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The American Society of Media Photographers and the Alliance of Visual Artists respectfully submits its response to Federal Register Notice 2010-3539 posted on February 24, 2010.

Sincerely,

Maria

Alliance of Visual Artists (AVA)

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**Office of the Intellectual Property Coordinator**  
**Office of Management and Budget**

**Request for Comments and Recommendations for an  
Improved Intellectual Property Enforcement Strategy**

**FR Doc. 2010-3539**

**JOINT COMMENTS**

**of**

**ASMP: American Society of Media Photographers**  
**CPI: Commercial Photographers International**  
**PPA: Professional Photographers of America**  
**SAA: Stock Artists Alliance**  
**SEP: Society of Sport & Event Photographers**  
**SPS: Student Photographic Society**

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**Submitted: *March 23, 2010***

## **Introduction**

On behalf of its members, the American Society of Media Photographers (ASMP), Commercial Photographers International (CPI), Professional Photographers of America (PPA), Stock Artists Alliance (SAA), Society of Sport & Event Photographers (SEP), and Student Photographic Society (SPS), are pleased to submit comments in response to the request for submissions printed in the February 23, 2010, Federal Register. We look forward to sharing our thoughts on the existing measures of enforcing of intellectual property rights as they pertain to the photographic industry, and offering our recommendations for the improvement of said systems.

As a means of familiarizing you with our organizations, we provide you with a brief description of our respective mission and membership:

**ASMP** is a non-profit trade association founded in 1944 by a handful of the world's leading photojournalists to protect and promote the rights of photographers whose work is primarily for publication. Today, ASMP is the largest organization of editorial and media photographers in the world, with 39 chapters in this country and over 7,000 members in the United States and more than 30 other countries. Its members are the creators of the most memorable images found in newspapers, advertising, magazines, books, multimedia works, and Internet web sites.

**CPI** is an energetic, nonprofit membership organization focused on the changing needs of commercial photographers. Led by successful commercial photographer volunteers and a skilled professional staff, CPI has put together information, resources and materials for photographers in this rapidly changing industry.

**PPA** is the world's oldest and largest nonprofit trade association for professional photographers and photographic artists from dozens of specialty areas including portrait, wedding, commercial, advertising, and art. PPA consists of some 22,000 individual members and includes nearly 160 independent photography organizations that have

elected to affiliate themselves with the association. For more than 130 years, PPA has dedicated its efforts to protecting the rights of photographers and to creating an environment in which these members can reach their full business and creative potential.

**SAA** is the only trade association focused exclusively on the business of stock photography. SAA serves stock photographers with a combination of business benefits, education and a powerful advocacy voice for licensing and copyright protection.

**SEP** is a private, nonprofit association dedicated exclusively to serving the needs of sport and event photographers. SEP marshals the resources of the event photography industry and delivers them to its members via their exclusive online content, Action News publication and live events.

**SPS** was founded in 1999 to provide career-building resources, networking opportunities, and informational resources to photography students. SPS represents students and educators in 300 different colleges, universities and trade schools that offer degrees in photography.

### **Defining the Industry**

Professional Photographers capture our memories and preserve the important moments in our lives – from weddings to graduations –, historic events, and contribute to memorable advertisements. Photographs help communicate the past and present in a manner unmatched by words alone, reminding us of who we are and where we have come from. It is professional photographers who create those invaluable images that help us communicate across miles, languages, and generations.

We believe professional photographers to be “the smallest of large copyright holders”. This is because a typical photography studio is a home-based business consisting of the photographer and one other person.<sup>1</sup> Additionally, unlike other professionals across the creative industries, photographers can easily create 20,000 or more separate works eligible for copyright protections on an annual basis. Some of the images captured by professional photographers shape our collective memory. Others, in fact the vast majority of those created, lack that kind of celebrity, but are treasured by the clients for whom they were made.

As a result, professional photographers are wholly dependent on their ability to control the reproduction of the photographs they create. They depend on this control for their income and livelihood, yet working photographers are most often forgotten when legislators and federal agencies attempt to redefine the law. This has often forced professional photographers to be their own first and final line of defense in protecting and enforcing their copyright.

### **Part I – Impact of Photographic Copyright Infringement on U.S. Economy**

No hard data exists to quantify the financial damage to the economy that results from the infringement of professional photographers’ copyrights, and we would urge the administration to conduct such a study.

What we do know, is that the infringement of photographic copyrights is widespread, particularly on the internet. An internet search engine for visual images has estimated that as much as 90% of the photographs that appear on the internet are posted there without permission from the copyright owners. In addition, both clients and third parties frequently violate photographers’ copyrights, relying on the small odds of being discovered and the high costs of litigation to insulate themselves from having to pay licensing fees.

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<sup>1</sup> Professional Photographers of America 2008 “Business Outlook Survey”

The Bureau of Labor Statistics estimates that there are approximately 152,000 working photographers in the United States.<sup>2</sup> We can further estimate, based on anecdotal information from our organizations' members, that each of them loses at least \$10,000 per year in licensing fees to infringements that they are unable to pursue as a practical matter. That means that the impact on the U.S. economy is at least 1.5 billion dollars every year.

## **Part II – Recommendations for Accomplishing the Joint Strategic Plan Objectives**

While we are supportive of all of the objectives set forth in the Joint Strategic Plan; for the purposes of these comments we would like to focus our recommendations on the following:

1. Reducing supply of infringing goods, domestically and internationally;
2. Identifying weaknesses, duplication of efforts, waste, and other unjustified impediments to effective enforcement actions

The above list and subsequently the recommendations to follow are organized with no particular priority in mind.

### *Reducing supply of infringing goods, domestically and internationally*

Our organizations regularly educate our members on methods by which they can proactively protect their works and inform their clients about the copyright laws that apply to professional photographs. In addition to educating the photographer, our efforts also include:

- ASMP has been in ongoing discussions with the U.S. Copyright Office and major software developers to create an automated, on-line copyright registration system that would be incorporated into the software that most photographers use as part of the digital workflow in managing their digital photographs.

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<sup>2</sup> 2008 Bureau of Labor Statistics National Employment Matrix.

- PPA’s Retail Compliance Network (RECON) which samples the copyright compliance of photographic service centers at major “brick and mortar” and online retailers. This is a ‘secret shopper’ style program through which photographers ask photo centers to reproduce an image clearly-marked with a copyright notice. PPA uses these results to help the retailer understand their exposure to an infringement suit and improve their compliance with the law.
- SAA is currently engaged in a project titled “getMETASmart” to help not only those who create digital imagery incorporate “metadata” into their image files but, those who use and distribute the files as well. Metadata refers to descriptive, technical, or administrative information – like a copyright notice. The goal of this project is to help everyone involved with digital photos better understand photo metadata and establish best practices for harnessing this rights management tool. This undertaking stems in part from the organization’s 2006 *MetaData* Manifesto.<sup>3</sup>
- [www.PhotographerRegistry.com](http://www.PhotographerRegistry.com), is a website in which all six of our organizations participate. Born of the “orphan works” debate, The Photographer Registry is a creator-based search that will allow a user to look up the photographer or studio that created the image they wish to reproduce. The site not only allows a photographer to list their current business contact information but, also any previous business locations or names making them easily accessible to those seeking a license.

While these are example of our industry’s efforts to address the infringement of photographic copyrights on a small scale, we would look to the Office of the Intellectual Property Enforcement Coordinator (OIPEC) to create programming that addresses more widespread practices of photographic infringement.

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<sup>3</sup> The Stock Artists Alliance *MetaData Manifesto* is available for download in its entirety at <http://www.stockartistsalliance.org/metadata-manifesto-1>

Professional photography exists at both a direct-to-consumer business model (i.e. portrait or wedding photographers) but, also one that can be marketed to a broad-spectrum of clients (i.e. commercial, editorial, advertorial, etc.). It is this second class of photographers, which most frequently experiences the widespread infringement of their work. Those images that one day appear on the front page of a local newspaper may later appear in textbooks distributed nationwide without the consent of the photographer.

It would also be our desire to see greater attention given photographic infringement on the whole. Much of the debate around piracy and trafficking, and subsequently the resources devoted to investigations, search, and seizure of infringing goods is focused on higher-dollar value media, like movies, music and computer software. However, as can be seen in the estimated figures in Part I, the overall financial impact of infringement of photographs is quite significant and warrants attention on the part of the OIPEC.

#### *Identifying weaknesses and other impediments to effective enforcement actions*

The ability to effectively enforce their copyrights is an issue frequently debated among professional photographers. As it stands, the law requires the registration of a work prior to pursuing litigation in Federal Court. For photographers, the vast majority of whom are high volume producers, copyright registration is an overwhelming task whether electing to register a single work or group of images.

For example, professional photographers specializing in photojournalism spend most of their time in the field, with only occasional visits to home or office. Very few photojournalists – and other photographers for that matter, have the luxury of a “back office” to handle the paperwork, and in the spectrum of finding clients, making photographs, delivering those photographs, billing and collecting payments, and registering the copyrights, it is easy to see which tasks are always accomplished and which must often go to the wayside.



The need for registration, coupled with the expense of Federal Court litigation, puts justice out of the reach for the majority of professional photographers. As small business owners with limited income, photographers are forced to reinvest in their business rather than pursue a person or firm who has essentially stolen their work.

For many, overlooking copyright infringement is a matter of “good business practice,” as most photographers have no desire to cement their reputation as industry someone who routinely sues their clients.

It is for this reason that our organization have advocated for an alternative dispute resolution that allows copyright owners, like photographers, to seek small amounts of monetary relief. The recommendation for such a study was included in Section 5 of S.2913 the “Shawn Bentley Orphan Works Act of 2008” passed by the U.S. Senate in September 2008.<sup>4</sup> The creation of a low-cost dispute resolution mechanism that could serve as a substitute for Federal Court proceedings would give photographers an affordable way to enforce cease and desist demands and the infringement of their works more broadly. Similarly, any changes that would ease the burdens and requirements of registration as a prerequisite to litigation and/or to eligibility for statutory damages and counsel fees would be of immense value to professional photographers.

### **Part III – Supplemental Topics for Comment**

In this third and final section of the IPEC request for comment, we wish to offer our thoughts and/or recommendation in the below listed topic areas. Just as before, our responses are given without regard for priority.

4. Examples of existing agreements in the U.S. that have had a significant impact on IP enforcement
5. Methods of strengthening information shared between stakeholders and Government agencies to improve enforcement efforts
8. Approaches for standardization among authentication tools and technologies applied by rights holders to enable the identification of those goods as genuine.

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<sup>4</sup> The study included in the legislation is also referenced in Professional Photographers of America’s response to the January 26, 2005 Notice of Inquiry of U.S. Copyright Office (FR Doc. 05-1434).

14. Methods to limit or prevent use of Internet to sell or otherwise disseminate infringing products
20. Provide specific suggestions on the need for public education and awareness programs for consumers.

Optional Topic #4: Examples of existing agreements in the U.S. that have had a significant impact on IP enforcement

With respect to the photographic industry the Digital Millennium Copyright Act of 1998 (DMCA), which resulted from the World Intellectual Property Organization's (WIPO) "Copyright and Performances and Phonograms Treaties Implementation Act of 1998," has increased the ease through which a professional photographer can enforce their own copyright protections.

The ability for copyright owners like photographers to send "takedown notices" created a method by which they could immediately seek the removal of their work(s) from infringing websites through the site's Internet Service Provider.<sup>5</sup> Photographers addressing infringements via this method of enforcement often forfeit any ability to collect monetary compensation or other losses to which they may be entitled as a result of the use. However, as discussed above, most photographers are not able to enforce monetary compensation for most infringements because of the burdens of registration and the costs of litigation. For those photographers, seeing their work removed from infringing websites is as close to justice as they can afford.

Similarly, the provisions contained in 17 USC §1202 enable photographers to pursue those infringers who infringe or otherwise hijack their works through the removal of their copyright information. The protections afforded under this specific provision of the DMCA is of particular benefit to those photographers creating digital images and make use of watermarking, metadata, digital fingerprinting and other technological advances that make the copyright owner known.

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<sup>5</sup> 17 USC § 512

Optional Topic #5: *Methods of strengthening information shared between stakeholders and Government agencies to improve enforcement*

For professional photographers, this begins by insuring that the industry is included as a stakeholder in the OIPEC's view and operations. As previously indicated, the vast majority of photographers are small business owners who produce a high volume of works created expressly for clients. Unlike the music and film industries, few photographic works are created for direct mass consumption and result in a high volume of retail sales.

While their individual contributions to the overall creative economy may be marginal when compared to higher grossing forms of media, photographers who suffer infringements feel the impact more severely. Losses that result from the infringement of their copyrights means reduced revenues and generally results in one or both of the following: higher prices for future clients/consumers, and a small business needing to reevaluate its ability to continue operations.

Insuring that photographers have a voice in copyright exchanges is a first step to ensuring that their intellectual property rights are effectively defended and enforced by those agencies that are tasked with such efforts.

Optional Topic #8: *Standardization of authentication tools and technologies applied by rights holders to enable the identification of those goods as genuine.*

Our organizations have supported a number of industry initiatives to achieve standardization in such tools and practices. For example, ASMP is a participant in the PLUS licensing system (see <http://www.useplus.com>) and has created an initiative relating to best practices for managing the workflow of digital photography (see <http://www.dpbestflow.org>).

As mentioned under Part II, SAA encourages photographers to embed metadata into the digital images files they distribute. The recommendation is that photographers take advantage of all three types of metadata (technical, descriptive and administrative) as each serves a unique role in identifying the origin of an image.<sup>6</sup> This information can be defined as follows:

- Technical Metadata is most often the information generated by the camera which includes at minimum the image size and color profile.
- Descriptive Metadata is information that may be entered by the photographer like captions, titles, keywords, or the subject matter.
- Administrative Metadata includes details such as licensing or rights management information, like the identity of the creator and his/her contact information.

The inclusion of the above information will prove helpful in not only determining an image's authenticity but, also in tracing a file back to its creator. This is especially important as images created and transacted digital often exist only in an electronic format. Of course, metadata is only effective for authentication purposes so long as it is not removed, or "stripped," (innocently or otherwise) by the user from the image file.

It would be most helpful if the OIPEC could bring representatives of the community of users of photographs to the table with our organizations to develop mutually agreeable standards relating to the creation, use and maintenance of metadata, watermarking and other methods of protecting digital images and the rights to them.

Optional Topic #14: *Methods to limit or prevent use of Internet to sell or otherwise disseminate infringing products*

With the advent of social media for both personal and commercial applications, the distribution of images online has increased exponentially. Although a firm number of online photographic infringements may not exist, photographers are finding their work to be less safe than ever. As mentioned earlier, one search engine for photographs estimates that 90% of the images posted on the internet are infringements.

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<sup>6</sup> Information on metadata standards as set forth by the Metadata Working Group (MWG) can be found online at [www.metadataworkinggroup.org](http://www.metadataworkinggroup.org).

For some photographers, this means changing their business models to adapt to their client's growing demands to possess the digital files for an online use (i.e. social networking page, company web site, blog, etc.). For others, this means higher prices for paying clients as a means of absorbing infringement as a "loss leader". While the DMCA provisions have been helpful in addressing known cases of online infringement, it is those that go unknown that are most troubling to photographers.

It would be our recommendation to ensure reasonable network management tools are in place to detect infringement and/or establish a pattern of infringements. The online trafficking of infringing content should be treated no differently than any other illicit content transmitted by users.<sup>7</sup> The responsibility to monitor the Internet for infringing acts should not be placed solely on the creator or the creator community. Professional photographers, and similar small business creators, simply cannot afford to spend as much time monitoring past clients' and third party uses of their work as they do in creating new images for their clients.

In addition, many photographers use visual image search engines, such as PicScout ([www.picscout.com](http://www.picscout.com)) and Idée ([www.ideeinc.com](http://www.ideeinc.com)) as an attempt to track infringements of their images. However, as discussed above, there remains a wide gap for photographers between discovering infringements and being able to do anything about them.

Optional Topic #20: *Provide specific suggestions on the need for public education and awareness programs for consumers.*

Just as we educate our members on how to speak to their clients concerning photographic copyrights, we would hope to see a similar effort launched by OIPEC. Such an effort should focus on clarifying the copyright laws to consumers to raise awareness that the same laws that protect their favorite filmmakers, authors and musicians also protects the local photographer they use for their wedding or product shoot. In fact, it might be as

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<sup>7</sup> April 13, 2009 Comments to National Telecommunications and Information administration and Rural Utilities Service Request for Information (March 10, 2009 Federal Register notice, Docket No. 090309298-9299-01)

simple as allowing photographers to affix similar warning labels as those used by the music and film industries to products they distribute to clients.

We appear to be in a culture that believes that there is no difference between “can” and “may” when it comes to using copyrighted property, especially when it comes to photographs. That mind set begins at an early age, and the OIPEC and government, generally, needs to do a massive education on the value and need for copyright --- and the possible consequences of infringement.

Such educational efforts may also prove beneficial to those who regularly handle professional images and other visual media. In our experience, even professional members of the user community are unaware of the protections afforded to the creator under existing laws. This is not to say that vast majority of professional photographers suffer innocent infringements. Instead it means professional photographers are struggling to protect themselves against the threat of infringement by a client whose expectations are often far beyond their typical services.

In addition to its own educational efforts mentioned in Part II, ASMP and PPA are members of the Copyright Alliance whose Copyright Alliance Education Foundation, is taking charge of educating not only the next generation of copyright owners but, also those who will be future consumers of copyrighted works. Ensuring there is an appreciation for copyright ownership early on, will help change the dialogue between photographer and consumer.

## **Conclusion**

In closing, we appreciate this opportunity to offer our recommendations and comments on behalf of our member photographers. We hope that you will take our response into consideration as you move to execute the Joint Strategic Plan. We look forward to engaging the Office of the Intellectual Property Enforcement Coordinator in an open dialogue to further explore the protection and enforcement of photographic copyrights.

Respectfully Submitted,

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