BEFORE THE
OFFICE OF MANAGEMENT AND BUDGET
THROUGH THE
INTELLECTUAL PROPERTY ENFORCEMENT
COORDINATOR (“IPEC”)
WASHINGTON, D.C.

REQUEST FOR WRITTEN SUBMISSIONS AND RECOMMENDATIONS REGARDING INTELLECTUAL PROPERTY VIOLATIONS AND ENFORCEMENT

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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 print, online and broadcast media on a daily basis. Infringements of the copyrights to this material have contributed to a devastating economic loss for NPPA members, as newspapers and television stations (both local and network) reduce staffs. This has prompted many photojournalists to migrate from staff positions to work as independent contractors.

In turn, copyright infringement takes a more direct economic toll on these small business owners, whose livelihoods depend on licensing their creative work. Besides completing assignments, marketing their original work, navigating an increasingly complex map of privacy and publicity laws and collecting their fees, freelance photographers must shoulder the burden of policing infringements in a time of “viral” communications. If our work can be pirated with impunity, these skilled, experienced professionals have nothing of value to sell.

The ever-increasing misappropriation of NPPA members’ imagery also threatens the nation’s health and public safety by undermining a profession Americans rely upon for information. Most photojournalists view our profession as a calling. None 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.

In addressing the IPEC’s request for detailed recommendations regarding the objectives and content of a Joint Strategic Plan, as well as those for improving the Government’s intellectual property enforcement efforts, the NPPA believes the U.S. Copyright Office (Office)
must improve the registration process by allowing easier, online group registration of published visual images and consider entirely removing the distinction between published and unpublished images. The Office should also fully support metadata standards, which the Office has endorsed, both tacitly and effectively, by funding the SAA Photo Metadata Project. At the very least, the Office should endorse or set a minimum standard for: imbedded, indentifying metadata, including copyright status. It should also seek and endorse security measures and workflow standards, so metadata will not be stripped from images. Furthermore, the Office should support improved technology for visual searches and create a less burdensome method for adjudicating copyright claims – so long as copyright holders are not unreasonably pressured to settle their claims for less than rights-managed market values. A new, government-sponsored, educational/advertising campaign should make clear to the public the value and importance of intellectual property. Finally, the NPPA believes that the IPEC should proceed with great caution regarding any proposed legislation that would create an “orphan works” exemption for copyright infringements.

For these important reasons, the NPPA respectfully submits this comment regarding intellectual property violations and enforcement. Additionally, the NPPA offers the service and vast expertise of its members should the IPEC wish any additional input and advice concerning the economic and professional effects of copyright infringement.
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Comments of the National Press Photographers Association

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 8,000 members include still and television photographers, editors, students and representatives of businesses serving the photojournalism industry.

Overview

NPPA is very concerned about the threat posed by violations of intellectual property rights, including the costs to its members as a direct and indirect result of those violations. It is also deeply concerned about the threat copyright infringement poses to the health and safety of our members as creators and consumers of intellectual property.
Although it is difficult to ascertain complete numbers, a recent article on Yahoo projected we can expect “Newspaper Publishing” “to lose 24.8 percent of its 326,000 jobs”\(^1\) While not all of those jobs involve photojournalists, they have been particular targets of cost cutters. All nine of the Washington Times’ photography staff were laid off in December 2009, along with the acting managing editor for photography.\(^2\) Last year alone, the list of layoffs seemed endless: The San Diego Union-Tribune, the Boston Herald the Baltimore Sun and the New York Times were but a few publications to shed editorial employees, including photographers and picture editors.\(^3\) Those economic cutbacks do not stop at traditional print publications but affect television news, as well, with layoffs in Minneapolis, Miami, Cleveland and Denver.\(^4\)

The loss of staff positions has forced hundreds of photographers to either seek work in other fields or as independent photojournalists. For most, that means a loss of employer-provided healthcare coverage. It also means those working as small-business entrepreneurs must depend directly on licensing and copyright protection of their work in order to survive.

Those losses also erode the fabric of journalism when fewer news organizations with less staff and resources remain to report on important stories. Many of these organizations have become more reliant on content supplied by “citizen-journalists” and contract or freelance photographers, who may submit their work on speculation. This makes the ownership and copyright of those works even more important as full-time
employment with benefits gives way to independent contractors, whose income is derived solely from the sale of their work.

Additionally, the ever-increasing misappropriation of member-created content, due in part to a lack of understanding by the public of the value of photography, also reduces the economic incentive to participate in the profession of photography. This devaluation of photography as both a news medium and art form may effectively undermine our nationally cherished freedom of expression.

**Recommendations**

To accomplish some of the objectives of the Joint Strategic Plan and to significantly improve the U.S. Government’s copyright enforcement efforts, the NPPA proposes the IPEC improve the copyright registration process by promulgating rules to facilitate group registration of published visual images online. The NPPA also asks the IPEC to encourage the makers of software tools and the distributors of images to consistently and precisely follow internationally agreed upon metadata schemas, including consistent field names, to enable easier identification of image information and ownership. The association also recommends implementing protocols that would prevent metadata from being stripped from the material it is meant to identify and protect. Additionally, the NPPA supports the development of technology to improve visual searches on the Internet.

On the legislative front, NPPA urges the IPEC to proceed with caution regarding
any orphan works proposals and also investigate the feasibility of implementing less burdensome and costly judicial recourse to copyright infringement such as a “Small Claims Copyright Court.” Finally, NPPA proposes the IPEC support an educational/advertising campaign by the government, highlighting the value and importance of protecting intellectual property.

**Copyright Infringement and Aggregators**

An additional concern for photographers is that of news aggregators and their use of hyper-linking (“inline linking”). Aggregators such as Google News collect headlines, stories, photographs and other material from the Internet and then place similar stories and images together. Linking, as it pertains to copyright law, concerns the use of coding technology to connect to others’ Web content, much of which is proprietary to the originating website. The NPPA is particularly concerned that an aggregator can profit from infringement of others’ original creative works. Our organization staunchly opposes the proposition that by sharing imagery on the Internet one effectively places original works in the public domain thereby making them susceptible to inline linking. We disagree with the holding that the fair use exception allows inline linking to another’s image if said image is not actually on the purported infringer’s server.5

NPPA believes these decisions could be codified by enacting statutes that support the argument that delivering an image to someone’s Web browser cache constitutes “publishing.” We believe it makes no difference to the viewer whether the source for
cached data is the copyright owner’s server or the aggregator’s. The source for the cached content, however, determines who may profit from its marketing as well as the advertising that accompanies its delivery. When what is delivered is not owned by the provider, that provider is extracting value from another’s property.

NPPA also believes deciding these issues based upon case law is inappropriate and counter-productive for the advancement and protection of intellectual property rights. Rather, legislation is the appropriate avenue for such purposes.

**Support Collaborative Efforts Emerging Within the Industry**

The NPPA encourages the IPEC to support and work closely with The Picture Licensing Universal System (PLUS), which is an example of a successful initiative between various industry stakeholders including the NPPA. PLUS has defined and coded in a hierarchy almost all possible uses for imagery. The consortium is now building a registry of image creators, users and PLUS-encoded licenses.

The glossary and coding process it underpins are bringing some order to a confused imaging marketplace. PLUSPak licenses and similar adaptations of the system smooth commerce in imagery for copyright holders, distributors and image users. The IPTC has now added PLUS fields to its XMP metadata schema, and several key imaging software vendors are supporting the new fields.

Internet search solutions can track these fields, as they can other embedded, language-based metadata. But more significantly, a PLUS license code – a string of
numbers – can include information about an image’s licensor, licensee, the use(s) licensed and all parameters of that license (scope, region, expiration date, etc.). This code can also be embedded within visual data that cannot be stripped from an image file. Coupled with emerging visual-search software products it offers a powerful tool for policing infringements on the Internet. Therefore, we ask the IPEC to support PLUS as an industry-standard solution for defining and tracking image licenses and rights holders.

Another example of a successful agreement having a significant impact on intellectual property enforcement is the IPTC-XMP metadata schema. NPPA applauds the Copyright Office’s Digital Preservation Initiative, which has endorsed best practices and proper workflows for preserving and leveraging such image metadata.

The IPTC-XMP metadata schema has proved itself an effective tool for not only storing caption and creator information for history, but also for alerting image users to copyright ownership, licensing status and contact information. But its implementation among different imaging and image-management software applications has been uneven. NPPA hopes the IPEC will encourage all who create and manage tools and systems for collecting and distributing image files to fully implement the latest IPTC schema.

As part of its mission the IPEC should embrace metadata education and encourage creators to use these tools properly. Users and aggregators (in particular) should be required to look for, preserve and protect: creator, copyright, contact and content metadata in all media. This is particularly critical in digital visual media that in
many cases are not accompanied by (or have been separated from) any such written information.

The NPPA believes the IPEC is aware of some methods for embedding non-visible watermarks, such as Digimarc, as well as those for image “fingerprint” searching, such as Idée and PicScout. Appreciation of these methods should also be part of any educational initiative. PLUS (as mentioned above) will, as we understand it, offer an affordable (if not free) path to such tools, while also offering a free, non-profit, non-proprietary registry. The NPPA notes that while use of these methods, along with the DMCA, offers some copyright infringement protection, now may be the time to add criminal statutes for willful stripping of such metadata.

**The Digital Millennium Copyright Act (DMCA)**

Another measure that has helped rights holders protect their copyrights is the take-down-notice provision of the DMCA. Copyright holders have used this tool to limit infringements to some extent and the NPPA encourages the IPEC to explore other similarly creative solutions for addressing copyright infringement. Despite its usefulness, we note the take-down-notice provision is not a comprehensive solution because it places the burden on the rights holder to act to stop the infringement, when, under the Copyright Act, that burden should be on the user to obtain prior authorization.

Additionally, to improve intellectual property rights enforcement efforts and to strengthen information sharing between stakeholders and U.S. Government agencies,
NPPA proposes a hotline and/or website for reporting copyright infringements. We believe this would offer a more efficient and centralized method for policing infringements. While the DMCA has helped copyright owners issue take-down notices, it would certainly be more effective if infringement notices came from a federal agency.

**Eliminate the Distinction between Published and Unpublished Visual Works**

NPPA also supports amending the Copyright Act to eliminate the distinction between published and unpublished visual works, particularly as related to registration. This would simplify the registration process, eliminating the risk that a claim for copyright protection would be ruled invalid by an inaccurate designation. Given changes in law and technology, the need for this distinction seems to have passed. There is little significant difference in legal protections for published and unpublished images, and more importantly, the definition of “published” is open to interpretation in the age of instant transmission and publication.

The Copyright Act of 1976 was enacted as a statutory revision of the previous law because of technological advancements since the Copyright Act 1909. Under the old act, only works that were published and contained a notice of copyright were protected by federal statute. Protection for unpublished works came from state copyright law. An issue leading to the new legislation centered on works that were “published” but did not contain a copyright notice. Those works fell outside both state and federal copyright protection and were considered part of the public domain. The 1976 Act cured that
distinction by extending federal copyright protection “to original works of authorship fixed in any tangible medium of expression now known or later developed . . .”?

Given Congressional foresight 35 years ago that technology might advance; from a practical perspective it seems unnecessary to distinguish published from unpublished images in the registration process. This separation requires extra steps and extra fees when registering groups and collections. For photojournalists, it can be a real challenge to determine when and whether an image has been published. Does publication take place when a photographer delivers images to a distributor or publishing client? Are images that are shared with potential clients or limited audiences considered “published?” When? Many photographers try to register all images before delivery, when it is clear they have not been published. But for photojournalists covering breaking news and other events this is not practical – or even possible, in many instances.

Copyright Litigation

The NPPA encourages the IPEC to study the feasibility of creating a federal “Small Claims Copyright Court” as a viable alternative for copyright litigation that would enable more timely and affordable enforcement of infringements. As with other small claims courts, its use would be at the option of the infringed party and would only be available for recovery of lesser monetary amounts. The NPPA recognizes the benefits and drawbacks of such a system, but believes the idea merits exploration. While an easier enforcement mechanism would promote copyright protection and enable creators, a
small-claims copyright court would need to avoid applying so-called “micro” and “royalty-free” payment standards to imagery the copyright holder has not marketed in such a discounted manner.

Conclusion

The NPPA appreciates the opportunity to make recommendations regarding the objectives and content of a Joint Strategic Plan, as well as those for improving the Government’s intellectual property enforcement efforts. The economic impact on our members along with the insidious nature of copyright infringement places our members and the very nature of our profession in peril. Therefore, the NPPA looks forward to the further development and implementation of an intellectual property enforcement strategy that will address our concerns.

Respectfully submitted,
NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION

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ENDNOTES


3 For a list of articles relating to layoffs, see the following search within the NPPA website at http://tinyurl.com/ylgcfax


5 See, e.g., Perfect 10, Inc. v. Amazon.com, Inc., 487 F.3d 701 (9th Cir. 2007)

6 See, 1-4 Nimmer on Copyright § 4.01

7 17 U.S.C. § 102