of dollars, even after adjusting for inflation. For all of these reasons, professional photographers typically have limited financial resources at their disposal. The movie image of professional photographers based on David Hemmings driving a Rolls-Royce in Blow-Up is just that: a movie image. It is as close to reality as the bar scene in the first Star Wars movie.

Every year as ASMP's General Counsel, I receive hundreds of telephone calls and e-mails from our members and other professional photographers reciting similar stories: They have discovered an unauthorized use of a photograph. The image was registered before the infringement. The photographer has contacted the infringer and issued a demand. The infringer has refused to pay a licensing fee and/or cease the infringement. In essence, the infringer has said, "So, sue me." The photographer wants to know what to do.

In most cases, the practical answer is, sadly, "nothing," for a variety of reasons. First, and most importantly, the amount in controversy is likely to be only a few hundred to a few thousand dollars. One need only go to the websites of major stock image houses like Getty Images or Corbis, (located respectively at <http://creative.gettyimages.com/source/home/home.aspx> and <http://www.corbis.com> for confirmation: Simply register as a potential customer and go through the process of selecting an image and asking for the price for a hypothetical use.

The relatively small size of the claim makes it next to impossible, as a practical matter, to find an attorney who will take the case. Although the Copyright Act provides for the possibility of an award of counsel fees against the defendant if and when the photographer wins, there is simply not enough money at stake for a decent copyright attorney to be interested in pursuing the case:

1. He or she does not want to antagonize a judge by taking up the court's time with a case that would be in a municipal small claims court if it were not for the fact of exclusive federal jurisdiction over the subject matter.
2. There is no guarantee that the defendant will actually be able to pay any award of attorney's fees.
3. The eligibility for statutory damages is of illusory value: The court will always try to match the statutory damage award to its best guess of the actual damages. In addition, trying to estimate or predict what statutory damages might be in any

given case has proved to be an exercise in futility. Further, no matter whether actual or statutory damages are at stake, proving them may cost more in expert and consultant fees than the amount at issue.

4. There is the undeniable risk of not winning. That is always a consideration for attorneys trying to decide whether to take any particular case, especially where a contingent fee arrangement is being considered; however, in this situation, there is nowhere nearly enough potential reward to counterbalance any risk of loss.

5. The client/photographer cannot afford to pay the attorney's fees up-front, but the amount in controversy is so low that contingent fee arrangements are not likely to be a viable option.

6. The client/photographer cannot afford to pay the out-of-pocket costs of litigation, separate from and in addition to attorney's fees, such as expert witness fees, depositions, travel, etc. In some states, even if the photographer is lucky enough to find a lawyer who will take the case on a contingent fee basis, the ethical rules prohibit the attorney from advancing the out-of-pocket costs.

7. Even if none of the above factors were true, the disruption to the photographer's business and the emotional drain of years of litigation (since the average case can take two years or so) are simply more than most sole proprietors can afford. Attorneys are in the business of dealing with litigation, and we are used to living with it --- it is our job, no more, no less. We often lose sight of the soft costs to our clients of litigation: to individual creators who are parties to litigation, the experience is intensely personal and emotional, and it stays at the front of their minds every minute from the beginning of the case to the end, and even long after. In addition, the time spent working on the case is time that cannot be spent on making or marketing photographs. The costs of federal litigation for an independent contractor are not limited to money --- years of investing time and energy in a single case are crippling to people whose sole source of income is their ability to create and market their work.

Another major source of both high legal fees and lost time is the vast amount of discovery that is available under our current system. That, combined with the interstices of our procedural rules, allow a defendant with a deep pocket to put a sole proprietor plaintiff in the poor house through endless discovery requests, depositions and motions. The wealthy and/or corporate defendant is in a position to drive up the plaintiff's legal fees while forcing the plaintiff to choose between searching for and copying documents, on one hand, or working for a living, on the other.

The Copyright Office has long recognized the particular needs of individual creators of copyrighted works and acknowledged the general unavailability of the protections of copyright to those people, as a practical matter. What ASMP would like to see, to correct that situation, is a revision to the system of copyright

enforcement that would accomplish the following goal: Create a system of enforcement that would be efficient and affordable enough to allow the practical and fair redress of claims involving comparatively small amounts of money.

Before going into a discussion of the possible structure of such a system and some of the issues and challenges that would come into play, we want to address what may appear to be a trivial matter but what is, in fact, of potential significance: nomenclature. The phrase “small claims” seems innocuous enough. Unfortunately, it has some subtle but serious side-effects. “Small” is definitely a comparative concept, especially in this context. However, when used here, it creates an impression of smallness, even of insignificance, in an absolute sense. That is, cases that fall within the “small claims court” jurisdiction seem trivial in scope. In fact, no matter how much or how little money may be at stake, copyright infringements are intensely personal and significant events to the professional photographers involved. To view them otherwise is demeaning at some level. As this study moves forward, I hope that we can substitute a less connotative and probably more accurately descriptive word, such as “limited.”

Specific Responses

The Notice of Inquiry for additional responses sets forth a number of specific questions with respect to which the Copyright Office is seeking comments. The following responses are numbered to correspond to the numbers assigned to those questions in the second Notice of Inquiry and set forth ASMP’s analysis and position. However, ASMP would be happy with any solution that would give photographers practical access to the justice system to enforce their rights under the Copyright Act without having to incur the expense and complexity of retaining legal counsel.

To put these responses into context, upon further study of the issues during the past year or so, ASMP has concluded that the best practical solution to this complex problem would be an amendment to the Copyright Act that would grant concurrent jurisdiction to the state courts. This, in turn, would allow photographers to use the small claims courts in those jurisdictions in which such small claims courts have been established. Such an approach has many inherent drawbacks, such as a lack of expertise in copyright law and a low maximum recovery, but overall it appears to ASMP to be, as a practical matter, the most workable approach. Systems that would require the consent of both parties would be rendered ineffective by defendants who know that, without their consent, photographers would be unable to pursue their claims against them. Other systems that might theoretically be preferable to concurrent state court jurisdiction present fatal constitutional and/or funding problems. ASMP is left to conclude that the approach most likely to provide many photographers with practical relief would be concurrent state court jurisdiction over copyright infringement claims.

1. Nature of Tribunal/Process

On its face, a process administered by the Copyright Office and/or the Copyright Royalty Judges would be a desirable option because it would provide adjudications by people having expertise in copyright law, something that is not always the case in any court system of general jurisdiction. However, the difficulty presented by these alternatives is that it appears that appeal to the Federal courts would be constitutionally mandated. The threat of such an appeal by defendants with deep pockets would, as a practical matter, negate the benefits of any alternative system. Arbitration and mediation would have the same drawbacks, along with fees for arbitrators/mediators that history has shown to be prohibitively expensive. To the extent that any system would require the consent of both parties, most defendants would simply withhold consent, knowing that the plaintiffs would thus be helpless to pursue their claims against them.

2. Voluntary versus Mandatory.

The system should be mandatory. As a practical matter, given the choice, virtually no plaintiff with a small claim would ever choose the current Federal system to pursue claims over a small claims system: the current Federal court system is simply too expensive for a plaintiff ever to elect the Federal system, given a workable alternative. Conversely, if defendants had the right to move a matter from the small claims system to the Federal courts, the threat of such removal would have the practical effect of denying most plaintiffs access to the small claims system.

3. Arbitration.

Arbitration would not be a preferable option for the reasons set forth above.

4. Mediation.

Similarly, mediation would not be a preferable option for the reasons set forth above.

5. Settlement.

If ASMP's suggestion of concurrent state court jurisdiction were adopted, no additional mechanism for settlement would be needed.

6. Location of Tribunal(s).

Similarly, if concurrent state court jurisdiction were adopted, locations of tribunals would be dictated by the applicable judicial systems.

7. Qualifications and Selection of Adjudicators.

See ASMP's responses to 5. and 6. above. While copyright law-trained adjudicators would be highly desirable, that factor would be trumped by the economy and convenience of state small claims court procedures.

8. Eligible Works.

ASMP believes that photographs are the poster child for works that are in need of enforcement through a small claims system. The Copyright Office has frequently recognized that photographers are the class of creators that are the most disenfranchised in the copyright system. ASMP does not comment on other classes of works or categories of creators.

9. Permissible Claims.

Simplicity is key to any small claims system. Because of that, ASMP believes that jurisdiction should be limited to claims for infringement. Similarly, because state small claims courts do not typically have equitable powers, small claims would presumably have to be limited to monetary demands and awards.

10. Permissible Claim Amount.

To be compatible with state small claims court jurisdiction, the maximum amount would have to be limited to an amount within the purview of those courts. Certainly, \$25,000. would be a cap within which such courts would fall. As a practical matter, plaintiffs opting for state small claims court proceedings would be limited to a lower number within the jurisdiction of such courts. Claims between the applicable small claims court maximum and \$25,000. would be heard by the state trial court of general jurisdiction.

11. Permissible Defenses and Counterclaims.

All traditional defenses, such as fair use, should be permitted. Similarly, a defense based on a DMCA safe harbor argument would have to be allowed in order to avoid eviscerating the DMCA. If claims relating to the DMCA, such as those relating to takedown notices, were permitted, related defenses would also have to be. However, as stated in 9. above, ASMP does not believe that claims arising under the DMCA should fall within the jurisdiction of a small claims system.

12. Registration.

As ASMP stated in its Initial Comments, one of the greatest impediments to professional photographers' access to the current copyright enforcement system is the requirement of copyright registration before litigation can be instituted. Accordingly, ASMP believes that claims should be permitted in the small claims

system even without registration. ASMP recognizes that a defendants, as well as the adjudicators, should be entitled to proof that the plaintiff has a valid copyright. This could be accomplished through registration or, in the absence of registration, proof of submission to the Copyright Office of an application for registration (as is the current practice in certain Federal courts) without having to wait for the issuance of a registration certificate, or other credible proof of copyright.

13. Filing Fee.

Under ASMP's proposal, filing fees would be dictated by the applicable state small claims courts.

14. Initiation of Proceeding.

Similarly, the requirements of initiating proceedings would be dictated by the applicable state small claims courts.

15. Representation.

In ASMP's view, to make the system truly efficient and affordable, it has to be structured to allow the parties to proceed pro se. Once attorneys enter the picture, the potential complexities and the resultant expenditures of time, effort and money escalate. This would essentially be "People's Court" for more limited copyright claims. Constitutional requirements of the right to legal representation would appear to be satisfied by permitting legal representation and/or by allowing appeals from state small claims courts to courts of general jurisdiction, as is the case with those state small claims courts with which ASMP is familiar.

16. Conduct of Proceedings.

As is the case with Questions 13., 14 and others, the details would be dictated by the Court Rules of the applicable state small claims courts.

17. Discovery, Motion Practice and Evidence.

See ASMP's answer to 16.

18. Damages.

See ASMP's answer to 16. Awards of statutory damages and/or attorneys' fees would typically not be available.

19. Equitable Relief.

See ASMP's answer to 16. Equitable relief would typically not be available.

20. Attorneys' Fees.

See ASMP's answer to 18. Attorneys' fees would typically not be available.

21. Record of Proceedings.

See ASMP's answer to 16.

22. Effect of Adjudication.

See ASMP's answer to 16.

23. Enforceability of Judgment.

See ASMP's answer to 16.

24. Review/Appeals.

See ASMP's answer to 16. Typically, adjudications would be subject to appeal by way of a trial de novo in a court of general jurisdiction.

25. Group Claims.

See ASMP's answer to 16. Typically, claims could be brought only by the individual copyright owners.

26. Frivolous Claims.

See ASMP's answer to 16.

27. Constitutional Issues.

ASMP believes that allowing concurrent state court jurisdiction would allow small claims systems to satisfy all constitutional requirements.

28. State Court Alternatives.

As previously stated, allowing concurrent state court jurisdiction appears to ASMP to be the best, albeit not an ideal, solution to the problem. It would satisfy constitutional requirements while imposing the fewest practical impediments to access to the justice system for small copyright claims. While the adjudicators would probably not have experience or even familiarity with copyright law, that defect is outweighed by the benefits of such an approach and the detriments to other alternatives.

29. Empirical Data.

See ASMP's introductory comments.

30. Funding Considerations.

See ASMP's answer to 16.

31. Evaluation of Small Claims Systems.

ASMP believes that, like any significant change in the Copyright Act, the results should be studied and evaluated after a reasonable period of time, such as 5 years.

32. Other Issues.

ASMP believes that the questions set forth in the Copyright Office's Second Notice of Inquiry have comprehensively addressed all of the relevant issues. Should other issues arise, ASMP believes that the Copyright Office has always been accessible to the copyright community for further input.

Conclusion

There is almost an infinite variety of approaches to solving this problem that would be likely to meet with ASMP's approval, and ASMP is open to discussing any and all of them. As stated in ASMP's initial comments, ASMP has been working closely with an ad hoc committee of visual arts organizations, including Graphic Artists Guild (GAG), Professional Photographers of America (PPA), Picture Archive Council of America (PACA), North American Nature Photography Association (NANPA), and American Photographic Artists (APA). Although each organization is filing its own comments, we all generally support each other's efforts and the same overall goal: A system that allows fair, speedy and economically affordable access to legal enforcement of copyrights for all copyright holders, irrespective of the economic impact of any particular infringement.

We all look forward to working together with the Copyright Office and Congress to achieve these targets.

As stated at the beginning of these comments, virtually everyone in the copyright world has long recognized that photographers are uniquely disenfranchised from access to the copyright protections to which they are legally entitled. Anything that the Copyright Office and Congress can do to help correct that situation would be of great benefit to working photographers and greatly appreciated by them. The current inquiry is a superb opportunity to help the small businessmen and -women who are such an important part of the nation's economy and, at

the same time, to make our legal system move a bit closer to a system of justice, not just of laws.

Thank you for your time and consideration.

Respectfully submitted,

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