
**COMMITTEE ON THE JUDICIARY**

**U.S. HOUSE OF REPRESENTATIVES**

**HEARING ON "COMPETITION AND COMMERCE IN DIGITAL BOOKS"**

**SEPTEMBER 10, 2009**

# EXECUTIVE SUMMARY AND SUBMITTED STATEMENT OF VICTOR S. PERLMAN, GENERAL COUNSEL AND MANAGING DIRECTOR, AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS ON BEHALF OF: AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS GRAPHIC ARTISTS GUILD NORTH AMERICAN NATURE PHOTOGRAPHY ASSOCIATION PICTURE ARCHIVE COUNCIL OF AMERICA

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

**215-451-ASMP EXT. 207**
**FAX: 215-451-0880**
**perlman@asmp.org**
**http://www.asmp.org**

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

ASMP's statement is submitted on behalf, not of just ASMP and its members, but of several other major organizations representing photographers, freelance commercial artists and illustrators, and other owners of copyrights in visual materials.

1. **Exclusion of Visual Materials and Their Rightsholders.**
As detailed in the objections filed in the U.S. District Court by ASMP, GAG, NANPA and PACA, visual materials were scanned by Google without permission on the same basis as textual materials. Despite that, the negotiations leading to the proposed settlement completely excluded the rights relating to visual materials. Not surprisingly, the proposed settlement carves out the interests of copyright owners of visual materials to the greatest extent possible. Most significantly, such rights would not be represented under the collective licensing system envisioned under the proposed settlement.

2. **Harm to Visual Materials Rightsholders.**
The concept of a collective licensing system that encompasses textual materials but that excludes visual materials appearing in the same books is absurd on its face. Reminiscent of Animal Farm, it takes the position that all copyrighted materials are equal, but some are more equal than others. The harm to those copyright holders whose works would be excluded from the system is obvious.

3. **Harm to the Public.**
Freelance creators of visual artworks are already, by and large, earning only modest incomes. Most new professional photographers last only approximately three years before financial pressures force them to find another career. Allowing their works to be scanned, and perhaps licensed, without a commensurate revenue stream or representation within the licensing entity would exacerbate an already difficult situation. As a result more professional creators would be forced out of the field. Professionally made images constitute a national heritage of extraordinary value and quality. If that resource is reduced, so is the benefit to the viewing and reading public.

Conversely, if images are not licensed by the proposed collective licensing entity (in spite of having been scanned), the public is then deprived of much of the value of the books they wish to access. How much good does a nature book without photographs or illustrations do for the reading public?

4. **Unconstitutionality and Inequity.**

Exclusion from a Congressionally created or mandated revenue source that is available to others whose interests are identical would be, at best, highly suspect under constitutional law (and, presumably, offensive to a Congressional sense of equity and logic). It would raise issues such as the deprivation of equal protection and the taking of property without due process. The sort of approach contemplated in the proposed settlement would turn copyright law on its head, by forcing copyright owners to take action by affirmatively opting out of a system in order to protect their rights, rather than forcing a prospective user of copyrighted material to take action by obtaining permission. That would so drastically alter the traditional and fundamental contours of copyright law as to raise constitutional issues of its own.

5. **Conclusion.**

The creation or mandate of a collective licensing system for book rights is an extremely complex issue with ramifications that require long and careful examination and consideration. Whatever Congress chooses to do, or not to do, it is crucial to the public good, to the rights of copyright owners of visual materials, and to the balance of interests dictated by Article I, Sec. 8, Clause 8 of the Constitution, that the traditional contours of copyright not be changed. It is especially critical that the copyrights in visual materials not be forgotten, ignored, or abused.

## SUBMITTED STATEMENT OF VICTOR S. PERLMAN

Mr. Chairman, Ranking Member Coble, and distinguished members of the Committee, thank you for the opportunity to present our views on the proposed class action settlement in the case of The Authors Guild, Inc., et al v. Google, Inc. ASMP and the other parties on whose behalf I submit this statement have filed objections to the proposed settlement, and a copy of those objections is attached as an exhibit to this statement.

**Introduction.**
This statement of the American Society of Media Photographers (ASMP) is made on behalf, not of just ASMP, but also on behalf of the Graphic Artists Guild (GAG), The North American Nature Photography Association (NANPA) and the Picture Archive Council of America (PACA).

ASMP is the nation's preeminent organization representing the interests of professional photographers working in the field of publication photography, and it is the oldest and largest organization of its kind in the world. Founded in 1944 by a group of highly accomplished photographers, ASMP has long included in its membership the world's leading photographers. Their photographs have been published in magazines, newspapers and books all over the world for over 65 years. ASMP's mission is to promote and protect the interests of publication photographers in Congress, the courts, the Copyright Office and other forums, and to educate its members, other photographers, their clients, and the public with respect to the rights of photographers and the best business practices to preserve and protect those rights.

The Graphics Artists Guild ("GAG") is a national union of graphic artists dedicated to promoting and protecting the social, economic and professional interests of its members. GAG's members include graphic designers, Web designers, digital artists, illustrators, cartoonists, animators, art directors, surface designers and various combinations of these disciplines.

The Picture Archive Council of America ("PACA") is the trade association of North America that represents the vital interests of stock archives of every size, from individual photographers to large corporations, who license images for commercial reproduction. Founded in 1951, PACA's membership includes over 100 companies in North America and over 50 international members. Through advocacy, education and communication, PACA strives to foster and protect the interests of the picture archive community.

The North American Nature Photography Association, Inc. ("NANPA") promotes the art and science of nature photography as a medium of communication, nature

appreciation and environmental protection. NANPA provides information, education, inspiration and opportunity for all persons interested in nature photography.

**Exclusion of Visual Materials and Rightsholders.**
These organizations all have at least one thing in common: They represent the interests of visual artists whose works appear in the books that Google has scanned without permission, but who have been almost entirely eliminated from the proposed settlement and were completely excluded from the negotiations leading up to it.

In the event that Congress has occasion to deal with the issues involved in the Google Book Project and the proposed settlement of the Authors Guild class action, it is crucial to remember that visual artworks and their creators are every bit as impacted by them as text authors and publishers. The fact that the authors, publishers and Google have excluded the visual arts community from the proposed settlement to the greatest extent possible must not lead Congress down the path to the same travesty. The absence of any representative of visual creators and copyright owners from the panel that testified in this hearing suggests that our concerns are valid. We hope that this statement will alert Congress to the risk of inadvertently repeating the glaring omission of rightsholders of visual materials from the scheme embodied in the proposed class action settlement.

Indeed, since Congress is charged with overseeing the public good, it is critical to note that the exclusion of photographers, artists and other owners of the copyrights in visual materials from the proposed settlement hurts the public to possibly an even greater extent than it harms the visual creators. Congress must ask itself: If electronic access to books is in the public interest, how is the public interest served by giving them access to illustrated books without illustrations?

**Collective Licensing Systems.**
The proposed settlement has primarily two aspects: a retrospective pay scheme for past acts by Google, and a prospective arrangement for future acts, including the creation of a collective licensing entity. For purposes of this statement, we are going to assume that Congress' focus is primarily, if not exclusively, with the prospective aspects.

As mentioned briefly above, the interests of the owners of copyrights in visual artworks are identical, both legally and practically, to those of the owners of copyrights in textual materials. For that reason, if Congress were to create any kind of collective licensing agency, or take any action remotely resembling the arrangement set forth in the proposed settlement, excluding the copyright interests in photographs or other visual artworks would be irrational, inequitable,

and contrary to the public interest. Further, it would raise serious questions of constitutionality under the Equal Protection clause, among others.

Most photographers and artists are modestly compensated. The image of photographers driving a Rolls Royce and living in a world of luxury come from films like Antonioni's Blow-Up, and they have as much to do with reality as Star Trek. As the Register of Copyrights has pointed out on several occasions, they are the group most disenfranchised under the current copyright system. They look to the revenue streams from their copyrights to provide a living and, one hopes, some retirement income. If a licensing system were built that excluded their rights – or worse, that included their rights without providing representation in the creation and administration of the system – many of them would be forced out of the business. As it is, most photographers who "turn pro" currently end up changing careers after about three years for financial reasons, and the recent economic downturn has only exacerbated that situation. This affects, not only photographers and artists, but the public, as well. Anyone who has ever taken photographs knows that, no matter how good one may be as a serious amateur, his or her photographs almost never rise to the same quality as a professional's. Anything that contributes to the economic pressure on photographers and illustrators also inevitably contributes to the deterioration of the nation's visual heritage.

The above comments are relevant to how a Congressionally created collective licensing system along the lines set forth in the proposed settlement should be structured. An integrally related question is whether Congress should be involved in the creation of such a system, at all.

For over 200 years, the traditional contours of copyright law have been based on the concept that one generally must seek approval from a copyright owner to use a work, at risk of liability. That is, the burden of getting permission is on the user. Under the scheme embodied in the proposed settlement, that basic premise of copyright law is turned on its head: The burden is suddenly on the rightsholder to come forward and take affirmative action to stop his work from being used. Such a 180-degree reversal of a fundamental aspect of copyright law would be extraordinary and should not be pursued except in the most extreme circumstances and need. That extreme level of compelling need does not seem to exist today, and it certainly has not been demonstrated.

In addition, such a system would certainly change the fundamental and traditional contours of copyright law, and we know that legislation that does that runs the risk of being challenged, perhaps successfully, on Constitutional grounds.

We support fully collective licensing systems, as long as they are structured properly. Generally, licensing is best done through the private sector. However,

if Congress were deem it to be in the public good to create or mandate some form of collective licensing system for books, it must be on an opt-in basis for the rightsholders, for all of the reasons set forth in this statement. To conscript rightsholders or their works into a collective licensing system without their consent would be ill-advised, inequitable, and of questionable constitutionality under at least the Equal Protection and Due Process Clauses. As mentioned above, it might also, in the long run, adversely affect the quality of visual images available to the public.

In addition, we support and echo many of the concerns raised at the hearing, especially those of Marybeth Peters, the Register of Copyrights, which we will not waste the Committee's time by repeating in this statement. The problems of a de facto compulsory licensing system, are apparent to anyone who has been involved with the law and/or business of copyright licensing. In any event, if Congress were to deem it appropriate to create or mandate such a system, it would raise a host of problems outlined in Ms. Peters' statement and those of Messrs. Misener and Simpson. Many such objections to the proposed settlement agreement were filed by numerous individuals, groups and organizations in the U.S. District Court for the Southern District of New York. We are attaching a copy of the objections and supporting documents that we filed, for the Committee's further information.

**Conclusion.**
The creation or mandate for a collective licensing system for book rights is an extremely complex issue with ramifications that require long and careful examination and consideration. Whatever Congress chooses to do, or not to do, it is crucial to the public good, to the rights of copyright owners of visual materials, and to the balance of interests dictated by Article I, Sec. 8, Clause 8 of the Constitution, that the traditional contours of copyright not be changed. It is especially critical that the copyrights in visual materials not be forgotten, ignored, or abused.

Thank you for your time and consideration.

Respectfully submitted,

Victor S. Perlman
General Counsel and Managing Director
American Society of Media Photographers, Inc.
150 North Second Street
Philadelphia, PA 19106
215-451-ASMP Ext. 207
Fax: 215-451-0880
E-mail: perlman@asmp.org

**EXHIBIT**

**OBJECTIONS FILED IN U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK**

**AUTHORS GUILD ET AL. v. GOOGLE**