



American Society of Media Photographers

*Comments of Eugene Mopsik regarding Remedies and Enforcement
Prepared for the Berkeley Center for Law and Technology
The Next Great Copyright Act
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Good Afternoon.

As part of her recent testimony before the House Judiciary Committee, the Register of Copyrights, Maria Pallante, stated:

“... It is both possible and necessary to have a copyright law that combines safeguards for free expression, guarantees of due process, mechanisms for access, and respect for intellectual property.

She goes on to say:

“To this end, I would like to state something that I hope is uncontroversial. The issues of authors are intertwined with the interests of the public. As the first beneficiaries of the copyright law, they are not a counterweight to the public interest but instead are at the very center of the equation. In the words of the Supreme Court, “[t]he immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.” Congress has a duty to keep authors in its mind's eye,

including songwriters, book authors, filmmakers, photographers, and visual artists. A law that does not provide for authors would be illogical – hardly a copyright law at all.”

Professional photographers create many and probably most of the images that the American public sees every day: they create this country’s visual heritage. These images communicate the horrors of war and genocide, “the thrill of victory and the agony of defeat”, the events of every day life and the joy of discovery and travel. They create emotion, document history, and expand our knowledge. Much of the incentive to create, innovate and the ability to control the sale and license of these works would be lost without copyright.

Imagine *National Geographic*, *The Sunday New York Times* and its Magazine, *Travel and Leisure*, *Saveur*, and *Sports Illustrated* all without photographs! And not just any photographs; stunning images that consistently stretch the bounds of creativity and innovation. Each assignment is a challenge to create something new, never seen before. Professional photography enriches and opens our eyes to new worlds making us better informed and more sensitive to the issues and conflicts occurring around us. Again, in order for professionals to be able to sustain a livelihood, they need to be able to control the sale and license of their works so that they may receive fair compensation for their ongoing use. Copyright is the cornerstone of this equation. Remedies and Enforcement help to insure fulfillment of the promise.

Practically speaking, visual artists and in particular photographers are without reasonable remedies for the myriad of infringements occurring every hour primarily through digital display and transmission. Freelance photographers create the largest numbers of copyrighted works, yet they are the group that is the least able to access the protections theoretically afforded by the Copyright Act. The primary reasons for that inequity are the extremely high cost of federal court litigation; the typically low amounts in controversy, when compared to the costs of litigation; the fact that most freelance professional photographers earn comparatively modest incomes; and the fact that many infringers are aware of this

situation and use it to their advantage. These factors coupled with the disruption to business and the emotional stress of litigation are simply more than most sole proprietors can afford.

Additionally, due to a cumbersome and expensive copyright registration process most images are not registered prior to infringement taking statutory damages and perhaps more importantly attorneys' fees and costs out of consideration from the beginning of any enforcement effort. Many infringers are beyond the reach of the law and the DMCA does little to discourage their actions. While the willful stripping of identifying information is prohibited by the DMCA, this provision of the act is rarely if ever enforced. Take down notices are required for each infringement rather than a single notice of infringement for a unique image. Each occurrence of the image requires a new takedown notice! Metadata that would serve to identify the rights holder is routinely stripped from images - either upon upload or through other action - and persistent, machine actionable identifiers are illusory. Currently, the PLUS Coalition holds the greatest hope for the tracking and identification of these "orphaned" images, but PLUS is underfunded and understaffed.

What is needed is some form of Alternate Dispute Resolution or what has been called Copyright Small Claims Court with the goal being to create a system of enforcement that would be efficient and affordable enough to allow the practical redress of claims involving a few thousand dollars or less. In the best of all worlds this would be managed by the Copyright Office in the fashion of a tribunal. Limited discovery, limited recovery (under \$30,000.00), no lawyers, all documents submitted in digital form for consideration, incentives for participation, no appeal. Constitutional questions, yes! Dreamer, maybe? A desire to have reasonable access to and remedies for visual artists; justice, not simply legislation, definitely!

In addition to ADR, there are a few other changes in the statute that might contribute to accommodating the unique needs of visual artists. The ability to register images from within digital asset management workflow would greatly facilitate the number of

registrations. When a photographer processes his images at the end of a digital shoot, he could simply select images for registration and an "action" from within his workflow would prepare the registration forms and ensure that the proper identifying information is placed in the image files. Simultaneously, these images could be deposited in an image registry for the purpose of ongoing identification and as part of the effort to reduce Orphan Works. Also, additional advantage would be gained if the Copyright Office registrations were to be image searchable rather than searchable only by rights holder or title. This would require changes in rights holder registration practice as well as within the database of the Copyright Office. Scarcity of funding is one of the chief impediments to this improvement in practice. An annual subscription allowing for unlimited registrations of images for a flat fee would further encourage the act of registration. The elimination of the published versus unpublished distinction would greatly simplify the registration process and eliminate one of the most confounding aspects of the process. The reasons for this distinction are illusory beyond their ability to add complexity to an already too complex process. Finally, returning Fair Use to an affirmative defense to be determined on a case-by-case basis rather than a right to be broadly applied to the use of images would be a step in the right direction. Recent courts have expanded the scope of Fair Use to the point where the library and university community no longer desire Orphan Works legislation.

Moving on to enforcement, many of the issues have already been stated. The simple fact is that it is easier to steal images than it is to license them. Good and honest people, who would never walk into a store and steal tangible goods, think nothing of stealing images. It is next to impossible to communicate the value of property that exists only as ether in digital form. The problem is compounded by the belief by many that what appears on the Internet is free for the taking. Couple that with the simple truth that photography is an avocation for much of the world; a pleasurable activity that is meant to be shared and not monetized. Finally, there are any number of business models predicated on the display and distribution of images without any share of the generated revenue stream finding

its way back to the rights holders. While visual artists want their images seen, at the same time they need fair compensation for use. At times it seems as though every one has figured out how to make money from photographs except for photographers!

The Holy Grail for enforcement would be the creation of the previously mentioned persistent actionable identifiers. Identifiers that cannot be removed from the files and that are machine-readable. In the absence of this technology - not currently on the horizon - there are tools and possible courses of action that could contribute to greater enforcement of image copyrights.

Image recognition software, such as PicScout or TinEye are useful in identifying the occurrence of an image on the Web. Meanwhile, the occurrences must then be analyzed to determine which are authorized and which are infringements; this is not a difficult process since it has been reported that over 80% of the images appearing on the Internet are unauthorized. Witness the recent decision by Getty Images to make over 30 million images available for free non-profit use through an Embed. The images remain on Getty's server, they appear seamlessly on the licensee's application, Getty gets to harvest significant information regarding where the images appear, who is viewing the images, the nature of the content, etc. and gets to market that information - making the Metadata more valuable than the previously unmonetizable images. Getty owns Picscout - one of the first and best image recognition software companies and they can't keep up with the infringements! Where does this leave the individual photographer? The sheer number of infringements coupled with the inability to make any reasonable recovery for all of the reasons previously stated, make this a marginal tool.

As part of the original Orphan Works study authored by Jule Sigal, it was recommended that industry partners and associations create registries to facilitate the identification of Orphaned and other images in the marketplace. The photography and illustration community, joined by partners in the library, museum advertising and design and publishing space worked to create PLUS - the

Picture Licensing Universal System (useplus.org). PLUS created a universal glossary of trade terms that is machine readable and then went on to create various licensing terms and packages customarily used by the professional community. Additionally, PLUS has created a Registry that will connect rights holders and rights information, and will additionally facilitate the automated management of licensed rights. Without getting into the technical capabilities of PLUS, let it be said that it comes closer to creating a persistent machine actionable means of identification than any other entity on the market. PLUS is working with the LOC and Copyright Office, the UK Copyright Hub, the EU Rights Data Integration Project, Linked Content Coalition, and the British Library just to name a few of its partners. PLUS is agnostic - it represents the interests of both rights holders and the consumers of images.

Meanwhile, PLUS is not in the business of licensing. An extended collective licensing entity needs to be created to facilitate frictionless licensing for the secondary use of images. These would be small uses made on the Internet and in reprographic form. The collective license would preserve the licensing model and contribute to an income stream for rights holders. ISP's and tech companies such as Google and Pinterest, currently creating revenue from the display and transmission of images, would probably bear the significant portion of the fee burden. Such a licensing entity would be most closely patterned after the Sound Exchange model.

A group of imaging industry associations including the American Society of Media Photographers (ASMP), The American Photographic Artists (APA), the National Press Photographers Association (NPPA), and the Graphic Artists Guild (GAG) has been spearheading this effort. The group has received verbal support from the Copyright Office and IFRRO - the International Federation of Reproduction Rights Organizations. With the approach of market failure for the licensing of secondary rights and the other unique problems of the visual materials space, legislation or a consent degree would be sought to allow for the currently prohibited

collective licensing. This effort is in the incipient stages and one part of an enforcement effort.

In conclusion, it has long been recognized that photographers are uniquely disenfranchised from access to the copyright protections to which they are legally entitled. Enforcement of rights is nearly impossible. It is time for government to step in to ensure the preservation of our visual heritage and to enable visual artists to sustain a reasonable profit from their works. We seek remedies and enforcement actions that lead to justice for individual rights holders, not simply more legislation.

Thank You.

A handwritten signature in black ink, appearing to read 'E. Mopsik', with a stylized flourish at the end.

Eugene Mopsik
April 4, 2014