
**BEFORE THE
U.S. COPYRIGHT OFFICE**

WASHINGTON, D.C.

**REQUEST FOR COMMENTS REGARDING STUDIES
ON REMEDIES FOR SMALL COPYRIGHT CLAIMS**

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**COMMENTS OF THE
NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION**

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SUMMARY

As both staff photographers and independent photojournalists, members of the National Press Photographers Association (NPPA) create original intellectual property for publication and broadcast in all media. Our images and video help Americans – and others – understand their world. As the news media have trimmed their staffs, more and more of our members find themselves working as independent contractors, licensing their images and footage. Copyright infringement of this material has contributed to a devastating economic loss for our members, as newspapers and television stations (both local and network) reduce staffs. Copyright infringement 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 photographic 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 devastating.

Photojournalists work on extremely tight deadlines covering events of great national and international importance, including political events, wars, breaking news and sporting events. These types of images are of interest to a large number of publishers and individuals. They are widely infringed as a matter of course.

Today, a news photographer 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 interest in the subject matter documented by news photographers, the world takes immediate note of a newsworthy or interesting photo, 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 and 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 member-created content also threatens the country’s public health and safety by undermining a profession America relies upon to provide the public with compelling images and stories. Most photojournalists 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 this great nation.

Given this state of our industry, we are eager to respond to the Copyright Office’s request for comments on how copyright owners have handled small infringement claims, the obstacles they have encountered in doing so and potential alternatives to the current legal system that might better accommodate such claims. The NPPA believes the U.S. Copyright Office should create a less burdensome method for adjudicating copyright claims – so long as rights holders are not unreasonably pressured to settle their claims for

less than rights-managed market values. We also believe a vibrant, government-sponsored, educational advertising campaign would help the public better understand the value and importance of intellectual property rights.

For these important reasons, the NPPA respectfully submits this comment regarding remedies for small copyright claims.

COMMENTS OF THE NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION

INTRODUCTION

Founded in 1946, the National Press Photographers Association (NPPA) is a 501(c)(6) non-profit professional organization dedicated to the advancement of photojournalism, its creation, editing and distribution in all news media. NPPA encourages photojournalists to reflect high standards of quality and ethics in their professional performance, in their business practices and in their comportment. NPPA vigorously promotes freedom of expression in all forms. Its more than 7,000 members include still and television photographers, editors, students and representatives of businesses serving the visual journalism industry.

For photojournalists, copyright infringement is a pernicious problem. Not only has it reduced the profitability of our clients, resulting in layoffs and budget cuts for outside contractors, 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 an attorney willing to take their cases.

On behalf of the NPPA, we thank the Register and Chairman Smith for this opportunity to provide our comments regarding the critical need for alternative proceedings that would improve the resolution of small copyright claims. While there are other areas of concern to news photographers, being able to protect their intellectual property rights is of paramount importance if they are to remain in business.

We also commend the other associations for their work in this area. While our specific comments regarding remedies for small copyright claims follow, please know we have worked with several other organizations, including the American Photographic Artists (APA) and the American Society of Media Photographers (ASMP). While these organizations may recommend slightly different approaches to adjudicating small copyright claims, the NPPA supports their positions. We hope this is the beginning of a meaningful conversation between all parties and the Copyright Office. We fully support an improved system that eases the economic and legal impediments for those with small copyright claims, while simultaneously streamlining the need for discovery and expediting full and final resolution of claims that qualify for such review. We also recognize none of this may be possible without legislative help from Congress, and we look forward to working with our senators and representatives to amend copyright law accordingly.

Due to an economic downturn and the reduction in staff by many news organizations, an ever-increasing number of our members find their future not as employees but as independent contractors. Most operate as sole proprietors. Given the unknown nature and timing of news, it is extremely difficult to manage accounts, register works, enforce copyright, maintain and grow a business, while at the same time being available at a moment's notice to cover an assignment. They do all these things in the same business climate that has forced many of their former employers to the brink of bankruptcy – and beyond.

In this digital age, independent photojournalists face rapidly rising costs, competition from large photo agencies, corporate contracts of adhesion seeking all rights

for dwindling fees, user-generated content provided free-of-charge to news agencies, and an exponential increase in the availability and technical quality of consumer cameras.

Misbehavior euphemistically called “right-click gone wild” and the general misguided belief that appropriation of anything on the Internet falls under “fair use” have also contributed to the dilemma for photojournalists. Our members are victims of the same people who thought that music on the Web was there for the taking. Aside from individual infringers, we would argue that some corporations infringe with impunity because they believe those thefts will never be detected.

For those infringements that are discovered, most will never be prosecuted because it is economically unfeasible for the creators to commence an action in federal court. And finally, for those few claims that are brought, the defense offers pennies on the dollar as “the cost-of-doing-business.” But they will spend thousands on legal defense fees. This is a business model that must be drastically changed if news photographers are to continue to survive.

Another underlying cause of this problem is that for the most part, the actual damages (if they were to be assessed) for infringing these images are only a few hundred to a few thousand dollars. Such small dollar amounts make it impractical for most attorneys to justify appropriate retainers, since the amount of legal work may be the same as in cases worth significantly more. In the rare cases that attorneys agree to handle such matters, photojournalists as plaintiffs must consider all the potential consequences and costs involved in discovery, as well as the risk they might lose their cases and be assessed the successful defendants’ legal fees.

Other factors to be considered under current copyright jurisprudence are: whether statutory damages will apply or whether the award will more approximate actual damages (which, in cases of news photographs, are for the most part *de minimis* when compared to the cost of litigation); the time spent by the photographer meeting with his attorney, going to court, attending depositions, etc. (this can quickly exact a toll on personal and business life); and finally, the emotional cost that a prolonged legal matter has on all participants. This is especially true for someone who believes something she created (perhaps risking her life at a news event) has been usurped by someone else, who is now intentionally using every legal roadblock to prolong the agony and to thwart a timely and fair settlement.

ISSUES

Because the Copyright Office is receiving a wide range of possible solutions, and there is likely merit in all of them, the NPPA first would like to express what we feel are important elements to any solution the copyright office might pursue. We believe such a solution must address issues of:

Accessibility

To be effective, any solution must provide access to remedies for infringement. Legal proceedings should be available to copyright holders regardless of when they registered their work. Registration as a prerequisite to bringing a claim is acceptable, but there should be no limits to a claim based on when that registration occurred. In addition, because the turn-around time for a registration certificate can be several months, we support the suggestion that a claim can be brought by initially providing proof of a

registration application. Of course an actual registration certificate would be required prior to a final judgment. We also stress that paying special handling fees for a “rush registration” is not a feasible option for a truly small claim.

Affordability

To be accessible and practical, any solution must be affordable for the copyright holder, particularly when balancing the recovery potential with the expense of bringing a claim. Therefore, the process should involve limited discovery, which in itself will be a tremendous cost-saver. Another cost-saving measure would allow a rights holder to represent herself *pro se*. In order to enable a rights holder to represent herself effectively, limits on procedural wrangling would need to be established. An often employed defense strategy in a typical federal copyright case involves extended use of procedural hurdles in order to prolong the case, exhausting the plaintiff’s patience and resources. Such strategies should be foreclosed in a small claims case. Clearly, some procedural pleadings must be available; but they should be extremely limited and should be structured in a way that they do not untimely delay the resolution of a case.

Brevity

Any new system should be structured to expedite cases and limit duration. The validity of copyright infringement cases involving photographs can often be determined on the face of the pleadings and by comparison of original works to infringing uses. If an infringing photograph is identical to a protected one, there is no need to prove access and copying. There is also no need to demonstrate substantial similarity. In such cases, the rights holder should not be subject to extensive, detailed discovery, or to investigation of her financial status, her business model or other irrelevant facts. Indeed, the only question

that might remain before the court would be the amount of damages. Accordingly, it is critical to any solution that discovery, if permitted at all, should be limited in time, scope and topic.

PROPOSALS

NPPA, having considered other proposals, recognizes that there is an endless realm of possible solutions. We are excited about those possibilities and support any plan that makes enforcement of copyright more accessible to photographers and other copyright holders. The following are mechanisms that we believe would also achieve those ends.

Binding Arbitration / Tribunal

The suggestion that the Copyright Office run a tribunal or other kind of system is one that NPPA supports. Particularly when photographs are infringed, the issues are often very straightforward and do not require a complex legal analysis. In addition, to the extent that complexities do exist in copyright law, an expert tribunal such as one promulgated by the Copyright Office would increase the likelihood of predictable and similar outcomes.

Accordingly, NPPA supports the idea of a tribunal or arbitration system in general and offers the following guidelines as an example:

In cases where the level of infringement is below a certain amount, (i.e. \$25,000) the photographer may ask (pre-commencement) that the infringer submits to binding arbitration. The Copyright Office, being well-versed in the laws would be charged with overseeing the arbitration or tribunal. Regional opportunities might improve the viability

of this option, but a photographer would not have to personally appear - they could hire an attorney in the area where the office sits to prosecute their claim.

There would have to be limitations to discovery and other procedures to make this a useful option as binding arbitration can sometimes be as expensive as a trial if not kept in check. It is our understanding that California Lawyers for the Arts runs an alternative Dispute Resolution service and they would likely be a good resource for understanding the nuances of a potential tribunal system.

While there may be Constitutional barriers to making this system mandatory, we suggest that an incentive to the litigants would be that refusal to participate could result in a presumption of attorneys' fees to the prevailing party.

Motion for Disposition as a Small Claims Case

Despite the often relatively straightforward nature of a basic, low-dollar copyright claim, cases can drag on for years with extensive discovery. With that in mind, we propose an option for either party to be able to file a Motion for Disposition as a Small Infringement Claim. This would be a dispositive motion, but unlike a traditional summary judgment would be available without discovery. We believe the Disposition could be structured as follows:

Discovery would be stayed – but the court could determine that discovery is required and refuse to grant the motion. Alternatively, it could grant the motion on the issue of liability and then order limited discovery to determine damages. The motion would need to be filed within sixty (60) days of service of process and could be filed by either party. The Motion must assert that the claim can be determined as a matter of law on the pleadings and the available evidence, without any further discovery. Discovery

would be stayed while the motion was being considered. Injunctive relief might be part of the requested relief, but there would be a cap on the damages requested (i.e. \$25,000).

The non-movant would have thirty (30) days to file a response, arguing that discovery was in fact needed. Absent any proof that a defendant had obtained a license (either implied or explicit) to use the work or that it was produced as a “work made for hire,” there would be a rebuttable presumption that an infringement occurred if the infringing work was an exact replication of the copyrighted work. A defense of fair use would also be available.

If the court granted the motion, the case would be resolved. If the court did not grant the motion, then in similar fashion to the denial of a summary judgment motion, the case would proceed. Any denial of a Motion for Disposition as a Small Infringement Claim should not result in the defendant being declared the prevailing party.

Discovery Control Plan

Because discovery is often the largest contributor to the time and expense of litigating a lawsuit, another option that would assist small claims litigants would be for a judge to impose a Discovery Control Plan for small infringement claims. This plan might also include: a jurisdictional limit to claims of \$50,000 or less, a set discovery period (60 days), a complete bar or significant limitation on depositions; a limit on interrogatories and requests for admissions; and a limit on requests for production.

The turn-around time for discovery requests might also be shortened to make the timeline more feasible. Experienced copyright attorneys should be consulted in the crafting of this option to ensure that truly necessary discovery is still permissible and the

most egregious types of discovery delays are foreclosed. The parties could make a motion to impose a plan of this type or the court could impose it *sua sponte*.

CONCLUSION

We are aware the Copyright Office is receiving many proposals, and we greatly appreciate the opportunity to be heard. We present our recommendations in the hope this process will begin a much-needed and long-anticipated conversation about this critical issue. As we stated at the outset, we have consulted with American Photographic Artists (APA) and the American Society of Media Photographers (ASMP) about their proposals. We have previously worked on various issues with a broad coalition of groups that advocate for the rights of visual artists, including the Graphic Artists Guild (GAG) the Picture Archive Council of America (PACA), the Stock Artists Alliance (SAA), the Illustrators Partnership of America (IPA), Editorial Photographers (EP), Professional Photographers of America (PPA), American Society of Picture Professionals (ASPP) and the North American Nature Photography Association (NANPA). We eagerly anticipate working with your Office to find a mutually acceptable solution to this issue.

Thank you for your time and consideration.

Respectfully submitted,

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