BEFORE THE
U.S. COPYRIGHT OFFICE

WASHINGTON, D.C.

NOTICE OF INQUIRY REGARDING COPYRIGHT PROTECTION FOR CERTAIN VISUAL WORKS

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COMMENTS OF THE NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION

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SUMMARY

As both staff photographers and independent visual journalists, members of the National Press Photographers Association (NPPA) are, in many cases, small business owners who create original intellectual property for publication and broadcast in all media. Our members' images and video help Americans — and others — better understand the world in which we live. As the news media have trimmed staff, more and more of our members are now working as independent contractors, licensing their images and footage for editorial use. Copyright infringement of this material has contributed to a devastating economic loss for our members. It takes a direct economic toll on these small business owners, who must shoulder the burden of policing infringements while at the same time seeking and fulfilling assignments, working on self-initiated projects and maintaining all of the tasks of running a 24/7 business. For many, losses due to infringement have been overwhelming.

Compounding this problem is the time and cost involved in copyright registration not to mention that, even when properly registered, the litigation costs in bringing a copyright lawsuit are prohibitive in comparison to the monetary remuneration available. For those just seeking to take down an infringing image the DMCA process is both frustrating and ineffectual.

Visual journalists work on extremely tight deadlines covering events of great national and international importance, including political campaigns, wars, breaking news and sports. The images they create are of interest to a large number of publishers and individuals. Those images are widely infringed as a matter of course. Today, a visual journalist has the capability to transmit an image within moments of taking it. That image can be posted immediately to the Internet by the photographer or the photographer's client. Because of the enormous public appetite in the subject matter documented by visual journalists, the world takes immediate note of a newsworthy or interesting image or recording, and the theft begins.

Within seconds of its creation that image may be downloaded and re-posted becoming "viral" in short order. It is absurdly easy for a digital image to be stripped of its metadata, preventing law-abiding publishers from identifying the rights holder or being able to legally license the work. Under increased competition some publishers use a photo without permission under the premise of "act first, apologize later." As part of that cost/benefit analysis, publications weigh the probability of discovery and resulting litigation against the time and cost involved in obtaining prior permission and licensing.

That ever-increasing misappropriation of visual works also threatens the country's public health and safety by undermining a profession America has traditionally relied upon to provide the public with compelling images and stories. Most visual journalists view our profession as a calling. No one really expects to become wealthy in this line of work, but most do expect to earn a fair living, support themselves and their family, and contribute to society. Copyright infringement reduces that economic incentive dramatically. This in turn may abridge press freedoms by discouraging participation in this field. It also devalues photography as both a news medium and art form, thereby eroding the quality of life and freedom of expression that are part of the foundation of this great nation.

COMMENTS OF THE NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION

INTRODUCTION

The National Press Photographers Association (NPPA) welcomes the opportunity to provide the U.S. Copyright Office with comments on how certain visual works, particularly photographs, are monetized, enforced, and registered under the Copyright Act.

Founded in 1946, the NPPA is a 501(c)(6) non-profit professional organization dedicated to the advancement of visual journalism, its creation, editing and distribution in all news media. The NPPA encourages visual journalists to reflect the highest standards of quality and ethics in their professional performance, in their business practices and in their comportment. The NPPA vigorously promotes freedom of expression in all forms. Its approximately 6,000 members include still and television photographers, editors, students, and representatives of businesses serving the visual journalism industry.

For visual journalists, copyright infringement is a pernicious problem. Not only has it reduced the profitability of our clients and employers, resulting in layoffs and budget cuts, but has also created overly burdensome legal costs which act as an impediment to pursuing legal remedies in federal court. Too often, rights holders find it difficult to justify enforcement — and difficult to find or afford an attorney willing to take their cases.

On behalf of the NPPA, we again thank the Register for this opportunity to provide our comments regarding the problems and challenges that photographers face regarding registration, monetization and enforcement of their work under the Copyright Act. While there are other areas of concern to visual journalists, being able to protect their intellectual property rights is of paramount importance if they are to remain in business. Further, we believe that First Amendment protections are undermined when those who create journalistic works, relied upon to inform the nation, are unable to properly and affordably shield those images from widespread copyright infringement; further eviscerating their ability to earn a living.

We note that each of the areas of inquiry in this NOI and in these comments are interconnected. The registration challenges lead to enforcement challenges; the enforcement challenges result in further challenges to monetizing images; the challenges to monetization impact the return on investment when it comes to registration and enforcement. Ineffective methods of enforcing copyright feed an unwillingness in our society to license and pay for use of images. And the business model of photography is severely impacted by the endemic theft of images, which without commensurate protections cannot be prevented.

NPPA supports the comments submitted by other groups and associations such as the American Society of Media Photographers (ASMP), the Professional Photographers of America (PPA), Digital Media Licensing Association (DMLA), the American Photographic Artists (APA), the Copyright Alliance and particularly the requests of the Graphic Arts Guild to enable group registration for illustrations and graphic designs.

Finally, we have added as an Appendix to our comment which include the comments submitted to us by our members in response to the NOI.

SUBJECTS OF INQUIRY

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

a. Lack of knowledge, understanding and respect for the value of visual images

A huge barrier to monetizing photographs taken by professionals ("Photographs", "Image" or "Works") is a general lack of understanding by the public regarding copyright law. This lack of education runs the gamut from the very basic – knowing that photographs are protected by copyright and must be licensed – to the more nuanced variances regarding how licensing works. Even professionals in the publishing industry who deal with photographs on a daily basis often do not understand the importance of copyright to a photograph, when it is permissible to use or re-use photographs and what qualifies as genuine "fair use."

Members of the general public often do not understand the difference between the physical ownership of a photographic print, and the right to reproduce the image. We frequently also see references, even among experienced legal professionals to "copyrighted work" absent the realization that nearly every creative work made is copyrighted upon creation.

The lack of appreciation for even the most basic copyright principles has led to disruption of traditional licensing practices, non-compliance with cease and desist requests and an almost total devaluation of visual images. On the Internet, everyone can be a "publisher." But unfortunately this new breed of publishers do not comprehend or respect the importance of copyright and licensing requirements.

b. Compliance with copyright law and licensing requirements is a challenge

Even among experienced publishing companies, there are factors that lead to common infringement. Companies that profit from prolific use of images often use staff that are either ignorant of their obligations under copyright law, or simply have made the calculation that it is easier to ask forgiveness than seek permission.

c. Stripping of metadata keeps willing customers from finding photographers

As many image users have noted, the inability to link-back an image to its owner creates a problem for the user. It also creates a problem for the photographer, who might otherwise receive licensing revenue that will go unbilled or collected because the user was unable to determine who the author was. Technological interventions, including some social media platforms, many website templates and website software programs often strip valuable and informative metadata from images.[1]

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[1] *See* David Riecks, *Social Media Networks Stripping Data from Your Digital Photos*, LIBRARY OF CONGRESS, April 11, 2013, http://blogs.loc.gov/digitalpreservation/2013/04/social-media-networks-stripping-data-from-your-digital-photos/ . *See also*, Andrew Orlowski, *Entire internet credits snapper for taking great pic while actually dead*, THE REGISTER, March 28, 2013, http://www.theregister.co.uk/2013/03/28/hive_mind_photo_fail/ (reporting that an image that was erroneously credited to Henri Cartier Bresson was taken years after he died, but "the image file's metadata, which contains the attribution information, is stripped from digital photographs, often by large news organizations such as the BBC and Sky, on an industrial scale")

d. Companies that engage in mass digitization believe the Copyright Act should not apply to them

With mass digitization, companies no longer complain that they cannot find the author, but rather that it is simply too difficult to ask for permission before using an image. They are essentially saying that their needs to engage in new business initiatives are more important than the rights of photographers to control their intellectual property. In this context, NPPA asserts that there is no reason why one company's desired business model should take precedence over an author's right to be compensated for their work.

e. Attitudes about fair use, including one that all educational uses are fair use or otherwise exempt from copyright

We have observed that the attitude about fair use has shifted significantly. While fair use is a defense to copyright infringement that operates in only certain circumstances, we find that users of images are claiming "fair use" on a broad basis, and in circumstances where the defense was never intended to apply. Exacerbating the problem, some academic groups that are clearly designed to support and excuse broad infringement are increasingly crafting so-called "scholarly articles and principles" supporting the notion that fair use is something to be broadly applied.

The misapplication of fair use, along with broadening attitudes about when fair use should apply, sometimes aided by the court system, has reduced the incentive to legally license images which has created a barrier to monetizing photographic works.

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

a. The cost of enforcement is prohibitive, and out of reach for the majority of visual journalists

Our members have consistently told us that the biggest barrier to enforcing and protecting their copyrights is the time and cost of doing so. Photographers find that protecting their work is tedious, costly, and time consuming, with little overall benefit. Specifically, the requirement that a copyright infringement claim must be brought in federal court and the cost associated with doing so make it difficult, if not almost impossible for photographers to pursue infringements. This cost is mostly related to upfront attorney retainer fees. Even in cases where photographers register their work in a timely manner and are victorious in court, there is no guarantee that the photographer will recover attorney fees and costs, which sometimes may dwarf the actual damage award.[2]

In 2012, the Intellectual Property Law Section of the American Bar Association conducted a survey of its members whose practices include litigation of copyright claims. Two thirds of respondents

[2] *See* Wills Citty, In *AFP v Morrel*, Judge Denies Attorney Fees to Morel Trial Lawyers, NPPA Advocacy Blog, March 24, 2015, http://blogs.nppa.org/advocacy/2015/03/24/in-afp-v-morel-judge-denies-attorney-fees-to-morel-trial-lawyers-grants-lien-by-former-lawyer/

said that they would not accept an uncomplicated case with a likely recovery of less than $30,000. A third said that they would turn away a case where the likely recovery would be less than $60,000.[3]

For visual journalists whose damages are below this threshold, it is extremely difficult to pursue an infringement. It is almost impossible to get an attorney to take the case. In addition, knowing that the barrier to enforcement is so high, photographers have little to no motivation to register their images because they know that even if they register their images, their chances of recovering attorney's fees are not guaranteed while the initial investment in litigation is so high as to make it unaffordable for most photographers.

b. Infringers are emboldened by the cost of enforcing copyright

Serial infringers and predatory pirates of copyrighted visual works are also well aware of this predicament, which is one of the things that emboldens them to continue their practices with an impunity that is more akin to absolute immunity.

Even occasional infringers are becoming increasingly aware of the cost/benefit analysis of an infringement lawsuit, which provides them with further incentive to ignore infringement cease and desist notices and requests for payment. This also has a detrimental effect on voluntary settlements; and acts as another bar to reasonable payment offers, which in turn enforces the negative and downward cycle of copyright registration and proper licensing.

c. The discretion to deny attorney's fees to a successful copyright infringement plaintiff exacerbates the enforcement cost problem

The discretion to deny attorney's fees to a successful copyright plaintiff, even when an infringement is willful, blatant, and massive, is an enormous impediment to enforcement – weighing against the viability of bringing a copyright infringement lawsuit. Even when damages are high, the cost of legal fees can subsume the award. The ability to recover attorney's fees is sometimes the only thing that can make an infringement claim viable for both plaintiff and counsel. Yet there is no assurance that courts will grant such an award to a successful plaintiff. For example, when Daniel Morel won a jury verdict of $1.2 million dollar copyright infringement against Agence France Presse (AFP) and Getty Images, the district court denied Morel's request for attorney's fees because it determined that AFP had raised a novel legal issue (despite its earlier holding that AFP's defense was without merit) and "the advent of social media, and the internet generally, poses a myriad of issues for both copyright holders and those seeking to license or exploit their work."[4]

d. The exclusive right to control the "display" of visual journalists' works has been almost obliterated by the courts

Under copyright law, the author of a photograph has the exclusive right "to display the copyrighted work publicly" 17 U.S.C. § 106(5). Yet in practice, photographic authors have almost no such right on the Internet due to a court-orchestrated change in the law regarding the copyright holder's exclusive right to display their images. In *Perfect 10, Inc. v. Amazon.com, Inc*., 508 F.3d 1146, 1161 (9th Cir. 2007), the Ninth Circuit held that the use of a technique called "in-line linking" was not a

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[3] *See* Comments on Remedies of Small Copyright Claims: Response to Notice of Inquiry (77 F.R. 51068) (Docket No. 2011-10), submitted by The American Bar Association, Section of Intellectual Property Law, October 19, 2012.

[4] *AFP v. Morel*, 10-cv-2730 (AJN) (S.D.N.Y. Mar. 23, 2015).

violation of the exclusive right to display. With this holding, and others like it, any website can display the work of any photograph that is on the internet, simply by using in-line linking. And in fact, entire business models, including social media sites, are built on the foundation of in-line linking to valuable content. The problem that has resulted is that the creators of this valuable content earn nothing from these uses, while the users who display such works have developed businesses worth billions of dollars, in some cases, based entirely on the display of copyrighted visual images belonging to others. With this interpretation of the exclusive rights in copyrighted works under 17 U.S.C. § 106, the exclusive right to "display the copyrighted works publicly" has been essentially obliterated. We do not believe that the intent of the copyright statute is upheld when photographers have absolutely no ability to control the right to determine who displays their work, or when massive corporations extract enormous profits at the expense of creators.

e. Identifying the infringer is a challenge to enforcement

Another problem related to us by our members pertains to online infringement, where it is often impossible to determine the actual owner of an infringing website because domain registration information can be anonymous, or outdated.[5] Further, to the extent that infringers are operating from other countries, those infringers are often outside of jurisdictional reach entirely.

f. DMCA inefficiency

The current notice and takedown process of the Digital Millennium Copyright Act ("DMCA") is an obstacle to the monetization and licensing of visual works. The safe harbor requirements encourage Internet Service Provider (ISP) ignorance regarding infringement rather than cooperation with copyright holders in an attempt to protect their work. This topsy-turvy problem could be remedied by rewarding the ISPs for their help in combatting infringement and piracy rather than providing immunity from monetary damages for taking a laissez-faire attitude to the ongoing misappropriation of visual works.

Whereas in the past NPPA has advised its members who have not been compensated for their work to use the DMCA to require that infringing images be removed from offending websites, we have found that of late, either those requests are entirely ignored or once taken down, the images are immediately put back up. The exponential number of online infringements makes it all but impossible to address these misappropriations through this ineffective process. The time spent and cost involved to monitor for infringements far outweighs any benefit derived from employing the DMCA process. What is even more troubling is the rise in counter-claim notices, where the ISP refuses to act until the copyright owner commences an impractical and costly copyright lawsuit, thus completely undermining the small relief sought.

Congress must revise these requirements so that all image infringements may be addressed with one takedown/staydown notice, thus dampening the ongoing game of whack-a-mole where the same image which has just been taken down reappears somewhere else.

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

[5] A requirement that domain owners provide an agent for service of process would improve this situation.

Our members have repeatedly told us that simplifying the registration process, and making it more affordable, would increase their participation.

The nature of visual journalism in 2015 creates enormous challenges to registration. While authors in other fields produce works one at a time, a visual journalist can produce thousands of works in a single day. This might include dozens of images that are published and widely distributed before the photographer goes home for the evening. Countless more remain unpublished, but may still have value. The next day brings a new assignment and a new set of published and unpublished images. This churn makes registration time consuming, cumbersome and costly.

a. The distinction between published and unpublished creates a barrier to registration and should be eliminated

The distinction between published and unpublished in the registration process should be eliminated. Because of the volume of images and the almost instantaneous "offer for sale" to publication, it is simply not practical for most visual journalists to register their work prior to publication. The problem is exacerbated because an independent visual journalist who digitally delivers a selection of images to a client, doesn't always know which images will be published by the client and which will remain unpublished. Additionally, images that are not widely distributed, are often relegated to definitional "gray areas" of published/unpublished works, where different authorities have issued conflicting opinions regarding their status.

Currently, published and unpublished images may not be registered together in a group. Complicating this, the concept of "publication" is still not clearly defined in the digital age of self-publication with restricted access options. "Publication" is currently defined in the Copyright Act as "**the distribution** of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The **offering to distribute** copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, **constitutes publication**."[6] Under this definition, sharing images with a single client in a password protected web gallery might render the image "published" even though it is never seen by the general public. However, the Copyright Office's Third Compendium defines "a limited publication," as "the distribution of copies of a work to a definitely selected group with a limited purpose and without the right of diffusion, reproduction, distribution, or sale . . . [and] is not considered a distribution to the public and, therefore, is not publication."[7] It is worth noting that the doctrine of "limited publication" was developed for the purposes of determining whether copyright was forfeited under the 1909 copyright law and not for the purposes of determining whether a work is published or unpublished for registration purposes.[8] It has however been applied to registration.[9] Importantly, when most visual journalists publish to a limited audience of potential clients, they might not meet the definition of "limited publication" if the sharing includes an implied or general right for the client to take those images and distribute them further, which is the general underlying purpose of the visual journalist/client relationship.

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[6] 17 U.S.C. § 101(emphasis added)

[7] *See* Compendium of U.S. Copyright Office Practices, Third Edition, §1905.1, December 22, 2014. *See also*, http://asmp.org/tutorials/published-or-unpublished.html (stating that if images are in a private area of a website the image is "probably not published.")

[8] *See White v. Kimmell*, 193 F.2d 744, 746-47 (9th Cir. 1952).

[9] *See, e.g., Niemi v. Am. Axle Mfg. & Holding Inc*., 05-74210, 2008 WL 905558, at *14 (E.D. Mich. Mar. 31, 2008)

Confusion is further created by the fact that "[t]he definition of publication in U.S. copyright law does not specifically address online transmission," and "the Copyright Office therefore asks applicants, who know the facts surrounding distribution of their works, to determine whether works are published."[10]

Determining not just whether an image is published, but when the date of first publication occurred, as well as separating published from unpublished images is one of the factors that makes the registration process intimidating and cumbersome to photographers. In practical terms there appears to be little or no difference whether an image is published or unpublished and thus the NPPA recommends that the distinction be removed from registration requirements and that published and unpublished images be permitted to be registered together.

There may be reasons why it is preferable for a copyright owner to include the publication status, such as when a work is a work-for-hire. In that case the Copyright Office should, at a minimum: 1) make it optional to identify a work as published or unpublished; and 2) permit registration without a designation if certain criteria (which make publication status irrelevant) are met.[11]

Copyright protection is available for all unpublished works and for all published works when an author is a citizen of, or domiciled in, the U.S.; or when an author is a citizen or domiciled in a nation that is a party to treaty with the U.S., or if the work itself has been first published in the U.S., or in a nation that is a party to a treaty with the U.S. While publication status of a work can affect limitations and the duration of the copyright itself in some cases, these factors can be established in the event of an infringement and should not be required to merely register a copyright. The purpose of registration is still served without a designation of published vs. unpublished.

NPPA also notes that two of our members have told us that they have had separate registrations "co-mingled" requiring extensive follow-up with the Copyright Office.

Finally, the NPPA is aware that a subscription system has been proposed in the past and we believe it would be a successful means of increasing participation in the registration system. We believe that this is something the Office should explore further to determine its feasibility. In addition to increasing participation in registration, this would enable visual journalists to register all of their works prior to publication, thus eliminating the "publication" problem.

b. Unofficial registration services mislead photographers on the need and proper place for registration

Another challenge we have observed is that there are some "registration" services that are not affiliated with the U.S. Copyright Office, and where the "registration" these services provide do not automatically include registration of a work with the U.S. Copyright Office. NPPA is concerned that some photographers may mistakenly believe that such options provide the legal protections that are only available through formal registration. For example, one company offers its own registration system, and claims that registration with their service generates evidence which would be valid in case of unauthorized use. However, other than separating a photographer from her money, the service does

[10] Copyright Registration of Photographs, U.S. Copyright Office, http://www.copyright.gov/fls/fl107.html

[11] For example, if the work is not a work-for-hire, was created after January 1, 1978, was not published before March 1, 1989, and the registrant is making a deposit, the distinction has little if any substantive effect on the status of the registration or the copyright.

not provide the protections of registering with the U.S. Copyright Office; and it takes some digging within the website to realize that the service charges extra to assist with such registrations or to learn the truth about the need for registration with the U.S. Copyright Office. We think that a campaign ensuring that these companies are complying with Federal Trade Commission rules and other consumer protection laws would be helpful to photographers who are the unwitting consumers of these services.

c. Deposit requirements are a challenge and it is unclear whether they are useful

The deposit requirements are also a challenge. They appear to be nothing more than a formality as deposits are not searchable. NPPA has been told anecdotally that most deposits are not kept and therefore appear to add another level of complication to the registration process without adding any benefit or value.

In fact, it seems that the registration system would be unable to handle the volume of registrations if all NPPA members participated in the registration system and provided deposits. If high-volume, low-value creators such as visual journalists truly registered all of their images and provided deposits, the Office would be overwhelmed.

Finally, NPPA would like to emphasize that registration is somewhat irrelevant to many visual journalists because of the lack of a reasonable option for bringing "small" copyright claims (which are really not small amounts to these creators). Photographers have no incentive to register their work if they know they cannot successfully pursue infringements.

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?

Those who use images legally may suffer economically because they are competing in the market with those image users who unethically and illegally infringe copyrights. Licensing photographs legally involves a cost, and when businesses avoid that cost with impunity by infringing on the rights of others, it hurts the profits and the viability of businesses who follow the law and license images properly.

Unlike written works, the name of, and information about, the creator is not included with the visual image. In order to solve this problem copyright, descriptive and contact information (Copyright Management Information (CMI)) is often embedded as "metadata" in the image. Unfortunately that metadata is frequently stripped out when the image is uploaded onto the web or when used on other digital platforms making it all but impossible for a prospective user to locate and contact the copyright holder or licensing agent.

Exacerbating this anomaly is the Office's archaic online database. Search by registration is an almost useless function. What is truly required is a fully functional database of visual works with reverse image search. NPPA supports PLUS Registry, which is "an online resource developed and operated cooperatively by a global Coalition of all communities engaged in creating, using, distributing and preserving images."[12] Such a registry would not only assist users in finding licensable content but could also have the capability to act as a hub – linking to other registries to create a very comprehensive search.

[12] See: www.PLUS.org

In situations where the author of the work can be ascertained, the general lack of knowledge and understanding of copyright law by creators and users is the most significant challenge faced by those who wish to appropriately license and use visual images. This is compounded by the difficulty in locating the creators or owners of the image as well the devaluation of the market for such images due to the misbelief that anything found on the Internet may be used for free under the fair use doctrine.

NPPA believes that users of images also suffer a penalty when they receive misinformation regarding fair use and copyright. We assert that fair use is a defense to copyright infringement which must be determined by the court on a fact-specific, case-by-case basis. Unfortunately "fair use" has become more of a buzzword, misleading users into the belief that they can just say those two magic words and be on their way. A number of groups have bolstered this misconception by publishing "best practice papers" which have been written without any input from the creators and owners of copyrighted visual works.

An example of this can be found in the College Art Association's (CAA) *Code of Best Practices in Fair Use for the Visual Arts.*[13] Created "with and for the visual arts community," it and the surveys it was based upon were written without any input from visual creators or the organizations representing them. In-point-of-fact NPPA reached out to CAA regarding this omission and subsequently expressed our concerns in a letter to CAA[14] on the already published *Code* along with the American Photographic Artists, the American Society of Media Photographers, the Graphic Artists Guild, the Digital Media Licensing Association and the Professional Photographers of America. CAA has failed to respond to that letter and follow-up emails despite originally requesting the letter. The only conclusion we can draw from this failure to respond or engage in any dialogue is that the authors of the *Code* and CAA are not interested in hearing any other viewpoints than their own.

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

a. The non-economic benefits of copyright protection should not be overlooked

The NPPA believes that the purpose of copyright protection is multi-faceted and while the economic incentives to creators is critical, it is not the only benefit of copyright. We are concerned that the other public policy reasons behind copyright often get lost in the discussion over the economics of copyright. It is important to note that for authors, copyright is not just about getting compensated for use. Copyright is important because it protects authors from having their work used in ways that they do not approve of and in ways that they never intended. Particularly with photographers, the subject(s) of the work may have only consented to being photographed for certain purposes. Photographers have sensitive clients, or clients with privacy concerns. Unauthorized use of photographs therefore affects more than just photographers.[15] While the NPPA is seeking a solution for compensating photographers

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[13] COLL. ART ASS'N, CODE OF BEST PRACTICES IN FAIR USE FOR THE VISUAL ARTS (2015), *available at* http://www.collegeart.org/pdf/fair-use/best-practices-fair-use-visual-arts.pdf

[14] Letter from Mickey H. Osterreicher, General Counsel, National Press Photographers Association to Janet Landay, Program Manager, Fair Use Initiative, College Art Association (Mar. 12, 2015).

[15] *See, e.g.,* Alicia Calzada, *A strong example of why copyright matters*, NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, July 13, 2012, available at http://blogs.nppa.org/advocacy/2012/07/13/a-strong-example-of-why-copyright-matters/; *Kristina Hill, et. al v. Public Advocate for the United States*, Case No. 1:12-cv-

for currently uncompensated uses such as those involving in-line linking on social networking sites, the NPPA also has questions regarding proposals for broad-based compulsory licensing systems. NPPA is concerned that for photographers, control of their work can be very important for many non-economic reasons, including, but not limited to:

- when some images are inherently more valuable than others;
- when photographers contract with clients to produce exclusive images with exclusive rights;[16]
- when photographers document sensitive situations;
- when the subjects of the images agree to be photographed only for certain purposes; and
- when the use of images for certain purposes would negatively impact the reputation of the photographer;
- when the need and desire of a photographer to protect the integrity of their work by ensuring honest uses.

For example, photographs by highly acclaimed visual journalist Ami Vitale were used – out of context and without permission – for a viral campaign in response to the kidnapping of 250 girls in Nigeria by the militant group Boko Haram. Vitale's photographs were actually taken of women in Guinea-Bisau (which is more than 1,000 miles from Nigeria) who had no connection whatsoever with the kidnappings. The infringement left Vitale concerned both for the integrity of her story, the truth of the images and the well-being of the subjects in her photographs.[17] In an interview about the infringement, the New York Times quoted Vitale as saying, "I go into communities and I make a promise that I will be responsible with their images and that I will deliver the message that they articulate to me. We are responsible as photographers and journalists when we make promises to do justice to their stories and honor them in the way that they have honored us by sharing their stories."[18]

Wedding and portrait photographer Kristina Hill was also the victim of misappropriated images. As a commercial photographer, she took an engagement photograph for a same sex couple planning to marry and like many photographers posted those images, with permission of the couple, on her blog. A political campaign stole the images and used them in conjunction with a campaign ad that was considered derogatory to homosexuals, and in particular her clients. Her clients' suit for the use of their likeness was dismissed, but she was able to successfully sue for copyright infringement, even overcoming a fair use defense.[19]

Any changes to copyright law that do not account for these valid concerns will fail both photographers and their subjects.

b. Copyright Small claims is the most important initiative for photographers

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02550, filed Sept. 26, 2012 (USDC Colorado), available at http://cdna.splcenter.org/sites/default/files/downloads/case/Hill-v-Public_Advocate.pdf

[16] See Ad Agency Guide To Photography Usage Terms, A PHOTO EDITOR, February 5, 2010, available at, http://aphotoeditor.com/2010/02/05/ad-agency-guide-to-photography-usage-terms/ (describing exclusive rights and parameters).

[17] *See* James Estrin, *The Real Story about the Wrong Photos in #BringBackOurGirls*, The New York Times, May 8, 2014, avail. at http://lens.blogs.nytimes.com/2014/05/08/the-real-story-about-the-wrong-photos-in-bringbackourgirls/?_r=1

[18] *Id*.

[19] *See, e.g.*, Calzada, *supra* Note 15; *Hill v. PAUS*

While touched upon briefly above, we believe it is important to emphasize that for our members and constituents, the establishment of a small claims tribunal for copyright infringement is the most important initiative that the Copyright Office and Congress could accomplish. NPPA is prepared to put whatever resources it can towards accomplishing this goal and offers its full support to the Office and to lawmakers in pursuing this initiative. We refer the Office to, and incorporate fully, our Comments on Copyright Small Claims, filed on February 25, 2013.[20]

NPPA supports the modernization of the Copyright Office as an independent executive agency with a commensurate budget needed to make it a cutting-edge organization. Such changes are necessary in order to allow the Office to keep pace with the growing copyright registration needs in this country. Improvements will also more properly reflect the creativity of the intellectual property market it serves and to promote the continued growth of the creative sector. The Office must be allowed to develop and employ innovative measures rather than continue to rely upon the current manual examination and data entry system which has failed to progress much beyond the recordation system launched in the late 1800's.

We also support improvement and expansion of the Electronic Office Registration System (eCO) allowing users to submit a broader class of works in digital form and vastly improve the search capabilities of the system to bring it in line with current technological standards

Such modernization efforts must also include reducing average registration process times, where much of the information still needs to be manually inputted. The Office should have its own IT structure in order to more efficiently automate the filing process through updated digital recordation and registration.

NPPA looks forward to working with Representatives Marino and Chu in crafting legislation that strengthens the Office and its administration of the copyright system. Such a bill should be embraced as an achievable act of Congress which will in turn reduce friction in the marketplace while incentivizing creativity, supporting innovation, encouraging investment and creating jobs.

CONCLUSION

We are aware the Copyright Office is receiving many responses to its Notice of Inquiry, and we greatly appreciate the opportunity to be heard on behalf of visual journalists, whose images can only be protected when copyright law is strong and enforceable. We present our views in an effort to continue the conversation about these critical issues.

In a digital age of ever-expanding creativity and consumption, updated legal principles and new legislative mechanisms are needed to ensure that copyright law remains viable. The rights of photographers and the needs of users must be integrated into a functioning system that incentivizes and rewards creativity and innovation on both sides of the issue while simultaneously recognizing an inherent right of creators to exercise at least some control over the use of their works.

Such an updated and "fair" copyright system is imperative if the exclusive protections imbued in copyright law and the threat to photographers' ability to receive fair value for their work are to be reconciled with freedom of expression.

[20] Available at http://www.copyright.gov/docs/smallclaims/comments/noi_02263013/NPPA.pdf.

We thank the Copyright Office for the opportunity to present these concerns and suggestions.

Respectfully submitted,

Mickey H. Osterreicher
Alicia Wagner Calzada

Mickey H. Osterreicher, General Counsel
Alicia Wagner Calzada, Attorney, Haynes and Boone, LLP

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APPENDIX A

In response to the NOI NPPA sent the following email to its members reflecting the same questions posed by the Copyright Office in its "Subjects of Inquiry."

Dear NPPA Members,

The NPPA is drafting official comments to the United States Copyright Office regarding copyright protection of visual work. The NPPA's attorneys are drafting the comments based on years of experience working with and communicating with you, NPPA's members, on the issues you face every day. Please reply to this email if you have any additional thoughts you would like us to consider on the following topics:

- *What are your biggest challenges to monetizing and licensing your photographs?*
- *What are your biggest challenges to enforcing your copyright?*
- *What are your biggest challenges to registering your copyright?*
- *If you are a person who uses photography, what are your biggest challenges to legally using photographs?*

Any comments sent to Mickey Osterreicher prior to July 20 will be considered by the NPPA in the drafting of its official comments. Members are also encouraged to submit their own comments on the above points to the Copyright Office, prior to the July 23, 2015 deadline, at the following link: http://copyright.gov/policy/visualworks/comment-form/.

Yours truly,

Mickey Osterreicher
Alicia Wagner Calzada

The following are some of the responses we received:

Hi Mickey,

I'm so glad we are collecting our own examples to reply to the CO.

Interestingly, I am in the midst of catching up on the past two years of registration. I again find myself in the mire of collecting, organizing and converting more than 20,000 images, paying $110 for a service that would have been $70 a couple years back, and which has not improved in any measurable way commensurate with its increased price.

The process I follow for such a registration, and have written down, includes 17 steps (with more needed, based on a careful examination of this past week's effort), many of them highly technical, involving checking tiny details of export methods in PhotoMechanic and a very clunky ECO system, in which it is extremely easy to make a misstep.

I have many hours invested in these two group registrations of unpublished images. The work toward registration has stretched across some six months, with fits and starts, to ensure unique file names, complete metadata, coherent naming schemes and complete documentation (I also, based on legal advice from ASMP, supply a complete list of every file name involved). Then there is the issue of determining which images were published, separating them out and paying even higher fees, with more complex documentation, to register them.

And all this is for a deposit that I understand the office will discard after several years, if not much sooner. All I want to do is get this over with.

But that wish was thwarted by an interesting twist involving the ECO system. We successfully prepared both years' collections, and after three or four passes through the online steps for the first deposit (2013), we managed to insert my correct contact information in four or five different places, pay the $55 fee, and using my fast university connection, since both my home systems were not fast enough to complete the uploads (I organize and deposit my image files by calendar quarters) before they timed out, we completed uploading all files.

The online system explains that once an upload is complete, I may not make changes. Yet when I set out on a similar process for 2014's unpublished collection, I somehow managed to commingle its title with the 2013 application. The title line on that deposit now reads "Greg Smith Unpublished Photographs 2014 - Approximately 11,426 Images." If I click on that title, it also lists, below it, a similar title for my 2013 images. However, the deposit includes none from 2014, I cannot correct the title and I can't now combine the two years' worth of images (which I understand is legal but not particularly tidy) into the one deposit that purports to include both collections.

I spent 15 minutes on hold Thursday, trying to connect with someone in the CO. Then I had a meeting, followed by more and couldn't call again before the office closed at 3 p.m. my time (MDT). I sent them a message via email form Friday afternoon. The automated reply says to look for a real reply in my spam box and advises that such a reply will likely suggest I contact the office by phone

Hence, I am stalled. I dare not upload the 2014 deposit when its title is paired with the 2013 deposit. I can't fix the title myself, since it's locked. I can't figure out how I managed to insert the wrong title into a locked deposit. And I have no idea how or when I might eventually get "help" from a CO employee, nor whether such will be helpful.

So … the updating of my website (now years overdue) continues to wait on the registration of these images, despite perhaps 100 hours of work (nights and weekends) involved in trying to register the images in question.

And again, once they are registered, will anyone ever see that deposit again? I've built it to be search friendly, with unique file names, carefully input metadata and a complete list of files. But to what end? How will this actually protect my images? Why is it that the FBI only investigates infringements against the largest of copyright holders, companies who have entire floors filled with attorneys, while small holders, such as I, must go through such a cumbersome process, conduct our searches for infringements and invest our meager incomes in trying to prosecute such abuses?

I'm told it's important I register my images. I understand the reasoning why. But is it any surprise that I am among a very tiny percentage of professional visual artists who actually register their work? And is it any surprise that infringements of visual works are many times more common than licensed uses?

Thanks for all you do,
Greg Smith

HI!

I sent the answers below to ASMP already. They are my answers, no matter who asks me so I hope you will include them in your submission.

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

The onslaught of unethical users grabbing my photos (my intellectual property) off the web, presuming they are "free" and knowing the prospects of getting "caught" are almost non-existent. Similarly the lack of easy ways for the rare ethical user to find me as an owner of content that said user wants to license, content that has been separated from the metadata showing its original source. That separation is typically through the default metadata stripping that is common on most social media sites. That metadata stripping should be the first thing addressed in any legislation. The best way to prevent so-called Orphan Works is to prevent the metadata stripping that falsely creates so-called Orphan Work.

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

The lack of tools, other than the toothless DMCA take down notice, to inform copyright thieves that they are in the wrong and force them to stop using misappropriated imagery. A proper tool would be a simplified system where as an author, I just have to prove I own the work and I then can demand and GET compensation from end users who steal my work.

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

The Library of Congress eCopyright site is balky at best, a poor design at worse and only usable by those highly dedicated individuals who can create workarounds to get past the various bottlenecks in that system. The price of registrations should be going DOWN to encourage more users rather than going up.

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

Ethical end-users have to compete with non-ethical end-users, meaning the ethical users pay for images and then have to compete with end users and other outlets/publications that do not pay for the content, content which serious laws would require those unethical users to pay for.

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

The Copyright office should arrange some kind of collaboration with someone like the Plus Licensing (https://www.useplus.com/aboutplus/system.asp) system so when individual photographer's images are registered with the Copyright office they have the option of becoming part of the Plus Licensing database.

Regards,

David H. Wells

My biggest problem is the Wild, Wild West of the internet. People just post what they want. I have had some success recently asking/telling people they need to license it and when I sent a bill out to one user they paid it without question then took it down as I requested. I kept the bill under 500.00 at 450.00.

I don't think we can win this one.

Stanley Forman

Hi Mickey,
Thanks for the work that you and Alicia are doing on our behalf.

I will send comments directly to the copyright office -but will speak here to just the
Challenges in enforcing copyright as a freelance photographer

Challenges:
As a freelancer, I have little to no clout as an individual.
Alicia is aware of one copyright issue I had with a small town newspaper

Legal fees are high - I did not get very far. The attorney for the small town newspaper has a big city (Boston) lawyer on retainer and they were quite dismissive.

I'd look to the copyright office to make it easier and less expensive to file copyrights and easier to apply penalties for improper use -particularly where alteration (like cropping in my situation) takes place. I know of others who have come up against "automated processes that strip out information as the images are processed," etc. I am moving further away from photojournalism and more into pre-paid event photography because less headache, better compensation and a great willingness to post digital links back to me - helping the SEO for both my business and the client I am supporting with visual imagery.

Without a large painful penalty for copyright violations - lawyers are not interested in small time issues with low financial reward to them and repeat offenders know this and game the system with impunity. The end result for photojournalism is not a good one. The public's right to ethical imagery (as in politically neutral, not a slanted visual point of view) is jeopardized every day and the office of the President (POTUS) appears to be a complicit party to this pervasive attitude.

Keith Spiro

Hey there Mickey,

I say the hardest thing about Copyright is the copyright office website. I wish it was just more intuitive. Really, if they could just make it like Tumblr or any other social media companies website, that would be great. I would file far more often if that was the case.

The only other problem is finding out people used my images, I really need to make it a habit to look that up.

Hoping you all the best.
-Rick Majewski

Dear Mickey and Alicia:

I have a series of comments about the copyright process, all of which come from a series of mishaps in the registration process, over a number of years.

1. The length of time between the submission of the registration and the receipt of that completed registration is unconscionably lengthy-it is regularly at least a year, sometimes longer.

2. The inaccuracies in the final registration are legendary- the final forms frequently do not follow what the application details. In the past week, I have received two text registrations in which the copyright office altered the title of the registrations, so that both registrations shared the same name.

3. Loss of the application, check and samples. I have lost track of the numerous and multiple times each of these items has been lost, requiring that I scan and resend copies of each - multiple times in each instance.

4. The copyright website is difficult, if not impossible to navigate, depending on the day one needs to use it. The forms frequently do not work. The instructions are unintelligible.

5. When these circumstances occur, should the applicant be new to the process, there is little incentive to persist, continue, or worse, to make registration a habit.

I have had a legion of problems registering visual content and written material that continue as I write. I hold my breath when I submit registrations because so many of the registrations have been fouled up. The worst example of this was two separate registrations, each sent separately that were co-mingled, requiring extensive correspondence and time to correct.

If I think of anything more that is relevant, I will write again. I am also forwarding this post to Daniel Abraham, who is an IP lawyer in Brooklyn, NY. He and I have fought the good fight to resolve these problems.
KATHIE FLORSHEIM

My biggest copyright issue is keeping the right to it. Most news organizations DEMAND all copyrights. Any organization that posts images on the web DEMAND all copyright. They certainly don't want to pay for it. Yet, I need to take what they are giving.

If NPPA is at all concerned about copyright issues, I suggest you stop trying to encourage (especially with my dues) more people from entering into journalism.

I am sure you will discard my sentiments while dismissing me as a hypocrite.

Sincerely yours,

Chris Kleponis

What are your biggest challenges to monetizing and licensing your photographs? *I am challenged by the dishonesty of people believing that the internet is a source of free photos. But I have a steady stream of companies selling promotional products (sending me samples with my own work emblazoned on it). My website has right clicking disabled and when someone right clicks a copyright warning appears - so what other products have they used my image on - to other clients or potential clients.*

I am now forced to boldly put a watermark across images rather than just in the corner - people will download and clip the copyright notice away from the image and some have passed off my work as their own.

What are your biggest challenges to enforcing your copyright?
The amount of time I spend image searching trying to protect my work. Google images despite countless calls and online complaints refuses to remove my images from their pages. These images are clipped directly from my website - see note above - and used. They are fully downloadable by anyone with a computer. An internet presence is needed for business, but with things like this happening people believe they can move with impunity and use any image they want to.

So what is NPPA going to do - another written challenge that like everything goes nowhere?

What are your biggest challenges to registering your copyright?
If you are a person who uses photography, what are your biggest challenges to legally using photographs?

George Wilson

Mickey / Alicia:

We file a great deal of copyrights and the system has gotten better. For one they have increased the file size that can be uploaded and given that we just produce contact sheets automatically in Photoshop, we can file thousands of low res images at one time. Additionally the turnaround time for getting a certificate can be as little as 3 months now, when the registration is filed online. That's a great improvement over the past, which could take over a year.

However the online system still has a problem of uploading single images. Which has to be uploaded and chosen one at a time, vs just pointing to a folder and having the system upload each images in the folder one at a time. That can be time consuming and at times, we just mail in a DVD, which tends to

get lost from time to time. We're also told by the copyright office that submitted materials are disposed of every 7 years, which could present problems in later litigation.

Enforcing online images that are copyrighted - the biggest nightmare is the wonderful Clinton Telecommunications Act, whereby if you find someone using images online, you need to notify them and they have 30 days to pull it down. Many sites do not have contact information so you can't pull them down. And even if you do, it allows many to get away with it for free for those 30 days. We have an ongoing case involving [REDACTED] we are the only ones with images [REDACTED], and have them all registered. We find many that steal them from online usages that we have licensed them such as local TV News outlets, and then have to track them down to have them taken off of sites. But while on those sites, someone else steals them as well and it goes round and round. A Hollywood movie is about to made of the subject and to be protective we sent letters to the producers offering our images for license and to also put them on notice of our copyrights as well.

I have a good size case coming up soon in which [REDACTED] We put the companies on notice and they all responded, saying they would forward the demand onto legal counsel, but never heard back from them. The images continue throughout the world online [REDACTED]. We'll see where that takes us. All the images were registered back in 2010, 2012, 2015, prior to us putting all these outlets on notice.
[REDACTED]

Our biggest challenges to registering is just the sheer volume of digital images we produce. Instead of just registering the selects, we register the entire takes. This protects us in the event that one of the outtakes gets used later down the road.

We also use and purchase rights to photography, the biggest challenges is getting the proper release. A more current issue is that of getting images from the US Government that are supposedly in the public domain produced or owned by the US Government. We've been getting a lot of push back over who owns the rights or if they are in fact copyrighted when produced by the US Government. A simple example might be the recent images of Pluto. NASA put them out, but some also listed under a university and more on other sites. The question is, who owns the rights given that NASA is releasing them. Many government sites are not putting up notices to be cautious of copyrights. You'll see that images with the NASA logo being taken off and logos like that of the NYT, amongst others being added in its place.

We've had an instance at two US National Archive libraries were at one, they would not allow us to copy a newspaper clipping produced back in 1865. Saying it was copyrighted. That's over 150 years ago. Another warns that many of the items in the national archives, photos included, may be copyrighted by others without the material having an original source.

Another recent challenge was that of putting in a FOIA to a government agency for photos of a project the US Government was producing. Though the government owns the work product and related research, they would not provide the images until they had a signed release from the photographer that produced the images. We acknowledge that someone else might have owned the copyright, but the government refused to release the images under FOIA saying they were copyrighted. We informed them that copyright was not a disqualifier for not releasing the images. They felt if they did release them, that the government would then be in violation of the copyright. This is a new one to us and another hurdle we have to overcome when it comes to getting images released from the government. When this happens we tend to fall back on, Fair Use. In a recent instance, the government used images

we wanted to get on a sensitive project as part of a large stand up display at a trade show. We simply took the photo of the display and then in the caption explained how the government was showing these images for the first time at a trade show, getting around the governments copyrights issues and using them under fair use.

And finally, pool images. I have always been of the mind that if a photographer provides a "pool" image, there should be a signed release or agreement. In the past I had a colleague that was upset in that he provided a pool image and a year later he saw it on a billboard, licensed by another. Given that copyright can only be transferred or licensed in writing. Many are just taking a chance in using, licensing or selling an image that was produced by others as is the case with images produced in "pool" and in many cases putting their name or outlet on it for syndication via photo agencies outlets. With the upcoming visit of Pope Francis, many pools images will be produced and shared, without the benefit of a signed release or limitation to the usage.

Greg E. Mathieson, Sr.

What are your biggest challenges to monetizing and licensing your photographs?

The biggest challenge to monetizing and licensing are the morons who are not in this for the long haul. The bottom feeders who give their work away and eventually go out of business. They don't read and don't care about photographic contracts or signing work for hire agreements. There is a fundamental lack of understanding by many young photographers about the business practices of photography which will sustain them for a career. More education is needed both on the business practices and ethics of photography.

What are your biggest challenges to enforcing your copyright?
The biggest challenge is dealing with the liberal definition of "fair use" and the cost of litigation. Another frustrating aspect of the legal process is that the judges themselves are uneducated about significant copyright case law as it applies to photography even at the appellate. As a photographer I was very frustrated in my recent lawsuit when I knew more about the case law than they did.

What are your biggest challenges to registering your copyright?
The biggest challenge is the volume of work which should be registered but is not due to cost and time of the process

Michael Kienitz

Hi Mickey,

Thank you for reaching out on this issue. While I appreciate the effort it is the smallest part of a big issue. Commenting on USCO drafts isn't going to significantly change what effects working photographers and the challenges we face. The NPPA was established in a time when the majority of

members were employees. Today most working news photographers are contract, freelance or independent. (Another failure of the NPPA). The end result is we have no protection and no security. The copyright law can say anything but there is little or no ability to enforce all but gross violations.

The fact is we are still individuals with no collective support for a big problem. The NPPA has so failed to perform any function beyond discussing, agreeing to discuss and writing on their discussions about copyright. Where would musicians and songwriters be if this is all they had was the NPPA instead of ASCAP and BMI? Could you imagine a world where songwriters had to bill each radio station directly for use of their songs? Absurd yet this is how it exists for still photographers in today's world and organizations like the NPPA and ASMP simply stand by and hold discussions. If there is no organization that can take collective action on behalf of members then they are no better than educational organizations or photo contest organizers. Advocacy without action is meaningless.

What are your biggest challenges to monetizing and licensing your photographs?

Collection and enforcement of licensing and usage. Due to lack of sufficient copyright enforcement and the difficulty of pursuing violations photographs are treated on the internet as a "free" commodity to use as wished without any regard of ownership, licensing or payment. This applies to individuals and corporations. Without a mechanism for tracking and collecting licensing use and fees the copyright law is meaningless.

What are your biggest challenges to enforcing your copyright?
There is no method to enforce copyright laws unless there is gross negligence as attorney fees and the cost of pursuing violators exceed the recovered loss. The burden of tracking and collecting image use and violations are left to individuals without the time or means to do so. It becomes an impossible task as images have no tracking codes based on ownership. In cases where violations can be tracked it is nearly impossible to get a response from the violator let along recover any license fees. The system simply does not exist let alone work for protecting photography and copyright.

What are your biggest challenges to registering your copyright?

The concept of registering copyright before publishing is no longer viable. This was fine when the publishing was a book or magazine which often took months but in today's internet based work publishing is instantly making it impossible to register before publication. Additionally the cost of registration is excessive unless material is registered in bulk. When I am being paid a few dollars for a picture license the idea of spending $35 to register it is absurd.

Regards,

Richard Ellis

Mickey,

I am a freelance photographer and also an attorney (retired).

There are a number of issues with both copyrights and the ability of photographers to get paid for their work.

The biggest issue with enforcing copyrights is the cost associated with an action. It is highly unlikely that even a full time, well established freelancer will have the resources and access to counsel needed to challenge a copyright infringement. I am not sure whether federal law provides for payment of attorney's fees, costs, etc. to the successful plaintiff but if not, it should be provided for in any new laws. Interestingly they are provided for in shareholder suits to cut down on the nuisance suits by minority shareholders. The loser pays. It should be that way in copyright infringement.

Additionally, damages should be treble the actual loss. The goal is to deter the infringing activity. All this is very similar to many state consumer protection laws which provide for treble damages plus attorney's fees.

Another idea, that maybe NPPA could organize, would be to establish a network of pre-identified counsel for NPPA members to contact with questions or to initiate suits. Since the law in question is Federal law, it might only be needed to establish a core set of law firms in major cities. The law firms would commit to establishing a core set of attorneys who would handle the cases. This would streamline proceedings since in many cases, a local attorney, from whom the photographer might initially seek assistance, is probably not that familiar with copyright infringement and a good deal of the cost of the photographer's action is chewed up by the attorney getting up to speed on the law.

It might take some additional thinking on how to establish this as a "benefit" of NPPA membership, but online seminars, legal guides for the photographer, etc. could be prepared. Maybe a small addition to the membership fee would give the photographer access to x hours of initial discussion with the attorney similar to the legal support programs offered in some corporate benefits packages. The cost of the initial discussion (paid for by NPPA from the additional membership fee) should be rebated back to NPPA if the lawyer takes the case since the full case if successful would cover all costs, etc.

Please let me know if I can be of further assistance.

All the best,

Tom Boland

Probably the biggest challenge to monetizing and licensing much of my work is work-for-hire contracts that I am forced to sign if I want to work at the major news outlets that give me a large chunk of my work. I do work for [REDACTED] these mega corporations demand work-for-hire agreements and therefore grab control of my copyright for any photographs I take on assignment for them. Unfortunately if you don't sign them you don't get any work from them. Canada has eliminated work-for-hire so that photographers maintain full control of their images regardless of who they work for. NPPA has done some great work on photographers' rights in the past. I would love to see you guys working towards the elimination of work-for-hire copyright grabs in this country.
Thanks for all you do!

David Sorcher

Hello,

The greatest threat to me and many of my colleagues is people and companies claiming "Fair Use".

[REDACTED]does this a lot and they are the leading company to which promotion of "Fair Use" which is not fair use but the stealing of our work. Most people either pay up or follow a takedown order. [REDACTED] just refers you to their lawyers and we go away because who can fight a giant?

Take for example one situation. An editor from [REDACTED] came to me for some photographs for a documentary of a man who died of cancer from asbestos, I told them they could use them for a fee. I mean the story was important and I would have given the usage to them for very little. I have sold the photos to a similar documentary.

The request went like this:

"Hi Louie,

I hope you're well. I'm a producer and the managing editor of [REDACTED]. We're currently in post-production for a documentary we shot about the Chemical Valley and its effects on the surrounding community. We interviewed Sandy Kinart, and I discovered that you photographed her late husband Blayne. Your photos are stunningly powerful, and heartbreaking. I'm really hoping we could use some of them for the film? It would run online on our site [REDACTED] *and on our YouTube channel.*

If you're interested we would, of course, credit you fully. Hopefully we can work something out?

Let me know, thank you."

I responded for a small fee sure they could use them

Then [REDACTED] didn't contact me back. After a few months a documentary on YouTube came to my attention. My photographs appear as newspaper clips the widow of the man had in a scrap book of an article I had published years earlier that she showed the filmmakers, the film holds on the photos for the scene.

Here is the link to the video (my photos appear twice starting at 28:25)
https://www.youtube.com/watch?v=UnHWZE0M_-k

I brought this to the attention of the editor at [REDACTED] and he responded:

"Hey Louie,

I understand where you're coming from--to a point. We had a conversation where we tried to license your photos for use in a more prominent fashion, and unfortunately we didn't have the budget to compensate you. That situation has not changed, we're still not in a position to compensate you, nor do we need to compensate you for the way in which your photos were used. Sandy happened to show us photos of her late husband, among them were photos that you were presumably compensated for

back when you shot them, and our camera captured that. If we, or any other news or documentary outlet, were to pay out every fair use clip and photo that appears in our productions, we wouldn't get much done."

There is more correspondence from him that I have, my agency even invoiced them for the photos and it just fell through the cracks. Attached are screen shots of the video and my photos.

Now of course my fear pursuing this is looking like the guy who profits from photos of a dead person. But really man, if things keep going like this people just need to keep filming my tearsheets and we won't get paid anymore.

This is the most pressing issue right now, the emergence of fair use and big companies who know they can blow off a photographer who can't afford a lawyer or the time to pursue this.

Sincerely,

Louie Palu

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1. Biggest Obstacle - The cost of actually pursuing a copyright claim. You can send DCMA takedowns, but the legal fees are brutal
2. Registering - Not anymore, see below. It is easy now.
3. Licensing - I push my editorial images through second parties. For editorial stuff, groups like Cal Sport Media and Zuma Press are a great resource. I know there is resistance to shooting on spec, and that is one conversation. My business model has us paid for the work we do upfront, and the stuff through Cal Sport is an additional revenue stream that gets images licensed that we wouldn't have licensed otherwise. Also, making images full searchable through Photoshelter helps a tons.

The cost of pursuing a copyright claim was my biggest obstacle and everyone who steals images knows this. To work around this, I employ the services of a company called ImageRIGHTS. For a yearly fee....this is what I get.

1. I upload all the images I want submitted to the USCO. As long as I have a spreadsheet with filenames and publish dates, it is fairly easy to get a submission ready. They do the submissions.
2. Once they have the images, the scan the internet for "Sightings".
3. I get an Inbox list of sightings and I can determine if they are authorized.
4. I also have a Claim Capture tool on my tool bar. If I see a stolen image, I click it and it grabs the information and drops it into my Inbox.
5. From the Inbox, I submit claims. ImageRIGHTS or their partners pursue the claims.
6. Either they submit a settlement letter to the infringer, with actual court action as an option, or they send DCMA takedown notices.
7. For any money recovered, it is 55/45 split in most cases.

This is my workaround. It isn't the best, but considering I can't file a Federal claim myself, it is the workaround that works best for me. What would be best is if there was a way to simplify the damages and make them uniform. The fact that you have to go to Federal Court is incredibly cumbersome. Having a step in between with a mediator maybe would be a good thing. With EEO cases, you submit you case and they give you a right to sue letter. Maybe if, based on Getty and Photoshelter licensing

rates, there was a suggested amount of settlement? There are enough copyright cases that a position like this could be easily funded by the thieves.

The other option is the NPPA form a group of lawyers who do what ImageRIGHTS does.

Thanks,
Scott Serio

Mickey,

First, thank you for your continuing work on behalf of photographers everywhere, it is truly appreciated.

My comments are probably identical to others, but I will say them anyway, thank you for your patience.

I know this probably isn't even being addressed because the US law is not structured to allow it, but photographers need language similar to Canada's where the moment the photo is taken it is protected under the law and doesn't have to be registered.

Is there a way a photographer could blanket register with the bureau and sign something that says "I'm a professional photographer every image I create is copyrighted by me unless the terms binding the job say otherwise? If that is too much, what about something that would register the contents of a website and allow items added over time to be covered as well?

The registration process needs to be updated so it can all be done online, simply and quickly.

Thank you again,
Colin Hackley

What are your biggest challenges to monetizing and licensing your photographs?

What are your biggest challenges to enforcing your copyright?
When and if challenged or ignored, procuring the resources ($$) to enforce and then recoup costs incurred.

What are your biggest challenges to registering your copyright?
Cost

If you are a person who uses photography, what are your biggest challenges to legally using photographs?
Location of source

Larry Davis

Hello - Thanks for championing this!

Biggest challenge to monetizing photographs - subscription models and a seemingly unwillingness to get photo editors to look to more places than just 3 to find images. Doesn't seem to matter how many mailings, letters, or phone calls one makes, it is very hard to direct market and get away from the subscription models being offered by the agencies. It's good for the agencies but lacks the robustness for individual photographers.

Enforcing copyrights - There doesn't seem to be a way to force collection even if one wins. It's almost always better to take a less than desirable settlement just to get something. Attorney fees are high - maybe because (and this can also work in to our benefit) to do any research one almost has to go to (or hire someone in) Washington D.C. to do the research for the case. Infringers also have an attitude that if they take down an image after caught using it on the web that the takedown is sufficient an action as is needed and that they don't owe you for the time they did use it.

Filing copyrights - The copyright office online filing has gotten better over the year. The biggest curiosity is the published/unpublished requirement. Technically we are all told that as soon as we push the shutter button that we own the image unless we are "work for hire". So why does it matter if it were published or unpublished. In my opinion it just creates a technicality loophole for the infringers when it all gets to court. Filing as published is too difficult because of file naming requirements by the LOC. If you don't use their conventions, they won't file it and if you do use them, you pretty much have to change your whole file naming convention or the two won't match up making any research just double difficult.

Alan Look

Hello,

Thanks for your work on this issues.

The biggest challenge to enforcing copyright for me is the use of social media as a marketing tool: currently Facebook, Twitter, etc strip out metadata from photos. When photos are reposted and/or shared there is absolutely no information in the photo to determine ownership (I use a watermark but it can be cloned/cropped out).

I shoot over 100,000 images a year for editorial, commercial and event clients: the current copyright process is beyond onerous and a nightmare to use. It's easier for me to forgo a few images used/copyright violations to deal with registering my images - and even registering them still creates a process of enforcement that is all but impossible except for very high value images. The cost/benefit of the current system just doesn't make sense.

I'm also a member of ASMP and think this is an important initiative. But I also think NPPA and ASMP should join forces to put serious pressure on Facebook, Instagram and Twitter to not remove metadata and create a process to protect photographers and their images.

Thank you,
Chris Council