

U.S. COPYRIGHT OFFICE

**NOTICE OF INQUIRY
(OCTOBER 27, 2011)**

**STUDY ON REMEDIES
FOR COPYRIGHT SMALL CLAIMS**

JANUARY 16, 2012

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

**SUBMITTED BY:
VICTOR S. PERLMAN
GENERAL COUNSEL AND MANAGING DIRECTOR
AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, INC.
150 NORTH SECOND STREET
PHILADELPHIA, PA 19106**

**215-451-ASMP EXT. 207
FAX: 215-451-0880
perlman@asmp.org
<http://www.asmp.org>**



INITIAL COMMENTS OF ASMP

Introduction and Background

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.”

Potential Alternatives for Limited Copyright Claims

There are many possible ways to accomplish this and variations on how such a system could be structured. ASMP might well support most of the possible arrangements that would accomplish the desired goal. However, as a starting point for consideration, we offer the following characteristics for a possible model.

Copyright Registration

To begin at the beginning, one of the impediments to professional photographers’ access to the current copyright enforcement system is the requirement of copyright registration before litigation can be instituted (and earlier, for eligibility for an award of attorney fees and/or statutory damages). Accordingly, a claim could be filed under the “new” system even without registration. We recognize that a defendant should be entitled to proof that the plaintiff has a valid copyright, something that is accomplished by the current system of requiring registration before litigation can be commenced. Therefore, if it were too problematic to allow a claim to be filed in the absence of registration, a possible alternative would be to allow the claim to be filed upon the 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.

Pro Se

In our view, to make the system truly efficient and affordable, it should be structured to require the parties to proceed pro se; lawyers should not be permitted to represent either side. 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. We recognize that there are possible Constitutional and other statutory ramifications to a system that deprives a party of the right to legal representation contrary to the party’s desires, and this would have to be studied before legislation could begin to be drafted.

Tribunal

Since copyright is a somewhat esoteric area of the law, and since it has become abundantly apparent that much of the general population is unaware of the existence, let alone the substance, of copyright law, ASMP would like to see the tribunal structured so as to provide at least some level of copyright experience and/or expertise. To achieve this, we envision either one central or several regional bodies with jurisdiction over this new type of claim. Given state courts' backlogs and their complete absence of experience in dealing with copyright law because of its exclusively Federal jurisdiction, we believe that the new court system should fall in some way within the Federal legal (judicial or administrative) system.

While the Copyright Royalty Board is obviously familiar with at least certain aspects of copyright law, it is not clear whether that body is the best candidate to act as the adjudicator under the new system. It is, however, one possible alternative, perhaps as an expanded version of the current CRB. Alternatively, a tribunal unrelated to the CRB could have access to panels of various industry experts for assistance with difficult issues. A further acceptable alternative could be to have the tribunal(s) consist of panels of arbitrators with copyright experience. In any event, being deprived of one's right to a jury trial implicates additional Constitutional issues that would have to be addressed as this study progresses.

Mandatory Jurisdiction

In order to avoid potential abuses, e.g. by a defendant seeking removal to District Court simply to put economic pressure on a plaintiff, we believe that the new court's jurisdiction should be mandatory on both parties. That is, once a plaintiff files a complaint alleging copyright infringement in an amount of damages that is within the new court's jurisdiction, that jurisdiction is automatic and mandatory. It would only be if and when discovery disclosed infringing uses that warranted amending the complaint to demand a figure outside the new court's jurisdictional limit that the case could be removed to a District Court.

Discovery

Speaking of discovery, that is one of the areas that can make traditional litigation so expensive, demanding and time-consuming. The new system should also permit pre-trial discovery, but on a very limited basis. Discovery would be limited to deal primarily with the extent of the infringing acts, how the works were obtained by the infringer, the validity of the plaintiff's copyright, and the plaintiff's relevant earnings history. All relevant documents should be submitted by the parties to the court and each other, electronically, substantially before the hearing date.

Virtual Courtroom

There should be a (comparatively) short time frame from complaint to answer to disclosure to hearing to disposition. Hearings would be tightly controlled and of short duration. Except in cases where both parties are in locations close to the tribunal(s), hearings should be conducted over video-conferencing systems rather than in person. As suggested above, there would be either only one central, or perhaps several regional, hearing boards, by-passing the current requirements of jurisdiction and venue.

Enforcement

One of the problems with the current copyright system is that one can obtain a valid judgment against an infringer only to find that trying to convert the judgment into dollars proves to be almost as difficult, time-consuming and costly as prosecuting the underlying claim. There should be incentives to encourage prompt payment as well as penalties for delayed payment of a judgment.

Appeals

Appeals should be to a geographically appropriate U.S. District Court, but any appeal should require the appellant to post a bond sufficient to cover the appellee's estimated attorney's fees for the appeal, to be paid to the prevailing appellee in the event that the appellant loses the appeal.

Jurisdictional Limit

We are open to all possible ways of structuring the jurisdictional limit of the new court system. However, our wish list would cap jurisdiction at somewhere between \$10,000., which is the limit for many large-city small claims courts, and \$25,000., which may be a more reasonable amount given the extraordinary legal fees required for copyright litigation in District Court.

Scope of Remedies

In addition to the ability to award monetary damages, it is crucial that the tribunal have equitable powers to the extent of being able to enjoin future repetitions of the infringing acts. Otherwise, we could be faced with the same plaintiffs having to sue the same defendants over and over, endlessly. To the extent that infringed works have been incorporated into derivative works, the amount of damages could be computed so as to include the equivalent of a license fee that would allow the derivative to be used, going forward, upon payment.

Conclusion

There is almost an infinite variety of approaches to solving this problem that would meet with ASMP's approval, and we are open to discussing any and all of them. While we have given a general outline of what we think might be the best solution, we have 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. More specifically, we seem to desire a number of specific steps toward achieving that goal:

- The ability to bring a claim without the need of legal representation, in a forum that is cost effective and that does not require expensive travel or other out-of-pocket costs or expert fees.
- The ability to have a claim adjudicated timely by a tribunal that is knowledgeable about copyright.
- In the event that the process is not binding on a defendant once elected by a plaintiff, provision for incentives to discourage a defendant from rejecting the alternative forum and forcing a claim to be brought in a federal court of general jurisdiction; and
- A resolution of a claim that offers finality and ease of enforcement of any judgment.

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

As I said at the beginning of this statement, 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. Perhaps more importantly, this is one of those all too rare situations where government can really do “the right thing:” help the small business-men and -women who are such an important part of the nation’s economy and, at the same time, 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,

Victor S. Perlman

General Counsel and Managing Director



American Society of Media Photographers, Inc.
150 North Second Street
Philadelphia, PA 19106
215-451-ASMP Ext. 207
Fax: 215-451-0880
E-mail: <perlman@asmp.org>