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DIGITAL IMAGE REPRODUCTION, DISTRIBUTION AND PROTECTION: LEGAL REMEDIES AND INDUSTRYWIDE ALTERNATIVES

Jonathan A. Franklin†

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I. INTRODUCTION

In one of the first major cases of digital photographic piracy, a stock photo agency, FPG International, sued a newspaper, Newsday, for 1.4 million dollars.[1] FPG alleged that Newsday scanned two small images from FPG's image catalog and published a work that incorporated the two FPG images without paying the stock agency or photographers for their use.[2]

Until the recent development of scanning and digital image manipulation technologies, a newspaper could not have created a high-quality publishable work from the thumbnail catalog images. Due to the arrival of the digital revolution, photographs and other two-dimensional images are now easily duplicable without the permission of the artist. This occurs anytime a computer user scans a protected image and again when the user copys it to another disc.[3] There is no incremental cost to copying images from one computer to another. Even if the duplication occurs over a cable or phone line, it is virtually free (except for the regular telephone toll charges). Given the ease of duplication and distribution under the current technologies, a creator has no incentive to produce works because they may be compensated only once. The licensee can subsequently distribute free digital copies—eliminating the market for future authorized licenses. Thus, the fundamental challenges for electronic distribution are to ensure that the creator retains financial incentives to continue to produce works and to properly allocate the costs of production and distribution fairly among the various users.

The ease of duplicating electronic works creates the need for a more accessible system of licensing and distribution to prevent unauthorized use of protected subject matter. Although existing legal remedies may provide relief in certain cases, taking legal action is expensive. After discussing the available legal remedies, this article will explore how best to permit public use of those works without injuring the initial creator.

In the coming age of electronic magazines and multimedia projects, end users will become more interested in licensing digitized images for electronic, rather than print, projects; and licensors will have to contend with a medium that has a long lifetime and a mutable character. Thus, it is important to consider the most efficient way to

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1. James A. Martin, *Computers Make It Easy to Steal*, S.F. EXAMINER, Apr. 17, 1994, at C1.

2. George Garneau, *Lawsuit Alleges "Photographic Piracy,"* EDITOR & PUBLISHER, Feb. 26, 1994, at 8.

3. Martin, *supra* note 1, at C1.

deliver digital information to end users and the legal and practical implications of that delivery system. In order to make the widespread delivery of digital information profitable, the system will require the ability to convey sound, still images, and motion pictures over telephone or cable wiring. Almost any type of information could serve as the model for an early electronic information distribution service. However, stock photography is particularly well-suited to electronic delivery for four reasons: (1) stock images are differentiable, (2) protected by copyright, (3) not valued for rarity or timeliness, and (4) compete solely on the basis of the image.

Currently, several hundred stock photography agencies license thirty million images for various commercial uses.[4] Within the stock photography industry, a photographer who has taken a picture contracts with a stock agency to license the image to end users. The agency publicizes the photograph by publishing it in a printed catalog of thumbnail images, distributing large copies to interested users, and performing licensing negotiations in exchange for fifty percent of the royalties.[5] Stock photographs are often simply cropped, pasted up, and reprinted without significantly altering the original image.[6] Although stock images are clearly differentiable, they are also somewhat fungible because out of several similar images the licensee selects and uses only one.

There are extensive transaction costs in negotiating inexpensive licenses between the agent and the end user on a per image basis. In most cases, stock photographs have standard licenses where the fee depends on the quality and rarity of the image and circulation of the document in which it is used.[7] In the future, stock images will be delivered electronically from a centralized location to permit instant access to publication quality images.[8] Due to this basic change in the way business is done, stock photography agencies provide an excellent model for studying the next generation of the information distri-

4. "According to a report on stock photography by the Westlight Agency in Los Angeles, the stock photo market consists of approximately 500 picture agencies worldwide, representing about 250 million images from 30,000 photographers, with annual revenues estimated at $500 million." Donald Carli, *Digitizing Stock Photographs*, GRAPHIC ARTS MONTHLY, Aug. 1991, at 115.

5. *Id.*

6. For an excellent discussion of digitally manipulated images and the law, *see* John Gastineau, *Bent Fish: Issues of Ownership and Infringement in Digitally Processed Images*, 67 IND. L.J. 95 (1991).

7. John Durniak, *Camera*, N.Y. TIMES, Feb. 2, 1992 section 1, part 2, page 56.

8. Lambeth Hochwald, *Copyright: Will It Do You Wrong?*, FOLIO: THE MAGAZINE OF MAGAZINE MANAGEMENT, Apr. 15, 1994, at 46.

bution services and the problems associated with such a technological shift.

Because the uses for an image change over time, it is important to determine what would be the most efficient method of distributing and collecting images in the electronic age.[9] After assessing the available legal remedies and two centralized royalty collecting alternatives, this article proposes a system based on the collecting society model.[10] The incorporation of pre-existing industry custom into a new centralized electronic distribution system would minimize transaction costs while better serving end users. Moreover, the high volume and relatively low per-image licensing fees of the stock industry make the collecting society model appropriate for digital image distribution and collection.[11] Such a private computerized licensing scheme would also benefit creators, distributors, and end users by reducing transaction costs while permitting variable pricing and electronic delivery. A centralized electronic distribution system also raises a variety of novel issues, including optimal pricing methods, distribution controls, and the prevention of unauthorized uses of the protected images.[12] Solving these problems will help create a blueprint for an electronic delivery service that will someday distribute images, music, and motion pictures to private homes on demand.[13]

Section II of this article describes the existing legal claims and remedies available to creators and distributors of stock photos who are confronted with the unauthorized use of their images. Section III discusses the alternatives to individual licensing and enforcement actions. After concluding that a centralized computer distribution and accounting system would best serve the creators and distributors, section IV suggests how existing industry standards can help tailor the implementation of the collecting society model. Section V briefly discusses the international implications of such a distribution scheme, focussing on

9. Paul Goldstein, Stella W. Lillick, and Ira S. Lillick, *Copyright in the Information Age*, STAN. LAWYER, Fall 1991, at 7.

10. A collecting society is an non-profit agency that licenses the use of property, collects royalties from the licensees, and distributes the royalties, to the creators and owners of the licensed property. Some collecting societies also engage in active enforcement of the licenses, while others leave the enforcement up to the property owners, resulting in a lower overhead rate.

11. *See* Jeff Ubois, *Digital Artists Face Copyright Issues*, MACWEEK, Jan. 27, 1992, at 2 (describing a meeting of digital artists at which "[c]ollective societies, modeled on those in the music industry, were proposed by a number of participants").

12. This paper will not address the capital investment necessary to create such a service or how the service's overhead costs should be raised. *See* Stanley M. Besen et al; *An Economic Analysis of Copyright Collectives*, 78 VA. L. REV. 383, 383 (1992).

13. Goldstein et al., *supra* note 9, at 7.

the problems of variable copyright terms and foreign collecting societies.

II. LEGAL ISSUES

Both copyright law and contract law provide remedies for the illegal electronic distribution of images. These laws are rooted in the belief that the image is the property of the creator and, based on his property right, the creator has the initial right to control and license the image. In some cases, additional legal claims, such as privacy and unfair competition claims, may be available to prevent the unauthorized use of the image.

A. *Copyright Claims*

Copyright law protects any image that contains a very low requisite level of originality.[14] Copyright law protection grants the copyright holder certain rights, including the rights of reproduction, preparation of derivative works, public distribution, performance, and display.[15] Normally, the photograph's copyright owner retains the copyright and sells the physical image or licenses its use for a specific term and context.[16]

If a copyright holder feels that his copyrighted image has been infringed by an unauthorized duplication of the original, a copyright infringement claim likely exists.[17] In such a case, the copyright holder must demonstrate that the alleged infringer either copied his image or created a substantially similar image after having access to the original work.[18] A plaintiff can also bring a claim of contributory infringement against "[o]ne who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another."[19] For example, Playboy recently sued a computer bulletin board for scanning and selling digitized versions of protected images

14. Feist Publications v. Rural Telephone, 499 U.S. 340, 359 (1991).

15. 17 U.S.C. § 106 (1-5) (1988).

16. Wolff v. Institute of Electrical and Electronics Engineers, 768 F. Supp. 66, 67 (S.D.N.Y. 1991).

17. Tony Spina, *Law is Clear on Copying Photographs*, CHI. TRIB., Oct. 26, 1990, at 99.

18. Rogers v. Koons, 960 F.2d 301, 307 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 365 (1992). For a discussion of the substantial similarity test and digitally altered images, see Benjamin R. Seecof, *Scanning Into the Future of Copyrightable Images: Computer-Based Image Processing Possess a Present Threat*, 5 HIGH TECH. L.J. 371, 392-97 (1990).

19. Gershwin Publishing Corp. v. Columbia Artists Management, 443 F.2d 1159, 1162 (2d Cir. 1971). In a more recent case, Universal claimed that Sony was a contributory infringer for distributing its Betamax videocassette recorders, thereby aiding end users in copyright infringement. Universal did not prevail because the Supreme Court found that the recording of television programs was fair use. Sony Corp. v. Universal City Studios, 464 U.S. 417, 442 (1984).

without a license.[20] Although the defendant settled after losing a partial summary judgment,[21] Playboy could have claimed at trial that the computer bulletin board operator was liable for both direct and contributory infringement.

When a valid copyright infringement claim exists, the defendant may still avoid liability by invoking an available defense. One of the primary copyright defenses is fair use. To invoke the fair use defense, a defendant must meet a four factor test.[22] The first factor, the character of the use, considers whether the work was used for a commercial purpose.[23] The second factor, the nature of the underlying work, addresses whether the work was purely artistic or partially functional; works that are partially functional may not receive the highest level of protection.[24] The third factor, the amount of the original incorporated into the infringing work, addresses the portion of the work that was appropriated relative to the entirety of the original, including both the proportion of the work that was taken and the importance of that portion.[25] The fourth factor, the effect on the market for the underlying work, weighs whether the duplicate's use injured the market for the original.[26] In traditional fair use cases, more weight is placed on the first and fourth factors. More recently, however, the second factor—functionality—has been given increased weight in the context of software litigation.[27] In cases of image duplication, the third factor is also likely to be important because a user often will not take an entire image and thus may have a stronger fair use claim.[28] It is important to remember that because the fair use test is a case-by-case multi-factor balancing test, the defendant's failure to surmount one or two of the factors does not necessarily mean that the defense as a whole will be unsuccessful.[29]

Under United States copyright law, the first sale doctrine[30] limits the copyright holder's right to distribute[31] an image by extinguishing the ability to control the resale of the protected work after the initial

20. Playboy Enterprises v. Frena, 839 F. Supp 1552 (M.D. Fla. 1993).
21. Susan Orenstein, *Look Who's Talking*, LEGAL TIMES, Sept. 12, 1994, at 4.
22. 17 U.S.C. § 107 (1988).
23. 17 U.S.C. § 107(1).
24. 17 U.S.C. § 107(2).
25. 17 U.S.C. § 107(3).
26. 17 U.S.C. § 107(4).
27. Sega v. Accolade, 977 F.2d. 1510, *amended by* 1993 U.S. App. LEXIS 78 (9th Cir. 1993).
28. Rogers v. Koons, 960 F.2d 301, 310-11 (2d Cir. 1992), *cert. denied*, 113 U.S. 365 (1992).
29. Campbell v. Acuff-Rose, 114 S. Ct. 1164, 1180 (1994).
30. 17 U.S.C. § 109(a).
31. 17 U.S.C. § 106(3).

sale. Although the creator retains the copyright, he or she does not retain control of the product embodying the copyright.[32] The purchaser can resell or donate the purchased image as long as it does not interfere with the original creator's copyright. The first sale doctrine permits the owner of a disc with a digitized image on it to sell the disc to a third party but not to duplicate the image. There are exceptions to the first sale doctrine, including sound recordings and computer programs,[33] but it is unlikely that digitized images meet these exemptions.

If an individual infringes a copyright, the infringer may be liable for injunctive relief, actual damages, and lost profits. However, the infringer may be able to limit damages to a fair licensing fee[34] if she can demonstrate that she did not have notice of that the work was protected. Prior to 1988, the United States required works to have a copyright notice in order to be copyrighted; if there was no copyright notice, the work was considered to be in the public domain. The innocent infringement defense became more important in 1988, when the United States became a signatory to the Berne Convention. As part of becoming a signatory, the United States repealed the notice requirement for protected works, but still required that there be notice if the copyright holder sought to collect statutory damages. Since the Berne amendments, more protected works are distributed without copyright notice such that the user cannot know whether the works are protected or in the public domain. In these cases, the innocent infringement defense will limit damages to a fair licensing fee. In the context of digital image duplication, the Berne amendments may have significant implications. Currently, many individuals who use scanners to scan an image from paper onto their computers do not realize that selling or distributing scanned images is illegal.[35] Because the end user—the individual using the scanned image—is without notice of the copyright, the copyright holder's sole financial benefit from expensive litigation against the end user would be the fair licensing fee. The image owner would not be able to collect punitive damages or attorney fees.[36]

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32. Mirage Editions v. Albuquerque Art, 856 F.2d 1341 (1989), *cert denied*, 489 U.S. 1018 (1989).

33. 17 U.S.C. § 109(b)(1). Based on 17 U.S.C. § 101, a digitized image does not fall within the definition of a computer program.

34. 17 U.S.C. § 405(b).

35. John L. Roberts, *So, You've Got a New Scanner. Psst. . . Ever Heard of Copyright?*, ADVANCED IMAGING, Apr. 1994, at 94.

36. In Design v. K-Mart Apparel Corp., 13 F. 3d 559, 568 (2nd Cir. 1994).

B. *Contract Issues*

In the area of stock photography, a copyright holder is usually a single party[37]—either the creator of the photograph or the stock agency. However, when a work is distributed, at least two contracts are signed: one contract between the creator and the distributor and a second contract between the distributor and the end user. Also, there may be additional contracts, such as one between the photographer and the subject or between the stock agency and digital rights agent. Because contract disputes based on copyright licenses are considered issues of state law, the breach of an enforceable license between the parties will provide a state breach of contract claim. Even when the contract is based on federal copyright law, the issue is still considered a state issue that fails to satisfy the standards for federal jurisdiction.[38]

1. Traditional End User Licensing

Traditional licensing of images varies greatly depending on the specific industry. For example, stock photography licenses include the right to use an image only for a single publication, and not in perpetuity.[39] In contrast, narrowly licensed images of artwork, such as images for postcards or posters, have longer license terms.[40] Unlike artistic photographs, which are valued for their rarity,[41] stock photographs are quite similar to reproductions of art objects because their

37. The copyright holder is a single party unless there is joint authorship, meaning "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." 17 U.S.C. § 101. If a work is considered a joint work, either author can license the work without consent from the other authors. Community for Creative Non-Violence v. Reid, 490 U.S. 730, 753 (1989); Strauss v. Hearst, 8 U.S.P.Q.2d 1832, 1840 (S.D.N.Y. 1988).

38. Schoenberg v. Shapolsky Publishers, 971 F.2d 926 (2d Cir. 1992).

39. Durniak, *supra* note 7, at 56

40. Steven Vincent, *High Art, High Tech*, ART & AUCTION, Feb. 1993, at 83.

41. This article does not address artistic photographs because collectors value them on the basis of rarity and hence a portion of their value would be lost by digital duplication and distribution.

Even within the realm of protected subject matter, works that gain value from rarity are not likely to be included in such a distribution system. It is important to distinguish between art created for art's sake in a limited edition and images created primarily for financial gain through licensing. While works of art garner a great deal of press coverage and carry an aura of prestige, the worlds of stock photography, graphic artists, and product designers are more likely to be distributed on electronic mass distribution systems. There are vital issues of artist's moral rights and resale royalties associated with electronic mass distribution. However this paper will focus on the property aspects of works created for mass distribution. For an art-oriented analysis, *see* Jennifer T. Olsson, *Rights in Fine Art Photography: Through a Lens Darkly*, 70 TEX. L. REV. 1489 (1992).

value is unrelated to the value or rarity of the underlying object.[42] Along with the term of use, licenses also include provisions that define whether the licensee has exclusive or nonexclusive use of the image for the license's term.[43]

Exclusivity is often a problem in image licensing because the use of identical images in similar contexts may cause viewer confusion.[44] Terms such as exclusivity, nature of use, and term of use are all material terms in an image license.[45] The cost of the license fee depends on the circulation of the document that includes the image.[46]

2. Licensing In the Electronic Age

Unlike a print image which has a defined circulation and distribution date, there is no industry custom or parallel pre-existing technology that defines the scope of electronic reproduction rights. Users can electronically manipulate distributed images in new ways as novel technologies are created to take advantages of public demand.[47] Multimedia has been a buzzword for quite a while, but it is only with new technologies that permit vast amounts of storage and high speed access that the plans of the past are finally becoming feasible.[48] In classical negotiations, the licensor knows what he or she is buying and can tailor the license to conform to the intended use. In negotiating for long-term electronic reproduction rights, such certainty is currently unavailable.[49]

Individualized negotiations can become very costly when there are a large number of identical low value transactions. Because negotiating licensing agreements with individual users of mass products like software is impractical, some companies have turned to shrink-wrap licenses.[50] Shrink-wrap licenses are created by placing a seal on

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42. Andrew Decker, *Ready for New Applications, the Digital Technology Industry Focuses on Museums*, ANTIQUES MONTHLY, Jan. 1993, at 37.

43. For an example of the difference, *see* Jamie Beckett, *Photo Gets Double Exposure in Ads; State Farm Says It Owns All Rights to Picture Used by B of A*, S.F. CHRON., Sept. 26, 1991, at C1 (highlighting the difficulty of coordinating limited distribution and non-exclusive licenses).

44. *Id.*

45. Matthew Leeds, *Clip Media, Copyright, and Consumers*, MICROTIMES, Feb. 8, 1993, at 288.

46. Durniak, *supra* note 7, at 56.

47. Susan Orentein, *Digital Multimedia Madness*, LEGAL TIMES, Sept. 13, 1993, at S29.

48. Abigail Foerstner, *Technical Revolution Creating Desktop "Darkroom,"* CHI. TRIB., May 8, 1992, at 81.

49. O. Casey Corr, *The Image Industry — Powerful Multimedia Computers Create Growing Market, Growing Concern Among Artists Over Electronic Images*, SEATTLE TIMES, May 26, 1991, at E1.

50. *See generally* Page M. Kaufman, *The Enforceability of State "Shrinkwrap" License Statutes in light of Vault Corp v. Quaid Software*, 74 CORNELL L.R. 222 (1988).

the packet containing the diskettes. The seal states that by breaking the seal and using the program, the user accepts the terms of the license. It is unclear whether these are valid and enforceable agreements, or unenforceable contracts of adhesion.[51]

The rise of new digital technologies has led to the development of new licensing issues. These issues include: attempts to limit the printing or downloading of images, conflicts with pre-existing print licenses, and even the fundamental question of whether new technologies fit within the existing electronic rights license.[52]

a. Limitations on Printing Images

It may be necessary to limit the printing of images from electronic sources for several reasons. Particularly, it may be necessary to limit printing due to concerns that print copies could be distributed in place of the electronic version. For example, the CD-ROM version of Grolier's Encyclopedia does not permit printing as part of the production license. A user must therefore refer to the electronic encyclopedia every time he needs to access the stored images.[53]

One alternative to licenses that prevent printing is to place a copyright notice on any printout containing the word "copyright" or a C in a circle, the year, and the copyright holder's name.[54] This solution would be unsatisfactory if subsequent photocopies or electronic duplicates intentionally or innocently exclude the notice, thereby permitting subsequent copiers to claim that they were innocent infringers. Art museums and professional photographers are also concerned that printouts might be of sufficient quality to mislead viewers as to the origin of the image and thereby injure the market for the original.[55]

b. Conflicts Between Electronic and Print Rights

Today, many parties have print contracts for books, postcards, or other tangible image reproductions. Licensing these images for electronic publication will be quite complex if the two licenses threaten to overlap. Overlap can occur if the initial print license was drafted prior to the existence of electronic rights.[56] If the electronic rights are too

51. Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69 (N.J. 1960).

52. Both the stock photo and art photo licensee are negotiating for rights of an undetermined value and the licensor is concerned that there is no discrete circulation or limited dates of distribution, thereby limiting interest from subsequent licensees.

53. Thomas F. Villeneuve & Daniel M. Kaufman, *Multimedia Success Will Require Inter-Industry Understanding*, THE COMPUTER LAWYER, Vol. 10, No. 11, Nov. 1993, at 29.

54. 17 U.S.C. § 401.

55. Vincent, *supra* note 40, at 82.

56. Villeneuve & Kaufman, *supra* note 53, at 29.

broad, they will depress the value of the print licenses that are currently the mainstay of stock photo and museum licensing businesses. Unlike information providers, such as news services, for whom the value of images arises out of putting material online as soon as it is released, image providers, such as stock agencies, will probably profit most from licensing and re-licensing desirable images. Therefore, the licensor of electronic images will generally have electronic rights to images that have been licensed for print use in the past. Concurrently, frequent prior use of the image in one medium may affect the desirability or value of that image when used in another medium.

c. *Compensation for New Technologies*

The longer the term and the more flexible the uses permitted by a license, the more the licensee can take advantage of new technologies to gain more than what the licensor thought was being licensed. This problem is particularly troublesome when the licensee has an exclusive license because the licensor cannot take advantage of the new uses herself.

This issue is likely to occur as new technologies conflict with older ones. Determining the breadth of a grant of all electronic rights is an impossible task, but permissible period of use is likely to be pivotal. It is unlikely that a company would be willing to invest huge amounts in equipment and image scanning if their license precludes them from using or reselling their stored images after a relatively short period of time.

Instead of worrying about the breadth of the license, licensors must attempt to negotiate royalties that will compensate for the unexpected technological advances.[57] For example, the license could include higher royalties for products based on technologies outside an enumerated list of expected uses. It is far more challenging to limit the context and define the use of licensed images than to set the terms and prices for various uses in print and electronic formats.[58]

C. *Other Legal Remedies*

Several other remedies may be available to copyright holders in specific situations. The first of these exists when an image contains

57. Orenstein, *supra* note 47, at S29.

58. Wojnarowicz v. American Family Ass'n, 745 F. Supp. 130, 134 (S.D.N.Y. 1990) (illustrating the moral rights issues when an artist's work is cropped and used in a religious pamphlet as an example of an offensive project sponsored by the National Endowment for the Arts).

identifiable individuals. If the person pictured has not signed a release, he or she might have a claim under state law.[59]

These "rights of publicity" are defined by state statutes and generally apply unless they are preempted by federal copyright law[60] or the First Amendment.[61] The Copyright Act generally preempts state law, but if the publicity claim is based on an uncopyrightable image, such as a voice or a face, then state law is not preempted.[62] Moreover, many state statutes limit the right of publicity to cases in which the image is used in trade or advertising[63] and it is common in the industry for models and other parties to sign releases in exchange for consideration.[64] These releases preclude an invasion of privacy claim for the term of the release.[65]

The second additional legal remedy arises under the Lanham Act[66] when an image is repackaged and sold as the work of another party.[67] The Lanham Act prevents unfair competition in cases where the source of origin is altered.[68] This statute protects works that have not yet gained the secondary meaning required to attain trademark protection.[69] Athough a false statement of origin can create a cause of action, the cause of action exists only against commercial competitors.[70]

Finally, in rare cases the photographer may have a moral rights claim under the Visual Artists Rights Act of 1990.[71] Photography was once the definition of objective truth.[72] More recent technological ad-

59. Cohen v. Herbal Concepts, Inc., 482 N.Y.S.2d 457 (1984) (finding a right even when the plaintiffs' faces were not part of the image because the picture of the plaintiffs' backsides from shoulders to feet view made them identifiable).

60. 17 U.S.C. § 301.

61. Cox Broadcasting v. Cohn, 420 U.S. 469 (1975) (holding that public interest in judicial proceedings could not be curtailed by a state statute baring the publication of a rape victim's name).

62. Sinatra v. Goodyear Tire & Rubber Co., 435 F.2d 711 (9th Cir. 1970), *cert. denied*, 402 U.S. 906 (1971).

63. N.Y. CIV. RTS. LAW §§ 50, 51 (1990).

64. Caesar v. Chemical Bank, 483 N.Y.S.2d 16 (1984), *aff'd* 496 N.Y.S.2d 418 (1985) (holding that oral consent was insufficient and only went to mitigating damages).

65. Welch v. Mr. Christmas Tree, Inc., 454 N.Y.S.2d 971 (1982) (finding a claim survived when image was used two months after release expired).

66. 15 U.S.C. § 1125(a) (1988).

67. Can-Am Engineering Com. v. Henderson Glass, 814 F.2d 253 (2d Cir. 1987) (discussing the use of a competitor's logo leading to an improper designation of origin).

68. Lanathe v. Atlantic Recording Corp., 847 F.2d 1403 (9th Cir. 1988).

69. Two Pesos v. Taco Cabana, 112 S. Ct. 2753, 2759 (1992).

70. Scott E.Thompson, *Consumer Standing Under Section 43(a): More Legislative History, More Confusion*, 79 TRADEMARK REP. 341 (1989). The reach of section 43(a) requires interstate business because it derives its strength from the Commerce Clause.

71. 17 U.S.C. § 106A (Supp. IV 1992).

72. *See* Gastineau, *supra* note 6.

vances such as image scanners, sophisticated image manipulation software, and the ability to send digitized images between computers have altered this "factual" aspect of photography.[73] For example, National Geographic once manipulated the Great Pyramids of Egypt and the Sphinx to fit them within the cover of the magazine and TV Guide once placed Oprah Winfrey's head on Ann-Margaret's body for one of its covers.[74] In the future incidents like these may become more common as the necessary technologies become available to smaller publications and home computer owners.[75] The wide availability of these technologies suggests that the use of raw images may be changing from a static form kept in an album to a dynamic form that is manipulated for a broad range of uses.[76]

Although some artworks are protected from alteration by the Visual Artists Rights Act of 1990, the Act does not apply to stock images because it requires the protected work to be a limited edition and explicitly excludes reproductions of works of art from triggering the rights.[77] These limitations must be included in the contract between the stock agent and the end user.

III. EXISTING STANDARDIZED ROYALTY COLLECTION SYSTEMS

While legal remedies which protect against the illegal digital duplication of images exist, the costs of enforcing these legal remedies are generally far greater than the amount recoverable. This is due to the fact that stock photos are generally licensed for relatively small fees relative to the costs of litigation.[78]

Because of the limitations of legal remedies, photographers must look elsewhere to protect their rights. This can best be achieved through the formation of a royalty collecting society. Such collecting societies were developed to respond to the prohibitively high transaction costs of a system that would otherwise require individual licensees to negotiate with licensors.[79] In the collecting society, the

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73. Lois F. Lunin, *Kodak High-Tech Imaging Center Faces Ethics and Copyright Issues*, INFO. TODAY, Oct. 1992, at 39.

74. James Cox, *Photo Fakery Toughens Governor's Image*, USA TODAY, July 15, 1992, at 5B; Fred Davis, *In Digital Photography, A Picture Can Be Worth A Thousand Lies*, PC WEEK, Mar. 4, 1991, at 126.

75. Abigail Foerstner, *Technical Revolution Creating Desktop "Darkroom,"* CHI. TRIB., May 8, 1992, at 81.

76. *See* Barbara Robertson, *Photo-Retouching Technology: Friend or Foe*, COMPUTER GRAPHICS WORLD, Nov. 1990, at 92.

77. 17 U.S.C. § 106A(c)(3) (Supp. IV 1992).

78. Rick Sammon, *Time, Effort Pay for Stock Photographers*, CHI. TRIB., June 12, 1992, at 68.

79. One could conceivably have a system in which individual performers entered into individual contracts with broadcasters, granting them a license to broadcast their work. Of course,

licensee—the broadcaster of the musical work or copier of a journal article—pays a fixed amount to the society, which in turn distributes the collected funds to the licensors.[80] Collecting societies are non-profit organizations that retain funds sufficient to cover the costs of allocation and redistribution of funds.[81] They provide centralized management and collection of royalties and an over-arching enforcement strategy, thus making it more efficient than systems in which individual stock houses electronically distribute and enforce the electronic licensing agreements only for their limited number of images. In addition, the collecting society could set prices for electronic reproduction rights and keep centralized records while remaining financially accountable to the individual photographers.[82]

This centralized model has been used in the music industry for decades[83] and has more recently been applied to the field of article reproduction. Within the music and articles industries, collecting societies were developed to respond to the prohibitively high transaction costs of a system that would otherwise require individual licensees to negotiate with licensors.

There are several parallels between the stock photography industry and the music and articles industries. In the stock photography industry, like the music and article industries, a large number of licensors and licensees must agree to terms for the use of the works. The vast number of individual licenses required limits the ability of individual licensors to directly negotiate with individual end users.[84]

A. *Licensing Through Collecting Societies*

Two standard methods of fee setting exist: (1) the Copyright Clearance Center variable pricing model,[85] and (2) the music industry model.[86]

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given the tremendous number of broadcasters in this country, one individual is incapable of entering and enforcing such a huge number of contracts.

80. *See generally* Besen et al., *supra* note 12 (discussing the economic basis of collecting societies).

81. STANLEY M. BESEN & SHEILA NATARAJ KIRBY, COMPENSATING CREATORS OF INTELLECTUAL PROPERTY: COLLECTIVES THAT COLLECT 21 (1989).

82. *Id.*

83. Robert A. Gorman, *The Recording Musician and Union Power: A Case Study of the American Federation of Musicians*, 37 SW. L.J. 697, 699 (1983).

84. Besen et al., *supra* note 12, at 383.

85. American Geophysical Union v. Texaco Inc., 802 F. Supp. 1 (S.D.N.Y. 1992) (describing the Copyright Clearance Center's method of licensing the photocopying rights to technical articles to commercial subscribers).

86. Broadcast Music Inc. (BMI) and the American Society of Composers, Authors, and Performers (ASCAP) currently operate under this model because there is a compulsory licensing

The Copyright Clearance Center (CCC) was created at the suggestion of Congress[87] to collect royalties from the duplication of articles from scientific and technical journals.[88] Because the photocopying of technical articles is quite common, the CCC was intended to create a centralized royalty collection and licensing service to compensate authors for royalties lost due to the resulting decline in subscriptions because of the extensive use of photocopying.[89]

Under this system, licensing rates are set by the independent journals and the CCC acts primarily as a collection agency.[90] The CCC offers two distinct options: the Transactional Reporting Service (TRS) and the Annual Authorizing Service (AAS).[91] The TRS—which is intended for the occasional photocopier—requires that the copier report each article copied and the number of copies made.[92] On the basis of that information, the CCC bills the reporting party. In contrast, the AAS—which is intended for the larger corporation—permits unlimited internal-use copying for a flat fee.[93] The existence of a collecting society prevents infringers from claiming that the unauthorized copying was the only available alternative since a rights licensing clearinghouse did not exist.[94] Unlike most other collecting societies, the CCC leaves enforcement to the individual journal publishers.[95]

In contrast to the CCC, the American Society of Composers, Authors, and Performers (ASCAP) and Broadcast Music, Inc. (BMI) charge a flat rate for each song played and distribute the licensing receipts from radio stations, bars, and clubs to the songwriters and music publishers.[96] Although the individual songwriter cannot negotiate the cost or terms of the license, the licensee pays on the basis of how many songs are played. The proceeds are distributed on the basis of a survey of member works played by the licensees. Both the CCC and the ASCAP models require that a portion of the licensing fees be

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scheme for musical works. Once the creator permits one recording of the work, she cannot prevent others from performing the same work. 17 U.S.C. § 115 (1988).

87. S. REP. No. 983, 93d Cong., 2d Sess., at 122-23 (1974).

88. BESEN & KIRBY, *supra* note 81, at 47.

89. *Texaco*, 802 F. Supp. 1.

90. BESEN & KIRBY, *supra* note 81, at 47-48.

91. *Texaco*, 802 F. Supp. at 14.

92. *Id.*

93. *Id.* at 15.

94. David Goldberg & Robert J. Bernstein, *The "Texaco" Decision*, N.Y.J.L., Sept. 30, 1992, at 3.

95. BESEN & KIRBY, *supra* note 81, at 47.

96. Bernard Korman & I. Fred Koenigsberg, *Performing Rights in Music and Performing Rights Societies*, J. COPYRIGHT SOC'Y, at 366 (1986).

used to cover overhead for the society's rent, accounting, legal representation, and other on-going costs.[97]

The CCC model provides a more appropriate collecting society model for stock images. Variable pricing is a more complex scheme to manage,[98] but unlike music where the most popular songs are played the most, the value of an image must be captured at the time of licensing. Although a system of variable pricing would require additional effort to maintain, monitor, and collect the payments of various sizes, this added effort is warranted given that the value of a stock photograph varies greatly depending on the user's plans.[99] It is important to allow photographers the right to assign a value to their image to differentiate between images on the basis of subject and image quality. Furthermore, a photographer with higher creation costs should have the opportunity to recoup the initial outlay. However, unlike the CCC model, the image distribution service should also act to enforce the licenses rather than leaving enforcement to the individual property creators. Without unified enforcement, administrative centralization is not being used to its fullest advantage.

One of the primary concerns with any collecting society is the threat of antitrust litigation. If an electronic stock photography distribution system is created, the society could rely on previous collecting society rulings to avoid the threat of litigation.[100] The CCC model should prevent such antitrust claims in two respects. First, there is no price fixing because the creator can set the price and type of the license. Second, the creator will be able to license the image outside the computerized distribution system, so the creator's agreement with the system is non-exclusive.[101] Furthermore, if more photographers use the system, it will be far easier to justify the scheme based on the need to decrease transaction costs.

B. *Taxation*

Although collecting societies help remunerate creators, they will not remunerate the creators of images that are frequently pirated. In these cases, one can look to a system of taxation based on models developed in other industries. For example, digital audio tape recorders permit a user to duplicate a compact disc or tape without a loss in

97. BESEN & KIRBY, *supra* note 81, at 9.

98. Paul Goldstein, *Commentary on "An Economic Analysis of Copyright Collectives,"* 78 VA. L. REV. 413, 415 (1992).

99. Paul Karon, *Electronic Publishing Faces Traps Over Copyrights*, INFOWORLD, Mar. 9, 1992, at S70.

100. United States v. ASCAP, 331 F.2d 117 (2d Cir. 1964).

101. BMI v. Columbia Broadcasting Sys., 441 U.S. 1 (1979).

quality, thereby raising the concern that after the first copy is sold, other users will duplicate the first copy rather than purchasing another one.[102] The concern generated by this potential for loss of prerecorded music sales led to the passage of the Audio Home Recording Act.[103]

The Audio Home Recording Act responds to the new technology in two ways. First, it prevents the duplication of digital recording of a compact disc.[104] Second, in order to compensate performers, writers, publishers and producers for lost sales, the Act places a tax on digital audio tape recorders and blank digital audio tapes.[105] Two-thirds of the revenues from the collected taxes are distributed to the Sound Recordings Fund,[106] which in turn distributes forty percent of its revenues to the performers and sixty percent of its revenues to the record companies.[107]

Several issues must be considered in evaluating the probable effectiveness of schemes like the Audio Home Recording Act for the electronic duplication of stock photography. In particular, taxation is only fair if the primary use for the blank medium is limited to the duplication of protected material.[108] For example, if certain discs can only be used to store protected images, then the tax would be sensible; but if the discs have alternate uses, such as storing public domain images or word processing files, then taxation would be inappropriate.[109] Unless recordable digital media are used primarily for the duplication of protected works, users who do not duplicate protected works will be continuously and unfairly taxed for their use of blank

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102. Japanese and European manufacturers first considered marketing digital audio tape (DAT) recorders in 1986. U.S. Congress, Office of Technology Assessment, *Copyright & Home Copying: Technology Challenges the Law*, OTA-CIT-422 (Washington, D.C. U.S. Government Printing Office, Oct. 1989) 3. The introduction of DAT and other digital recording media was delayed due to concerns over the potential for unlimited duplication of copyrighted materials. *Id.* at 18.

103. 17 U.S.C. § 1001 (1992). The Audio Home Recording Act was signed into law by President Bush on October 28, 1992.

104. Peter Newcomb, *The Sound of Money*, FORBES, May 11, 1992, at 102.

105. 17 U.S.C. § 1011.

It is likely that blank media will remain less expensive than the prerecorded equivalent. Therefore, those who are indifferent to the effort of taping will continue to record at home rather than purchasing the prerecorded version.

106. *Id.* at § 1014(b). The other 33% of the collected income goes to the Musical Works Fund, which compensates the publishers and composers of the musical works. Bill Holland, *Audio Home Recording Act Passes; Next Step: Dividing the Royalty Pool*, BILLBOARD, Oct. 17, 1992, at 1.

107. 17 U.S.C § 1014(b) (Supp. IV 1992).

108. Jon Pareles, *Grabbing for Royalties in the Digital Age*, N.Y. TIMES, Apr. 12, 1992, at 26.

109. Newcomb, *supra* note 104, at 102.

media.[110] Even with a tax refund system, individuals attempting to obtain refunds could create a greater burden on the centralized agency than the benefit of the tax itself.[111]

Although a taxation scheme has the benefit of lower overhead due to the absence of enforcement costs, there is no discrete object to tax in the context of photography. A tax on scanners would be grossly overbroad and there is no storage medium suited specifically to the storage of unlicensed protected images. If, in the future, specific technologies permit pirates to threaten to eliminate the legitimate market for licensing images, then taxation may be appropriate.

IV. Competitive Pricing for Multiple Uses

Even after selecting an electronic collecting society system, the members must decide how to charge the users to recoup the costs of the system's development. They may choose to charge users either for time online, for the number of images viewed, or at an annual flat rate. For example, the system must decide whether a consumer looking at thumbnail pictures of Paris should be charged the same amount as an advertising executive who duplicates a single publication-quality image and creates a derivative advertisement based on it. Although this hypothetical may seem far-fetched, future technologies will make the appropriation of pre-existing copyrighted material a common occurrence, and a computerized distribution system's success will depend on weaning users away from current industry norms by offering more choices and easier access. Currently, consumers buy a compact disc, rent a video, watch a movie, and listen to a free radio broadcast. Although some users buy videos, wait until movies reach free television, or purchase cable television service, each of these groups values the same information differently.

Under my proposal, once the computerized distribution system is in place, the image creators will not be limited to a set price or license. Although licenses will likely be somewhat standardized, each creator will be able to set the term, exclusivity, and use limitations. In order

110. It has been estimated that it will be at least five years until wide-scale consumer audio applications of DAT are available. In these five years, enactment of the Audio Home Recording Act would raise over $100 million annually, two-thirds of which would come from computer users. *Id.*

111. This critique does not even address the narrower problem of when the blank medium is used to record public domain information or when the specific digital audio recording constitutes a fair use. For a summary of the vast number of resources addressing fair use and home taping, *see* Ralph Oman, Copyright Implications of Digital Audio Transmission Services Report 59-72 (1991).

for the service to succeed, it is important to consider the methods, habits, and expectations of existing users.

A. *Alternate Delivery Systems*

The simplest distribution system would be by CD-ROM or Photo CD—two similar methods of storing hundreds of images on a compact disc. The user would browse through the images and download the stored image.[112] Several CD-ROMs are currently distributed with the license price of the images included in the cost of the disc, thereby facilitating its use in small-scale desktop publishing efforts.[113] These discs generally include a broad license that explicitly limits resale or free distribution of the images.[114] Alternatively, because the storage capacity of CD-ROMs is limited, one could include only thumbnail-size images on the disc and require that the user contact the distributor for the final image.[115] Another alternative is to bill the users as the images are accessed. This would require special circuitry to report image access back to the image provider.[116]

A supplement to the compact disc delivery system would be a large centralized computer that has the capability to connect to personal computers. Instead of requiring a CD-ROM player, this system would require a modem. The image distributor would constantly update the images and user interface software, as is done, for example, by online legal research services. By controlling the distribution of the software and issuing user passwords, the service would limit access and maintain user records to aid customer service and billing.

Although the CD-ROM user would not have to rely on a distant computer, he would also lose the wide range of images that could be indexed and stored in several different graphic formats in the huge storage facility at a central location. Currently, the vast storage capabilities of CD-ROM is insufficient to give the user access to the entire range of images that could be stored by a distant computer.[117]

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112. Cathy Madison, *CD-ROMP; A Look at the Digital Delights of Stock Photography on Disc*, ADVERTISING AGE, Jan. 4, 1993, at 32.

113. Leeds, *supra* note 45, at 290.

114. Aileen Abernathy, *The CD Stock Market*, MACUSER, Apr. 1993, at 185-86.

115. *Image Bank's First Photo-CD Image Catalog*, NEWSBYTES NEWS NETWORK, Sept. 9, 1992. Researchers are working on compression schemes that will permit the CD-ROM producer to fit more images of the same quality onto a single disc. *Mirror Joins Forces With 3M, Stock Agencies to Market Innovative CD-ROM Based Stock Photo Researching System*, PR NEWSWIRE, June 29, 1992.

116. Don Clark & Ken Siegmann, *Cryptologics Tries to Put a Toll on Data*, S.F. CHRON., Aug. 11, 1992, at B3; Paul Eng, *Now There's a CD-ROM Reader on the Job*, BUSINESS WEEK, Feb. 15, 1993, at 104D.

117. Madison, *supra* note 112, at 33.

B. *Centralized Delivery System Goals*

The centralized service should have three goals: (1) encouraging browsing, (2) supporting electronic image transmission, and (3) preventing unauthorized use of images. It is important to encourage browsing of images to help users feel that they have not lost any opportunities that they had in the print age. In particular, there should be a minimal cost to browse the thumbnail images prior to viewing larger versions or licensing the use of an image. Browsing cannot be free because otherwise licensees would be cross-subsidizing those who use the browsing service without buying licenses. Moreover, because distinct electronic and print rights are licensed by different parties, the allocation of funds to subsidize browsing would be extremely complex. Of course, due to the cross-referencing abilities of a computer, the browsing process will be far more efficient than flipping through album pages of a single stock agency's book. Online searching will assist the user in finding the right image for his or her needs. In particular, the system should use industry terminology and layout as its metaphor in the same way that current computer interfaces use the desktop metaphor.

Second, once the user has found the desired image, it is traditional to use a large format copy of the image called a "comp" to ensure that the quality and details are appropriate.[118] This could be achieved by permitting full image viewing on the screen or perhaps permitting color printing of the image with a clearly visible copyright notice over the image stating that the image is not to be used for publication. Even though such a legend could be removed with existing scanning and computer technology, this would entail a great deal of effort to avoid a small per image cost for the licensed version.

Once an individual has found the desired image, she should have the option of receiving a high quality, electronically-scanned version of the image immediately. The speed of delivery will give this distribution service an advantage that is currently unavailable. Existing photo stock agencies will be able to distribute images they already own electronically, thereby gaining new revenues from existing assets. It is vital that the image be of publication quality because otherwise the delivery aspect of the process will not improve on existing practices.

Third, by including a copyright notice and computer code with the licensed image, subsequent users will be on notice that they cannot use the image without obtaining a license. This will preclude copiers

118. Abernathy, *supra* note 114, at 185.

from alleging innocent infringement, while publicizing the existence of a centralized licensing system. In the same way that photocopiers of journal articles cannot claim that a license for duplicating articles is unavailable, image users will not be able to claim that they were unaware of the availability of licenses for stock images.[119]

C. *The Future of Electronic Image Delivery Systems*

In the near future it is likely that all public goods such as books, magazines, images, music, movies, computer programs, and other forms of entertainment will be distributed through a unified cable or wireless system.[120] This system is expected to charge the consumer at the time he accesses the information, immediately allocating a portion of the charges to the creator as royalties.[121] Thus, if a user wanted to hear an orchestral work, she could choose from several versions for a range of prices, and her account would be charged for the selected performance.[122] Some have named this future of information distribution the "celestial jukebox."[123]

The celestial jukebox is only a small leap from the image delivery system already described. The primary difference being that the system already described centralizes only stock images, while the celestial jukebox will include music, text, and motion pictures. Along with this broader range of products will come a broader range of license types and use limitations. The greatest progress will likely occur in the quality of image reproduction at the user's end. Already there are plans for large flat color screens that combine pictures, television, and video games in one place.[124]

In the context of the celestial jukebox, different types of images will likely have a range of pricing schemes depending on their potential use. For example, newsworthy images may cost more than stock images to publish, and a Monet for display on a screen may cost less than the same Monet delivered in a format suitable for downloading and publication. The celestial jukebox will price each image in order to maximize income, and it is possible that the system will distinguish between home viewing and home recording—charging those who record a higher amount in exchange for the ability to retain the copy in a home library. At this point, a taxation scheme on recording equipment

119. *Texaco*, 802 F. Supp. 1.
120. Goldstein et al., *supra* note 9, at 8.
121. Goldstein, *supra* note 98, at 415.
122. Goldstein et al., *supra* note 9, at 8.
123. *Id.* at 8.
124. Paul Andrews, *High Technology—Continuum Is Its Name, Compiling Digitized Information Is Its Game*, SEATTLE TIMES, Dec. 8, 1992, at F2.

may be necessary to compensate creators for the unauthorized duplication of the library copies.[125]

Although the celestial jukebox benefits the information creators and end users, it presents several problems. One significant hurdle will be defining the territory of licensing. For example, royalties derived from the use of music in video and computer games are not covered by ASCAP or BMI, nor is there a computer game music collecting society.[126] Once the collecting party is determined, a royalty scheme will be needed that does not discourage use.

1. The Challenge of Enforcement

The challenge of enforcement in the age of the celestial jukebox will be greater for the image-oriented collecting societies than for ASCAP and BMI due to the greater number of uses for images. The ability to convey images from authorized services to computer bulletin boards permits instant distribution of protected images.[127] Furthermore, unlike popular music, commercially desirable public domain images exist,[128] and these images may have a photographer's credit, but require no license from the creator for use. A bulletin board operator cannot assume that an image is protected and delete it without eliminating the public domain images as well.

2. Fair Use of Digitally Stored Images

Another significant challenge will be determining how the fair use exception will be applied to the noncommercial use of images. The outcome of the four factor fair use test, and thus the success of the infringement claim, will vary on a case-by-case basis. But if a work is purely artistic[129] and is taken in its entirety,[130] then the copier will have lost at least two of the four factors.

A recent Ninth Circuit case, *Sega v. Accolade*,[131] highlights the complexity of applying the fair use defense in computer matters. In *Sega*, the defendant copied the plaintiff's video game and printed it

125. This expectation is based on the agreement reached in the Audio Home Recording Act, *supra* notes 104-108. *See also*, John C. Dvorak & Paul Somerson, *Hands Off That Scanner*, PC-COMPUTING, Nov. 1992, at 104.

126. Michael Dare, *Computer Game Hammers Home S'track Strength*, BILLBOARD, Mar. 14, 1992, at 11.

127. Nancy Melin Nelson, *Visual Information Systems: PC Privacy*, INFORMATION TODAY, Oct. 1992, at 34.

128. Rory J. O'Connor, *Bids for Publishing Rights Slow Multimedia Products*, S.J. MERCURY NEWS, Mar. 1, 1993, at 1D, 11D.

129. 17 U.S.C. § 107(2).

130. 17 U.S.C. § 107(3).

131. Sega v. Accolade, 977 F.2d. 1510, *amended* 1993 U.S. App. LEXIS 78 (9th Cir. 1993).

out to find how a particular piece of code worked as a part of the whole. The court permitted the fair use, placing great weight on the second factor of the four factor test: the nature of the work. Because the nature of the work was a commercial video game, and hence functional, one can only think that the result would be different if the work had been a purely artistic work without a functional aspect. It is unclear how fair use will be applied in cases of digitally encoded artistic works where the work is not functional, but must be duplicated prior to viewing.

Given the broad range of local, national, and international services that permit access to images, the United States should consider granting non-commercial users the right to duplicate the image a single time solely for in-house use by creating a fair use safe harbor. This article proposes a "home-use" amendment stating that if factors one and four—the non-commercial nature of the duplication and the absence of injury to the market for the original—are in the infringer's favor, then the defense is successful. As it is, electronic images are likely to be copied and viewed, yet the owner will have no notice that the image is protected, nor will he know the functional or artistic nature of the original or what proportion of the original has been copied in the duplicate version. A safe harbor will avoid chilling the use of public domain digitized images while ensuring that the image creators gain just compensation when their works are used in a commercial context.

3. Taxation in Exchange for the Home Use Safe Harbor

The Audio Home Recording Act permits users to make personal copies of sound recordings in exchange for a royalty on digital audio tape recorders and blank media.[132] The music industry gave up nothing for something because the duplication of analog recordings was already common, so the sound recording revenues from home recording had already been lost.[133] In the Act, they stood to make significant profits if the new medium was successful, thereby offsetting the losses in sales due to home taping.[134]

Unlike the music industry, there is no entrenched custom of electronic image duplication.[135] Unless there is active enforcement in the early years of the industry, personal image duplication will become

132. 17 U.S.C. § 1008 (1992).

133. Jon Pareles, *Grabbing for Royalties in the Digital Age*, N.Y. TIMES, Apr. 12, 1992, at 26.

134. *Id.*

135. Congress has addressed the primary method of duplication, photocopying. 17 U.S.C. § 108.

common and the visual image marketers will be forced to recoup losses from unauthorized computer transmission of protected images by taxation or licensing fees.

V. INTERNATIONAL IMPLICATIONS

The development of an international electronic image distribution system will create additional problems. In particular, the European Community (EC) has not yet unified copyright terms, so images that are public domain in one country may be protected in another.[136] Furthermore, the existing European visual artists collecting societies may conflict with this proposed royalty distribution scheme,[137] so the coordination of international royalty collection would require extensive multinational negotiations between the various collecting societies. As EC directives are passed and laws are unified, there may be more reason for optimism; however, the arts are a final bastion of cultural identity, and the unification of copyright laws is not expected in the near future.[138]

Unlike copyright in common law countries, civil law countries have a two-tier intellectual property protection system: they provide both author's rights, which protect both the property and the artist's reputation; and neighboring rights, which protect only the owner's property interests.[139] Although creators of literary and artistic work retain inalienable moral rights and longer terms of protection, creators of neighboring rights—such as sound recordings, computer programs, and industrial design—have no moral rights and shorter terms of protection.[140] The protection of photographs varies widely so that "artistic" photographs gain full artistic protection while commercial and personal photographs may retain only a neighboring rights level of protection.[141]

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136. Case 341/87 EMI Electrola v. Patricia, 1989 ECR 79, 2 CMLR 413, 1 FSR 544 (1989).

137. *See generally*, Adolf Dietz, *Copyright Issues in the E.E.C.*, 30 J. COPYRIGHT SOC'Y 517 (1983) (discussing the breadth of copyright protection available in European Community Countries).

138. *Ministers Beg To Differ in Length of Protection*, IV EUROPEAN REPORT No. 1812, Nov. 14, 1992.

139. STEPHEN STEWART, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS 6-7 (2nd ed.1989).

140. *Id.*

141. *Id. See also, Major Harmonization Directive*, III MULTINATIONAL SERVICE No. 318, Feb. 1992, at 10.

A. *International Conventions*

Two major international conventions affect the worldwide protection of intellectual property. In 1988, the United States[142] joined the older of these conventions, the Berne Convention for the Protection of Literary and Artistic Works.[143] The Berne Convention does not require the full protection of photographs due to the mechanical nature of their creation.[144] It limits its subject matter to "literary and artistic works,"[145] and photographs may or may not be included depending on each signatory's definition of artistic photographs. Under the Berne Convention, each signatory may set any term of protection greater than twenty-five years from the date of creation.[146]

Non-artistic photographs are relegated to the lesser status of a "neighboring right" as covered by the Rome Convention on Neighboring Rights.[147] The Rome Convention grants remuneration to creators of works unprotected by the Berne Convention such as sound recordings. The United States is not currently a signatory to the Rome Convention.

B. *International Case Law*

A judgment of the Court of Justice of the European Community has highlighted the tension between open borders and varying lengths of copyright protection for the same expression.[148] In *EMI Electrola v. Patricia*, the underlying work was a set of Cliff Richard songs that were in the public domain in Denmark but were still protected in Germany. Patricia, a Danish record company, recorded the songs and attempted to sell them in Germany where the German copyright holder attempted to block the sale. The Court held that the import to Germany could be blocked without addressing whether the recordings could be made in Germany for sale elsewhere.

Until there is a harmonization of the European laws protecting photographs and an agreement with the European collecting societies, the creation of an international image distribution system will be particularly challenging.

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142. Berne Convention Implementation Act of 1988, Pub.L. No. 100-568, 102 Stat. 2853 (1988).

143. Paris Text, 1971.

144. Berne Convention, art. 7(a)(1971).

145. Berne Convention, art. 2(1).

146. Berne Convention, art. 7(4).

147. The International Convention for the Protection for Performers, Producers of Phonograms and Broadcasting Organizations, completed in Rome, Italy, in 1961 is also known as the Rome Convention on Neighboring Rights. Oct. 26, 1961, 496 U.N.T.S. 43.

148. Case 341/87 EMI Electrola v. Patricia, 1989 ECR 79, 2 CMLR 413, 1 FSR 544 (1989).

VI. CONCLUSION

Although the stock photography industry is perfectly suited for digitization,[149] a great deal of thought must be given to the implementation. Significant issues which must be addressed include image quality, cost allocation that encourages browsing, image costs that reflect the transaction cost savings, and a standardized licensing system to facilitate innovative uses, thereby creating broader demand.

Although it is easy to conclude that a collecting society should manage the royalty collection process, images have a broader range of potential uses than sound and will require a far more complex management process. The stock photography market should consider using the CCC variable pricing model, but including the ASCAP enforcement mechanism to unify the collecting society's legal positions. Furthermore, by computerizing the system, individual photographers will not be required to give up the bargaining power that they had during the era of tangible print.

Images will clearly be one of the important commodities of the information age. Some creators will gain fame and fortune while the vast majority will remain largely invisible yet neccessary to meet society's demand. The sooner industries consider how they will adapt to the coming changes, the better they will be able to respond to individuals within those industries.

149. Carli, *supra* note 4, at 115.