

Comments by:
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I have been in the stock photography business for over 50 years serving first as a photographer, later as an owner of Stock Connection (www.scphotos.com), a stock photo agency, author of a widely used stock photo pricing guide (Negotiating Stock Photo Prices) and for 24 years editor of Selling-Stock.com, an online newsletter that deals with issues related to the marketing of stock photography.

Orphan Works and Mass Digitization

Given how technology has advanced, the copyright registration rules for Visual Materials need to be totally revamped.

To provide some degree of protection for the vast majority of creators of Visual Materials the following are needed:

- 1 – The development of non-profit and for-profit image registries that can be visually searched with the speed of today’s Images search on Google or Bing. All the images in these registries should require some type of permission or licensing for use.
- 2 – At least one, and possibly several, hubs that will simultaneously access all registries should be established. Users could then perform searches through the hub that would allow them to determine if a particular image needs to be licensed. The registries would also be able to supply contact information with each image enabling searchers to get in touch with the licensor. If some creators don’t want to make their contact information publicly available on the web, they could work through licensing organizations that represent creators, handle negotiations and contact the creator when necessary.
- 3 – A small claims court system structured to require the parties to proceed pro se should be established. Non-residents whose images have been used without permission should be able to bring a small claims action against a U.S. company.
- 4 – There should be no requirement that an image must be registered with the Copyright Office before a case can be brought in the small claims court. A judge would be required to determine if the image, and contact information, could have been found as a result of a “diligent search” through one of the hubs or registries prior to the date the image was first used by the defendant. If it could have been found, and there is no other evidence that the user attempted to contact the creator, then the use was unauthorized.

There would be no cost to the Copyright Office or the U.S. government to operate either the registries or hubs. All that would be required is for Congress to approve and encourage use of registries and hubs and establish a small claims process.

Congress should encourage Google, Bing and Yahoo to become hubs but there should be no limitation on other organizations also becoming hubs. If the major search engines refuse to operate as hubs other organizations like UsePlus.org, PicScout.com and the Copyright Hub (<http://www.copyrighthub.co.uk/>) in the UK would likely be able to take on the role.

These actions would reduce the overhead costs of the Copyright Office, reduce government costs in general and in the words of Victor Pearlman, General Counsel of ASMP in 2006, "help the little guy, and make our legal system move a bit closer to a system of justice, not just of laws."

The establishment of a small claims process may have been delayed due to the desire to do nothing until the varying needs of all creators can be dealt with at once. A more limited process that just focuses on the needs of creators of visual materials might be easier to implement. Once tested in operation, it might be easier to find ways to expand the small claims concept to cover other types of creative work.

This recommendation deals only with the copyright protection of visual material. Existing rules for all other types of copyrighted materials would need to remain in place.

Registrations of visual materials that are in place prior to the introduction of any new registry and small claims rules would remain in effect. Creators who had previously registered their work could bring an action in the small claims court using their registration as proof of their ownership of the image. However, under the current system there is no way to determine whether a defendant had performed a diligent search prior to use of the image.

Creators who have previously registered their images could also put the same images in one or more registries making it easier for potential users to find them, and enabling them to make a claim before the small claims court that a diligent search was not performed. Creators who have registered their images with the Copyright Office would not be required to use the non-governmental registry system.

Any creator could still choose to use the Federal Court system rather than the small claims system.

This will not solve all the problems of historic images where the creator or his or her heirs are difficult to locate, but it will greatly reduce the unauthorized use of most of the professionally produced images that have been created in the last decade. We believe uses of these images make up a major portion of all unauthorized uses.

The following articles examine the issues discussed in more detail and outline solutions.

Proposed Solution To Copyright Protection

Posted on 2/13/2014 by [Jim Pickerell](#)

In the future copyright registration of still images and illustrations as it is currently conducted in the U.S., may be unnecessary. Congress should encourage the development of a privately funded, non-profit facility where those who want to use images they find on the Internet or in print can easily determine if the image needs to be licensed for use. While this would need to function in tandem with the existing copyright system, in the long run it could save the government money.

It should be recognized that a huge percentage of those who create images have no particular desire to protect the images they create or to license rights to their use. Technically, these creators own the “copyright” to their images, but the vast majority of image creators are unconcerned about whether someone else makes use of their image, or not. Currently there are probably fewer than 500 million still images and illustrations images circulated worldwide that require licensing for use. This is a small fraction of the estimated 880 billion images that can be found on the Internet. The focus needs to be on how we can help customers determine whether the image they want to use is one that requires permission or licensing, or whether it is free to use.

Definitions

CREGs – Multiple registries where creators can place small copies of the images they want to protect or license. The registries will fingerprint each image submitted so it is possible to do a rapid visual search of the entire registry to determine if a particular image is in the registry. Attached to each fingerprint will be contact information for the creator, or an organization that the creator has authorized to act on his or her behalf for the purpose of licensing uses of the creation.

CSE – A private non-profit organization that establishes a single, universal Central Search Engine (CSE) that would perform visual searches, similar to a Google Images search. However, rather than searching the entire Internet for images this search engine would only search qualified registries that contain nothing but images where permission, or licensing, is required for use. Examples of such registries: PicScout, Copyright Hub in the UK and CEPIC Image Registry in the EU. Private organizations could also create new databases.

Creating Registries

Each country might create its own image registries and make that them available to CSEs for searching. For efficiency purposes the CSEs would encourage small organizations to consolidate their offerings into larger registries. In order to participate on the CREG the

creator would be required to attach certain metadata to each image file uploaded including: creator's name, contact information for licensing and date of uploading to database.

Since people regularly use images that are created by someone residing in another country, the CSEs should search all registries around the world rather than requiring customers to seek out multiple CSEs in order to do a "diligent search."

Adding Images To Registries

Individual creators would be able to directly upload any quantity of the images they wished. Each time an image is uploaded to the collection the date of upload will be attached to the image. A facility would be provided for larger organizations representing many creators to do bulk uploads.

Each image file would need to be a minimum of 700px and a maximum of 900px on the longest side.

When first signing up creators would create passwords that allow them access to their own images at any time. They should be able to change their contact information, or remove images from the collection at any time. Only creators with the proper password would be able to make modifications to the metadata connected to particular images.

Individual creators would pay a small fee that would allow them to upload a small quantity of images and cover storage and bandwidth of those files for 5 years. It is believe that a fee less than the U.S. Copyright Office currently charges for image registration would be sufficient to profitably fund the operation of a registry.

For legal purposes each registry must be capable of supplying a certified copy of any image file along with the date of upload, which can be presented at court. A fee would be charged for this service.

Funding

The base fee would cover storage of as few as 100 images for 5 years. The creator could upload these images over a period of time. All images would not have to be uploaded at once. The clock for the 5 years would start whenever an image is uploaded.

Fees for larger organizations representing many creators would be negotiated based on volume.

After 5 years the creator would be notified and asked to pay an additional fee that would cover storage and bandwidth for an additional term.

At the end of 5 years the creator may have images that are about to expire and other images that will expire at other intervals over the next five years. A single renewal would

extend the time for each covered image by the number of years in the renewal period.

Registries might be required to pay non-profit CSEs a portion of the money collected for uploading images to cover the operational costs of the CSE.

Initially, there will probably be very few searches of the CSE so the bandwidth costs should be minimal. However, as more and more people get caught for unauthorized use, and if courts make it clear that user that can't demonstrate that they have conducted a "diligent search" are liable to pay fees and some penalty, many people may start using the service. At that point a system could be set up to charge for doing searches. Customers could be sold a package of credits for \$15 to \$25 that would entitle them to a certain number of searches. Many might find that it is worth paying a little fee upfront rather than risk getting caught for an unauthorized use and being charged a big fee.

Performing A "Diligent Search"

Anyone interested in using an image could, with a single search of any CSE, determine if a particular image needs to be licensed and get information as to who to contact to properly license the use.

To perform such a search they would simply need to drag a digital copy of the image they were interested in using onto the CSE's application. In a matter of seconds the engine would determine if the image is in any one of the registries and provide contact information for one or more individuals or organizations that could give permission to use the image or license use.

The same image may be represented by many licensors in many countries or states and thus might appear multiple times in any search. A licensee could choose to license the image from any of the authorized licensors found in the search.

If no image is found the potential user could reasonably assume that the image creator is not interested in licensing the image. However, that is not a guarantee that the creator won't surface at some point and make a claim. Such claims in the U.S. would need to be filed in Federal Court and could not take advantage of the Small Claims process.

Evidence of a "Diligent Search"

In the event of an unauthorized use complaint it would be a simple matter to determine if the image in question could have been found by searching a CSE on or before the date of first use. If the date the image was placed in one of the registries searched by the CSE preceded the date when it was used then a "diligent search" was not performed.

Preventing Fraud

Some people will surely try to claim ownership to images they did not create by uploading them to a registry. In such a case the actual creator will need to prove in court

that he/she was the creator and not the person making the fraudulent claim. The laws would need to provide severe penalties for those found guilty of fraud.

Comments:

Catalina Cotelin

We know that many people who use images without paying for a license do this by doing Google / Bing searches and copy-pasting images found randomly on the internet. Why do you think that these people will replace their current usage behavior with the CSE?

Posted on Feb 19, 2014

Jim Pickerell

When they find that image on Google or Bing they have no way to determine if it needs to be licensed, or where to go to license it.

If there was an easy way for them to quickly determine if the image needed to be licensed and where to go to get such a license I think many people would change their behavior.

In addition, if such a registries existed it would be much easier to set up a small claims process for going after unauthorized uses. Once people begin to learn that they are likely to get caught if they make an unauthorized use of an image they will probably make a greater effort to pay for uses when necessary.

It is becoming easier and easier to find unauthorized uses on the Internet. However, in most cases it is too costly to go after infringers legally. If we can couple my system for finding copyright owners with a good simple small-claims legal system it could go a long way to encourage people to be more law abiding and respect the property of others.

Posted on Feb 19, 2014

Don't Be Evil

Posted on 3/21/2014 by [Jim Pickerell](#)

The informal corporate motto for Google is "Don't be evil." This motto is sometimes incorrectly stated as Do no evil. But the company's image search tool (<https://www.google.com/imghp?hl=en&tab=wi&ei=VEYsU5TECOFz0wH8zoHABw&ved=0CAQQqi4oAg>) *facilitates* and *encourages* theft. The same is basically true of Bing and Yahoo.

There is a very easy fix to this if any of these search engines wanted to implement it.

Under the search box they should place something like the following warning:

The image creator's permission may be required to make certain additional uses (such as copying and pasting to another web site) of images found using this tool. In some cases it may be necessary to pay a license fee in order to make an

additional use. To determine if the image found needs to be licensed and how to do it [CLICK HERE](#).

Clicking would take the user to a similar tool, operated by the same search engine. Instead of searching the entire Internet, this tool would only search a relatively few private registries where those image creators who wished to control the use of their work had placed copies of their images.

The registries would have to comply with certain rules in order to be included in the search.

- 1 – They would maintain a database of image fingerprints which is what the search engine's tool would search
- 2 – All of the images in the registry would require some type of permission or license for any additional use.
- 3 – When an image is found the database would immediately deliver a copy of the image contained in the database for comparison purposes and the copyright holder's name.
- 4 – The database would also deliver contact information for the individual or licensing organization, enabling the potential user to immediately start the process of obtaining permission for use of the image.
- 5 – The database would maintain a record of, and be able to deliver on request, the date the image was uploaded to the database in order to later determine if any future use was made after the date of upload.

Such databases already exist including: PicScout.com, [UsePLUS.org](http://www.useplus.org), [UK Copyright Hub \(http://www.copyright-hub.co.uk/\)](http://www.copyright-hub.co.uk/), CEPIC Image Registry (<http://www.selling-stock.com/Article/cepic-image-registry>), [PicturEngine.com](http://www.picturengine.com) and others. Some of these databases are not fully functional at the moment for image search, but it would be very easy to turn on the addition features required if there was an effective Hub promoting this type of search.

Government Action

At the moment the U.S. Copyright Office and the EU (<http://www.selling-stock.com/Article/eu-and-us-seeking-comments-on-copyright-rules>) are looking for ways to modernize copyright rules and regulations to provide additional protection to all copyright holders. In the case of the U.S. Copyright Office they hope to develop recommendations for Congressional action.

The single most important thing the U.S. Congress should do is ask Google, Bing and Yahoo to voluntarily create a tool like the one described above, and provide clear notice to their users of the new tool's existence under their existing image search tools. If the companies refuse then the Congress could move to enact legislation.

In the U.S., private industry is required to put certain notices on food and drugs to protect consumers and help them be better informed. Why shouldn't private organizations that

operate Internet search engines be required to protect copyright holders as well as consumers (because they run the risk of getting into legal trouble for unauthorized use).

The EU and the UK Parliament might want to support and provide encouragement to the U.S. Congress if it were to take such an action. If the companies refuse to implement such a search tool for U.S. searches the UK and EU might want to require such a tool for searches in their jurisdictions.

Giving Google, Bing and Yahoo More Power

Some in the photo industry are opposed to Google, Bing and Yahoo taking on the role of Hub for an image search that would enable users to locate images creators. Their argument is that these search engines already have too much power. They believe the Hub should be operated by a non-profit organization. Various for profit registries would then collect the data that would be searched by the non-profit Hub. I disagree.

1 – One of the big problems with a non-profit is figuring out how to fund it. In the UK the Copyright Hub is already facing that issue. The UK Parliament funded the development of the Copyright Hub, but the government is not prepared to fund it long term. The UK is struggling to come up with a dependable alternate method of funding.

In the US we have UsePLUS.org, which is non-profit. It has been a decade in development. It has been funded through grants from trade associations, various companies and interested parties in the industry, but it does not have a solid, long-range plan for adequate funding.

2 – Possibly the most important issue is how to make users aware of the existence of the Hub and convince them to go there to check if the image they want to use needs to be licensed. Traditional customers are aware of UsePLUS, but the average new customer and Internet user will have no idea that it exists.

Some believe the answer is a massive Public Service Campaign. It is unclear to me how such a campaign will be funded. And it will certainly need to be more than a one-shot effort.

3 - Meanwhile, the three major search engines already have the attention of users. They will be competing against any private non-profit Hub for the attention of image searchers.

4 - Part of the Orphan Works thinking is that there are major commercial and non-profit organizations that want to use images they find on the Internet, or in publications, but they can't conveniently find the image creator (or someone who represents that creator). In such cases, for the good of society, these organizations believe they should be allowed to use the images with impunity. Image search can easily solve a significant portion of this problem. (There may be some historical that are not in any of the registry databases, but this is a very small portion of the problem and going forward it will be less and less significant.)

But, these large organizations that have trouble finding the creators of images that were produced 50 or more years ago are only represent the tip of the iceberg of users. There are a huge number of smaller users, not just high school students building personal blogs, but small businesses that want to operate within the law, but really don't understand what is required or how to do it. We have to make these people aware of what they should do and make it easy for them to do the right thing. I'm skeptical that a public service campaign will solve this problem.

5 – We have to combat the general belief that everything on the Internet is free. A statement under the Google, Bing and Yahoo image search boxes will do much more to combat this idea than any public service campaign promoting another site where users could find the owner of certain images.

The motto of the existing search engines is no longer “Don't be evil,” it's more like “Don't do anything that might reduce our profit.” The irony is that if they were to make the move I recommend it would cost them almost nothing, give them more useful data about image users, and probably result in increased advertising revenue. Then they could “increase profit,” and still “not be evil.”

Will People Steal Anyway?

Posted on 4/1/2014 by [Jim Pickerell](#)

Some say the whole idea of setting up image is a waste of time because everyone will continue to go to Google, Bing and Yahoo and grab anything they find believing it is their right.

I believe large segments of the population wants to do the right thing if:

- 1 - doing the right thing is relatively easy in terms of time and effort needed to accomplish the task,
- 2 - the costs to use the work are reasonable,
- 3 – there is a reasonably high risk of getting caught, if they make and unauthorized use, and
- 4 – the penalties, once caught, are clear cut; high enough to be uncomfortable, but not so high that it makes it worth hiring lawyers to try to avoid paying anything.

The first principle should be that Image Creators have the right to be consulted about any use of their work, the right to be compensated for such a use and the right to establish the price for such uses. Basically copyright laws insure these rights with a “Fair Use” exception.

Let Me Examine Each Point

1 - Technology has advanced to the point where it is possible to do a visual search of a large number of image registries in seconds. Check out the [Copyright Hub](#)

(<http://www.copyrightHub.co.uk/>) and do a "Search by image" to see how image users could easily determine if permission is necessary to use an image and where to go to get that permission. Currently over 150 million images can be found on the registries accessed by the Copyright Hub.

The main problem with this Hub is that so far no one has figured out how to broadly promote it or fund its operation long term. To really be effective all types of image users must be made aware of such a Hub's existence and where they can go to determine if permission is needed to use a particular image.

I have argued that Google, Bing, Yahoo, and maybe other International search engines that are already widely used by all types of image users would make better Hubs for such searches. These organizations currently offer visual search of the whole web. They could easily offer an additional option that only searches qualified registries where all the images in each registry require some type of permission for use.

Such Hubs would also provide a lot of useful information to the search engine operators. Assuming adequate penalties for unauthorized use are in place, people who find an image they want to use for commercial purposes would recognize that it is in their best interest to determine if the image needs to be licensed before they grab and use it. Being able to identify those who might have a commercial interest in using images could more than justify the cost of operating the Hubs.

Private non-profit and even for-profit organizations should be allowed to establish registries that would be searched by the Hubs. Each would need to meet certain basic requirements established by the Hubs.

Finally, if Google, Bing and Yahoo are out there competing against a hub that is trying to encourage users to respect copyright and private ownership the chances of any non-profit copyright hub being widely used by the broad community of Internet users is greatly diminished.

2 – Current microstock prices for the most part are very reasonable for professional users, even for the smallest business. If users cannot afford even microstock prices, and want to avoid the risk of having to pay a penalty, then they should spend a little more time looking for one of the millions of free images available on the Internet that might work for their purposes.

There are already sites where people can search for Creative Commons licensed images that allow certain types of free use.

Some creators feel that anyone wanting to use one of their images should be willing to pay a much higher price for the privilege. These creators should have the right to establish the price and refuse permission to use their work if the user will not agree to their terms. On the other hand, given the current competitive landscape, some of these creators may discover that they need to lower their prices for Internet use significantly if

they hope to license any uses to their images at all.

3 – Given the advancements in visual search technology there is already a reasonably high risk that any use will be discovered. As more and more image registries are developed it will become very likely that any use on the Internet – if the image remains on the site for any length of time – will be discovered.

The difficulty is not in finding image uses, but in determining whether they were legally licensed or not. Many photographers license their images through multiple agencies. Often it can be six months, or longer, after an image is licensed before the photographer receives notification of a use. No agency wants to contact potential infringers unless they are sure they have access to all the legitimate licenses to the image.

In many cases the agency or distributor that licenses a use does not supply the customer's name to the creator. When graphic designers license uses they are often working for another entity on whose web site the image will actually appear. All these issues make it very difficult to determine whether an image has been legally licensed, or not.

Some creators who are having the greatest success in identifying infringements are those who only license through their own web site, or who have images on Flickr and handles all the negotiations with customers themselves. As it becomes easier to track unauthorized uses more photographers may decide that it is better to handle all negotiations themselves, or to have a single representative (with no sub-distributors) who handles all negotiations for them.

4 – There must be a penalty for unauthorized use that is more than the user would have had to pay had they licensed the use properly, but is also reasonable. The penalty must also cover the creator's overhead of identifying and tracking infringers. It would help if there could be a clear formula for calculating small claims damages.

Right now, in the U.S., there are potentially very high penalties, but litigating in Federal Court is very costly, involves a high degree of risk that it will not be successful, and has the potential of being dragged out forever in appeals. For most whose work has been infringed it is not a satisfactory solution. Most infringements are for a single image and for very small uses. It seldom makes sense to pursue such cases in Federal Court.

Last year in the UK a small claims process was instituted last year. In the U.S. a small claims process has been under discussion for about a decade and may be getting closer to some type of action in the U.S. Congress.

While the UK system is currently under utilized photographer David Hoffman reports that one of the benefits has been that the mere existence of the IPEC small claims track means that many infringers, when approached for a settlement, now pay up before any papers are filed. They are aware that they have no defense, that going to court will only increase their costs and that the IP owner now has a practical remedy that they are likely to use if required.

For all these reasons, I think a system that makes it easier for consumers to quickly determine if an image needs to be licensed and who to contact to license the rights; along with reasonable penalties for infringement and a Small Claims system would greatly improve copyright protection for U.S. image creators.

Small Claims In The UK

Posted on 3/31/2014 by [Jim Pickerell](#)

Late in 2013 the Patents County Court (PCC) that handles copyright claims in the UK was renamed the [Intellectual Property Enterprise Court](http://www.bailii.org/ew/cases/EWHC/IPEC/) (IPEC) and a provision for submitting small claims was introduced. The small claims track is intended for claims with a value of up to £10,000 and where costs orders are tightly controlled.

According to Anne Mannion with the Swan Turton law firm in the UK, His Honour Judge Hacon, the judge assigned to the Intellectual Property Enterprise Court says the small claims track is currently being underused even though there are excellent deputy judges available to hear claims.

Photographers have told Mannion that they find the court forms and procedures daunting. His Honour Judge Hacon says the court is currently revising the guide to the IPEC small claims track. It is hoped that the revisions will make the procedure more accessible to litigants in person and other court users.

Reports of IPEC judgments can be found online at [Bailii](http://www.bailii.org/ew/cases/EWHC/IPEC/) (http://www.bailii.org/ew/cases/EWHC/IPEC/), however, the court doesn't appear to be have published any judgments from the small claims track so far.

What's Happening In The U.S.

The Copyright Office has been looking into the possibility of a Small Claims court (http://www.selling-stock.com/Article/copyright-small-claims-court) since 2006, and on September 31, 2013, released a 201 page report of its findings (<http://www.ipo.org/wp-content/uploads/2013/10/CopyrightSmallClaims.pdf>) during its two-year study on copyright small claims. The report documents the significant costs and other challenges in making a claim for an infringement.

In the U.S., copyright infringement cases must be heard in Federal Court. In the vast majority of photography cases the potential monetary damages are relatively small making it impossible, as a practical matter, to find an attorney who will take the case. A small claims track that would enable a photographer to make a claim without requiring the assistance of an attorney could be very beneficial.

Hopefully, the U.S. Congress will be able to learn something from the UK's experience and move forward with legislation in the near future.

Comments

- After Eugene Mopsik of ASMP called David Hoffman's attention to this story Hoffman wrote:

Thanks for this. I spoke to Anne Mannion in February about the underuse of the IPEC small claims track. As Jim writes, partly this is because it's hard work for a non-lawyer and there are a number of procedural hurdles to jump and bear traps to avoid. A clear step-by-step guide with examples and templates would make a big difference.

There is another reason though which is more positive. The mere existence of the IPEC small claims track means that many infringers, when approached for a settlement, now pay up before any papers are filed. They are aware that they have no defense, that going to court will only increase their costs and that the IP owner now has a practical remedy which they are likely to use if required.

- Posted on Apr 1, 2014

Jim Pickerell is founder of www.selling-stock.com, an online newsletter that publishes daily. He is also available for personal telephone consultations on pricing and other matters related to stock photography. He occasionally acts as an expert witness on matters related to stock photography. For his current curriculum vitae go to: <http://www.jimpickerell.com/cv.asp>.
