Comments on Copyright Protection for Certain Visual Works

Getty Images

July 21, 2015

BACKGROUND

Getty Images is a leading creator and distributor of still imagery and video content. Getty Images represents more than 150,000 individual contributors (photographers, illustrators, and videographers), and owns or represents more than 80,000,000 unique visual works. Our award-winning imagery can be seen at www.gettyimages.com, as well as our other websites, including www.istockphoto.com, www.wireimage.com and www.thinkstock.com.

The value of professionally produced images cannot be overstated. These images convey every day's news, illustrate trends and shape our society. They draw and retain users on websites more effectively than print alone. Images are also indispensable for online marketing. The professional production of images is a complex, sophisticated and expensive business. Besides the creative work of skilled photographers around the world, image production and distribution requires a high degree of coordination, organization and investment. Additionally, there is significant work and technology investment undertaken by professional photographers and their licensing agencies in the selection, editing, captioning and key-wording of images, as well as in developing search functionality and improving digital distribution, in order to provide publishers with the most sought after and relevant images in a timely and efficient manner. These creative and technical innovations benefit the general public, but this investment and innovation are threatened if imagery can no longer generate revenue.

Getty Images appreciates the opportunity to respond to the Copyright Office's inquiry into protection for visual works. Copyright is key to our business, and we support efforts to ensure that content creators' rights are respected.

SUBJECTS OF INQUIRY

1. **What are the most significant challenges related to monetizing and/or licensing photographs, graphic artworks, and/or illustrations?**

- Framing/the "server" test.

Framing incorporates an image into a website so that a website visitor perceives the image as appearing on that website, even though the image is technically hosted on a third party site. Framing allows the website using the frame to gain all of the benefits of having the image appear in its entirety on its website while bearing none of the costs (of creating, producing, and hosting the image, of content licence fee, royalties, etc.). Framing prevents a viewer from seeing an image in its original context, and fundamentally deprives image creators of recognition of their authorship, revenue, and the ability to

control where their images appear online. In addition, framing causes consumer confusion as to the source of an image and the permission to use it, which in turn has significantly encouraged and accelerated internet piracy over recent years.

- Framing has grown more prevalent since the Ninth Circuit adopted the "server" test in *Perfect 10 v. Amazon*, 508 F.3d 1146 (9th Cir. 2007), holding that there was no infringement of the public display right where a copy of the image was not stored on the framing website's server.

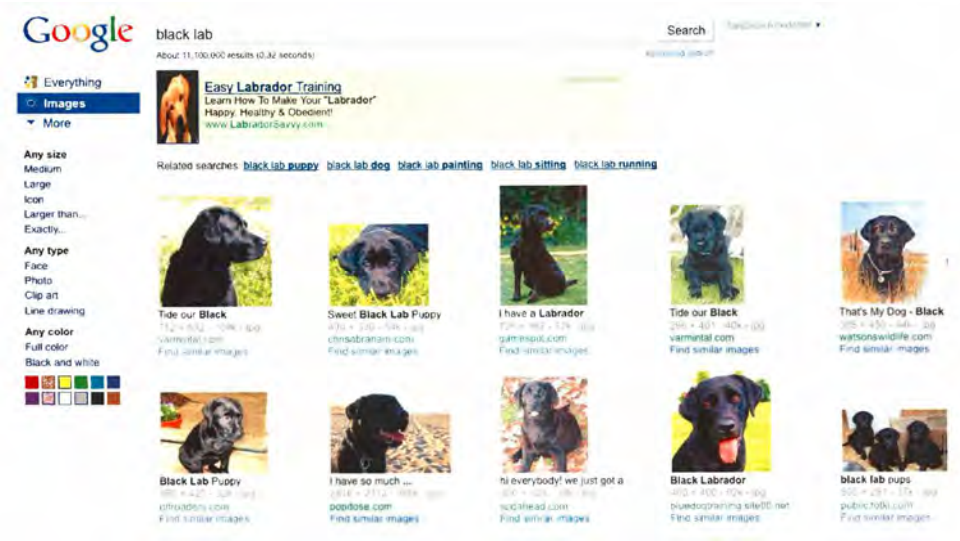
- The Perfect 10 decision ignores the plain language of the Copyright Act, which states that a copyright owner has the exclusive right "to display the copyrighted work publicly." The Copyright Act explains that "display" means to "show a copy of it [*note that there is no requirement that the infringer make that copy*], either directly or by means of a film, slide, television image, or any other device or process…." 17 U.S.C. § 101. The frame used to show a copyrighted work hosted elsewhere is just such a "device or process."

- The "server" test also works to judicially exhaust a copyright owner's rights. Once an image is licensed for online use the first time, others relying on the "server" test can simply frame the image already in use instead of licensing it themselves. This deprives rights holders (and legitimate licensees) of control and compensation, sanctions free loading, and encourages image providers to withhold images for online use or to place them behind paywalls.

- <u>Full-size image search</u>.

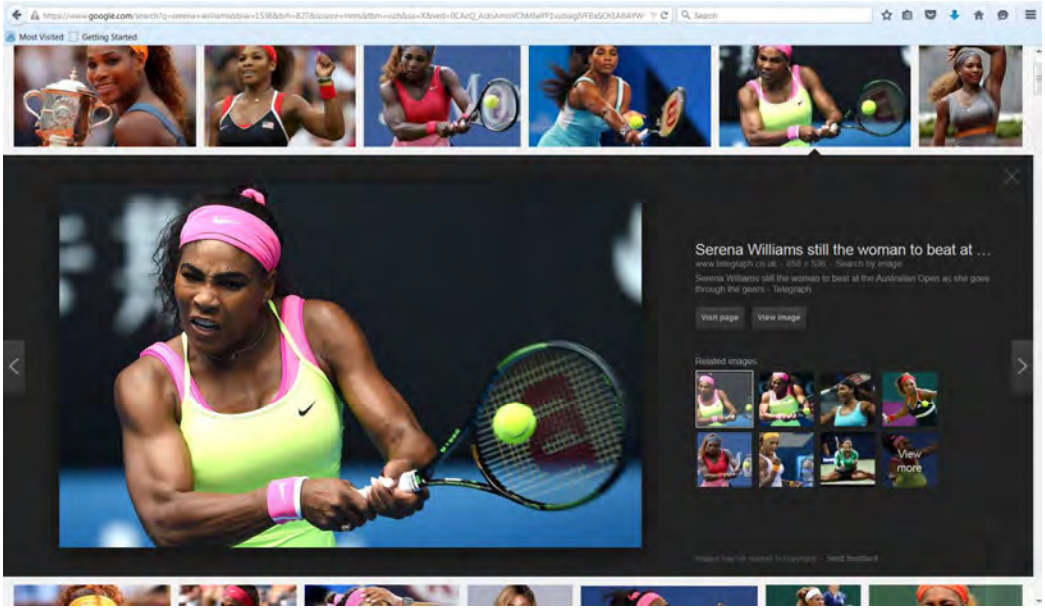
One of the most pernicious examples of framing is Google Images. In January 2013, Google launched a new version of image search. In the old version, Google answered a user's image search query by providing thumbnail-sized images that linked directly to third-party websites where a particular image could be found. The low-resolution and small size of the images were not a good substitute for the original copyrighted work, and thus encouraged users to click through to the source website to see a larger-size image. Since then, Google has transformed fair use into endless abuse, and framing has been used as a tool to decimate the professional image market and capture market share for itself.

Here is an example of what Google image search used to look like:



Since January 2013, Google has offered full-size display of images. Google frames these images in high resolution and allows its users to download them. Additional features for use and display, such as photo galleries and slideshows, have been added. There is no clear reference to the fact that the images are protected by copyright, nor has Google sought or obtained consent from rightsholders. Nevertheless, Google has become the leading global distributor of imagery, offering a perfect substitute for images licensed by photo agencies, at the same resolution and file size, but with absolutely no payment or royalty to the creator. Because Google itself offers the images and the ability to copy and save those images, users no longer need to visit the sites where the images are hosted (and available for licensing). Click-through traffic has dropped significantly, as Google looks to keep users within its own environment to build its brand and to maximize its advertising revenues.

Below is an example of what Google image search looks like today:



This is more than just a hypothetical problem. In cases where we have detected unauthorized use of our images on commercial websites, nearly 90% of infringers claim to have sourced our images from Google image search.

- DMCA Safe Harbor

The photo industry is one of the biggest casualties of the DMCA's safe harbor. Individuals and businesses alike no longer have the same incentives to respect property online as they do offline. As a result of cases such as *Viacom v. YouTube*, platforms that host infringing content uploaded by their users are encouraged to do as little as possible (lest they learn too much, acquire actual knowledge of infringing material, and trigger liability) to exclude copyrighted content. Instead of being incentivized to do the right thing and work cooperatively with rights holders, there is actually a disincentive, typically coupled with a financial interest in having high-quality professional content on the site. In the meantime, these same platforms build significant value, advertising revenue, etc. off of hosting, displaying, and in some cases, distributing such content. The current imbalance could be corrected by requiring platforms to bear some of the burden of identifying and excluding copyrighted content (through readily available technology) and/or to share some of the generated value with those who create the content. If ContentID can be created for music and video, why not for still images and other visual works, particularly where image recognition tools already exist?

At the very least, the DMCA should be amended so that instead of shielding platforms from liability even when they are chock full of copyrighted content and generating revenue, immunity is only available when the platform has taken reasonable measures to exclude copyrighted content.

2. What are the most significant enforcement challenges for photographers, graphic artists, and/or illustrators?

- Cost

The most significant enforcement challenge for photographers is the cost of filing a federal copyright lawsuit. In many cases, the cost to hire outside counsel and prepare litigation far exceeds the relatively modest sums typically sought in connection with unlicensed use of an image. This effectively leaves photographers without a remedy, triggering a vicious cycle that, for lack of enforcement and its deterrent effect, leads to still more infringement. For this reason, we continue to support the Copyright Office's recommendation for a small claims tribunal.

- Scale

In addition to cost, scale also poses a significant challenge. The vast quantity of infringing uses of visual works on social media and other online platforms is mind boggling. Copyright is respected only as the exception, not the rule. As discussed above, amending DMCA safe harbor protection to encourage

platforms to partner in enforcement efforts would go a long way to changing user behavior and strengthening copyright protection.

- Anonymity

We frequently encounter infringement of images on websites where the infringer's identity is unknown, often because the domain name has been registered through a proxy and there is no valid contact information. Bad actors too often hide behind anonymous proxy services, making enforcement more difficult. Domain name registrars should be encouraged to develop guidelines under which accurate information must be disclosed to copyright owners establishing a prima facie case of infringement.

3. What are the most significant registration challenges for photographers, graphic artists, and/or illustrators?

The main hurdle on registration is the volume of images created and distributed every day, and the fact that there is currently no registration process or API that fits within photographers' existing workflows, coupled with the complexity and expense of registration.

Bulk registration, while a welcome improvement, still requires individual works to have the same author, claimant and publication year. This requires significant manual sorting, and this administrative burden limits our ability to register large quantities of images. Also, the distinction between published and unpublished works causes unnecessary confusion.

4. What are the most significant challenges or frustrations for those who wish to make legal use of photographs, graphic art works, and/or illustrations?

- Education. Lack of understanding of the need to license, particularly as it relates to using images sourced from Google Images. In general, there are a lot of misconceptions about copyright, fair use, and what is in the public domain.

- Unfair Competition. For those who do license images, the frustration is seeing others use those same images for free. The value of a licensee's investment in licensed content is diminished by those who freeload, particularly when the licensee's website hosts advertising in order to generate revenue, but misses out on site visitors who access the licensed content via framing on other sites. Also, full size image search negatively affects lawful image users, who suffer since search results act as a substitute for, and siphon traffic from, users' own sites.

- Identification of Owner or Licensor. For those who understand the need to license and wish to seek permission, it can be challenging to identify the owner or licensor of an image, especially when many platforms strip metadata as a matter of course when images are uploaded.

- Visual Search. To be effective, the copyright registration database should have a visual search function. Many potential licensees do not know the name of the owner or licensor or the title of a copyrighted work, but image recognition technology could be used to facilitate a search-by-image function that would allow comparison of the desired image to images registered in the database.

5. **What other issues or challenges should the Office be aware of regarding photographs, graphic artworks, and/or illustrations under the Copyright Act?**

The issues described within our comments are vital to the future of photographers and the photo industry. To address these challenges effectively requires a modern US Copyright Office capable of meeting the needs of users and owners of copyrighted works in the digital economy.

Getty Images appreciates the Copyright Office's study on copyright protection for visual works and looks forward to providing additional comment on any other issues raised.