From: [redacted]
To: FN-OMB-IntellectualProperty
Subject: Confidential submissions?
Date: Monday, March 22, 2010 3:19:23 PM

Hi,

A follow up question, please.

I would like to call attention to technology solutions that I do not want to be part of the public record. Specifically, there are aspects of recommendations concerning copyright that would have application to national security and state and federal law enforcement. To what email or physical address may I send that information to ensure that it does not become part of the public record?

Thanks, again.

all the best,

Randy

PS. At what URL may I see PDF postings online of IPEC submissions?

At 11:46 AM -0400 3/19/10, FN-OMB-IntellectualProperty wrote:
>You may send it in whichever format you prefer.
>We are pdf'ing every submission and posting them
>on our website next week.
>
>Thanks!
>
>-----Original Message-----
>From: Randy Taylor [redacted]]
>Sent: Saturday, March 13, 2010 3:22 PM
>To: FN-OMB-IntellectualProperty
>Subject: form of submissions?
>
>To whom it may concern,
>
>I am preparing a report to submit. Do you prefer
>to receive it as a PDF file or Microsoft Word
>document or in some other form?
>
>Thanks,
>
>all the best,
>
>Randy
>--
>
>Randy Taylor
>CEO
>StockPhotoFinder.com, Inc.
>10 East 23rd Street, Suite 500

>New York, NY 10010
>(212) 929-6965
>
>search, marketing and identification ...
>StockPhotoFinder.com - The Stock Photo Search Engine
>Extreme-Niche-Marketing.com - The Ultimate Photo Marketing Tool
>C-Registry.us - The Copyright Registry

--

Randy Taylor
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(212) 929-6965

search, marketing and identification ...
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C-Registry.us - The Copyright Registry

From: [redacted]
To: FN-OMB-IntellectualProperty
Subject: alternate file to be sent
Date: Wednesday, March 24, 2010 5:02:16 PM

Thomas L. Stoll
Office of the Intellectual Property Enforcement Coordinator

Dear Mr. Stoll,

At 4:54 pm, I submitted comments for IPEC in an email entitled "IPEC submission". It contains a 52 page attachment that is a Word document entitled "IPEC_Submission_Randy_Taylor_032410.doc".

I had problems properly formatting the hierarchy in MS Word, but sent it "as is" to meet the 5pm deadline. I will reformat it overnight and send it to you a second time tomorrow. There will be no substantive changes to the content. I am seeking to put it into the best organized document for viewing.

If the replacement file tomorrow is not acceptable, then please accept the version sent previously as my submission. Otherwise, I would be pleased if you would permit me to submit a slightly revised version tomorrow.

Thank you,

all the best,

Randy

--

Randy Taylor
StockPhotoFinder.com, Inc.
10 East 23rd Street, Suite 500
New York, NY 10010
(212) 929-6965

search, marketing and identification ...
StockPhotoFinder.com - The Stock Photo Search Engine
Extreme-Niche-Marketing.com - The Ultimate Photo Marketing Tool
C-Registry.us - The Copyright Registry

From: [redacted]
To: FN-OMB-IntellectualProperty
Subject: IPEC submission
Date: Wednesday, March 24, 2010 4:54:20 PM
Attachments: IPEC_Submission_Randy_Taylor_032410.doc

Ms. Victoria A. Espinel
United States Intellectual Property Enforcement Coordinator
Office Of Management And Budget
Herewith, please find submission for IPEC, attached as a word document.

Thank you,

Randy Taylor

--

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search, marketing and identification ...
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C-Registry.us - The Copyright Registry

March 24, 2010

Ms. Victoria A. Espinel
United States Intellectual Property Enforcement Coordinator
Office Of Management And Budget

Ms. Espinel and concerned parties,

The majority of attention relating to copyright use and infringement has centered on the motion picture and music industries. Though movies and songs often cost more to produce, photographic images are much more broadly used and, therefore, more commonly infringed than other visual or audio media. Images touch the daily lives of more people, more often. Images, which include photos and illustrations, are second only to text as the most common creative element in the world's web sites. 100 billion images are made available via the Internet each year. The observations and comments herein pertain mostly to those images. More specifically, this report and its recommendations relate to digitized content files that are conveyed and consumed via the Internet where the greatest growth of use and infringement occurs.

To briefly convey my credentials, I have 30+ years experience in the U.S. and abroad in creating, marketing, licensing and distributing photography for editorial and commercial purposes. I am currently co-founder and CEO of StockPhotoFinder.com, Inc., the stock photo search engine, and uniquely positioned to offer objective commentary. I am not a lobbyist.

Thank you for this opportunity to possibly influence public policy concerning copyright.

Respectfully yours,

Randy G. Taylor

Evaluative Report And Recommendations For The Application Of Copyright Laws, Technology And Public Policies By The Office Of The United States Intellectual Property Enforcement Coordinator

By Randy G. Taylor

Reference: Request for submissions, Federal Register, February 23, 2010 (Volume 75, Number 35), Page 8137-8139, DOCID:fr23fe10-127

Index:

This Report contains eleven sections:

About The Author

Randy Taylor is not a paid lobbyist. Mr. Taylor is a renowned expert in the photo industry who is uniquely qualified to speak to the issues because of his collective experience in all significant aspects of the photo industry. Mr. Taylor offers well-rounded and objective perspective that is based on his decades-long involvement in photography.

For a decade, Mr. Taylor was a leading photojournalist with Associated Press in Paris and l'Agence Sygma (now Corbis), covering news events worldwide. Subsequently, he was a Vice President with Getty Images, heading up its editorial division. Mr. Taylor is currently cofounder and CEO of StockPhotoFinder.com, the stock photo search engine, where he has daily contact with companies that license images and use technology for images.

Mr. Taylor is an Industry expert who has spoken at numerous photo industry events in the U.S.A. and Europe. He is often asked to be a panelist on subjects related to copyright and orphan works. With experience spanning most aspects of the photography industry, Mr. Taylor frequently shares his unique mix of future vision and expertise in process automation, search engine marketing and online image licensing. Mr. Taylor also created the numbering system for the PLUS Media Matrix and assembled its licensing parameters.

Abstract

This Report considers political, legal and technological aspects and ramifications and makes recommendations for solutions and strategies that effectively and efficiently combat intellectual property infringement and that foster or enforce intellectual property rights of individual creators and other rights holders with an emphasis on visual arts, such as photography and illustrations, in digital form.

Overview:

In response to the request for public comments regarding the Coordination and Strategic Planning of the Federal Effort Against Intellectual Property Infringement by Ms. Victoria A. Espinel, United States Intellectual Property Enforcement Coordinator, Office Of Management And Budget, this Report is submitted for consideration with the desired intent to influence executive, legislative and public policies that sustain the value of copyright and its benefits to the primary stakeholders who create, market, store, distribute, license and consume creative works.

The scope of this Report is limited to the subset of intellectual property that is visual and audio creative work, whether copyrighted or not copyrighted, which include photographic images, illustrations, video & film and music & audio recordings in all

media, as well as “mashups” that combine multiple creative works.

Summary Of Current Environment For Copyrighted Content

Despite all its complexities, today's media industry boils down to Content and Conduit. Industry participants create, market and license Content, or, they are engaged in its storage, distribution and use (the "Conduit"). The ultimate beneficiary is the Content Consumer.

Throughout the debates, lobbying and other efforts concerning copyright that are occurring worldwide, the interested parties also fall into two camps: Those who favor free content and a diminished role for copyright, and those believe that rights holders should receive value in exchange for their creativity.

These two groupings tend to align, such that proponents of paid use most often make their livelihood from Content Consumption. And, those that favor "free" content are often associated with the Conduit side of the industry.

Put more clearly, supporters of existing copyright laws and paid content use often include:

- Corporate content creators (i.e., movie studios, TV, newspapers, magazines, etc.)
- Professional creators (i.e., musicians, videographers, illustrators and photographers, etc.)
- Agents (i.e., stock photo agencies, distributors, etc.))
- Collection societies
- Individual and corporate rights holders (i.e., estates, publishers, etc.)

While supporters of "free" content who want to weaken or marginalize copyright law often include:

- Search engines
- Manufacturers of computers, mobile phones, digital devices, hard drives, etc.
- Internet Service Providers
- Academic, academia and libraries
- Entry-level creators
- Companies whose business model requires content access

There are two major trends that influence Content Consumption and monetization of content.

The first that Content Consumption is becoming universal. Unlike yesteryear when content was consumed from a limited list of specific sources via specific devices, Content Consumption in the future will not benefit from or be penalized by a limitation of sources or consumption methods. Ultimately, substantially all content will be available from all sources to see and hear on all devices.

A second growing trend in the monetization of copyrighted content is the repurposing of segments or parts of larger copyrighted works to grow revenue and return on investment by rights holders. This also has the effect of increasing the quantity of copyrighted objects and the ownership variations of those rights. An example of this is ParamountClips.com[1] web site for licensing Paramount movie clips for advertising, and ultimately, public use. (So, you can license a famous clip like the Godfather saying "I'll make him an offer he can't refuse"). With segmentation, more copyrighted content will need to be tracked and be susceptible to unauthorized inclusion in other content (so called "mashups").

Public opinion generally sides with wanting "free" content. Surveys indicate that most Americans think it is or should be legal to use someone else's content for one's personal use[2]. Anecdotally, Content Consumers complain about the high cost of cable TV and web access while searching "free" content. In the mind of the general public, many feel that the price of hearing and seeing the content they want should be included in the price they pay to access that content. Most people do not understand the difference between the capability to access content and the right to consume that content (to "license it").

This perception that is "should" be free has been magnified in practice by the impact of digitization. Creating, copying and sharing digital content has become incredibly easy for anyone to do.

This public attitude complicates governmental action concerning copyright. Since many, if not most, of American citizens copy the creative works of others without permission, then a significant portion of Americans regularly violate Federal Law.

This is further complicated by International Agreements by the United States. The ability to change copyright laws or their application is limited by international treaties, such as BERNE/TRIPS, which can be affected by territorial decisions. Foreign governments recently expressed this exact concern in Federal Court as it relates to the proposed Google Book Settlement.

The ultimate and overriding impact of any revisions concerning copyright laws or their

---

[1] Reference:
http://www.nytimes.com/2009/12/15/business/media/15film.html?_r=3&scp=1&sq=video%20licensing&st=cse
Paramount licensing as reported in the New York Times.

[2] Reference: http://creatorscircle.com/PDFs/Creators_Circle-issue1.pdf
A survey by Creators Circle Magazine in Spring of 2009 found that, in New York City, people were asked in face-to-face interviews "Should it be illegal to copy an image from a web site for your personal use?" 74.3 percent of 144 respondents said "no," it should not be illegal
to take web images for personal use.

practical application or government policy, and what this report attempts to illuminate, is that any and all decisions will shift revenues and wealth from one party to another party. The transference of wealth will be of greater impact than any anticipated behavioral changes amongst Content Consumers.

And lastly, I note that all the solutions envisioned in this report, and likely all the needs and solutions proposed in similar statements to your office, can be completely supported and executed with existing technology. The free market system has already produced an ample range of viable options to solve all issues relating to intellectual property. Therefore, government policy and applicable law can be most effective at achieving its goals by rewarding and fostering use of existing solutions.

As pointed out by one party in the Google Fairness Hearing, it is within the realm of possibility that in our life time a “non published” use might include the direct implanting of images to the brain without passing through a visual or auditory device.

As science fiction as this may sound, the Internet or similar Conduit could theoretically become a method of instant communication between people from one brain to another.

Often laws are enacted to protect the “small guy”. To use a physical metaphor, many states have laws that say a car driver must yield to a pedestrian. This is because a human is no match for a car and will be severely damaged in that collision. The outcome is equally obvious when an individual rights holder is opposed by a corporation that has a market capitalization over 9 figures. The match is so uneven between the individual rights holder and the major corporate users of infringing content.

In the broadest of terms, this Report suggests the following approaches could be effective in addressing the issues:

- Global efforts with U.S. trading partners are a good first step
- While major corporate interests are undeniably persuasive, the interests of small companies and individual creators should be protected
- Shared information via universally accessible means, such as registries, enables many solutions
- Traditional copyright laws and processes are inadequate to address the needs in a digital information age
- All the technologies needed are readily available to provide solutions to all copyright related issues

The following sections identify specific aspects, challenges and solutions as queried by the office of the Intellectual Property Enforcement Coordinator (``IPEC'').

Scope of creative industries, copyright infringement and its impact on markets

The size of creative industries, of which photography and illustration is a small subset, has been documented in various forms.

Senator Orin Hatch, member of the Senate Judiciary Committee, described the impact of creative industries on the U.S. economy on June 9, 2009, saying "… each year, copyright piracy from motion pictures, sound recordings, business and entertainment software, and video games costs the U.S. economy $58 billion in total output, costs American workers 373,375 jobs and $16.3 billion in earnings, and costs federal, state, and local governments $2.6 billion in tax revenue."

In its report on the Arts & Entertainment Industry entitled "The economic impact of the creative arts industries: New York and Los Angeles", the United States Department Of Labor Bureau Of Labor Statistics says that one of every 4 creative arts industry jobs in the Nation operated out of either of those locales in 2006. The BLS Report states:

> *During the first quarter of 2006, about 1.2 million private-sector jobs (1.1 percent of total employment) in the Nation were associated with creative arts industries, a decrease of about 50,000 jobs (4.0 percent) since 1990. … During the same timeframe, total private-sector employment increased by 21.2 percent, or approximately 24 million jobs.*
>
> *Nationally, in the creative arts industries in 2006, about 1 out of every 2 jobs (46.0 percent) was associated with one of the following four sectors: motion picture and video production (16.2 percent), periodical publishers (12.0 percent), television broadcasting (10.6 percent), and radio stations (7.2 percent).*
>
> *In the 27 creative arts industries, the average weekly wage in 2006 was $1,044, an amount 34.9 percent higher than the comparable national private-sector wage.*
>
> *Other high-paying sectors included integrated record production and distribution ($1,880), news syndicates ($1,612), Internet publishing and broadcasting ($1,458),*
>
> *During the first quarter of 2006, 1 out of every 4 jobs (25.8 percent) associated with the creative arts industries in the country was located in either New York or Los Angeles. New York accounted for 10.2 percent of these jobs, while 15.6 percent were based in Los Angeles.* [3]

[3] Reference: http://www.bls.gov/opub/mlr/2007/10/art3full.pdf
Arts & Entertainment Industry Report "The economic impact of the creative arts industries: New York and Los Angeles" from the United States Department Of Labor Bureau Of Labor Statistics.

In a statement to the Special 301 Committee, 2010 Special 301 Hearing, March 3, 2010, Eric H. Smith of the International Intellectual Property Alliance (IIPA), a "coalition of seven trade associations representing over 1,900 U.S. companies that depend on adequate and effective copyright protection and enforcement by our trading partners", said:

> *The "core" copyright industries contributed over one-fifth (22.74%) of the total real growth of the U.S. economy in 2007 .... [employing] 11.7 million people (8.51% of the U.S. workforce) and generated over 11% of U.S. GDP in that year. Exports and foreign sales of the "core" creative industries increased to over $126 billion in 2007 and led other key sectors of the economy.* [4]

On July 20, 2009, the International Intellectual Property Alliance (IIPA) released an economic report entitled *Copyright Industries in the U.S. Economy: The 2003 - 2007 Report*, the twelfth study written by Stephen Siwek of Economists Inc. This report details the economic impact and contributions of U.S. copyright industries to U.S. Gross Domestic Product, employment, economic growth and trade. The latest data show that the "core" U.S. copyright industries accounted for an estimated $889.1 billion or 6.44% of the U.S. gross domestic product (GDP) in 2007. These "core" industries were responsible for 22.74% of the real economic growth achieved by the U.S. economy in 2006-2007. In addition, the "core" copyright industries employed 5.6 million workers in 2007 (4.05% of U.S. workers) in 2007. The report also provides data on the estimated average annual compensation for a worker in the core copyright industries: $73,554, which represents a 30% premium over the compensation paid the average U.S. worker. Finally, estimated 2007 foreign sales and exports of the core copyright industries increased to at least $126 billion, leading other major industry sectors. [5]

Furthering its estimates, the International Intellectual Property Alliance (IIPA) in Appendix A of its 2010 Special 301 Report, issued February 18, 2010, details by country estimates industry losses for 2009 due to piracy at $14.273 billion for business software and $1.487 billion for records and music. [6]

---

[4] Reference: http://www.iipa.com/pdf/IIPASpecial301OralStatement030310.pdf

[5] Reference: http://www.iipa.com/pdf/IIPASpecial3012010SubmissionPressReleaseFinal011810.pdf
Report: "Copyright Industries Urge Greater Global Protection of American Jobs and Exports Threatened by Piracy" by the International Intellectual Property Alliance (IIPA)

[6] Reference: http://www.iipa.com/rbc/2010/2010SPEC301LOSSLEVEL.pdf

Analysis Of The Threat Posed By Violations Of Intellectual Property Rights

1) Costs to the U.S. economy resulting from such violations

    a. Direct results

        i. Decreased revenue to photographers and illustrators due to:

            1. Loss of shared ad revenue

            2. Loss of licensing revenue

            3. Loss of assignment revenue

    b. Indirect results

        i. Loss of new markets

            1. Markets are expanding that use the Internet as a delivery method rather than a Content Consumption tool. One example is a Manhattan based restaurant that will launch in summer 2010, which is owned in part by a corporation that also owns a social media web site and that is an ISP. Protected by DMCA safe harbor provisions and the "click wrap" agreement at its web site, which are supplemented by the likely argument that those online uses are also a "fair use", this corporation is possibly positioned to display unauthorized content as part of a wall-sized live technology display. This use would otherwise require a licensing fee for the content because it is a commercial store. However, that revenue will likely be lost without a court challenge.

        ii. Loss of tax revenue

    c. Impact on the creation or maintenance of jobs

        i. Photographers

            1. 152,000 professional photographers are at risk as the value of their creative works is taken or redirected by third parties. Because the current level of revenue for photographers is so low, the impact of any lost revenue is extraordinarily damaging. The U.S. Bureau Of Labor Statistics indicates that job growth for photographers should be average for the next

decade, thanks in part to the increased use of images on the Internet. However, this projection almost certainly does not reflect the rapid decline in paid licensing of images for web use in 2009 and the increasing use of images without payment. The U.S. Bureau Of Labor Statistics states:

> *Photographers held about 152,000 jobs in 2008. More than half were self-employed, a much higher proportion than for most occupations.*
>
> *Employment of photographers is expected to grow 12 percent over the 2008-18 period, about as fast as the average for all occupations. … Moreover, growth of Internet versions of magazines, journals, and newspapers will require increasing numbers of commercial photographers to provide digital images. … Improvements in digital technology reduce barriers of entry into this profession and allow more individual consumers and businesses to produce, store, and access photographic images on their own. News and commercial photographers may be the most adversely affected by this increase in amateur photographers and non-copyrighted photos.*
>
> *Median annual wages of salaried photographers were $29,440 in May 2008. The middle 50 percent earned between $20,620 and $43,530. The lowest 10 percent earned less than $16,920, and the highest 10 percent earned more than $62,430. Median annual wages in the photographic services industry, which employed the largest numbers of salaried photographers, were $26,160. … Unlike news and commercial photographers, few fine arts photographers are successful enough to support themselves solely through their art.* [7]

ii. Illustrators

1. Illustrators have also been damaged by the increase of unpaid use of their creative works on the Internet. More so than for photographers, this has been offset to some degree by an

[7] Reference: http://www.bls.gov/oco/ocos264.htm
Occupational Outlook Handbook, 2010-11 Edition, from the Bureau Of Labor Statistics, United States Department Of Labor

increased demand for illustrators to create artwork specifically for digital devices and Internet uses that are paid for by major corporations on a "work for hire" basis. The U.S. Bureau Of Labor Statistics states:

> *Artists held about 221,900 jobs in 2008 [of which 26,600 are Fine artists, including painters, sculptors and illustrators]. About 60 percent were self-employed.*
>
> *Employment of artists and related workers is expected to grow 12 percent through 2018, about as fast as the average for all occupations. An increasing reliance on artists to create digital or multimedia artwork will drive growth.*
>
> *Demand for illustrators who work on a computer will increase as media companies use more detailed images and backgrounds in their designs.*
>
> *Median annual wages of salaried fine artists, including painters, sculptors, and illustrators, were $42,650. The middle 50 percent earned between $29,230 and $60,650. The lowest 10 percent earned less than $20,780, and the highest 10 percent earned more than $83,410.* [8]

iii. Investigators

1. While abuse of copyright and infringements negatively affect creative industries, some areas benefit. Ironically, the job outlook for investigators who are tasked with catching infringers is expected to grow. The U.S. Bureau Of Labor Statistics states:

> *Private detectives and investigators held about 45,500 jobs in 2008.*
>
> *Employment of private detectives and investigators is expected to grow 22 percent over the 2008–18 decade, much faster than the average for all occupations.*

[8] Reference: http://www.bls.gov/oco/ocos092.htm
Occupational Outlook Handbook, 2010-11 Edition, from the Bureau Of Labor Statistics, United States Department Of Labor

Increased demand for private detectives and investigators will result from heightened security concerns, increased litigation, and the need to protect confidential information and property of all kinds. The proliferation of criminal activity on the Internet, such as identity theft, spamming, e-mail harassment, and illegal downloading of copyrighted materials, also will increase the demand for private investigators. [9]

d. Critical assumptions relied upon

i. Based on obvious trends, this Report makes the following assumptions on which its recommendations are based:

- All content will become available for consumption on all devices
- In a world that is increasingly interconnected and "digital", the benefits and challenges of copyright use and infringement are global by nature, and therefore require a global solution
- All technology that would be needed to execute any required copyright solution already exists in business, government and academic environments.
- Any change or evolution of copyright law will either reinforce protections for individual creators or direct or redistribute copyright-related revenues to or between major corporations.
- Market risk in general, and of copyright infringement in particular, is born in a disproportionately large amount by individual creators than by corporations.
- Traditional copyright processes for registration and enforcement are inadequate to address the quantities and magnitude of the Internet.

2) Threats to public health and safety posed by intellectual property infringement

a. Detailed description of the threat globally, both in the U.S. and in other countries

i. Whether knowingly or unknowingly, many, if not most, U.S. citizens violate Federal laws on a regular basis by using copyrighted content without authorization. There is a fundamental risk to society in having a large portion of its citizens disobey laws.

[9] Reference: http://www.bls.gov/oco/ocos157.htm
Occupational Outlook Handbook, 2010-11 Edition, from the Bureau Of Labor Statistics, United States Department Of Labor

ii. Expansion or loosening of "fair use" definitions

1. Status Quo – It's common knowledge that copyright is part of the U.S. Constitution with a worthwhile purpose. Copyright is the status quo, which has served well for two centuries. David Oxenford and Robert Driscoll describe copyright as follows:

> *"Section 106 of the Copyright Act gives the owner of a copyrighted work a number of exclusive rights with respect to the work, including the right to reproduce the work, the right to distribute the work, the right to prepare "derivative works" based the work (e.g., a new arrangement of a song or a translation of its lyrics into another language) and, in many cases, the right to publicly perform and publicly display the copyrighted work. The copyright owner also has the right to authorize or refuse to authorize others to exercise any of these rights."*[10]

2. Challenges

Some organizations advise caution in implementing new rules governing copyright and the use of copyrighted creative works, pointing to valid concerns, such as privacy issues and unjust application of broad laws by individuals who happen to work in positions of authority.

But more often than not, these seemingly plausible justifications for deferring, decreasing or dismantling copyright enforcement are the public face of a much more aggressive campaign to shift money from rights holders to non-rights holders.

Powerful entities are endeavoring to take revenues away from the rights holders that are derived from copyrighted works and transfer that revenue to U.S. and foreign corporations. To accomplish this transference of money, they employ an extensive network of people who apply a full range of political, judicial, social and business pressures. One of the primary rationalizations being used for this transference of money is the legal doctrine of "fair use".

[10] David D. Oxenford and Robert J. Driscoll, The Basics of Music Licensing in Digital Media, March 10, 2010, http://ow.ly/1gKKA

iii. Lack of trademark, liable, trade secret protections online

1. Absent costly court action, there is currently no adequate way to address violations of trademark, liable or trade secrets in online web posts. This absence encourages parties to rely on DMCA Take Down orders to remove content for which the main objection is not related to copyright. It would help to relieve the stress on copyright laws and actions if suitable laws were enacted to address other areas of web abuse.

iv. Failure of respect and undermining of society values, perception of unfair

v. It is a risk to society when entire generations lose respect for regulatory authority by seeing it as unfair. This point of view is raised by Nobuko Kawashima of Doshisha University in Japan in referring to user modification of games, as covered by Kesler, C. A.,1993. Galoob v Nintendo, Ms. Kawashima writes:

> *"… these cases have given rise to interesting legal issues of digital technology and their relation to copyright law and users' autonomy, but whether actions of similar sorts or of higher quality in creativity would be fair use in the US or unlawful in Japan remains highly unpredictable."*
>
> *"…copyright law is rarely concerned with mini-creators, people who get inspiration from existing copyrighted works and add to them to create new expressions, attempting creative self-expression and reflectively understanding existing cultural products."*
>
> *"Cases of video game modifications have been introduced, where the points at issue included whether the cheats created derivative works in the US and whether their use infringed the authors' moral right to integrity in Japan. With the lack of legal clarity inherent in fair use in the first place in the US and the difficulty of economic analysis in it that courts often fail to overcome, the cheat device survived, but the future for creative activities of users remains uncertain."*
>
> *"The challenges of digital culture to copyright are frequently discussed in relation to how we might protect copyright owners' economic interests and expand (or limit)*

authors' moral rights particularly in civil law countries, but more focus should be placed on the user creativity discussed in this paper. As has been argued, it is one of the most formidable challenges to copyright law, involving a new dimension of creativity to the current world of copyright inhabited by professional authors and commercial distributors." [11]

vi. Repercussions of societal shift might include:

1. Increased use of computer viruses via pirated images

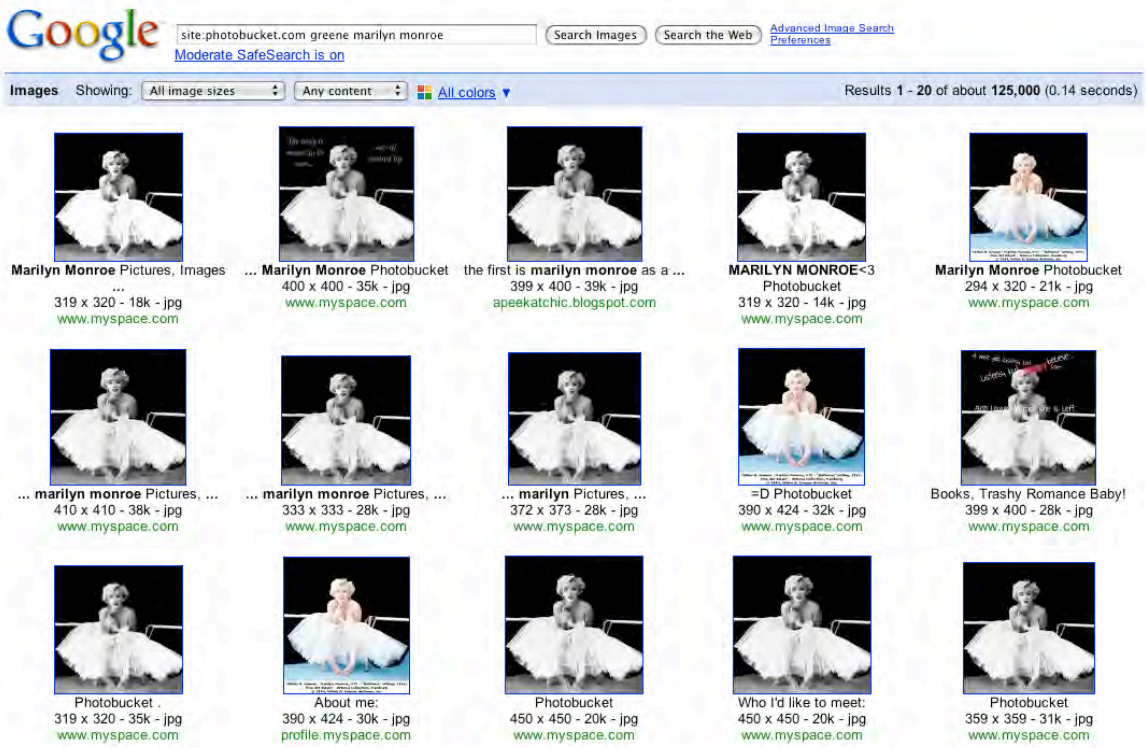
2. Undermining of authority at a national, state and local level

3) Emerging or future threats to the U.S. economy or to health and safety over the next five to ten years

a. Rampant unauthorized use, copyright infringement has occurred at the low-end of the market for online image licensing. Some estimates say there are 100 unauthorized uses online for every paid use of a professional images. Content Consumers are unable or unwilling to pay to license images that would otherwise cost in many cases less than one dollar to legitimately license. This is tantamount to a failure of the marketplace at the low end. The risk exists that this market failure will expand and consume higher priced content, including movies and music.

b. To illustrate this point, the following is a "screen grab" that shows one single image of Marilyn Monroe that has been added to the accounts of multiple users, all having agreed to the terms of the "click wrap" agreement, at the MySpace® web site. Google® includes these images in its search results.

[11] Reference: http://www.serci.org/documents.html
"New Challenge for Copyright Law and Cultural Policy - Forthcoming in *International Journal of Cultural Policy" by* Nobuko Kawashima of Doshisha University



Marilyn Monroe photographs by Milton H. Greene © Joshua Greene
www.legendslicensing.com

Specific Recommendations For Accomplishing The Objectives Of The Joint Strategic Plan

Overview

On March 16, 2010, the Federal Communications Commission (FCC) presented the National Broadband Plan to Congress, part of the American Recovery and Reinvestment Act of 2009 (the "Recovery Act"). In its almost 400 pages, "Connecting America: The National Broadband Plan" sets out the goal of significantly increasing the speed and reach of broadband access.

This expansion of capability and reach will multiply the already unprecedented benefits and impact of the Internet on the personal and business interests of America. Of particular significance is the dual role of the Internet as both a method of content delivery as well as an interactive method of visual and audio Content Consumption.

By enabling the almost instantaneous global reproduction and consumption of Content, the Internet is both as opportunity and a threat for copyrighted content and for copyright itself, as well as the indirect uses of content in general.

The stakes are very high. According to the Global IP Center, U.S. Intellectual Property is worth over $5 trillion, accounts for half of all U.S. exports and contributed $37 billion to the U.S. trade balance (as of 2006).[12]

While corporate interests and the country as a whole have benefited greatly from this ever growing value of intellectual property – economically, politically and culturally – the individual creator responsible for this creative bounty has received a diminishing portion of the value of their creativity. In the case of photographers, the marginalization of their financial reward has become extreme and painful for most, to the point at which the viability of the profession is at risk.

Yet, photographers (of all quality levels) and their brothers and sisters, the illustrators, are largely responsible for the Internet being visually pleasing, given the magnitude of this visual element.

[12] Facts referred to are from http://www.theglobalipcenter.com/facts, which states:
Intellectual property accounts for over half of all U.S. exports, helping drive 40% of U.S. economic growth. (U.S. Department Of Commerce, "Bush Administration Officials Update Congress On Intellectual Property Enforcement Efforts," Press Release, 26 July 2006)
U.S. intellectual property is worth between $5.0 trillion and $5.5 trillion—more than the nominal gross domestic product (GDP) of any other country. (Robert J. Shapiro and Kevin A. Hassett, "The Economic Value Of Intellectual Property," USA For Innovation, October 2005)
America is a net exporter of intellectual property, contributing $37 billion to our trade balance in 2006. (Shayerah Ilias and Ian F. Ferguson, "Intellectual Property Rights and International Trade," Congressional Research Service, 12/20/07)

750 mobile phones with cameras are sold each year, and 100 billion images are made available online each year. [13] Over 1 trillion web pages (unique URLs) have been indexed for search.[14] Most web pages contain photos or illustrations.

The following graphic, which is accumulated from various anecdotal estimates, provides an approximation of the quantity of images that are uploaded and stored at photo sharing web sites:

	Images	Uploads/Mo.	Users/Monthly
ImageShack	20 billion	100 million	33.2 million
Facebook	15 billion	850 million	161.0 million
PhotoBucket	7.2 billion	-	58.6 million
Flickr	3.4 billion	-	76.5 million

Despite this veritable explosion of Content creation and Content Consumption via the Internet – or, perhaps because of it – the vast majority of professional creative works online are used, and a substantial quantity of user-generated-content that is made available, which enjoys the same rights of copyright as professional content, are used without payment or authorization from the rights holder.

This section of the Report attempts to quantify and explain the major trend, which is a made difficult by the lack of studies in photography and illustration, which are commonly funded by special interest groups. Photographers and illustrators tend act as individuals at all levels.

[13] Reference: http://www.beet.tv/2008/07/google-will-kno.html
In a July 2008 interview with R.J. Pittman, Google's director of product management for consumer search properties, he said 100 billion images are being captured and made available online every year, 750 million mobile phones with cameras sold very year, and that he soon expects there to be over **a trillion images** online.

[14] Reference: http://googleblog.blogspot.com/2008/07/we-knew-web-was-big.html
On July 25, 2008, Google software engineers Jesse Alpert and Nissan Hajaj announced that Google Search had discovered one trillion unique URLs, saying "Recently, even our search engineers stopped in awe about just **how** big the web is these days -- when our systems that process links on the web to find new content hit a milestone: 1 trillion (as in 1,000,000,000,000) unique URLs on the web at once! … Strictly speaking, the number of pages out there is infinite … This graph of one trillion URLs is similar to a map made up of one trillion intersections. So multiple times every day, we do the computational equivalent of fully exploring every intersection of every road in the United States. Except it'd be a map about 50,000 times as big as the U.S., with 50,000 times as many roads and intersections."

4) Recommendations for significantly improving the U.S. Government's enforcement efforts via proposed legislative changes, limited to regulations, executive orders, other executive action, guidelines, changes in policies, practices or methods

    i. Seek international consensus via treaties and conventions

        ii. Global problems require global solutions

            a. Because the Internet crosses all borders, and because most citizens in developed countries are Content Consumers via the Internet, a global solution vis-à-vis copyright will be more effective than a patchwork of national laws.

                i. In a letter to Mr. Stanford McCoy, Assistant U.S. Trade Representative for Intellectual Property and Innovation, Office of the U.S. Trade Representative, Eric H. Smith of the International Intellectual Property Alliance (IIPA) used statistics for game download, illustrating the global nature of infringement. He said:

                > *"Countries with the heaviest unauthorized number of P2P game downloads by volume were Italy (20.3%); Spain (12.5%); France (7.5%); Brazil (6%); and China (5.7%)."* [15]

            b. Inherently in the process, the "lowest common denominator" that has the broadest public support on a global level will be adopted because global treaties must then be ratified within national legislative bodies.

            c. The likelihood of passage of legislature in Congress may increase if the House and Senate ratifying international treaty agreements instead of creating far-reaching rules with local political ramifications from scratch.

            d. International treaties in copyright include the Berne Convention of 1886, the World Intellectual Property Organization (WIPO) of 1967, the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) of 1994, and the

[15] Reference: http://www.iipa.com/rbc/2010/2010SPEC301COVERLETTER.pdf

WIPO Copyright Treaty of 1996. Currently under negotiation is the Anti-Counterfeiting Trade Agreement (ACTA).

2. Foster the creation and sustenance of Registries

    a. Suggested requirements of a Registry

        i. Provide grants and incentives to incentivize and foster the open sharing of data between registries

        ii. Provide API or similar access to the U.S. Copyright Office database to enable registries to both register copyrights and link to USCO data

        iii. Opt-in inclusion of content

        iv. Dispute resolution process

3. Initiate a minimum statutory damage or fine for failure to obey a DMCA Take Down order, separate from copyright statutory damages. A minimal fine, which could be levied by the FTC, or preferably a small value that could be used in court settlements, per object that is requested to be removed via the DMCA, but not removed by the ISP.

    a. Contract law is often used by corporate web sites to establish de facto permission to use infringing materials that a normal and reasonable person would know is likely infringing. “Click wrap” agreements are relied on by corporations to “turn a blind eye” to infringing materials that are hosted, distributed and/or consumed by the products and services of the corporation. Many “click wrap” agreements have the user claim ownership or the right to use images that are uploaded. Even though these are largely ignored by users, corporate web site, such as social media web sites and photo sharing sites, often have massive quantities of infringing images at their site that are monetized.

    b. A small fine or statutory damage per content file would be:

        i. A measured response that is proportional to the infringement

ii. An effective alternative to 3 strikes rule which could possibly deny due process if there is no right of appeal

c. Responsibility rests with the entity most capable of efficiently executing in the most cost effective way

d. ISPs are best positioned to pass these costs along to customers who violate copyright, just as clients are charged late fees for late payments or fees for other services that increase costs of the ISP.

4. A unique file ID or number is required for each digital content file for the orderly conducting of processes and business.

   a. It is recommended that each Registry be a de facto hub of numbers and that a centralized authority be established to track these numbering system. Numbering at Registries should be a "trusted intermediary" that acts a hub, a "trusted third party"

   b. Given the necessity of identifying ownership rights in copyrighted content and the option, at the discretion of the rights holder, to use Digital Rights Management of their choosing, there is a clear requirement of a numbering system and interconnected numbering system. Numbering is deceptively simple. And yet, there is a simple solution.

      One does not want to inhibit the algorithms that will exist in the future by having a list of approved algorithms. What is needed is the mandate to enable access to and to share numbering to map or collate numberings systems and thereby identify content between systems based solely on an identifying number.

      This methods, therefore, permits all numbering systems to coexist. What is needed is an authority to uniquely identify each numbering system, which would be registered with the authority.

      By default, every digital file has its own unique ID, which is derived from the 1's and 0's that make up the digital

binary file. This ID can be converted to an encrypted ID using various methods of haching, many of which are open source. These methods are already commonly used by search engines and other companies with large quantities of duplicate files.

It is recommended to foster the access and sharing of these file identifiers between companies by providing grants and funding to those companies that share this information. Furthermore, it is recommended that scientific standards bodies provide and periodically update best practices recommendations as to what haching processes meet government standards so as to help standardize the methods.

5. Expand copyright notice methods to include machine readable methods and alternatives and acceptable means of notification, which can be listed and updated, from time to time, at the U.S. Copyright Office web site. Since display of copyright ownership information will again be appropriate in view of pending Orphan Works legislation, broadening the methods of adequately conveying such notice is appropriate.

6. Define Orphan works as being limited to works and digital files that are older than 20 years. In this way, most modern content, which embodies the greatest commercial value and which will be most damaged by Orphan Works type legislation, can gain some level of protection.

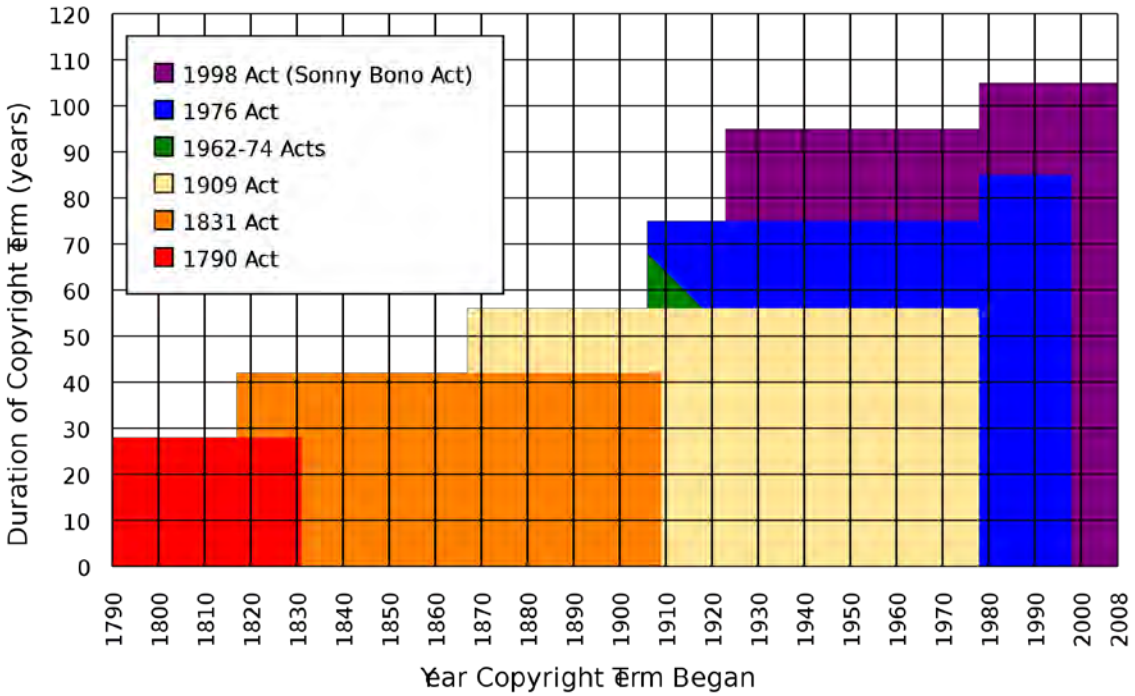
7. Initiate a worldwide cap on the duration of copyright

    a. It is commonly viewed that the ongoing extensions of the term for copyright solely benefits the major corporations that own copyrights that would otherwise expire.

    b. It is recommended that, via international treaty, the term of copyright be capped or limited at the highest time frame of current levels so that no further extensions are possible.

    c. The progression of copyright term extensions is embodied in the following chart by Tom Bell: [16]

[16] Image Reference: http://en.wikipedia.org/wiki/File:Copyright_term.svg



iii. Compulsory license for low-end web use

1. All indications are that the vast majority of online uses for which images could be obtained and properly licensed for less than one dollar are, instead, being used without payment or authorization. In essence, there has been a failure of the marketplace or low-end content use of minimal value.

2. It is recommended that Congress should enact and the U.S. Copyright Office should implement a compulsory license for micro-transaction uses that value less than one dollar. In this process, all users would have a right to license images for a fee that is equal to one penny or less for each page view or viewer who sees or accesses this content from a web site or any other device that is under their control. Should the value of the use exceed one dollar, the compulsory license would no longer apply, and instead, existing copyright laws and licensing methods would prevail.

Page Reference: http://en.wikipedia.org/wiki/Public_Domain_Enhancement_Act
Chart for extensions of copyright life, as of as appeared in Wikipedia on March 20, 2010, created by Tom Bell. This file is licensed under the Creative Commons Attribution-Share Alike 3.0 unported license.

iv. Fair Use

1. Overview

If one were to interpret the global struggle over control of copyright as an economic war, then the main battlefield would certainly be “Fair Use”.

What is “fair use”? Sanford University describes it as:

> *“any copying of copyrighted material done for a limited and "transformative" purpose such as to comment upon, criticize or parody a copyrighted work”. It then cautions, “If this definition seems ambiguous or vague, be aware that millions of dollars in legal fees have been spent attempting to define what qualifies as a fair use. There are no hard-and-fast rules, only general rules and varying court decisions.”* [17]

Some organizations advise caution in implementing new rules governing copyright and the use of copyrighted creative works, pointing to valid concerns, such as privacy issues and unjust application of broad laws by individuals who happen to work in positions of authority.

But more often than not, these seemingly plausible justifications for deferring, decreasing or dismantling copyright enforcement are the public face of a much more aggressive campaign by major corporate interests to shift money from rights holders to non-rights holders.

Powerful entities are endeavoring to take revenues away from the rights holders that are derived from copyrighted works and transfer that revenue to U.S. and foreign corporations. To accomplish this transference of money, they employ an extensive network of people who apply a full range of political, judicial, social and business pressures. One of the primary rationalizations being used for this transference of money is a unilateral expansion of the legal doctrine of “fair use”.

Additionally, the “fair use” argument is increasingly being used in situations where the use is obviously not a fair use, but in

[17] Reference: http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter9/9-a.html

which the infringing party benefits from the delay of court action or the requirement of the rights holder to pay to adjudicate an invalid "fair use" defense.

2. Efforts to convert financial benefits of copyright from rights holders to 3rd parties through "fair use"

    a. In 2006, the court decision in Perfect 10 v. Google established that inline linking and the display of thumbnail images of third party content is a "fair use". Subsequent to that decision, however, some companies, including some search engines, have begun to monetize the display of these unauthorized image copies that the court has deemed a "fair use". The court has not yet decided if it is also a "fair use" to generate revenue from advertising that is directly related to the use of copies of infringing images.

    b. "Fair use" is also being used as a defense by ISPs that are also the web site owner, and that refuse to remove infringing content. There is an inherent conflict of interest when a major corporation acts as its own ISP. DMCA Take Down notices that it receives are, in essence, asking the corporation to remove content from itself and notify itself if it objects to that removal.

3. The shift of wealth from rights holders through "fair use" is significant

    a. Many key industries generate revenues, in part, because people want to use their products and services to access "free" content. Over time, a general misunderstanding has occurred in the marketplace in which users feel they have a right to free content because they pay for access via products and services that "contain" that content. As a generalization, supporters of "fair use" include companies that provide the Conduit, such as search engines, hardware and software makers, and ISPs. A 2007 Report by Jennifer Urban of Public Knowledge and BerkeleyLaw states:

        "... companies that rely upon [fair use]—such as consumer device manufactures, software developers, and Internet platform providers—are extremely

productive contributors to the economy. A recent whitepaper published by the Computer & Communications Industry Association trade group finds that in 2006 the "fair use industries" generated $4.5 trillion in revenue, and generated an estimated $194 billion in exports." [18]

4. Purpose of the "fair use" doctrine is not to shift wealth from creators to third parties

    a. At no point in the "fair use" doctrine does it prescribe or imply that the purpose of "fair use" is to transfer the value of copyright from the legitimate rights holders to third parties, which could be U.S. or foreign corporations.

    The position that "fair use" is intended to create wealth for those who would, except for the "fair use" doctrine, be considered infringers of that copyrighted property is analogous to saying that the rights of U.S. citizenship are meant to benefit people in foreign lands who are not U.S. citizens. The rights holders of copyrights, who are often the individual creators who enrich society with their creativity, should remain the primary beneficiaries of their creative works for a reasonable period of time.

5. Ability to automate determination of "Fair Use"

    a. In a Press Release on February 18, 2010, Gigi B. Sohn, president and co-founder of Public Knowledge, states:

    "There is no technology that exists, and one is not likely to exist, that can determine which uses of copyrighted material are fair use, and which are not, so the filtering would be useless." [19]

[18] Reference: http://www.publicknowledge.org/pdf/cra-introduction-02132010.pdf
As cited on page 5 of a February 13, 2010 report entitled "Updating Fair Use for Innovators and Creators in the Digital Age: Two Targeted Reforms", prepared on behalf of Public Knowledge by Jennifer M. Urban, associated with the Samuelson Law, Technology & Public Policy Clinic of BerkelyLaw, University of California.

[19] Reference: http://www.publicknowledge.org/node/2908

Though Ms. Sohn is mostly accurate in that statement, it excludes that technology already exists that can identify to some degree what is not a “fair use”, and that the determination of what is not “fair use” could be automated and appropriately flagged with filtering methods. By reversing the logic – identifying what is not “fair use” instead of what is “fair use” – automation can be applied, and the free market will provide solutions.

To maximize this benefit to society, it is recommended that greater clarity of what is not “fair use” should be specified and enumerated in appropriate international treaties, federal agency rules (i.e., the FTC, subject to eventual court challenge), judiciary decisions and other regulatory processes.

Without affecting or diminishing “fair use”, automated processes that can help defend copyright, copyrighted property and the interests of rights holders can be applied if governing bodies can agree upon and specify those aspects that are not “fair use”. By default, consensus of opinion would limit inclusion to aspects that are the most broadly agreed upon. This list could be amended periodically as consensus changes.

6. Recommendation to Limit “Fair Use” to No profit motive

    a. It is recommended that - without altering the “fair use” doctrine - trade practices, regulatory bodies and international treaties should interpret “fair use” to exclude gainful intent. Monetization of copyrighted content that is used without authorization of the rights holder should exclude that use from any “fair use” exception to copyright laws. Images and other content that appear in search engines, in web sites, in device applications, in software and via other display and Content Consumption methods should not be a “fair use” if revenues are derived from the display of that copyrighted content, including advertisements.
        i. The benefits of this simple interpretation would include the enabling of automated processes that can detect unauthorized uses that are not “fair use”, the maintenance of revenue by the rights holder, and the ability of the creator or

rights holder to exclude their creative works from services of which it does not support or approve.

b. Textbook industry as an example of possible impact

i. Textbooks are an example of possible conflict that is resolved by a rule of not permitting gainful benefit or profiting from "fair use". A teacher could potentially find materials on the Internet and use them in the classroom because there is no profit motive. However, the same images when included in a textbook for which money is charged or entities are paid for its creation would be a commercial use not included in "fair use". Likewise, placing content on a web page or site by the teacher for his or her students would also be possibly covered by "fair use". However, if the page or web site had advertising, calls to purchase goods or services or in other ways sought to monetize the traffic that has come to view the content, then that would not be covered under "fair use". The size of the textbook market is large, as indicated in this report at Berne. It said:

Annual spending on education of all forms worldwide is over $2 trillion; in the United States of America alone spending amounts to $750 billion.

Globally, 84 million students of higher education attend 20,000 colleges and universities. 66 million adults and more than 50% of all employed persons participate in some form of continuing education.

In each of the territories covered in this study, commercial publishing of educational materials is a major business. The United States textbook market is a large, growing, and fragmented business. Textbooks are written and marketed primarily for use in formal educational settings. Much of the

demand for graduate level textbooks depends on growth in the population attending institutions of graduate study. The United States textbook market overall has an annual volume of approximately USD 5.3 billion, and forecasters predict that around 40-50% of all textbooks will be available electronically in five years' time. [20]

7. Supporting arguments for not monetizing "fair use"

   a. The original predecessor to the Berne Convention said that rule exceptions cannot be monetized. It said:

As to the relationship between potential use and "normal exploitation," the Panel referenced preparatory materials for the 1967 Stockholm Revision Conference which formulated Article 9(2) of the Berne Convention. Here it found support for the proposition that the disputed exception "should not enter into economic competition" with the right holder: according to a report of the Swedish government and BIRPI (Bureau for the Protection of Intellectual Property, the predecessor organization to WIPO), "all forms of exploiting a work, which have, or are likely to acquire, considerable economic or practical importance, must be reserved to the authors." The Panel went further: "Thus it appears that one way of measuring the normative connotation of normal exploitation is to consider, in addition to those forms of exploitation that currently generate significant or tangible revenue, those forms of exploitation which, with a certain degree of likelihood and plausibility, could acquire considerable economic or practical importance."

The Panel then concluded on this point as follows: *"We believe that an exception or limitation to an exclusive right in domestic legislation rises to the*

[20] Reference: http://www.wipo.int/edocs/mdocs/copyright/en/sccr_14/sccr_14_5.pdf
On page 38 of the "Automated Rights Management Systems And Copyright Limitations And Exceptions", prepared by Nic Garnett of Interight.com, presented to the Standing Committee On Copyright And Related Rights, World Intellectual Property Organization (WIPO), Geneva, May 1 to 5, 2006

level of a conflict with a normal exploitation of the work (…) if uses, that in principle are covered by that right but exempted under the exception or limitation, enter into economic competition with the ways that right holders normally extract economic value from that right to the work (…) and thereby deprive them of significant or tangible commercial gains." [21]

b. TRIPS was the basis for further clarification that says that exceptions (which would include "fair use") cannot conflict with the interests of the rights holder. It said:

According to the Panel's decision,[22] *in order for a member of the WTO to avoid having an exception invalidated under TRIPS Article 13, the member must establish:*

(1) That the exception is limited to a narrow and specifically defined class of uses. (However, the member does not need to explain the local policy upon which the exception is based);

(2) That the use conducted pursuant to the exception does not compete with actual or potential economic gain that the right holders would derive from normal exercise of the right in question; and

(3) That the use conducted pursuant to the exception does not unreasonably damage an interest of the right holder, such interest being derived from and compatible with general copyright objectives; the provision by the member of a compulsory license or other compensation mechanism could be instrumental in defeating a finding of unreasonableness. [23]

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[21] Reference: http://www.wipo.int/edocs/mdocs/copyright/en/sccr_14/sccr_14_5.doc
On page 9 of the "Automated Rights Management Systems And Copyright Limitations And Exceptions", prepared by Nic Garnett of Interight.com, presented to the Standing Committee On Copyright And Related Rights, World Intellectual Property Organization (WIPO), Geneva, May 1 to 5, 2006

[22] WTO Panel on United States-Section 110(5) of the US Copyright Act: Report of the Panel, WT/DS/160/R, June 15, 2000.

[23] Reference: http://www.wipo.int/edocs/mdocs/copyright/en/sccr_14/sccr_14_5.pdf

v. Discourage advertising that encourages infringement

    1. Make it a matter of policy via the FTC to prohibit advertising claims that promote the unlicensed replication of copyrighted content. Federal law prohibits the use of technology that circumvents copyright. FTC rules could be strengthened to prohibit marketing based on that prohibited act.

        a. An example of this might be the Apple® advertising with the slogan “Rip, Mix, Burn”. "Rip. Mix. Burn." (2001) was used to promote iTunes® desktop CD burning capability.

vi. Assign to a scientific standards body the task to monitor and recommend “best practices” haching methods and formulas

vii. Congress should create a compulsory license for low-end web use of photographic images

viii. Just as informants are paid by local police, larger entities are paid by various means, like in identifying narcotics smuggling. Make it free market many will apply to help for a fee. Let free market solve problem. Like paying farmers to grow legitimate crops instead of illegal ones.

ix. Better define the “fair use” doctrine

    1. What is “fair use”? Sanford University describes it as:

        “any copying of copyrighted material done for a limited and "transformative" purpose such as to comment upon, criticize or parody a copyrighted work”. It then cautions, “If this definition seems ambiguous or vague, be aware that millions of dollars in legal fees have been spent attempting to define what qualifies as a fair use. There are no hard-and-fast rules, only general rules and varying court decisions.”

    2. Dilemma – the ambiguity of “fair use” forces unreasonable parties to continuously redefine this copyright exception in court, which makes it difficult to automate monitoring and

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On page 7 of the “Automated Rights Management Systems And Copyright Limitations And Exceptions”, prepared by Nic Garnett of Interight.com, presented to the Standing Committee On Copyright And Related Rights, World Intellectual Property Organization (WIPO), Geneva, May 1 to 5, 2006

application of fair use exceptions and potentially clogs the judicial system with unnecessary cases that use the fair use argument to defend infringing activities. Furthermore, the "fair use" argument is increasingly being used in situations where the use is obviously not a fair use, but in which the infringing party benefits from the delay of court action or the requirement of the rights holder to pay to adjudicate an invalid "fair use" defense.

3. Recommendation – Clarify some aspects of "fair use" at a practical level to facilitate the application of automated processes to monitor for infringements while removing legitimate "fair use" exceptions. This would make enforcement more efficient.

b. Detailed description of a preferred method for accomplishing the recommendation, ranked in order of priority

i. Of the recommendations herein, the first and foremost in priority is to foster the creation and interlinking of Registries, using means at the disposal of governmental bodies, which could include tax incentives and grants that would foster open sharing of data, based on an economic incentive to share

5) Of these recommendations that would significantly improve the U.S. Government's enforcement efforts, a commonality occurs that is centered around the formation of a global network of registries. The elements of which would include the following:

a. Noting that only one commercial American Registry can perform these functions, but noting that competing commercial registries will likely emerge, the capabilities of registries should be required or encouraged to have the ability to:

i. Find rights holders from copies of content, both via manual online methods and via API or other automated process

ii. automatically register images and other copyrighted content

iii. Display images together with related registration information from the U.S. Copyright Office

iv. Act as a numbering hub and link to unique ID's and records of other registries and processes

v. Display a unique ID per content file as new copyright notice with that

file

b. Employing a cohesive combination of Registries that are enabled to be unified via “best practices” suggestions of scientific a standards body and unique file identification or numbering methods, together with grants, tax incentives and other incentives would ultimately provide the following benefits:

    i. Reducing the supply of infringing goods, domestically and internationally

    ii. Addressing weaknesses, duplication of efforts, waste, and other unjustified impediments to effective enforcement actions

    iii. Promotion of information sharing between participating agencies to the extent permissible by law

    iv. Disruption of infringement networks in the U.S. and in other countries

    v. Strengthening the capacity of other countries to protect and enforce intellectual property rights

    vi. Assistance of other countries to more effectively enforce intellectual property rights

    vii. Protecting intellectual property rights in other countries by:

        1. Working with other countries to reduce intellectual property crimes in other countries

        2. Improving information sharing between law enforcement agencies in the U.S. and in other countries

        3. Establishing programs to enhance the enforcement efforts of foreign governments by providing training and technical assistance designed to:

            a. Enhance the efficiencies and minimize the duplication of U.S. Government training and assistance efforts

            b. Prioritize deployment of U.S. Government resources to those countries in which programs can be carried out most effectively

viii. Having the greatest impact on reducing the number of infringing products in the relevant U.S. market, while:

1. protecting the intellectual property rights of U.S. rights holders, and

2. protecting the interests of U.S. persons otherwise harmed by infringements in other countries.

ix. The Registry Solution has far reaching potential benefits in that each government agency and personnel at all levels could access the registry to verify claimed ownership of content. As a result, the collective effect of broad adoption would be to:

1. Improve the adequacy, effectiveness and/or coordination of the various Federal departments, agencies and programs that are charged with enforcement of intellectual property

2. Strengthen information sharing between stakeholders and U.S. Government agencies to improve intellectual property rights enforcement efforts, including methods the U.S. Government can use to obtain more accurate information concerning the identities, corporate structures and locations of those suspected of intellectual property infringement

3. Provide new methods for rights holders and importers to provide information to U.S. Customs and Border Protection (CBP) on distribution and supply chains. Such information could enable CBP to increase the effectiveness of its process for selecting (``targeting'') imports for inspection by creating a segment of trusted imports, which would allow CBP to better focus its targeting on high risk imports and imports for which advance information is lacking

4. Provide methods to improve the adequacy, effectiveness and/or coordination of U.S. Government personnel stationed in other countries who are charged with enforcement of intellectual property.

Supplemental Topics

1) Existing technology that could or should be used by the U.S. Government or a particular agency or department to more easily identify infringing goods or other products

    a) The aforementioned Registry process is recommended

    b) Tagging technologies that place watermarks in the image, either visibly or invisibly, would facilitate identifying infringing goods.

2) Approaches for increasing standardization among authentication tools and technologies applied by rights holders to products to enable identification of these goods as genuine through a physical examination of the goods or product

    a) A self-governing standards body (i.e., a not-for-profit trade association, having as its directors, the directors of other trade associations) or other governmental body should monitor and aggregate:

        i) Types of haching that are used or recommended (i.e., the MD5 hache or similar)

        ii) Best practices

        iii) List suggested sources and resources

3) Specific measures to further secure the domestic and international supply chains to minimize the threat posed by infringing goods or products

    a) Open monitoring of the passing of content through choke points for the purposes of creating IDs of the content without knowing what the content contains. Enable check sums of all content that passes. This creates probable cause for court action to investigate further. (The administration of President Bush did this with telecommunications.)

    b) Filtering would still require a court order. Tracking would be similar to current technology common practices, which include noting the IP address of the site from and to. And cookies. And server blogs that log objects being accesses and downloaded. And, most ISPs use a check sum process anyway to eliminate duplicates to speed efficiency and lower storage costs.

4) Specific methods to limit or prevent use of the Internet to sell and/or otherwise distribute or disseminate infringing products (physical goods or digital content)

a) DMCA minimum statutory damage for the refusal to remove content refuse content by ISPs that wither own the web site for that content or that are outside of the parameters of the DMCA (as stated herein above).

5) Information on the various types of entities that are involved, directly or indirectly, in the distribution or dissemination of infringing products and a brief description of their various roles and responsibilities

   a) Internet Service Providers (ISPs)

   b) Search engines

   c) Hardware manufacturers

   d) Advertising networks and processes

   e) Individual peer sharing

   f) Corporations without malice

   g) Creators who mashup or alter content

6) Possible application of World Trade Organization provisions, including, but not limited to, those on anti-dumping, subsidies, standards and safeguard measures in cases where failure to enforce intellectual property laws in other jurisdictions produces unfair cost or other advantages for the production or distribution of goods and services or otherwise disadvantages U.S. right holders

   a) DMCA statutory minimum damages should be applied to Internet Service Providers who do not remove content based on a DMCA Take Down order or equivalent if they have not adhered to DMCA rules or if they are at the same time the ISP and the owner of the web site with infringing content (as stated herein above). Such fine or damages should be enforceable in international courts.

7) Specific strategies to significantly reduce the demand for infringing goods or products both in the U.S. and in other countries

   a) Foster free market processes and business models that make it very easy to:

      i) Identify rights holders

      ii) Properly license content at a fair price for minimal use via a compulsory license

b) Foster new copyright notices methods that are machine readable

Available Technologies

Adequate solutions for infringements of digitized content must include technology. To better understand the options and dynamics of available technologies, this Report includes the "Report On Technology Options For Copyright And Orphan Works Issues", prepared and presented on March 3, 2010 to CEPIC, the Coordination of European Picture Agencies Stock, Press and Heritage. CEPIC was established in Berlin in 1993 as a European economic interest group (E.E.I.G) not for profit in accordance with the European Communities Regulation and registered in Paris in 1999. CEPIC has Observer Status at WIPO, the World Intellectual Property Organization and is an Associate Member of I.P.T.C, the International Press Telecommunications Council. CEPIC represents over 1,000 picture sources in Europe with members from most different European countries. These sources represent the majority of professional images available in Europe.

Report On Technology Options For
Copyright And Orphan Works Issues
March 3, 2010

The purpose of this report is to detail the technology options available that can solve the issues of "orphan works" and "copyright infringement". This report summarizes the need to know "How to identify the rights holder of images" and "How to electronically control whether an image is copyright protected or not".

These issues are complex because their outcome will directly affect the distribution of revenues relating to the creation, marketing, licensing, access, distribution and consumption of content, including revenues to individual creators, stock photo agencies, publications, search engines, Internet Service Providers and hardware device manufacturers. The breadth of industries affected by these issues encourages comprehensive solutions for which technology is merely one part.

Furthermore, this report makes recommendations for global solutions concerning potential legislation on "orphan works" and copyright infringement issues.

From a technology perspective, the available options fall into two broad categories:

- Functionality that is more efficient in aggregated, centralized processes
- Functionality that each user controls

The technology required to identify or control rights holder identification and copyright has five core aspects:

- Persistent Identifiers - A unique ID number, which is a permanent/persistent identifier, is required for each object, which might be a photograph or a digital file that contains a photograph.

- Image Recognition - A method of identifying identical and substantially similar images

- Copyright Notice - A way to signal to users that an image is copyrighted

- Rights Holder Identification - A method that enables finding the rights holder of each image and subsequent related information

- Registration Process – Using registries, which are essential to achieve the objective, the registration process for adding data is different for each one

Optionally, technology could include digital rights management methods that physically prohibit or limit access or use of images:

- Access Limitation. A method that limits access to an image or file

The following describes in more detail the options available in each required aspect.

1. **Persistent Identifiers**

    a. Overview – The ability to identify each unique object is essential. Aggregation of content from multiple, unrelated sources that each will have an internal numbering system will occur. To avoid inadvertent overlap of numbers, a unique identifier is required for each object.

    b. Perspectives – Selecting a numbering or identifier system for any given project, from organizing a single photographer's archives to standardizing all images that exist, is governed often by personal experience and the preconceived perception that results from that experience. Considerations on perspective:

        i. Traditional Perspective - Traditional thinking says that an identifier should be issued per image based on its content, that the original high-resolution image is the "parent" with its own number, and that "child" objects should each have a derivative of the "parent" number. This thinking works well when there are limited quantities of derivatives of the original. For example, if the original image is distributed in a range of print sizes, like 5x7 inches or 400x300 mm.

ii. New Perspective - In the digital age, there are potentially unlimited quantities of copies of the parent image that could each be a unique digital file. The parent:child numbering process is inadequate when unlimited child objects are likely. A newer approach would be to consider each object as unique and issue an identifier per object (digital file) rather than per image. As such, two images that are identical in content but slightly different in size would each have a unique identifier. Another example might be the ISBN identifier for books in which a paperback and a hardcover of the same content would have different identifiers that are not necessarily related.

iii. Check Sums – Every digital file is made up of 1's and 0's that constitute the underlying binary code. Every digital file has a unique combination of 1's and 0's. In essence, every digital file has, by default, its own persistent unique identifier. Check sum processes, several of which are available as free, open source computer software, can derive a unique number from each and every file. Every camera, mobile phone and photo manipulation software that creates or alters a photographic image will, by its nature, "create" a unique identifier per image or copy of that image. An example of existing use of check sums would be the verification of digital signatures by banks.

c. Methods – There are two general approaches to numbering systems (persistent identifiers): centralized and decentralized.

i. Centralized – A centralized database that is controlled by an oversight authority can issue identifiers that are persistent.

1. Advantages
    a. Centralization facilitates consistency and standardization
    b. Centralization provides efficiency of scale that lowers the overall total cost of bandwidth and server capacity
    c. Centralization favors organized, paid marketing efforts to educate the marketplace

2. Disadvantages
    a. Centralization requires overhead cost in technology and staffing, which could require outside funding or user fees for use

b. Centralization requires greater bandwidth and server capacity from the issuing and tracking entity
c. Centralization creates risk of failure if the centralized process or company ceases operations
d. Centralization is more likely to employ a proprietary process that restricts competitive access
e. Centralization prohibits numbering at the time of creation of an image, such as inside a camera
f. Centralized issuing of identifiers requires users to "come to" the centralized database or its authorized representatives to get a number for each image
g. Centralized identifier systems, although viable for professional images and use, cannot extend to include all images in existence

ii. Decentralized – Good software programming can create a unique numbering system that can be used as a universal, standalone identifier creation method that resides on an unlimited quantity of disconnected computers and other devices. This would decentralize the control of identifiers, democratize the issuing of numbers, and enable unique creation of unique identifiers on a global scale.

1. Advantages
    a. Decentralization enables open source solutions that become highly survivable by broadening development, distribution and replication of code
    b. Decentralization broadens distribution channels and user access
    c. Decentralization lowers or eliminates the cost of bandwidth, staffing and servers for the oversight authority
    d. Decentralization reduces or eliminates the risk of failure of one controlling entity
    e. Decentralization is less conducive to proprietary processes that would otherwise restrict competitive access
    f. Decentralization enables numbering at the time of creation of an image, such as inside a camera
    g. Decentralized identifier systems can potentially extend to include all images in existence

2. Disadvantages
    a. Decentralization forfeits unified control of processes and uses, as well as marketing and marketplace education

iii. Recommendation – For images in digital form, I suggest that the check sum number that is inherent in every digital file be used as the persistent unique identifier with each file having a different number regardless of whether the object is a derivative or copy of a parent image. Not all images are in digital form. Therefore, I recommend a secondary system for issuing persistent identifiers that is centralized. (One such system is being created as of this writing by the not-for-profit PLUS Coalition).

iv. Forward Looking Hubs – No single identifier system will be able to include all images in existence. A variety of numbering systems will always need to exist. To be effective, every aggregator and registry will need to be a de facto hub of multiple numbering systems that map or align identifiers with other identifiers. Since not all files are digital, at least secondary numbering system will be required. And, because many creators and business already employ their own internal numbering system, at least a third numbering system will need to be included in each aggregator or registry hub. And, there will likely be at least one identifier for the image recognition "fingerprint". Therefore, all identifiers will ultimately be part of hubs with other identifiers.

2. Image Recognition

a. Overview – Image Recognition capabilities, once the secret realm of military intelligence, are rapidly becoming commonplace. At least a dozen companies provide or have developed image recognition for stock photo agencies. Google Images has added a form of image recognition for common use with its image search engine. More significant than the capability is how Image Recognition is applied in practical terms. Image recognition (which is more accurately described as pattern recognition) is most effective when the process is optimized for a particular business model. For example, is the primary function to find owners from many images, or to find infringers from many copies of one image? The scalability and effectiveness of each use of image recognition depends on the purpose of its intended use:

    i. Scalability Of Finding Image Copies – To identify copies of images from an original, which is used in processes designed to find

infringing uses online, all images in consideration as being a copy must first be "fingerprinted" and stored. Therefore, the total reach is limited to the quantity of images that have already been fingerprinted. Two of the largest social media photo sites upload over one billion images each month. Worldwide, billions of new images are uploaded monthly to the Internet, making it impossible to fingerprint a majority of images used online. Use of image recognition to find infringing copies will be effective only to the extent that a centralized process can spider and store images and will never include a majority of images online because the rapid growth of new images will always exceed the capacity to find and fingerprint that content. Many web sites and infringers have no incentive to facilitate finding image copies and could proactively create software defenses to inhibit fingerprinting.

ii. Scalability Of Finding Image Owners – To identify the owner of an image from any copy of that image, every copy in the world can be used to identify the owner, provided ownership information has be registered in a registry and associated with a fingerprint of the image in question. The fingerprinting process can be initiated "on the fly" from the copy that is unidentified to initiate the process. This process is, therefore, retroactive in that it applies to every image in existence by default. Scalability depends on the effectiveness of the centralized system to enable and entice rights holders and other sources of ownership information to include their ownership claims in the system, such as in a registry. Rights holders and information aggregators can be better incentivized to register their content than can end-users.

b. Recommendation – Provided images are identified in registries and other aggregated resources with each digital fingerprint associated with ownership and contact information, the ability to use image recognition to identify that owner from any un-credited or unidentified copy is very scalable and viable. I recommend image recognition be used for the purpose of finding rights holders from copies of their creative works. (Conversely, it is not scalable or viable to find copies of images online in significant quantities. The sole exception might be Google because of the massive scale of its existing technology.)

3. Copyright Notice

a. Overview – For decades, copyright laws have not required formal or governmental registration or affixing copyright notice adjacent to or on the images in order to have a valid copyright. Because of this, most

images online do not display or have copyright ownership information, which makes almost all images online susceptible to being mistaken as "orphaned works". In the future, it is important that this trend be reversed; that most images have a copyright notice; and that any proposed "orphan works" legislation must exclude images that are rightfully owned, but that do not have a copyright notice or other identification of the rights holder in or with the image. Currently hundreds of billions of images that are owned by individuals and companies could be subjected to inclusion in "orphaned works" because their ownership is not directly associated with each image.

b. Methods – There are five methods for associating copyright notice (and by inference, the identity of the creator/author of the image)

    i. Affixing Copyright Notice – As was commonly required until the 1970's, rights holders, publishers and other users can affix notice of copyright adjacent to each image.

        1. Advantages
            a. Any user can easily display a copyright notice when "publishing" an image
            b. The copyright symbol followed by the year and name of the rights holder is almost universally understood as a copyright notice

        2. Disadvantages
            a. For Internet use, displaying copyright notice is controlled by the end user who places the image on a web page … a user who may not be the rights holder or authorized, and who may be an infringer with no incentive to display proper copyright notice
            b. Display of copyright notice is infrequent for existing works, especially works published on the Internet, because it was not required for decades
            c. Displayed copyright notices are not persistent, and do not "travel" with the image when the image is copied from the original location

    ii. Metadata – Originating with press images, such as those used by newspapers, metadata (descriptions of image authorship, ownership, content, categorizations and other relevant information about the image) is used by some professional companies and individuals.

1. Advantages
    a. Several publicly funded efforts and those of trade associations are helping to extend awareness of the potential effectiveness of embedding metadata in image files
    b. Use of metadata is firmly entrenched in the newspaper industry and related fields
    c. Metadata can be embedded and read by most major photo software (to the degree that each version is compatible with other versions)
    d. Metadata can be added to an image with minimal training of the user
    e. Metadata is machine readable, enabling its use in automated processes

2. Disadvantages
    a. Various software operating systems, hardware platforms, photo manipulation software, and commonly used functionality may remove metadata from the image without the knowledge of the user
    b. Metadata can be easily removed by users without the authorization of the rights holder
    c. Naming conventions and subsequent mapping of data to database fields are different in various versions of software that recognize or embed metadata, creating conflicts in usability across some software that reads and displays metadata
    d. Metadata is language dependent and not easily translated from its original language once embedded in an image
    e. Metadata adds to the file size of the image, which slows the speed at which the image can display on a page and uses more bandwidth (a problem for small or thumbnail images since the size of the metadata is larger in proportion to the size of the image displayed)

iii. Visible In Image – Some creators and rights holders chose to display the copyright notice in the image itself for all to see

1. Advantages
    a. A visible copyright notice is easy to see and understand

b. A visible copyright notice is relatively persistent, and will "travel" with the image when the image is copied from the original location (unless the image is cropped to remove the notice, which requires special software and is a violation of DMCA)

2. Disadvantages
    a. Special software and skills are required to place a visible copyright notice in an image
    b. A visible copyright notice is not machine readable, and cannot be used in automated processes
    c. A visible copyright notice can often be removed by cropping the image
    d. A visible copyright notice is language dependent and cannot be translated from the original language that is part of the image
    e. A visible copyright notice is aesthetically displeasing

iv. Hidden Pixels – Various methods exist for hiding or disguising unique identifiers inside the pixels of an image that has been digitized, whether displayed in print or digital form.

1. Advantages
    a. Hidden pixels do not perceptively alter the aesthetics of the image
    b. Hidden pixels are currently the most persistent form of connecting information to an image file and will "travel" with the image when the image is copied from the original location (noting that removal is possible, but difficult)
    c. Hidden pixels are machine readable, and can be used in automated processes
    d. Hidden pixels can represent a unique identifier that can be linked to a registry with full information about the image and its ownership
    e. Some common photo manipulation software already enables use of hidden pixel methods

2. Disadvantages
    a. Because they are "invisible" to the user, hidden pixels do signal to the user that the image is copyrighted or protected

b. Special software and skills are required to embed or read hidden pixels in an image
c. Hidden pixel methods are proprietary and are generally owned by Digimarc Corporation or subsidiaries, which have over 700 patents that are related to hidden pixel methods
d. Accessing supplemental information from hidden pixels must pass through a system that is owned or authorized by the owner of that method of hidden pixels
e. Continuity and ownership of hidden pixel processes is dependant on continued operation of the company and could be acquired by other companies with conflicting interests

v. Veripixel – Veripixel displays a few visible colored pixels in a consistent location in each image, such that users can become aware that seeing these pixels is tantamount to an announcement of copyright. These pixels represent in colors the unique identifier that is the check sum of the digital file. Veripixel only functions with digital files that are based on visible pixels, such as images and other visual content. This "tagging" of images can be done with an automated process, individually or in bulk.

1. Advantages
    a. Any user can easily display a Veripixel copyright notice when "publishing" an image
    b. Veripixel tagging can be added to an image with minimal training of the user
    c. Veripixel is machine readable, enabling its use in automated processes
    d. Every image can be visually tagged with a unique identifier that is derived from the digital file itself
    e. Veripixel tags can be added at the moment of creation by cameras, mobile phones and other image capture devices
    f. A visible copyright notice is easy to see and understand
    g. A visible copyright notice is relatively persistent, and will "travel" with the image when the image is copied from the original location (unless the image is cropped to remove the notice, which requires special software and is a violation of DMCA)

h. Veripixel does not significantly alter the aesthetics of the image
i. Veripixel represents the file's unique identifier that can be linked to a registry with full information about the image and its ownership
j. Veripixel is language neutral and can be translated in links to data from the image

2. Disadvantages
    a. As a new method, broad educational efforts are needed to inform users how to use Veripixel
    b. Though practical for new works, existing works would need application of Veripixel
    c. Software and hardware manufacturers will need to adopt Veripixel to maximize the user base
    d. Veripixel is a proprietary process

c. Robustness – All forms of copyright notice can be removed, though some forms are more robust and survivable than others. International and national laws, such as the Digital Millennium Copyright Act, make it a violation to remove copyright notices

d. Recommendation – I recommend that all forms of copyright notice be used to the maximum extent possible. They are not mutually exclusive. Effective copyright notice becomes paramount should "orphan works" legislation become law. Of the methods of copyright notice available, Veripixel has the most benefits for digital files.

4. Rights Holder Identification

a. Overview – Assuming that rights ownership information is not directly part of or adjacent to the image file, then the critical component necessary is a registry of registered owners of images. A process must also exist to enable search of the database of rights holder information in a way that identifies the image for which ownership information is needed. Technology now enables this to be done using a check sum verification that matches exact copies of files and with image recognition, which compares similarities of the content of digital files. Ownership information must then be conveyed back to the user when found.

b. Methods - Database queries can be made based on a file name or title or description of the image, but these methods are unreliable with few results. In practical terms, there are two methods to determine

ownership information from images of unknown ownership that rely on image recognition:

i. Symbol Identification can be used in which a visual symbol (perhaps an "i" for information, for example) can be displayed

    1. Advantages
        a. None

    2. Disadvantages
        a. By displaying a symbol for images that have known owners, there must be a database query for every image on each page, which consumes bandwidth and slows the display of images, which can be noticeable if the page is of search results with many thumbnail images
        b. This method requires users to download a browser plug-in to enable the function
        c. Symbol identification requires user education to understand proper use of the process
        d. Users will see on a page which images do not have ownership information and may use that lack of ownership as a selection criteria
        e. Confusion may occur with other information services that also employ the letter "i" as an icon

ii. User-initiated or automated links to a centralized registry can display appropriate ownership information in various forms

    1. Advantages
        a. Bandwidth and speed are affected only when a user is interested in this information
        b. No special software or browser plug-in is required
        c. Users are already familiar with browser bookmarks or can be directed with screen prompts, reducing education requirements for use
        d. Users will not be encouraged to chose images that do not have known ownership in the database, instead choosing the most appropriate image for the user's needs, then checking for ownership
        e. The process can be fully automated for use with search engines and business sites that require frequent use of the function

2. Disadvantages
    a. None

5. Registration Process

a. Registries Overview – Essential to any process for finding the rights holders of un-credited images will be the use of registries that store information about the rights holders. Though technologies often accomplish similar tasks, it must be noted that there are substantial differences between the business models, functionality and benefits of registries. Because not all registries are created equally, caution and testing are suggested before committing to a service. As an example, one must compare the two better known registries as of this writing:

    i. One registry is free while the other charges a percentage of any sales that results from ownership inquiries

    ii. One registry does not require any upload or sending of image files while the other needs to receive hard drives of images

    iii. One registry has various automated processes to register images while the other does not

    iv. One registry has an API that enables fully automated linking to check image ownership while the other requires users to download and install a browser plug-in

    v. One registry checks image ownership as needed while the other uses bandwidth and slows image display to query its database for every image on the page, then displays a symbol to indicate that an owner was found (though no need has yet been determined).

6. Access Limitation

a. Overview – Digital Rights Management ("DRM") methods are designed to physically restrict access to content. Forced compliance is the rule. These methods use proprietary methods, sometimes involving secure "wrappers" that contain the content that is to be viewed or not viewed.

    1. Advantages
        a. DRM methods can effectively block most unauthorized use of content

    2. Disadvantages

a. DRM methods usually require the installation and use of proprietary software by the user to enable limitation of access
b. Total control is in the hands of the rights holder or content distributor

7. Recommendations Concerning Legislation

a. Effect Of Legislation – The primary effect of "orphan works" legislation will be to redistribute the income and accumulated value of content from one entity to another. Therefore, a careful consideration of social and business ramifications is recommended prior to enacting orphan works legislation.

b. Global Solution – Citizens endeavor in a global economy. The Internet is both a global method of consuming content and a global method of delivering content. "Orphan works" and copyright infringement are global issues that transcend any territorial boundary. International treaties, such as BERNE/TRIPS can be affected by territorial decisions, whether judicial or legislative. Therefore, a comprehensive, global solution is recommended for issues of "orphan works" and copyright infringement.

c. Technology Development – All the technology necessary to address issues of "orphan works" and copyright infringement already exists. Future development will refine these technologies and add competing variations to the marketplace. It is recommended that legislation should encourage and foster technology solutions.

d. Business Models – Equally as important as the technology solutions are the business models that apply the solutions to the marketplace. These business models will strongly influence or ultimately determine the user acceptance of the solution, the monetization and distribution of related revenues, and the magnitude and effectiveness of the social benefits of the solution. It is recommended that legislation should encourage and foster business models that fairly serve and benefit the primary stakeholders in issues of "orphan works" and copyright infringement, which include the individuals, companies and manufacturers that create, market, license, distribute and consume content, such as images. These stakeholders include individual creators, stock photo agencies, publications, search engines, Internet Service Providers, hardware device manufacturers and many other entities.

8. Summary

Registries will need to maximize rights holder information. To do so, registries will need to access as many sources as possible and share data between competing registries. Standardization of information should be encouraged from not-for-profit, governmental and educational databases and aggregators. Market conditions will likely solve sharing of data between commercial registries because dominant registries will pay to access data of minor registries.

In the interest of full disclosure, note that commercial businesses that I have co-founded have either invented or are actively marketing many, if not most, of the methods and technology components mentioned herein.

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Randy Taylor has created or managed or works with companies that have interests in the photo industry, including in some of the methods or processes suggested in this report.

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Summary Of Main Recommendations

Fair Use – This exclusion should not be allowed if money is made from the display use or performance of the creative work. No ads on the page. No ecommerce links. No calls for donations via text messages. No solicitations of any kind that require a payment or donation should be allowed for “fair use”.

Dated Orphan Works – Draft Orphan Works legislation so that it only applies to content that was created in its original version more than 20 years earlier.

Use ACTA as starting point for legislative solutions – The Berne Convention and TRIPS contain scope and conditions relating to copyright laws and use of copyrighted materials that are, at times, mandatory and binding with specific exceptions and limitations. It would seem appropriate that clarification, "ceiling" limits and "floor" limits for the application of copyright law and use of copyrighted materials would be most efficiently satisfied by such global treaties that are then adopted by national legislation.

Minimum Statutory Damages - In cases where the ISP is the owner of the content, and refuses to adhere to DMCA or international equivalent by refusing to remove content when a properly executed DMCA Take Down order is issued, there should be a clearly defined statutory damage with a timed element (i.e., $X per day per infringing copy). Most often, these are very big corporations with virtually unlimited legal resources. For the individual creator, rights holder or small business to confront such resistance is not economically feasible, which puts significant power in the hands of the corporate infringer to ignore copyright law. Such damages should be enforceable in international courts. And, they would reduce the likelihood and damages of international infringement if content can be removed upon request.
It would make it easier to address the issue between borders where a rights holder has one nationality and the infringer another. By setting minimums on a global scale, this permits national laws to enact locally appropriate amounts to the level of the local economy and potentially ceilings if desirable per copy of the infringement.

Expand acceptable copyright notice formats – There is clear need for new, machine readable forms of copyright notice, given pending orphan works legislation. It is recommended that the U.S. Copyright Office maintain a best practices guide of what would constitute a copyright notice, and list acceptable practices and methods that meet these guidelines.

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