SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 53 | Issue 3 Article 8

2003

# Comment: Contracting and the Rights of Photographers

Joel Hecker

# COMMENT: CONTRACTING AND THE RIGHTS OF PHOTOGRAPHERS

*Joel Hecker*[†]

I, too, would like to thank Professor Nard. I would particularly like to thank him for the order of presentation. Usually the person who goes last has an abbreviated amount of time. I think it is appropriate for a representative of photographers who always think that they get the short shrift anyway to go last. I will really not address *New York Times Co. v. Tasini*[1] for its merits or whether the pricing in and of itself is sufficient. I think that has certainly been covered adequately by everybody here. From the perspective of photographers, the *Tasini* decision is extremely important for the morale boost it gave. *Tasini* has to be read in connection with a number of other decisions that have come down recently from the Supreme Court and other courts. These decisions deal with the concerns of the photographers that, with the advent of the Internet and other technology, the Copyright Act would not be enforced and that their rights would be eroded through economic pressures. The obvious problem arises when people say "if something is on the net, then it must be free." You can download photographs very easily. The photography industry as a whole, from the content providers' perspective, looks at these decisions as positive showings by the courts that copyright rights will be enforced and that the 1976 Act can be applied to the new world of the Internet and the world economy. The mere fact that the rights are enforceable, and that photographers can win a case like this, is much more important than the actual dollars concerned for the individual plaintiffs.

---

[†] Joel L. Hecker, Counsel to Russo & Burke, 600 Third Avenue, New York, NY 10016. Specializing in every aspect of photography law. Acts as general counsel to hundreds of professional photographers, stock photo agencies, graphic artists, and other photography and content-related businesses nationwide and abroad. Also lectures and writes extensively on issues of concern to these industries, including writing a monthly column *You and the Law* in *PhotoStockNotes*, and hosts questions in an interactive chat-room entitled *Brush with the Law at Art Talk* on Theispot-Showcase, found at http://www.Theispot.com. Longtime member and past Trustee of the Copyright Society of the U.S.A., a member of the Entertainment, Arts and Sports Law Section of the New York State Bar Association as well as the Copyright and Literary Property Committee of the Association of the Bar of the City of New York. He can be reached at (212) 557-9600, Fax (212)557-9610, or via e-mail at HeckerEsq@aol.com.

[1] 533 U.S. 483 (2001).

The *Tasini* decision obviously affected authors much more directly than photographers. But the implications of the decision, and especially other cases like *Greenberg vs. National Geographic Society*,[2] which was just before *Tasini* and which also emphasized the fact that photographers have rights, are important for photographers as well. I am told – and I do not know if the professors here can verify – that the judge in the case wanted to instruct the Supreme Court how *Tasini* should go and, therefore, rushed his decision before *Tasini* came out. I heard that third hand. It sounds like it should be correct, and if it is not, it still makes a great story.

I have always emphasized written contracts with my clients. I interpreted *Tasini*, when it first came out, as just another example of a situation where contracts were not properly executed. Emily is involved in a few active *National Geographic* cases in New York concerning pre-1976 Act matters. She mentioned the disks involved the electronic use of all of the *National Geographic* issues since 1888. I will disagree with her only to the extent of how to define what the product is. The issue is not whether *National Geographic* has the right to put the images on a disk but whether additional compensation is due.

Obviously, photographers and authors feel that this is something to bargain for and that additional compensation should be paid. There are a couple of motions for summary judgment. Some of the relief was granted, some of it was not because of the facts, but just let me summarize the basics of those discussions. In one scenario, there is no written contract and testimony comes in as to what the custom and usage of the trade was at the time. So for instance, in 1960-something, a photographer and a representative of *National Geographic* and other magazines were doing a shoot, and they agreed that one-time use only rights would be granted. And that is what they do. No one signs any paperwork because they never signed paperwork. Even today, they do not sign paperwork. They should know better. My clients included. Hopefully some will listen to me.

But if, in fact, that is what happened, and now forty years later there is an additional economic benefit to be derived, why should the publisher get one hundred percent of the benefit without paying for it? However, if it turns out that the deal that they made included additional rights, then I do not think the content provider is entitled to any more. But to just assume that no additional pay-

---

[2] 244 F.3d 1267 (11th Cir. 2001).

ments are due is self-defeating. The whole argument evolves around what is in the paperwork.

With respect to *Tasini*; a lot has been said about the coercive nature of photographers' inability to prove entitlement to further benefits. That is a major problem, but not a new one. *Tasini* did not decide that. Photographers have been dealing with that for decades. They get an advertising contract which says, "you are an independent contractor. You get no benefits." The advertiser does not have to pay the photographer's employment taxes or anything else. But this is a work made for hire which, of course, is self-contradictory on its face. When they then realized that there could be a problem, the agencies added, "but if the law says this is not a work made for hire, you are going to assign all your copyright to us so we own the copyright." The language started that way because of the reversion of copyright between thirty-five and forty years. They did not want to have the potential of losing the rights. Work for hire, on the other hand of course does not create a potential reversion. Let me point out as an aside that, as Emily has said before, the views that I espouse are not of my firm or my clients. But I think they ought to be. If the parties deal with proper paperwork, then you can, at least, solve many of the problems.

I approach my practice with photographers, and I have represented a great many of them over the years nationally and internationally, by saying certain issues are legal that I would advise you to do, or not to do, something, and there are certain decisions that are business. If you are willing to give up rights for a payment, that is a business decision. That is not a legal decision. You must however, know what you're giving up. Many photographers walk away from certain editorial situations. I think they have more leverage, in that sense, than writers. Writers have far fewer venues to go to have their work produced. Photographers, if they are not getting enough money, can at least try to go elsewhere.

The economy aside, which is driving a lot of people out of the business – and aside from what David said – all of my clients believe that their day job is photography. Again, that is the economy. But they believe it is a calling, and this is what they do for a living. Photography has many different aspects. There is assignment photography. When you get an assignment, you do it. Then there is photography you create on your own. That is called stock photography, and constitutes preexisting work. Much of what is used in the editorial market, which is newspapers, magazines, and stuff like that, is stock photography. So for example, you have an issue on Chechnya and do not have time to get a photographer.

You may never get a photographer or the writer to go there, for self-preservation purposes as much as anything else. So what does the magazine do? They go to a stock agency or to a photographer that they know, or even to their files, to find a pre-existing photograph that matches their story. There is no way that could be considered a work made for hire, and the magazines recognize this. As a result, they pay for one time usage rights. Now, this one time usage may, by agreement, include usage on the Web or whatever else. It may be a one time usage that may last forever, and it may cover a number of different areas. But those rights are subject to a fee to be negotiated, and if the photographer wishes to also grant electronic rights in connection with that story, then that is a business decision for which the person gets paid for. But I think the ability for photographers to have rights recognized is the major distinction that has come out of *Tasini* and the other cases that have come to the fore at this point.

I do not believe that collective licensing will work for photographers. There are too many venues. They are too independent. The creative levels vary tremendously. I do however, agree with Naomi that the name recognition that comes from certain publications is extremely important.3 Having said that, many photographers move on once they establish a name or the connection. They are not willing to settle for the amount of money that is offered. There is a sense of reverse collective bargaining here. Most publications establish what they call a day or page rate. They pay a certain amount of money, usually a few hundred dollars, for certain rights and that is across the board unless you are a superstar and can demand more. A number of photographers have, in effect, decided not to work for some magazines, which pay very low rates. Some magazines have since raised them – National Geographic is one, raising their rates probably about seventy-five dollars. It is not a significant amount, but if you are shooting every day or a significant number of days a year, it is a modest increase. But the idea is that the increase in pay is a recognition that the publishers were missing out on content and also losing the quality of work because the quality of work did decline.

This happened in the sports industry which is very, very heavily dependent on photography. A number of the key sports photographers decided not to work for economic and ownership reasons. The editors that are clients of mine understood that the work

---

[3] Naomi Jane Gray, *Analyzing the Publisher's Section 201(c) Privilege in the Wake of* New York Times v. Tasini, 53 CASE W. RES. L. REV. 647 (2003).

just wasn't coming in. They weren't getting the same quality. You therefore have a dichotomy. Aside from the black list effect – my clients have been part of that too – you have the photo editors screaming, "when can I use your work. I need your work. Get this over with. Get this litigation finished. I need your work." But their hands are tied. So there is a bit of internal pressure there as well.

There is obviously an incentive basis to create. Photographers create for a living, and they do it because that is what they want to do. Everyone wants to enjoy what he or she does for a living because that is an extension of life. Hopefully everybody here enjoys what he or she does. I do and I know my daughter does (she is going to be on the panel this afternoon. I have to give her a plug). It is a joy to work with her on many things. She works a few blocks away from my office, but that is part of what you do and the enjoyment that can come with it.

Photographers also band together in the creative efforts. They talk to each other, they bounce ideas off of each other and they exchange information on better paying clients and the ones that you should avoid. This informal-type network, I think, has been very powerful, to the extent anything is powerful against a built-in monopoly such as the publisher empires. I think it has some very good benefits.

I therefore believe *Tasini* has to be read for exactly what it is. Before *Tasini*, the publishing empires – and I use that word in a positive, not a negative, sense – believed they had these rights. The content providers did not. They were paid for what traditionally had been customary usage rights. Then, all of a sudden, new usage rights come into existence with no additional payment. They have a difference of opinion. In most instances, it was an honest disagreement. Now *Tasini* comes down – the lawsuit that Emily started that changed everything. Once the publishers realized that someone could bring a claim, they changed their contracts. The decision was meaningless from that aspect. If the *Tasini* decision had come down in favor of the publishers, do you think publishers would have stopped issuing the new contracts that gave them the ability to use these additional rights for free? You have a reaction and a response. *Tasini* magnified the possibility of content providers winning, and I think that is the most important lesson to come from the case.