

## **Symposium: Collective Management of Copyright: Solution or Sacrifice?**

### **Photographers and Collective Licensing: A Short History with No Ending**

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In the early 1990s, the American Society of Media Photographers (“ASMP”) explored the possibility of a collective licensing solution to help manage the myriad uses of photography that were being created by a new means of digital distribution: the Internet. The entity was called the Media Photographers Copyright Agency (“MPCA”). Photographers were not ready for it, stock agencies were afraid of it and funding was scarce. It failed.

Years of anecdotal experience had shown that photographers were in a unique and compromised position in a rapidly evolving marketplace. We witnessed significant consolidation in the stock distribution industry and the creation of new royalty-free, subscription stock models that began to erode—and have indeed continued to erode—the market for original photography. The demise of the agency relationship between stock distributors and those contributing their photographs triggered the end of the profitable era for many stock photographers. Digital clip art was pervasive. Simultaneously, on the buyer side there was significant consolidation in the publishing and advertising industries. We witnessed the proliferation of “easy to use” digital cameras, the rise of the citizen journalist and a client mentality of “good enough” encouraged by a stressed economy.

The fractious nature of a photographic community comprised primarily of small independent businessmen/rights holders, coupled with the traumatic transition to the digital world, made it very difficult to reach a consensus and to build support for the collective licensing solution. Additionally, not all photographers and images are created equal. Some images have a distinctly higher value because of their unique nature or because they were created by a prominent photographer. Stock agencies felt threatened by the MPCA, and photographers could not agree on

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whether this was a good solution, especially since it required the surrender of a certain amount of control over licensing transactions.

Fast forward almost twenty years. Recent changes in the industry, economy and society have created a perfect storm; the transition to digital capture, digital distribution, the explosion of digital media outlets, the rise of the talented amateur, all coupled with a dilution of effective copyright protection have made it virtually impossible for a commercial photographer to sustain a career solely as an image creator. While the photography community is working diligently to navigate this new world and to take advantage of the enormous new opportunities it presents, the print to pixel revolution has been as disruptive to professional photographers as it has been to publishing and electronic media. For many, survival is contingent upon the establishment of multiple income streams.

ASMP has spent the last sixty-five years teaching photographers good business practices and emphasizing the importance of copyright protection based on a print paradigm—images going from the camera to reproduction on paper. This has been turned upside down in the last few years as more images are reproduced in the digital form than in print. Meanwhile, the pricing formulas for this new digital paradigm have not been firmly established.

For a number of years, digital use of images was simply licensed for images in print advertising or other contexts without any request for additional compensation. Now, however, digital use is primary for many images and print is secondary. In this new paradigm, there are no geographical boundaries: everyone is a worldwide publisher. Information has an unlimited lifespan because there is no shortage of space on the Web. Yet, even though images can now be exploited with even greater ease, the purposeful or incidental stripping of metadata means that most images have no licensing information or attribution information. Without an efficient licensing option, such as iTunes or some other collective licensing solution, it is far easier to click and infringe than to click and buy. How do you monetize use under these circumstances? Photographers want their images to be seen and used; we are simply seeking fair compensation for the use.

At the same time as the paradigm has shifted, clients are now seeking to maximize their investment returns, and so are seeking greater rights in the images they commission. For commercial work, this means additional rights for Web use, third party use and/or any use now or possibly envisioned in the future—all without any additional compensation. For editorial work, it means that the secondary licensing rights—the only thing that really ever made editorial work remotely profitable—are no longer left to the photographer. Through publication embargoes and contractual language, the photographer again is left with virtually no rights to his own intellectual property, and more often than not, without any additional compensation. While some publishers charge separate subscription fees for their electronic editions, they do not pay their photographers anything additional for the use. It frequently seems as though everyone except for photographers has figured out to make money off of photographs. Finally, there is a rising tide of public sentiment that information should be free, and a general reluctance to perceive the value of intellectual property that only exists in digital form and generally without

attribution and/or secure metadata.

So where does collective licensing fit into the current state of the industry and marketplace? It would seem that the commoditization of images along with digital distribution and micro transactions create a perfect fit for collective licensing; however, there has been little or no movement. The stock distributors continue to provide the closest thing to collective licensing for photographers, yet they are no longer obligated to act in the best interests of their contributors.

What stands in the way? Setting aside legal issues related to antitrust and collusion, I believe the biggest impediment to the establishment of an effective collective licensing entity has been the mindset of photographers. In order for collective licensing to work, photographers must be willing to give up control of the pricing and distribution of these small, primarily Web based uses. No one will get rich, but the heretofore unmonetized uses could become part of a secondary income stream. The best guess for an individual photographer would be a net of less than a few thousand dollars, with few exceptions. The financial return formula would be similar to that of the American Society of Composers, Authors and Performers ("ASCAP") or Broadcast Music, Inc. ("BMI") with a small percentage of superstars making well over eighty percent of the revenue. Photographers looking at this equation have been reluctant to sign on to any form of collective licensing, and yet they have already effectively given up control over their images, especially on the Web. At this point, what more is there to lose?

Another impediment has been finding or creating an entity to manage these collective rights for photographers. Add into the mix the fractious nature of and competition between the various photographer associations, such as ASMP, and you have a formula for failure. Additionally, the associations are not rights holders. They represent the best interests of their members, but do not hold rights to their members' images. They have no legal standing to negotiate on their members' behalf. Nor can they establish rates or even recommend pricing without running afoul of antitrust legislation.

The current state of technology allows for images deposited in registries to be identified via Web search by entities such as PicScout and TinEye.<sup>1</sup> Users, wanting to affect a quick and easy licensing transaction are generally frustrated. Metadata does not travel well with image files and is easily removed despite prohibition by the Digital Millennium Copyright Act ("DMCA").<sup>2</sup> The average corporate and consumer image user, going to the Web as an image resource, is not worried about the DMCA. The right holder is not easily located and there is probably no e-commerce solution in place. The Picture Licensing Universal System ("PLUS") has been working for years to create standards to allow rights and attribution information to travel within image files in a machine readable format that provides

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1. See PICSCOUT, <http://www.picscout.com/> (last visited Mar. 16, 2011); TINEYE REVERSE IMAGE SEARCH, <http://www.tineye.com/> (last visited Mar. 16, 2011).

2. See 17 U.S.C. § 1201(a) (2006) (prohibiting circumvention of technological measures that effectively protect a copyrighted work).

instant access and universal understanding.<sup>3</sup> PLUS is about to release a beta version of the PLUS Registry in response to the need created in recent versions of orphan works legislation.<sup>4</sup> Images within the registry could be available for collective licensing for small uses.

How do we make this happen? The Google Book Settlement—if ever resolved—may ultimately create a resource to manage digital book publication rights for authors and publishers.<sup>5</sup> The suit brought by ASMP, the Graphic Artists' Guild (“GAG”), the Picture Archive Council of America (“PACA”), the North American Nature Photography Association (“NANPA”) and a group of named plaintiffs may ultimately create a resource to manage the image use rights in both books and periodicals.<sup>6</sup> It is still to be determined if this will be an opt in or opt out regime, as well as the precise structure and management of the entity. The one thing that is known is that it will take substantial financial resources to create.

In my mind the most logical partner to advance collective licensing in the United States for photographers would be the Copyright Clearance Center (“CCC”). CCC has the financial resources, technical expertise and client base. Meanwhile, CCC is a primarily publisher driven entity that has refused to distribute reprographic rights payments directly to rights holders and/or to the Authors Coalition of America because of long standing perpetual rights affirmations from publishers. As reprographic distribution diminishes and digital distribution expands, I look to CCC to make direct compensation to rights holders especially for business and educational use of images. I would also be interested in working with them to create a collective licensing entity, similar to MPCA, that would manage the rights for vast numbers of photographs that now reside in individual photographer Web collections—images that are now being routinely used without permission and without compensation. I would like to make it easy, fast and cost effective to do the right thing. The big question is still whether professional photographers are ready. The bigger question is whether there will still be professional photographers if they are not ready.

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3. PLUS, <http://www.useplus.com> (last visited Mar. 9, 2011).

4. *See* Shawn Bentley Orphan Works Act of 2008, S. 2913, 110th Cong. (2008).

5. Amended Settlement Agreement, *Authors Guild, Inc. v. Google, Inc.*, 93 U.S.P.Q.2d 1159 (S.D.N.Y. 2009) (No. 05 CV 8136 (DC)).

6. Complaint and Demand for Jury Trial, *Am. Soc’y of Media Photographers, Inc. v. Google, Inc.*, No. 10 CV 2977 (DC) (S.D.N.Y. Apr. 7, 2010); *see also* GRAPHIC ARTISTS’ GUILD, <http://www.graphicartistsguild.org> (last visited Mar. 16, 2010); PICTURE ARCHIVE COUNCIL OF AM., <http://www.pacaoffice.org> (last visited Mar. 16, 2010); N. AM. NATURE PHOTOGRAPHY ASS’N, <http://www.nanpa.org> (last visited Mar. 16, 2010).