

**SUBCOMMITTEE ON COURTS, THE INTERNET,  
AND INTELLECTUAL PROPERTY**

**COMMITTEE ON THE JUDICIARY  
U.S. HOUSE OF REPRESENTATIVES**

**HEARING ON SMALL CLAIMS COURTS AND  
OTHER ALTERNATIVES TO RESOLUTION  
OF COPYRIGHT CLAIMS**

**MARCH 29, 2006**

**EXECUTIVE SUMMARY AND PREPARED STATEMENT  
OF  
VICTOR S. PERLMAN  
GENERAL COUNSEL AND MANAGING DIRECTOR  
AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS**

**AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, INC.  
150 NORTH SECOND STREET  
PHILADELPHIA, PA 19106**

**215-451-ASMP EXT. 1207  
FAX: 215-451-0880  
[perlman@asmp.org](mailto:perlman@asmp.org)  
<http://www.asmp.org>**

**PREPARED STATEMENT OF VICTOR S. PERLMAN**  
**EXECUTIVE SUMMARY**

The American Society of Media Photographers' mission is to protect and promote the interests of professional photographers who make photographs primarily for publication. ASMP is the oldest and largest trade association of its kind in the world. ASMP's testimony today is made on behalf, not of just ASMP and its members, but of virtually every major trade association in the United States that represents the interests of freelance photographers.

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.

The availability of statutory damages and attorney's fees is often an illusory benefit. With comparatively small amounts of money in controversy, copyright lawyers are usually uninterested in and/or unwilling to accept typical infringement cases. While statutory damages make the burden of proof easier for the successful plaintiff, they do not increase the amount of dollars likely to be recovered. If legislation currently being considered for so-called "orphan works" is enacted in a form that will limit the photographer's damages, the situation will only be exacerbated.

Accordingly, ASMP and its fellow organizations and members urge the Committee to institute a form of copyright claim resolution that will give freelance photographers the real access to the legal system that they so desperately need.

## **PREPARED STATEMENT OF VICTOR S. PERLMAN**

Mr. Chairman, Ranking Member Berman, and distinguished members of the Committee, I thank you for this opportunity to testify regarding the desperate need of professional photographers for some sort of structure that will give them the access to enforce their copyrights that they do not possess under the current system. I cannot think of any other issue that is of potentially greater importance to or impact on professional photographers.

The American Society of Media Photographers' mission is to protect and promote the interests of professional photographers who make photographs primarily for publication. ASMP is the oldest and largest trade association of its kind in the world. However, it is important to note that my testimony today is made on behalf, not of just itself and its members, but of virtually every major trade association in the United States that represents the interests of freelance photographers.

Freelance photographers create vastly larger numbers of copyrighted works than any other class of creators, 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 sad fact 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.

Freelance professional photographers are small businesspeople who are typically sole proprietors. Their training and education often extend beyond college, and with the constant and meteoric changes occasioned by developments in technology, their costs of and need for continuing training are a demanding fact of life.

Those same changes in technology also make the investment necessary to become and remain a professional photographer a staggering and constant burden. Where once a few camera bodies, lenses and strobes might be enough to get started, now multiple computers, monitors, scanners, and storage devices are absolute requirements, in addition to cameras, lenses and lights. Further, while a professional camera body used to cost a thousand dollars or so, new professional quality, digital camera bodies now cost many thousands of dollars, even after adjusting for inflation. For all of these reasons, professional photographers typically have limited financial resources at their disposal. The movie image of professional photographers based on David Hemmings driving a Rolls-Royce in Blow-Up is just that: a movie image. It is as close to reality as the bar scene in the first Star Wars.

Every year, I receive hundreds of telephone calls and e-mails from our members and other professional photographers reciting similar stories: They have discovered an unauthorized use of a photograph. The image was registered before the infringement. The photographer has contacted the infringer and issued a demand. The infringer has refused to pay a licensing fee and/or cease the infringement. In essence, the infringer has said, "So, sue me." The photographer wants to know what to do.

In most cases, the practical answer is, sadly, "nothing" for the following reasons. First, and most importantly, the amount in controversy is likely to be only a few hundred to several thousand dollars. One need only go to the websites of major stock image houses like Getty Images or Corbis, (located respectively at <http://creative.gettyimages.com/source/home/home.aspx> and <http://www.corbis.com> for confirmation: Simply register as a potential customer and go through the process of selecting an image and asking for the price for a hypothetical use.

The relatively small size of the claim makes it next to impossible, as a practical matter, to find an attorney who will take the case. Although the Copyright Act provides for the possibility of an award of counsel fees against the defendant if and when the photographer wins, there is simply not enough money at stake for a decent copyright attorney to be interested in pursuing the case:

1. He or she does not want to antagonize a judge by taking up the court's time with a case that would be in a municipal small claims court if it were not for the fact of exclusive federal jurisdiction over the subject matter.
2. There is no guarantee that the defendant will actually be able to pay any award of attorney's fees.
3. The eligibility for statutory damages is of illusory value: The court will always try to match the statutory damage award to its best guess of the actual damages. And no matter whether actual or statutory damages are at stake, proving them may cost more in expert and consultant fees than the amount at issue.
4. There is always the risk of not winning. That is always a consideration for attorneys trying to decide whether to take a particular case, especially where a contingent fee arrangement is being considered; however, in this situation there is nowhere nearly enough potential reward to counterbalance any risk of loss.
5. The client/photographer cannot afford to pay the attorney's fees up-front, and the amount in controversy means that contingent fee arrangements are not available.
6. The client/photographer cannot afford to pay the costs of litigation, separate from and in addition to attorney's fees, such as expert witness fees, depositions,

travel, etc. In many states, even if the photographer is lucky enough to find a lawyer who will take the case on a contingent fee basis, the ethical rules prohibit the attorney from advancing the out-of-pocket costs.

7. Even if none of the above factors were true, the disruption to the photographer's business and the emotional drain of years of litigation are simply more than most sole proprietors can afford. Attorneys are in the business of dealing with litigation, and we are used to living with it --- it is our job, no more, no less. We often lose sight of the soft costs of litigation. However, to individual creators who are parties to litigation, the experience is intensely personal and emotional, and it stays at the front of their minds every minute from the beginning of the case to the end, and even long after. In addition, the time spent working on the case is time that cannot be spent on making or marketing photographs.

As an example of the last point, you may recall the landmark case of Rock and Roll Hall of Fame v. Chuck Gentile. The case involved trademark and related claims asserted by the Rock and Roll Hall of fame based on the photographer's poster showing a photo of the Hall of Fame building. The photographer won in the 6th Circuit. Between the photographer's insurance and help from some fund-raising by ASMP, the photographer did not have to pay any costs of defense, himself. Despite that, when the case was over, the time and emotional demands of the litigation had destroyed his marriage, ruined his business, and forced him out of the photography profession entirely. The costs of federal litigation for an independent contractor are not limited to money --- years of investing time and energy in a single case are crippling to people whose sole source of income is their ability to create and market their work.

Obviously, the time that it takes to litigate a case in the federal court system, from start to finish is, by itself, a major source of both hard and soft costs to photographers. The sheer passage of long periods of time forces the parties and their lawyers repeat many tasks. This requires the photographer to pay additional legal fees that would not be incurred if the case were disposed of quickly. It also forces the photographer to spend time unnecessarily repeating various tasks and meetings, time that would otherwise be spent making and/or marketing photographs.

Another major source of both high legal fees and lost time is the vast amount of discovery that is available under our current system. That, combined with the interstices of procedure, allow a defendant with a deep pocket to put a sole proprietor plaintiff in the poor house through endless discovery requests, depositions and motions. The wealthy and/or corporate defendant is in a position to drive up the plaintiff's legal fees while forcing the plaintiff to choose between searching for and copying documents, on one hand, or working for a living, on the other.

The Copyright Office has long recognized the particular needs of individual creators of copyrighted works and acknowledged the general unavailability of the protections of copyright to those people, as a practical matter. What ASMP would like to see, to correct that situation, is a revision to the system of copyright enforcement that would accomplish the following goal: 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.

There are many possible ways to accomplish this and variations on how such a system could be structured. ASMP would support virtually any arrangement that would accomplish the desired goal. However, as a starting point for your consideration, we offer the following. In our view, to make the system truly efficient and affordable, it should be structured to require the parties to proceed pro se; lawyers should not be permitted to represent either side. Once attorneys enter the picture, the potential complexities and resultant costs escalate. This would essentially be “People’s Court” for smaller copyright claims.

The system should also permit only limited pre-trial discovery, if any. All relevant documents should be submitted by the parties to the court and each other before the hearing date. Discovery makes litigation more extended, complex and expensive.

There should be a (comparatively) short time frame from complaint to answer to hearing to disposition.

Hearings would be tightly controlled and of short duration. Where the parties are in distant locations from each other, hearings might even be conducted over video-conferencing systems rather than in person.

Appeals should require the appellant to post a bond sufficient to cover the appellee's estimated attorney's fees for the appeal, in the event that the appellant lost the appeal.

We are open to all possible ways of structuring a small copyright claims court system. However, our wish list would cap jurisdiction at \$10,000., which is the limit for many large-city small claims courts.

Our preference would also be that the judge be (or become) a copyright specialist by virtue of his or her assignment to a copyright-specific small claims court or to an administrative law judge position affiliated in some fashion with the Copyright Office, perhaps along the lines of the Copyright Royalty Judge system. One of the big problems facing small copyright owners is the fact that many judges do not have much familiarity with copyright, and they are particularly unfamiliar with the customs and practices of pricing usage of commercial photographs and other commercial works of art. Presumably, having an

adjudicator who deals with these areas of the law repeatedly would help to eliminate that problem.

An alternative, although less desirable in our view, approach would be to change the jurisdictional provisions of the Copyright Act to allow state courts to hear copyright cases involving less than some specified figure, such as \$10,000. That would solve some of the problems. However, if such cases were to be heard in state courts of general jurisdiction, much of the delay, expense and complexity of federal court litigation would remain. In addition, that approach would not address, and indeed would exacerbate, the problems of insufficient judicial copyright experience and expertise mentioned above. In addition, it would raise issues of obtaining jurisdiction over defendants outside the state.

As I said at the beginning of this statement, virtually everyone in the copyright world has long recognized that photographers are uniquely disenfranchised from access to the copyright protections to which they are legally entitled. Anything that this Committee can do to help correct that situation would be of great benefit to photographers and greatly appreciated by them. Perhaps more importantly, this is one of those all too rare situations where Congress can really do "the right thing," help the little guy, and make our legal system move a bit closer to a system of justice, not just of laws.

Thank you for your time and consideration.

Respectfully submitted,

Victor S. Perlman

General Counsel and Managing Director  
American Society of Media Photographers, Inc.  
150 North Second Street  
Philadelphia, PA 19106  
215-451-ASMP Ext. 1207  
Fax: 215-451-0880  
E-mail: <perlman@asmp.org>