

AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS

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The Honorable David O. Carson
General Counsel
Copyright Office
James Madison Memorial Building LM-403
101 Independence Avenue, S.E.
Washington, D.C. 20540

VIA ELECTRONIC MAIL**Re: Reply Comments in Section 1201 Anti-circumvention Rulemaking Proceeding**

Dear Mr. Carson:

The American Society of Media Photographers (ASMP) wishes to submit reply comments in the proceeding being conducted by the Copyright Office pursuant to Section 1201(a)(1) of Title 17, United States Code. It is the position of ASMP that Section 1201(a)(1) should fully come into effect, and that the Copyright Office and the Librarian of Congress should not suspend it with regard to users of any particular class of works, because:

None of the parties seeking suspension of Section 1201(a)(1) has demonstrated a substantial adverse effect on noninfringing use of any class of copyrighted works.

Any suspension of Section 1201(a)(1) would have an effect beyond the classes of work identified, and thus reduce the value of technological measures and the ability of photographers to protect their work from infringement on the Internet.

Suspension of Section 1201(a)(1) would weaken the practical ability of copyright owners to exercise their exclusive rights in the manner that they see fit.

ASMP is a non-profit trade association founded in 1944 by a handful of the world's leading photojournalists to protect and promote the rights of photographers whose work is primarily for publication. Today, ASMP is the largest organization of editorial and media photographers in the world, with 40 chapters in this country and over 5000 members in the United States and more than 30 other countries. Its members are the creators of the most memorable images found in newspapers, advertising, magazines, books, multimedia works, and Internet web sites.

ASMP has long been an advocate for professional photographers who make photographs for publication, and has helped frame copyright legislation and testified in Congress and in landmark

cases. ASMP has been active in promoting copyright protection and facilitating copyright registration for photographs, securing copyright ownership for photographers, and combating infringement and piracy of copyright in photographs. To protect and promote the hard-won legal rights of its member photographers on the Internet and in other digital environments, ASMP established the Media Photographers' Copyright Agency, MP©A, in 1993 to enable photographers to control the licensing of their images. Today, through the Media Image Resource Alliance (MIRA), its joint venture with the Copyright Clearance Center, ASMP provides publishers, businesses, institutions, and Internet web site developers with on-line access to and licensing of over 60,000 photographs by hundreds of editorial and media photographers.

Regardless of whether they are created with an analog or a digital camera, photographs are now commonly fixed and licensed in digital format, just as are the publications and web sites in which they appear. Digital fixation and licensing has many advantages, such as easier and more comprehensive indexing and retrieval and faster and more economical order processing and delivery. Therefore, MIRA and other photographic agencies are expanding their ability to deliver photographs electronically over the Internet. Such delivery complements the delivery of photo-ready stock, i.e. prints and transparencies, and photographs in digital form recorded on CD-ROMs. The ability to license and deliver photographs on the Internet is enabling photographers to make their photographs more widely available to the public.

The disadvantage is that digital fixation and delivery make our members' photographs more vulnerable to piracy in frightening new ways. Whereas an analog copy of a photograph degrades significantly with each generation of copies, unauthorized digital copies are completely faithful to the original, no matter how many generations of copies are made. The most recent instance of photographic piracy is the copyright infringement action of *Kelly v. Arriba Soft Corporation*, in which defendant operated a search engine that systematically found and copied millions of images on the Internet, including 35 of plaintiff's copyrighted photographs, in their entirety and then made them available to the public on its commercial Internet web site.¹ There are numerous other examples, though, because photographic piracy is widespread, such as:

Photographers report that web site developers frequently copy photographs licensed to one Internet web site and display them on other web sites. In some cases, their customers make infringing copies for their marketing partners to copy and display on their own web sites. Neither the customer nor the third parties who usually strip out the photographer's copyright notice - pay for these additional copies. One photographer reports that several customers have stopped doing business with her because she has complained about such piracy.

Wildlife photographers report that hundreds of their photographs have been illegally copied and are being distributed in Internet news groups interested in animals. Many other photographers have found their works have been copied by scanners and posted on the

¹ Although the federal district court found that defendant had infringed Leslie Kelly's photographs, it granted defendant's motion for summary judgment on grounds which ASMP believes were clearly erroneous and that defendant's infringement was fair use despite its wholesale nature and commercial purpose. That decision is currently under appeal in the Ninth Circuit.

Internet where they can be downloaded and copied anywhere in the world, particularly on sites outside the United States and beyond the reach of U.S. law.

These illegal uses can destroy the market value of unique images, some of which are effectively signature images for the photographers who made them. Such photographic piracy makes it more difficult for photographers to license their works. Even though some copyright owners have decided to tolerate such piracy in the hope of earning revenues from related services, photographers do not have this option. Photographers do not sell out concert tours, they do not sell advertising or computer equipment, and they do not conduct online auctions. Indeed, the only compensation that photographers generally derive from the works they create is the fee derived from licensing the exclusive rights therein.

That is why, as they expand their use of digital licensing and delivery, photographers will expand their use of technology to control authorized access to their photographs. For example, MIRA customarily licenses our members' photographs on a one-time basis for a one year period for use within the United States and its territories. Access control technologies could be used to ensure that photographs delivered via the Internet are received only by intended users and cannot be accessed by unauthorized parties. Moreover, access control technologies will enable photographers to tailor their permissions to the needs of the user.

Therefore, in using the Internet and digital recording media to license their images, photographers must be able to use technological measures to protect them from access by anyone other than authorized customers and under the terms agreed upon. Our members' customers, publishers, software developers, and Internet web sites - must also be able to control authorized access to their works, and thus to the photographs incorporated therein. The experience of other works in digital format has shown how important technology is as a supplement to copyright protection. But as has been so convincingly demonstrated time and again, no technological measure is impervious to being disabled or circumvented.

That is why Congress enacted Section 1201(a)(1). That is also why ASMP supports full implementation of Section 1201(a)(1) without suspension for users of any particular class of works. The reasons are simple. First, none of the parties seeking suspension of Section 1201(a)(1) has demonstrated a substantial adverse effect on noninfringing use of any class of copyrighted works. Second, any suspension of Section 1201(a)(1) would have an effect beyond the classes of work identified, and thus reduce the value of technological measures and the ability of photographers to protect their work from infringement on the Internet. Finally, suspension of Section 1201(a)(1) would weaken the practical ability of photographers and other copyright owners to exercise their exclusive rights in the manner that they see fit.

For example, some groups representing schools and libraries have expressed concern that Section 1201(a)(1) could make it more difficult for them to use copyrighted works, and have called on the Librarian to postpone the law's effective date with regard to a range of works. These concerns expressed are largely speculation, however, and fall far short of the distinct, verifiable, and measurable impacts on noninfringing use that Congress considered necessary for the Librarian to suspend Section 1201(a)(1). In the absence of any demonstrable adverse effects, some groups have instead attacked the nature of the works protected, arguing that users

should be free to circumvent technological measures controlling access to factual works such as newspapers and books, which frequently include photographs owned not by the publisher, but by the individual photographer. Such arguments miss the mark because the issue under consideration in this rulemaking is not the extent of copyright protection in certain works, but whether Section 1201(a)(1) has an adverse effect on noninfringing uses.

Some groups have referred to fair use and argued that there should be an exemption related to fair use, based on "currently accepted" fair use practices for digital materials. Having spent several years as an active participant in the Conference on Fair Use (CONFU) process, and in particular with regard to digital images, ASMP can assure you that there is no such thing as "currently accepted" fair use practices for digital materials. Users and rightsholders have entirely different views as to what practices constitute fair use. That is why there was no agreement as to guidelines for the fair use of digital images by the end of the CONFU proceedings.

Some groups have referred to budgets that "are already stretched thin." Having studied and been intimately involved with the economic aspects of the publication photography business, ASMP can assure you that nobody's budgets are stretched thinner than professional photographers' at this, the beginning of the twenty-first century. A few dollars or even pennies per user translates into a photographer's being able to send a child to college when multiplied by even a small portion of the millions of users of Internet material.

Other groups have called on the Copyright Office to consider suspending Section 1201(a)(1) to permit "reverse engineering for the purpose of permitting all forms of interoperability" and not just between computer software. Any such suspension of Section 1201 would be inconsistent with the intent of Congress, which restricted such "reverse engineering" exceptions to computer programs in Section 1201(f). It is unclear what the justification or purpose would be for such a suspension, especially with respect to expressive works such as photographs. What is clear is that such a suspension would be unwarranted because its effect would be to permit circumvention that promotes widespread copyright infringement, such as the recent and much publicized "cracking" of the Digital Versatile Disc Copyright Scrambling System (CSS) for motion pictures.

In closing, there is no sign that Section 1201(a)(1) has hindered or will hinder noninfringing uses of copyrighted works. The dire effects predicted by those seeking a suspension of Section 1201(a)(1) will not come to pass because photographs are widely available in unprotected formats. Most photographers today do not use technological measures to protect their works. Even should photographs in digital form be protected by technology, they will remain widely available in printed publications, print reproductions, and slide sets. In fact, MIRA provides unrestricted "guest" access online to digitally watermarked versions of the photographs in its catalog.

Indeed, the parties requesting such exceptions have not sustained their burden of demonstrating that the prohibition on unauthorized circumvention of technological measures controlling access to copyrighted works would adversely affect noninfringing uses of copyrighted works. Moreover, it bears repeating that, even if such adverse effects were shown, any such exemption

would likely have effects far beyond the particular works identified. Because many of the so-called factual works identified by these parties also incorporate photographs created by our members, a suspension of Section 1201(a)(1) is certain to diminish the ability of photographers and their licensees to control access to photographs. The absence of such adverse effects on users is in stark contrast to the adverse effect of piracy on photographers, and the importance of Section 1201 in protecting their works.

For these reasons, the Copyright Office and the Librarian of Congress should not suspend the application of Section 1201 with regard to users of any particular class of copyrighted works. ASMP is grateful for the opportunity to submit comments in this rulemaking proceeding, and looks forward to working with the Copyright Office in the future.

Sincerely yours,

**AMERICAN SOCIETY OF MEDIA
PHOTOGRAPHERS**

VICTOR S. PERLMAN
Managing Director and General Counsel