

U.S. Copyright Office

**Request for Comments and Recommendations for an
Alternative Dispute Resolution Mechanism**

FR Doc. 2011-10

JOINT COMMENTS

of

EPIC: Evidence Photographers International Council

PPA: Professional Photographers of America

SPS: Student Photographic Society

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Introduction

On behalf of its members, Evidence Photographers International Council (EPIC), Professional Photographers of America (PPA), and Student Photographic Society (SPS), are pleased to submit comments in response to the request for submissions printed in the October 27, 2011 Federal Register. We look forward to sharing our thoughts on the creation of an alternative dispute resolution mechanism that would enable creators of works with a relatively low economic value to effectively defend their exclusive rights under the Copyright Act.

As a means of familiarizing you with our organizations, we provide you with a brief description of their respective missions and membership:

EPIC provides members with education and resources to aid in the advancement of evidence photography. Founded in 1968, EPIC is a non-profit educational and scientific organization dedicated to the advancement of forensic photography and videography in civil evidence & law enforcement.

PPA is the world's oldest and largest nonprofit trade association for professional photographers and photographic artists from dozens of specialty areas including portrait, wedding, commercial, advertising, and art. PPA consists of some 22,000 individual members and includes nearly 160 independent photography organizations that have elected to affiliate themselves with the association. For more than 130 years, PPA has dedicated its efforts to protecting the rights of photographers and to creating an environment in which these members can reach their full business and creative potential.

SPS was founded in 1999 to provide career-building resources, networking opportunities, and informational resources to photography students. SPS represents students and educators in 300 different colleges, universities and trade schools that offer degrees in photography.

Defining the Industry

Professional Photographers capture our memories and preserve the important moments in our lives from weddings to graduations, provide a continuing witness to historic events, and create iconic works to help businesses sell products and services.. Photographs help communicate the past and present in a manner unmatched by words alone, reminding us of who we are, where we have come from and what we aspire to be. It is professional photographers who create those invaluable images that help us communicate across miles, languages, and generations.

We believe professional photographers to be “the smallest of large copyright holders”. This is because a typical photography studio is a home-based business consisting of the photographer and one other person.¹ However, unlike other professionals across the creative industries, photographers can easily create 20,000 or more separate works eligible for copyright protections on an annual basis. Some of the images captured by professional photographers shape our collective memory and have a high economic value, however, the vast majority of those created while treasured by the photographer’s clients, have an independent economic value that makes it impossible to enforce the photographer’s rights.

As a result, professional photographers are without any practical legal ability to control the reproduction of the photographs they create. Since they depend on the ability to control the reproduction of their work for their income and livelihood, working photographers are most often forgotten when legislators and federal agencies attempt to redefine the law. This has often forced professional photographers to be their own first and final line of defense in protecting and enforcing their copyright.

¹ Professional Photographers of America 2008 “Business Outlook Survey”

Background

As a participant in the March 2006 Subcommittee on the Courts, the Internet, and Intellectual Property referred to as the “Small Claims Hearing” in the Notice² PPA chief executive officer David Trust testified and provided a written statement stressing the importance and value of a photographer’s ability to seek redress for copyright infringements outside of the federal court system. As early proponents of the creation of alternatives to federal court, let us begin by examining the challenges created for photographers by the current legal system as well as the potential alternatives to the existing system.

A. Challenges of the Current Legal System

Through our dialogues with members who have suffered infringements there is one commonality that presents itself time and time again: no photographer is eager to sue a client. Most small business photographers, like our members, create images direct to consumer. They are creating family portraits, memorable wedding images, or a professional headshot. Our members work closely with each client developing a relationship critical to their livelihood. As a result, they often forgive infringements as an oversight or misunderstanding rather than risk alienating a client or future referrals.

However, there are occasions where filing an infringement action becomes warranted. In some cases, this involves the unauthorized reproduction and repurposing of work for commercial gain by a client. More often, such instances involve infringements by third parties.

Unfortunately, when photographers are left with litigation as their only means of addressing an infringement – they most often find their access to justice denied by simple economics. While an infringement valued at \$5,000 is a substantial amount to a professional photographer, seeking that relief under the current system is a money-losing proposition. Even if the majority of photographers were to take advantage of the remedies afforded them by federal registration of their images, the up-front costs of pursuing a federal lawsuit and the

² Remedies for Small Copyright Claims, before the Subcomm. On Courts, the Internet, and Intellectual Property of the H. Comm. On the Judiciary, 109th Cong. (2006)

minuscule amount of damages they stand to recover creates a virtually insurmountable barrier to the average photographer in need of pursuing a claim of low economic value.³

The ability to seek relief without the burdens of pursuing a lawsuit in the federal district court would enable photographers to better protect the exclusive rights afforded them under 17 U.S.C. §106.

B. Potential Alternatives for Small Copyright Claims

Trust's statement at the "Small Claims Hearing" reiterated the proposal for the administrative adjudication of "small copyright claims" that PPA previously outlined in its response to the U.S. Copyright Office's notice of inquiry on Orphan Works. This proposal urged legislators to consider including the study of such an alternative dispute mechanism in any Orphan Works legislation drafted as a means of ensuring copyright owners were not left without the ability to collect "reasonable royalties" should their "orphaned" work be used without their consent.⁴

Our initial vision of an alternative dispute resolution mechanism put forward some the following concepts⁵:

- If the actual damages claimed by a copyright owner are below a certain dollar limit, he or she may elect to use an administrative tribunal, rather than federal district court.
- By submitting the dispute to this type of copyright proceeding, the plaintiff will not be eligible for statutory damages.
- Damage awards in this proceeding would be tied directly to the value of the infringement. In order to produce a sufficient deterrent to infringement, and to avoid the creation of a de facto compulsory licensing scheme, damages should be set at a small multiple of the actual damages, with a higher damages multiplier applied when infringement is found to be willful.
- A copyright owner in this proceeding who successfully proves their infringement claim would only be eligible to receive reasonable compensation from the infringer as determined by the tribunal.
- All other defenses available under Title 17 would apply.

³ 2011 Professional Photographers of America Copyright Registration Quick Survey. See Attachment A.

⁴ Oral testimony of David Trust before the Subcomm. On Courts, the Internet, and Intellectual Property of the H. Comm. On the Judiciary, 109th Cong. (2006)

⁵ Original legislative recommendation for alternative dispute resolution put forward in oral testimony included as Attachment B.

- If the tribunal determines that an infringement claim was brought frivolously, or if the defendant offered no non-frivolous defense, the tribunal may award any costs and fees to the opposing party.
- Copyright registration shall have no effect on the availability of damages available in this proceeding. However, in order to preserve and further the mission of the Copyright Office and Library of Congress a work must be registered prior to submitting a claim to this proceeding.

Building on the above concept we would additionally recommend the Copyright Office consider these four additional factors when developing this process:

- The ability to bring a claim in a manner that is cost effective and does not require expensive travel, legal representation or similar fees.
- To have a claim adjudicated timely by a tribunal that is knowledgeable about copyright.
- In the event that the process is not mandatory once elected, to offer incentives to avoid having the defendant reject the alternative forum and demand that a claim be brought in a federal court of general jurisdiction; and
- A resolution that offers finality and ease of enforcement of any judgment.

Time and money are two factors that are critical to a professional photographer's ability to access any system that would allow them to defend their copyright ownership. Any alternative dispute forum that is instituted must be easy on the purse strings of a small business copyright owner. Our members will often times overlook an infringement simply because they feel the time and money they will likely devote to battling the infringer as means of asserting their rights will cost them more than they would stand to gain. This is in part to their being locked out of the federal court system due to lack of registration and the fact that they do not have the man hours available to take away from existing clients.

Registration notwithstanding, in addition to any monetary compensation received relating to the infringement a copyright claimant should be allowed to recover the cost of accessing this new dispute resolution system. Granting the copyright owner access to such damages would not be dissimilar to the awarding of attorney's fees and court costs as afforded under 17 U.S.C. § 505 and could be the difference between a photographer choosing to defend their rights or letting the infraction fall by the wayside.

Unlike mounting a federal court suit, we believe any alternative should provide a more timely method for defending a copyright. While we recognize that there are hundreds of thousands of photographers alone, it would be our hope that a tribunal or other forum dedicated to copyright claims of low economic value would be able to more rapidly review, hear, and decide cases. The length of time required to engage in a federal court suit is simply not practical for many of our members and we believe may be one of the factors infringers are able to use as leverage in trying to slough off any accusation of infringements brought to their attention.

In taking the length of a proceeding into account, we would also encourage the Copyright Office weigh the possible burdens of any appeals process to which copyright owners or infringers would be entitled. We recognize the need for each side to be able to dispute the final decision of the tribunal in the hopes of seeking a more favorable outcome. However, in order to ensure that appeals are not filed for the purposes of delay or increasing the costs to a small copyright owner, we would propose that any appeal—whether the Copyright Office adopts an approach using Administrative Law Judges or a Federal Magistrate—require the posting of a Bond such as the one contemplated by Rule 7 of the Federal Rules of Appellate Procedure.

We would also encourage the consideration of a centralized or common process of accessing this alternative dispute system. Much like filing a claim with the courts, it would be helpful to photographers to know that regardless of where they must remit their claim or the precise basis for their need to access the tribunal there is a solitary protocol that they must follow. As a means of controlling cost for copyright owners, our expectation would be that such filings, both initial and appeals could be completed by the copyright owner without the need to seek the advice or assistance of specialized legal counsel.

In a similar vein, we would prefer a system in which the adjudication of these small copyright claims was made by individuals who are knowledgeable in this highly specialized area of the law. In addition to allowing for faster adjudication of claims, taking an administrative law judge or similar approach would ensure continuity and provide all participants in the process

with a greater sense of predictability in regard to the anticipated outcome of any given case. Over time, this type of predictability would likely encourage parties to resolve disputes on their own and help keep caseloads at a manageable level.

We do not intend for this alternative method for pursuing copyright infringement claims to be a substitute for the existing court system. It would be our expectation that any alternative implemented would simply be an additional method for copyright owners to seek redress for minor infringements or those of relatively low economic value. However, we believe that Plaintiffs in copyright actions should have the ability to select whether to pursue actions in District Court or any alternative “small claims” process that is developed.

Current Uses of the Legal System

The Copyright Office wishes information on how photographers as creators currently leverage the federal courts to defend copyright claims of low economic value. As we indicated above, photographers who find themselves faced with a claim of this type generally shy away from the courts, or due to lack of copyright registration simply do not have access to the courts.

The traditional method of protecting copyrights (registration of images with the U.S. Copyright Office and litigation in Federal Court) is simply impracticable for a small business photographer with limited income. The volume of work produced by many, up to 20,000 individual photographs per year, would prove costly and time consuming should they attempt to register each and every image. As a result, the burden of registration coupled with the expense of Federal Court puts justice out of reach for most photographers.

We would argue that use of the courts by photographers like our members is virtually non-existent. It is for this reason that establishing an alternative mechanism that is both affordable and easy to navigate is critical to legitimizing a photographer’s defense of their work. We have reason to expect that the creation of a low-cost dispute resolution mechanism that could serve as a substitute for or even a precursor to Federal Court proceedings would give photographers an affordable way to enforce cease and desist demands and ebb the infringement of their works more broadly.

Conclusion

In closing, we appreciate this opportunity to offer our recommendations and comments on behalf of our member photographers. While the organizations that we represent have expressed their preferences in these comments, we wish to make it clear to the Copyright Office that any proposal which provides the owners of low-value copyrights an economically-feasible opportunity to have their claims heard and their rights adjudicated would be welcomed.

We additionally wish to recognize the ad hoc committee of visual arts organizations with whom our organizations worked closely, including American Photographic Artists (APA), American Society of Media Photographers (ASMP), Graphic Artists Guild (GAG), Picture Archive Council of America (PACA), and North American Nature Photography Association (NANPA). Each has filed its own comments which represented the thoughts and concerns of its membership, however we are in we are generally supportive of each other's positions and wish to work cohesively toward the same 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 hope that you will take our response into consideration as you complete your study of alternative dispute resolution mechanisms. We look forward to engaging the Copyright Office in an open dialogue to further explore the protection and enforcement of photographic copyrights.

Respectfully Submitted,

/s/ David P. Trust
Chief Executive Officer
Alliance of Visual Artists (AVA)

/s/ Maria D. Matthews
Manager, Copyright & Government Affairs
Alliance of Visual Artists (AVA)

Attachment A

Copyright Registration Quick Survey

Professional Photographers of America administered a survey of its members titled *Copyright Registration Quick Survey* over a 5 day period from Thursday, March 24, 2011 to Monday, March 28, 2011. During this time 2,830 completed responses were received to the survey during this time. The results analysis includes answers from all respondents who took the survey.

How often do you register your work with the Copyright Office?

- 2,392 (84%) of respondents said they NEVER register their work.
- 41 (1%) of respondents said they ALWAYS register.
- 324 (11%) of respondents said they OCCASIONALLY register.

Of those who always register their images:

- 210 (38%) want the additional protection offered by copyright registration.
- 111 (20%) wanted to establish their copyright ownership.
- 16 (2%) specifically registered to pursue an infringement suit.

Of those who choose not to register their work or register on a regular basis:

- 651 (25%) of respondents said they never heard about registration.
- 636 (24%) of respondents said it is too time consuming.
- 355 (13%) of respondents said it is too expensive.

Attachment B

Professional Photographers of America's Proposal for an Alternative to Federal District Court for Small Dollar Copyright Claims as included in Oral Testimony of David Trust

SECTION ____: ALTERNATIVE PROCEDURE FOR CERTAIN INFRINGEMENTS

(a) In any case where the damages claimed by a copyright owner in relation to a particular infringement are less than \$15,000, the copyright owner may elect to submit the infringement claim to an administrative proceeding, as described herein, in lieu of making a filing in federal district court.

(b) Prior to filing a claim with the administrative proceeding, the copyright owner must register his or her work with the United States Copyright Office. There is no requirement that a copyright owner register their work prior to an infringement in order to gain full relief as described in this section.

(c) The Copyright Office, through notice and comment rulemaking, shall develop standardized procedures for the administrative proceedings held under this Act. This shall be done with a focus on providing accurate decisions while minimizing costs involved to all parties.

(d) REMEDIES

(1) Monetary Damages

(A) Damages available to a successful copyright owner in this proceeding shall be calculated as being three times the actual damages. If the copyright owner successfully proves that the infringement was willful, the maximum damages shall be five times the actual damages.

(B) A defendant who proves that the infringement was innocent or that it complied with all of the requirements of 17 USC 514(a) shall only be liable for damages equal to a reasonable royalty as determined by this administrative proceeding.

(2) Injunctive Relief

(A) The administrative law judge presiding over this proceeding shall also have the power to provide injunctive relief identical to that described in sections 503 and 504 of Title 17.

(3) Costs and Fees

No costs or attorney fees shall be awarded in this proceeding unless the administrative law judge presiding over the proceeding shall determine that the losing party brought their claim or defense frivolously or in bad faith.