

First Things About Secondary Rights

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INTRODUCTION¹

Until recently, most freelance illustrators and photographers licensed their work exclusively through direct relationships with their clients. Clients commissioned a work for specific uses in their publications and paid a specific price to the creator. The rights negotiated for this usage were called *primary rights*; all other rights were *secondary* and, in theory, these were retained by the artist or photographer. For years, secondary rights were reckoned to have little or no commercial value. Yet, over the last three decades, major trends have altered this traditional licensing model and have made secondary rights a contested prize for publishers, commercial archives and creators alike.

The first of these trends is the growing demand from publishers that illustrators surrender all their rights as a condition of accepting assignments. The second is the spread of large, well-capitalized stock “agencies,” which use inventories of discounted back-work to compete with artists for their primary markets. Both of these trends preceded the internet, but online technologies have quickened the pace of change and have amplified their effects. This Article will largely address how these trends and the contest for secondary rights is re-shaping the field of visual arts. Part I will summarize the effects of change on freelance artists. Part II will outline the efforts by artists to create a system of collective rights management to protect their rights.

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1. The author was not involved in this story until the winter of 1997, when a stockhouse artist named Greg Voth wrote to ask that I write an article to call attention to stockhouse business practices. Among other things, Voth charged that stock “agents” were underpricing work and signing artists to unfavorable contracts. I looked into his charges, concluded that they had merit and began a series of articles that led to a wider discussion of how secondary rights are currently being licensed.

I. HOW THINGS HAVE CHANGED

For decades, the fields of illustration and photography were models of classical competition in which independent craftsmen competed with one another to do competitive work and charged competitive prices. In general, work was commissioned by clients for specific one-time usage and priced on that basis. The value of secondary rights was seldom discussed and rarely exploited, except on occasions when publishers sought additional usage for anthologies or overseas editions. Yet, with the advent of the digital age, these neglected secondary rights have been recognized as a potential stream of income for whichever parties control them.

In the past, if you were a publisher and needed a picture of, say, a partridge in a pear tree, you would likely commission one from an illustrator. Otherwise, you would have to search through a conventional library to find a picture you wanted, then track down the rightsholder and clear the rights. The same process would be true for those seeking a particular photograph. Now, however, with internet access and a search engine, you can find hundreds of suitable pictures and clear the rights online in a matter of minutes—provided that you have access to a large enough inventory of images.

As a consequence, middlemen have moved into the fields of photography and illustration, creating inventories of images by acquiring control, through various means, of artists' untapped secondary rights. Moreover, publishers, recognizing the potential value of creating inventories of their own, have increasingly sought to convert the primary rights they routinely acquire from freelancers into perpetual rights. Spurred by this objective, publishers increasingly demand that freelancers transfer all of their rights to the publishers as a condition of the freelancers accepting assignments. This transfer means that a publisher can then license a freelancer's work to third parties, generally without any additional payment to the creator, both as reprints of the compilation in which the work first appeared (magazine article, etc.) or as individual images separated from the original context.

Over the years, many artists resisted the spread of all-rights contracts and were guided in this by professional organizations such as the American Society of Media Photographers (ASMP, founded in 1944) and the Graphic Artists Guild (GAG, founded in 1967). Both groups did an effective job of monitoring bad contracts and educating artists about the importance of protecting their rights.

Stock "agencies," however, emerged later and for various reasons, took root with less scrutiny. Stock agencies had their genesis in the field of photography. At first, they appeared to be beneficial, promising photographers new markets for the tens of thousands of outtakes that photographers accumulate from their primary assignments. As Richard Weisgrau, then-executive director of ASMP, remarked in July 2000:

For many years, [stock] was good for photographers. They made a lot of money. But as competition increased among stock agents, prices began falling and production began to rise. [The stock agencies] kept saying "produce more work," and [the stock agency] sold it for *less*. *They went from a low-volume, high-price operation, to a*

*high-volume, low-price operation. It's okay for [the stock agency], because they get a percentage of every dollar . . . [a]nd they have no production costs.*²

By the mid-'90s, stockhouses such as Comstock and The Image Bank had glutted the photography market with millions of images, and the ill effect of these low-end sales on professional photographers had become clear: stockhouses were not so much creating "new" markets for imagery as encroaching on freelancers' existing markets, discounting fees to make the rights to "used work" attractive to clients. In September 1997, Henry Scanlon, founder and CEO of Comstock, gave an interview to *Photo District News* in which he explained the strategy by which they had successfully lured major clients away from freelancers. Using direct mail, he said, they had "hammer[ed] away at the market" and flooded clients with catalogs. "[A]fter a long struggle," they created a market "'position'" for stock that, he frankly admitted, would "decimate" the ranks of assignment photographers. Photographers who could not compete, he said, should "go to night school."³

For illustrators, the adverse effect of the stockhouses took longer to become apparent, generally because illustrators produce dramatically fewer images than photographers and few, if any, outtakes. In addition, many illustrators resisted the temptation to make "a little extra money" in stock sales, some even insisting that it was "unethical" to re-sell work to one client that had been done for another. Yet, as late as the late 1990s, illustrators still had no clearinghouse for reliable information about these developing business practices, and because freelance artists are scattered across the country, an awareness of what was happening was slow to develop. When it did, it was a grassroots effort.

Beginning in late 1997, using fax machines, e-mails and a commercial internet chat board,⁴ artists cobbled together an ad hoc network to share information, publish articles and discuss legal ways to adapt to the stockhouse challenge. On February 1, 1998, a panel discussion on "The Future of Illustration" hosted by the Society of Illustrators in New York City erupted into a contentious debate between freelance artists and the principals of The Stock Illustration Source (SIS), the self-described "world's largest stock illustration agency." That night, artists and their representatives charged the stockhouse with "predatory" business practices, and news of the event quickly spread by word of mouth throughout the field. Although requests were made to obtain a copy of the videotape of the event, the Society of Illustrators was unable to release it because the stockhouse owners refused to sign the necessary release forms.⁵

Six months later, an article entitled *The Stockman Cometh* appeared in the July 1998 issue of *Communication Arts*, a leading trade publication, alleging that the

2. Richard Weisgrau, *Becoming a Market Force*, ILLUSTRATORS' PARTNERSHIP, July, 2000, http://www.illustratorpartnership.org/01_topics/article.php?searchterm=00030.

3. *Future Stock: Comstock Goes Clip, Henry Scanlon Explains Why*, PDN, Sept. 1997, at 60.

4. See art talk, <http://www.theispot.com>.

5. The videotape can be viewed on the premises at the Society of Illustrators in New York City. Videotape: 1998 Founders' Day (SIS 1998) (on file with Society of Illustrators).

misnamed stock “agencies” were actually *competitors* discounting market prices to carve a niche for themselves out of the existing assignment field. That article, written by this author, noted that stockhouses were taking a classic approach to lowball competition: undersell the market, weaken competitors and steal clients. Only in this case, the discounters were acquiring free inventory from the competitors they were lowballing—a novel twist, certainly, on the classic approach. While previous discussions about stock had focused on its *ethics*, that article advised artists to stop complaining about stockhouse abuses and experiment with practical strategies to *compete*.⁶

“Since that [warning call],” according to the British Association of Illustrators (AOI), “the ‘stock issue’ has been extensively covered on both sides of the Atlantic in seminars, print, and web discourse. As a result more ‘creator-friendly’ alternatives have emerged and illustrators generally are far more aware of the issue.”⁷ Among the alternatives, many artists are digitizing inventories of their images for marketing to clients online. Some offer archives on their own websites, others market pictures through portals run by middlemen. While most artists agree that these improvisations will merely buy them additional time to adopt long-term strategies and are not themselves the ultimate solutions, the growing belief is that the nature of competition in the field of photography has changed irrevocably and that artists will continue to compete at a disadvantage until they find more effective ways to manage their rights.

In February 2000, the artists who were brought together by this grassroots movement incorporated as the Illustrators’ Partnership of America (IPA). This followed the first-ever Illustrators’ Conference held in Santa Fe, New Mexico in October 1999. To get this organization off the ground, attorney Bruce Lehman, former U.S. Commissioner of Patents and Trademarks and an intellectual property expert who keynoted the conference, acted as both an IPA board member and advisor. IPA also found an informal mentor organization in the photographers’ group ASMP. Their officers and legal advisor became a regular source of forthright information, and illustrators were able to learn from that organization’s longtime experience in all aspects of monitoring creators’ rights. Since then, the IPA has become the illustrators’ clearinghouse for information about developments in stock and secondary rights licensing.⁸

A. “FOREVER AND IN PERPETUITY”

To understand the current state of artists’ licensing, it is helpful to begin with a discussion of the spread of all-rights agreements. Dick Weisgrau of ASMP summarized the growth of this species of contract in a speech to the Association of Medical Illustrators at the Mayo clinic in July 2000.

6. Brad Holland, *The Stockman Cometh*, COMM. ARTS, July 1998, at 206.

7. AOI, What is Stock Illustration?, Sept. 7, 2004, <http://www.theaoi.com/Mambo/index.php?option=content&task=view&id=314&Itemid=28>.

8. Much of the information cited below can be accessed on the IPA website: <http://www.illustratorpartnership.org>.

The ASMP started in 1944 as a guild. During the late 40's and early 50's, we actually bargained with major publishers and established a day rate for photographers. Prior to 1978 . . . copyright belonged to the commissioning party. When I started in photography, the person who hired me owned my copyright. But because of ASMP's bargaining, the photographer was entitled to a continuing stream of royalties from the work . . . [O]n January 1, 1978 the law changed. Now we own the copyrights and we are in serious battles over these copyrights.⁹

Since 1978 (when the 1976 Copyright Act went into effect¹⁰), artists and photographers have learned how to tailor contracts to specify the conditions of the usage they were granting to publishers. Yet, from the beginning, some publishers sought to retain all the rights to a work by pressuring the artists to transfer the rights to them through work-for-hire contracts. Over the last three decades, the pressure to sign these pseudo-voluntary agreements has intensified. The worst contracts have now become so all-inclusive as to border on the surreal, requiring artists to deed the publisher "all rights forever and in perpetuity, for all media now known or yet to be invented, throughout the universe." Some contracts even contain retroactive and prospective clauses that would lock up all the artists' past or future work—or any work the artist has ever done or will do—for any publication the publisher now owns or may someday acquire.

Because many artists still balk at signing away extensive rights, some publishers are trying an alternate strategy to claim them anyway. They assert that § 201(c) of the Copyright Act,¹¹ which grants a publisher of a collective work a limited revision privilege, instead conveys extended rights to them to use a freelancer's work in new media or in new markets. In short, they argue that a presumptive and perpetual republication right flows from the first-time print publication of a collective work.

B. THE STOCKMAN COMETH

Unlike the spread of all-rights contracts, which were monitored by certain artists' rights organizations, stockhouses invaded the field quietly and were entrenched before most people noticed the volume of work to which the stockhouses had acquired rights. Artists themselves had started the practice of licensing secondary rights in primary markets, shortly after enactment of the 1976 Copyright Act. The late 1970s was a period of spiraling inflation, and some freelancers reasoned that reselling the rights to a few pictures now and again could offset their stagnant assignment fees. For twenty years these "stock" sales were rare, and because artists and their agents conducted them, they were handled as an extension of the artist's assignment work—that is, the work was priced so as not to undercut fees in the assignment market. There was no uniform pricing policy, but as the innovation spread, stock prices settled in somewhere below the sums paid for

9. Weisgrau, *supra* note 2.

10. Copyright Act of 1976, 17 U.S.C. §§ 101-801 (2004).

11. 17 U.S.C. § 201(c).

original art. The disparity of pricing for stock images versus commissioned work began to change in the late 1980s as certain entrepreneurs, recognizing the success of stock photography houses, entered the illustration field, as well, and began acquiring control of various artists' secondary rights.

At first, as in stock photography, these middlemen represented themselves to artists as "agencies" through which artists could license rights to their past works to "new" clients who lacked the resources to pay the traditional assignment prices. Instead, as in photography, the "agencies" promoted stock to traditional clients as a low-cost *alternative* to commissioning new work. Because, as described hereinafter, it cost the stockhouses nothing to acquire their inventory of pictures from artists, they could license stock for *any* fee and still profit, while they urged artists to regard even sums as small as \$7.12 as "found money."¹²

As the reality of these business practices became common knowledge, many artists noticed that assignments were decreasing, and even stock artists began to acknowledge that the "found money" they were making from low-end sales could not replace the assignment fees they were losing. And as many artists found themselves discounting fees to compete against stockhouse prices, some began talking about a "race to the bottom."

C. HOW STOCKHOUSES WORK

In a typical stockhouse arrangement, an artist assigns the stockhouse the secondary rights to a number of the artist's pictures under a long-term contract. The stockhouse pays the artist nothing for this; indeed, *the artist usually pays the stockhouse* a "production fee." The stockhouse offers clients hundreds of thousands of these illustrations by countless artists. Art buyers contact the stockhouse, not the artists, when they want to license rights. Stockhouse negotiators conduct all transactions at their own discretion, paying the artist forty percent (or less) of net domestic sales and twenty-five percent (or less) for foreign sales.¹³

Although stockhouses deny low-balling prices, many stock artists and photographers have testified to the contrary. Here is just one example. Photographer Mark Harmel is a member of the Stock Artists Alliance, a trade

12. As artists began sharing information on the internet, earnings as low as \$21.03 and \$12.50 were found to be common. In 1999, artist Will Terry criticized his stockhouse, Stock Illustration Source (SIS), for "lowballing" the market. The Creative Director of SIS replied publicly that Terry was an "ingrate," having earned an average of \$20,000 a year from his stock sales. I wrote about this at the time: "After a week of crunching numbers, Will faxed me a spread sheet of his entire stock earnings, [t]hen posted a summary on thespot[.com] . . . [T]he actual sales figures, taken on a case-by-case basis painted a sorry picture of how the stock house underprices fees up and down the market from editorial to advertising sales." The sums included a payment of \$7.12 for a fee that Terry believed should have amounted to hundreds of dollars. Brad Holland, *Stockman's Revenge*, in HONEY I SHRUNK THE FEES (1999), available at <http://www.illustratorspartnership.org/downloads/hollandhoney.pdf>.

13. Brad Holland, *Stock*, in THE EDUCATION OF AN ILLUSTRATOR 73, 74 (Steven Heller & Marshall Arisman eds., The Allworth Press 2000); see also Cathleen Toelke, *The Effect of Stock Houses on the Illustration Industry: A 2003 Report*, 2003, http://www.illustratorspartnership.org/01_topics/article.php?searchterm=00122.

association of rights-protected stock photographers. This was posted with permission on the IPA website:

I feel that Getty [Images] destroyed my two very good stock agencies: Tony Stone and FPG. They lowered the percentage on my Stone sales 20% and attempted to ramrod a very obtuse and bad contract down the throats of their current stock photographers. They are in the process of flooding their files with images where they get 90% commission from funded productions. In effect competing with their existing group of contributors that get a higher percentage. You are more and more likely to only see the credit of "Getty Images" rather than "The photographer/Getty Images." Their news and sports division are mostly work for hire, and the stock division is moving in that direction¹⁴ . . . I can't recommend Getty to any photographer that cares about continuing to make a living as a photographer.¹⁵

Generally, stock contracts restrict artists (in various ways) from independently licensing the images they have placed with the stockhouse. Some contracts contain automatic rollover clauses that require the artist to actively reclaim the rights to each picture within a narrow sixty-day window once every five years. Others have onerous non-compete clauses that force artists to keep their work off the market for years after they withdraw it from the stockhouse. During the life of the contract, the stockhouse can negotiate fees without the artist's consent and even enter into binding contracts with third parties that may permanently rob the artist of the rights to certain pictures.¹⁶

D. ROYALTY-FREE STOCK

Royalty-free images are pictures a buyer can use without limitation. This includes the right to alter the images or re-mix them and to use them as many times in as many different ways as desired without any additional payment to the artist. The artist need not be credited. For giving up these rights, the artist receives a small, one-time fee from the stockhouse or a small commission on sales. The stockhouse sells these pictures over the internet or on CD-ROM.

For the artist, the meager value of royalty-free art is that, unlike a traditional stockhouse consignment, he does not have to pay the stockhouse to catalogue the

14. On April 7 and 8, 2006, the Picture Archive Council of America, an organization representing stock agencies, met in Chicago. "On Saturday [April 8th], the PACA audience heard reports from representatives of the three biggest imagery companies: Lewis Blackwell of Getty Images, Gary Shenk of Corbis and Mark Berns of JupiterImages. All three companies are aggressively pursuing wholly owned content, meaning they own the rights to the pictures they sell." Daryl Lang, *What's Next For Stock? Depends Whom You Ask*, PHOTO DISTRICT NEWS, Apr. 10, 2006, available at http://www.pdnonline.com/pdn/newswire/article_display.jsp?vnu_content_id=1002314545.

15. Posting of Mark Harmel to http://www.illustratorspartnership.org/04_forums/index.php (Aug. 6, 2003, 08:50 CST).

16. Some stockhouse contracts are secret and contain non-disclosure terms. I have had access to one of these from an artist who insisted on anonymity, and I had the contract confirmed by another stockhouse artist to whom I read the terms over the phone. A public analysis of the Stock Illustration Source (SIS) contract is available (with responses from the stockhouse principals) on the February 1, 1998 "Founders Day" video. It can be viewed (by appointment) at the Society of Illustrators in New York City. Videotape: 1998 Founders' Day (SIS 1998) (on file with Society of Illustrators).

work. Fees or royalties are generally less than the artist would get for an equal number of minor illustrations from a modest magazine for one-time use. Moreover, by surrendering all interest in their pictures, artists can never build any residual value in their works. Also, because most freelancers have no monetary safety net, an inventory of pictures they can license through the years is the only financial security some may have.

Although stockhouses distinguish between rights-managed and royalty-free art in their sales practices, they've been known to clean out their inventory of rights-managed work by dumping poor-selling images or those that have become devalued through commercial overuse into the royalty-free market. Some artists are aware that this amounts to copyright infringement, and several have charged that it breaches their contracts. Nevertheless, artists who have lost—or never acquired—clients independent of stockhouse sales seem reluctant to challenge the practice. In private, many express fear of retribution by stockhouses. A specific example of this dumping of rights-managed work into the royalty-free market occurred in the spring of 2003, involving the stockhouse formerly known as SIS and one of the industry giants—Corbis (owned privately by Bill Gates).¹⁷

1. Images.com/Corbis: “Imagery is a Disposable Commodity”

After their 1998 “debate” with artists at the Society of Illustrators, the stockhouse SIS changed its name to Images.com. Along the way it acquired a small stockhouse (originally considered by some to be “artist friendly”): Spots on the Spot, founded by longtime stock artist Dave Cutler. On October 15, 2002, Images.com quietly initiated “a new policy of maintaining the confidentiality of [its] client[’s] names This policy is not negotiable and applies to all illustrators.” Several months later, in March 2003, the company’s artists were notified that the stockhouse had entered into “distribution arrangements” with Corbis. “No details were given,” one images.com artist later wrote, “and the email gave the impression that as things progressed, we illustrators would be informed.”¹⁸

Yet, when illustrators were informed, it was other artists, not the stockhouse, who supplied the details. Posting on the IPA website in 2003, several artists began to report what they were learning from personal phone calls about the new Image.com/Corbis policies. It appeared that artists would get only thirty-five percent of domestic sales, and images sold through Corbis would be “branded” and credited only as the property of Images.com/Corbis—artist’s credits would be dropped. In addition, pictures originally consigned to Spots on the Spot for rights-management would be sold through the Royalty-Free Division of the Corbis site.

Understandably, the higher commission fees were unwelcome to artists locked

17. David Carr, *U.S. Eyes Bill Gates' Photo Collection*, THE INDUS. STANDARD, July 28, 2000, <http://www.thestandard.com/article/0,1902,17230,00.html>.

18. Dave Cutler, *How I Feel About the Images.com/Corbis Deal*, http://www.illustratorpartnership.org/01_topics/article.php?searchterm=00117 (last visited Feb. 28, 2006) (on file with author).

into long-term contracts. But the dumping of rights-managed work as royalty-free product was especially outrageous: royalty-free rights, once granted to the buyer, are unlimited. Corbis's royalty-free terms promise buyers, "Once you purchase an image, it is pre-cleared and ready to use in a variety of ways."¹⁹ Yet, according to Spots on the Spot founder Dave Cutler, these illustrations were moved into the royalty-free market "without any discussions with participating artists."²⁰ Because copyright can only be transferred in writing, and because an agency cannot convert an artist's work to royalty-free status without the artist's consent, some artists publicly charged copyright infringement and breach of contract. Cutler posted an open letter on the IPA website:

I would not have believed that the powers-that-be at Images.com would allow illustrations submitted to them . . . as "rights-protected" stock illustrations to now become available as royalty-free clip art. Clip art that is controlled by unknown corporate employees who have no relationship with—or understanding of—the artists whose work they will now market and represent.

. . . I am also vehemently opposed to the fact that the copyright credit will list Corbis and Images.com and intentionally omit the artist's name. This is an incredible insight into the corporate mentality of these two companies, showing a deep lack of respect for the illustrator as creator and artist.

I am deeply disappointed and embarrassed. I also feel betrayed, particularly because I was the founder of Spots on the Spot. Now that collection is virtually the opposite of what I envisioned it to be. In its new incarnation, I would never allow myself or any artist who contacted me for advice to be part of such a travesty to the rights of artists and creators.²¹

As word of the "new policies" began to spread, Ken Fadner, Chairman and CEO of Images.com, and Marie-Christine Matter, Images.com's President, addressed a letter to their "contributors." In it, they did not respond to charges of copyright infringement or breach of contract, but instead attempted to justify their company's actions this way:

[S]ingle-image [royalty-free] sales are almost always for one-time uses and function very much like rights-protected sales, but at a lower price point. And since the Spots image file sizes are very small, there is, in fact, little chance that the images will be used for large projects. And, of course, they are not 'royalty-free' at all in the sense that a separate royalty is calculated and paid to the illustrator on each and every

19. Corbis, About Royalty-Free, http://pro.corbis.com/creative/en-US/help/content/About_Corbis/About_Royalty_Free.htm. See Corbis Content License Agreement, http://pro.corbis.com/creative/terms/content/EULAs/Certified_EULA_US.pdf (last visited May 29, 2006) ("Royalty-Free Content: The rights granted under this Paragraph include the right to make the Royalty-Free Content available to ten (10) separate individuals (cumulatively over the Term) for the sole purpose of manipulating or otherwise using the Royalty-Free Content to create the End Use according to the terms provided herein ('Uses') in any and all media now known or hereafter devised. You must obtain an additional license and pay Corbis the applicable one-time flat fee in order to make the Content available to more than ten (10) users").

20. Cutler, *supra* note 18.

21. *Id.*

single-image transaction.²²

Readers of this Article can determine for themselves whether a “very small” file size justifies the stockhouse’s unilateral decision to shift copyrighted work into the royalty-free market without the rightsholder’s permission. Even if every “single-image transaction” represents a “separate royalty,” it also represents another buyer who can now use that image indefinitely “in a variety of ways”—even if the CEO and President of Images.com assures rightsholders that there is “little chance” that this possibility will happen.

Mr. Fadner and Ms. Matter acknowledged that “not all of you” will agree with these “new strategies,” but wrote that they are necessary because “the new generation of art buyers sees imagery as a disposable commodity.” They blamed “a tendency for buyers to purchase particular images rather than to seek out the work of particular artists” as the chief reason for this change.²³

Yet, some artists were quick to state the obvious: that the “tendency” of buyers that the management of images.com blamed for degrading the illustration market was the very tendency their company had fostered and would even accelerate by removing artists’ names from their works. By crediting art only to “images.com/Corbis,” the stockhouse virtually ensured that clients would become reliant on the stockhouse, and not the artist, for pictures; prospective buyers could not “seek out the work of particular artists” if they did not know the artists’ names.

While a few disgruntled artists bantered about lawsuits for weeks on the internet following this announcement, the issue soon disappeared from illustrators’ chat rooms. Although some may think that litigation is desirable to right wrongs and clarify the legal issues that arise out of these business practices, it may be instructive to study the use of legal force by Getty Images against the respected photographer Penny Gentieu to understand the drawbacks of such measures.²⁴ In 2000, Gentieu sued Getty for breach of contract, breach of fiduciary responsibility and copyright infringement. She alleged, among other things, that Getty had withheld royalties, licensed her pictures beyond the scope of its authority, infringed her copyrights by directing other photographers to copy her images and failed to honor its obligation as her agent to market her work properly. Yet, in March, 2003, Judge Milton Shadur of the United States District Court for the Northern District of Illinois granted summary judgment for Getty. As Gentieu prepared to appeal the

22. Posting of SIS, To Our Contributors, to http://www.illustratorpartnership.org/01_topics/article.php?searchterm=00209 (Mar. 7, 2003, 14:39 CST).

23. A Disposable Commodity, http://www.illustratorpartnership.org/04_forums/index.php (Mar. 24, 2003, 14:09 CST).

24. See *Gentieu v. Tony Stone Images/Chicago, Inc.*, 255 F. Supp. 2d 838 (N.D. Ill. 2003); see also Victor S. Perlman, *Standing Up to a Giant: Penny Gentieu v. Getty Images*, ASMP BULLETIN, Winter 2004, at 18, <http://www.asmp.org/pdfs/bulletins/2004/winter04.pdf>; Stephen Filler, *Gentieu Litigation Shows Brute Force of the Courts*, ILLUSTRATORS’ PARTNERSHIP, http://www.illustratorpartnership.org/01_topics/article.php?searchterm=00135 (last visited May 10, 2006); ASMP, Press Release, ASMP files complaint with SEC against Getty Images, Inc. Why did Getty not disclose suit in SEC-required reports?, <http://www.asmp.org/news/spec2001/sec.php> (last visited May 10, 2006).

case, Getty petitioned Judge Shadur to order her to pay Getty's legal fees: \$ 728,308.23. Unless she did so immediately, Getty demanded that Gentieu surrender to them her photographs, negatives and copyrights; they offered to drop the demand if Gentieu would drop her appeal. Faced with financial ruin and the loss of her life's work, Gentieu dropped the case.²⁵

E. CAN STOCK HOUSES BE UNIONIZED?

In 2000, artists' representative Tamara Shannon summed up what grassroots artists had been saying for years: that stockhouses were engaged in "a hostile takeover of the illustration business."²⁶ On July 28, 2000, *The Industry Standard* said the same thing differently: "What had been a dowdy business has become a battleground between Corbis and Getty, companies controlled by two of the richest families on earth. Over the past several years, the two firms have been gobbling up smaller stock companies and now control at least 135 million images."²⁷

While professional organizations have ignored the spreading effects of stockhouse business practices, the owner of a stockhouse proposed his own strategy for artists. In a 1998 interview, Miles Gersten, founder and president of Artville, a royalty-free stock service (since bought by Getty) predicted that within the decade most stockhouses would be owned by multinationals such as Getty and Corbis. These giants would acquire so much market share, he suggested, that artists would have to depend on them for work. Then, he repeated what he had said earlier that year, on January 31, 1998, to the Graphic Artists Guild (GAG) at a GAG forum in Seattle Washington:

I just spoke to the Graphic Artists Guild about the stock business My opinion is that the Guild could act as sort of a Screen Actors Guild, negotiating minimum contracts, and things like that. Unfortunately, I think it's against the law, and an antitrust violation But I think the Guild could do some interesting things about negotiating with stock houses if it were legally allowed to do it.²⁸

This idea was echoed a year later by GAG's then-Executive Director Paul Basista. Writing in the June 1999 issue of *HOW*, a graphic arts trade magazine, Basista dismissed the grassroots "artists who rage against traditional stock agencies" as an "endangered species" headed toward extinction. Instead of

25. Brad Holland, *Corporate Injustice: An Interview with Penny Gentieu*, Illustrators' Partnership, http://www.illustratorpartnership.org/01_topics/article.php?searchterm=00137 (last visited May 10, 2006).

26. "The Future of Illustration," IPA Roundtable, *The New School*, Apr. 21, 2000 (Videotape available from IPA).

27. David Carr, *U.S. Eyes Bill Gates' Photo Collection*, *THE INDUS. STANDARD*, July 28, 2000, <http://www.thestandard.com/article/0,1902,17230,00.html>.

28. Telephone interview with Miles Gerstein, President of Artville (Feb. 19, 1998), *Reprinted in* Bob Dahm, *Stock Illustration and Its Effects on the Profession of Illustration*, 69-70 (1998) (unpublished Masters thesis, Syracuse University) (on file with author). See also Cynthia Turner, *CONTROLLING YOUR INTELLECTUAL PROPERTY: RETAIN & PROTECT YOUR VALUABLE COPYRIGHTS* 28 (2002), available at <http://www.illustratorpartnership.org/downloads/Control.pdf>.

challenging stockhouses, he wrote, artists should “adapt to these changes pertaining to the buying and selling of stock images” by unionizing. He characterized GAG as “a union that embraces creators of graphic art at all levels of skill and expertise.”²⁹ Over the next year he stuck to this theme: on March 9, 2000, for example, he joined an internet discussion about bad stockhouse contracts. His solution: “[A]ctors and ball players . . . organized as unions,” he wrote. “Can artists do this too? We think it’s possible and we’re working towards making that goal a reality.”³⁰

As part of their strategy, in March 1999, GAG members voted 709 to 239 to become Local 3030 of the United Auto Workers.³¹ GAG officers began referring to GAG as “a real union,” routinely citing the prosperity unionization had brought to actors and ball players. The problem with their analogy however, is that actors and ball players organized as unions because they were *employees*. Freelance artists are *independent contractors*, and as attorney Bruce Lehman explained to us in 2000, “Under the National Labor Relations Act, independent contractors don’t have a right to form a union [T]hat can only be addressed by a change in federal legislation. You would have to change the National Labor Relations Act [NLRA] to permit you to have a collective bargaining agency.”³²

This is exactly what ASMP had learned when in 1976 they petitioned the National Labor Relations Board to become a collective bargaining unit. According to Dick Weisgrau, “[a]fter two years and \$ 60,000 . . . we lost. The National Labor Relations Board turned the ASMP down because we were not employees. We were independent contractors, and the National Labor Relations Act applies only to employees.”³³

But while changing the NLRA might be a practical impossibility, could artists unionize if they were redefined (for legal purposes) as “employees”? This became the focus of a contentious debate that started in April 2002, when Representative Conyers of Michigan introduced a Congressional bill (The Freelance Writers and Artists Protection Act) drafted with the help of a UAW lobbyist.³⁴ The bill, which would have provided an antitrust exemption for freelance artists, writers and photographers, was supported by GAG and the National Writers Union, another

29. Paul Basista, *Stock Artists: Serfs, Sharecroppers or Shareholders?*, HOW MAGAZINE, June 1999 (on file with author).

30. Posting of Paul Basista to thespot.com/Conference: “The Stock Exchange”/Topic “Wow” (Mar. 9, 2000, 09:03 EST).

31. GAG, *Graphic Artists Guild Joins UAW* (March 23, 1999), <https://www.gag.org/uaw/index.php> (last visited May 10, 2006) (“[T]he 3,000 members of the Guild have voted by an overwhelming 3 to 1 margin to affiliate with the United Auto Workers/AFL/CIO.”). For the precise breakdown of the vote (709 to 239), see also Bret Harvey, *It’s Official: Graphic Artist Guild Affiliates with UAW*, GUILD NEWS, May/June 1999 at 3, available at http://72.14.203.104/search?q=cache:MgLIJhYjH4kJ:www.gag.org/res/guildnews/99_05_06.pdf+march+1999+GAG+UAW+709&hl=en&gl=us&ct=clnk&cd=1&ie=UTF-8.

32. Bruce Lehman, *Protecting Your Rights Collectively*, ILLUSTRATOR’S PARTNERSHIP, July 2000, http://www.illustratorspartnership.org/01_topics/article.php?searchterm=00027.

33. The Conyer’s Bill, <http://www.spar.org/events/index.html#CONYERS> (follow “Click Here to read more on the defeated Conyer’s Bill” hyperlink) (last visited Feb. 28, 2006).

34. H.R. 4643, 107th Cong. (2d Sess. 2002).

UAW affiliate. For multiple reasons, the bill was opposed actively by ASMP, the IPA and The Society of Photographers and Artists Representatives (SPAR). At a public forum at the Parsons School of Design on November 14, 2002, SPAR attorney Eric Vaughn-Flam summarized the issue that concerned many of the bill's opponents:

I'm going to refer you to section 2 . . . which is the heart of this . . . bill . . . that says . . . the anti-trust law shall apply to freelance writers or freelance artists . . . in the same manner as such laws apply to collective bargaining by employees who are members of a bargaining unit recognized under the National Labor Relations Act . . . to engage in collective bargaining with an employer . . .

. . . [I]n that one paragraph, it makes references to employees. Now, an employee status is kind of like Kryptonite to Superman, for practitioners in the copyright field. An author, under the copyright laws, is a person who would create a copyrightable work. An employee is someone who wouldn't actually own that work What that means is that the ownership doesn't belong to the person creating it, but rather to the employer [A] lot of people are saying "my God, do we lose our copyrights?" . . . I don't know, but I think it's clearly dangerous . . . [C]opyright retention . . . is a high priority with SPAR.³⁵

Copyright retention is a high priority with most freelance artists because authorship is the only means they have of asserting creative control over their work. Artists who lose their copyrights give others the power to alter their work without regard to their intentions or reputation. In addition, most successful illustrators value their independence for personal reasons—if they did not, they would have looked for work in greeting card plants, design firms or animation studios—all situations where employee artists surrender their copyrights to an employer. Most freelancers would probably support a union for these real employees, but few would voluntarily surrender their own independence, their copyrights and their clients to become stockhouse "employees." By the end of the year, the Conyers Bill had been recalled to the shop for repairs and has not resurfaced since.

Whatever the merits of this proposed legislation—or the heated debate it stirred—the information it exposed to artists revealed the fault line that stockhouses had opened up in artists' once "dowdy business," pitting the interests of a union against the different interests of freelancers. In the past, artists had acted as if unionization was a benign option they could exercise anytime a collective will to do so asserted itself. Yet, as freelancers came to understand that collective bargaining might come at the expense of their copyrights, discussion began to turn to alternative ways to muster our market force.

35. The Conyer's Bill, *supra* note 33; *see also* Eric Vaughn-Flam, SPAR Attorney Analyzes Conyers Bill (2002), <http://www.spar.org/events/index.html#CONYERS> (last visited Feb. 28, 2006).

II. PROTECTING OUR RIGHTS COLLECTIVELY

By 1998, four years before the Conyers Bill, some illustrators realized that if freelancers could not unionize, it was pointless to think or speak of it as an option. In search of a meaningful way to become a market force (and still retain independence), illustrators wondered publicly if it was possible to form a collective rights licensing mechanism such as the music rights organizations The American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music Incorporated (BMI). That was the theme of the first Illustrators' Conference, which convened in 1999. In his keynote address, intellectual property attorney Bruce Lehman agreed that illustrators' problems were similar to those once faced by composers. In 1914, the year ASCAP was formed, he noted, most songwriters still received their greatest income from licensing primary rights to Broadway shows, etc. Yet, "ASCAP was formed on the cusp of a technological revolution," he said. "Radio came along about 1920. Radio stations initially broadcast music performed live by studio orchestras. ASCAP extended the same licensing system that it had developed for vaudeville theaters, saloons and restaurants—to radio. So, with radio, a whole new industry, a whole new source of revenue, opened up to them."³⁶ A source of revenue, he added, that ultimately became greater than the primary markets for which the music had been intended. In comparing the situation of artists now to songwriters then, Lehman continued,

The technology that is evolving [in the publishing industry] permits a wider use of secondary use of [artists'] work. It wasn't that long ago that you needed a professional printer to make a good copy of a professional illustration. Now we have copying technologies that have become easier and ubiquitous. In fact, we are on the verge of a seismic shift—comparable to radio in the 1920's—that is the Internet. The Internet has the capacity to seize images and send them around the world in digital form so they can be produced with original quality. Now, that is a scary thing if you can't control your rights. But if you can, it may be an opportunity . . . you need to create an artist-controlled mechanism to enforce those copyrights, so that however the work is licensed, the artist retains control.³⁷

That would be done just like ASCAP and BMI, on a nonexclusive basis. You would be able to make whatever deal you wanted to do with your work. But for certain purposes, particularly these blanket licenses, you would just let this licensing arm . . . do it for you. It might be an automated process. But where you are dealing with an art director who is a consistent source of business for you, you want to make sure that you control those transactions very carefully. You don't want any blanket license there.³⁸

36. Bruce Lehman, *Protecting Your Rights Collectively*, ILLUSTRATORS' PARTNERSHIP, July 2000, http://www.illustratorpartnership.org/01_topics/article.php?searchterm=00027.

37. Lehman, *supra* note 32.

38. Bruce Lehman, *Six Licensing Scenarios*, ILLUSTRATORS' PARTNERSHIP, July 2002, http://www.illustratorpartnership.org/01_topics/article.php?searchterm=00028.

It was on this premise that in December 1999 the founders of the Illustrators' Conference met with Mr. Lehman and attorney Michael Shapiro in New York City to incorporate the Illustrators Partnership. The goal of this non-profit trade association—which would represent the *specific interests of freelance illustrators*—was to track developments in the field of illustration, develop a website to pass along what illustrators learned to others in the field, encourage artists to experiment with different ways to license their work individually and explore ways in which illustrators might manage and clear their future rights collectively.

This organization anticipated that the fundamental problem of creating a licensing arm would be one of resources. Again, it was Mr. Lehman who provided the fledgling trade association with a possible solution to the problem of raising money. He was aware that certain foreign royalties were being collected for American artists overseas, but that these foreign royalties could not be returned to those to whom they rightfully belonged because there was no organization in the United States willing or able to assume the responsibility for doing so.

These royalties are *reprographic fees*, and they are derived from the licensing of artists' work—generally through photocopies, but increasingly through digital republication. They are collected, often under blanket licenses, by Reprographic Rights Organizations (RROs) both in the United States and abroad. Although other countries have—or are developing—collecting societies to collect and distribute these funds to the proper rightsholders, the lack of a collecting society for American illustrators has put the money earmarked for them into limbo. Some countries escrow these homeless funds, some put the money to use in their own countries and some return it to entities in the United States who have so far refused to account for it. It was Mr. Lehman's suggestion that American illustrators band together in an effort to collect these foreign royalties and pool them into a war chest with the goal of creating an "artists ASCAP."

A. WHAT ARE REPROGRAPHIC ROYALTIES?

Reprographic royalties are income from the photocopying of creative work. This means the work of artists, writers and photographers whose work is subject to photocopying. Speaking for the IPA, Attorney Michael Shapiro explained it in plain English in the summer of 2001:

The most common example [of reprographic reproduction] is photocopying For many years, visual artists paid little attention to managing the reprographic rights in their works. But as the use of digital technologies by art creators and users rapidly increases, artists are beginning to recognize the importance of their reprographic rights . . .

When an artist works with a client, rights are usually managed under an individual license or contract. For example, under the contract an artist may decide to grant "one-time, North American print rights" for a specific project. But managing reprographic rights is more difficult. For example, how would an artist living in San

Francisco know if a . . . user in New York were photocopying her work without permission? Monitoring such secondary uses becomes even more difficult in today's global market. To address these and other problems (such as the large number of works and artists), reprographic rights are often managed on a "collective" basis.

Under a collective administration approach, a single organization has the responsibility for monitoring and enforcing rights and for collecting and distributing royalties to the rightsholder. In the United States, for example, the Copyright Clearance Center (CCC) grants licenses to universities, libraries, corporations and other users for the photocopying of published materials. In the year 2000, the CCC returned \$57 million to rightsholders (mostly publishers) for photocopying of printed pages in books, journals and other printed materials. The collection and distribution of royalties for use of reprographic rights abroad is accomplished under a network of "reciprocal agreements" between Reprographic Rights Organizations (RROs) around the world. Under these agreements, artists and writers outside of the United States annually receive compensation for the use of their reprographic rights. Regrettably, without an organization advocating the interests of professional illustrators, U.S. artists rarely, if ever, have received any compensation for the exploitation of their reprographic rights³⁹

B. WHAT IS AN RRO?

According to the International Federation of Reproduction Rights Organizations (IFRRO), RROs "began in the 1980s in response to the need to licence [sic] wide-scale photocopying, providing legal access to scientific and cultural printed works. RROs licence [sic] reproduction of copyright protected material whenever it is impractical for rights holders to act individually. They are set up and governed by rights holders, creators and publishers. RROs derive their authority from national legislation and/or from contracts with rights holders."⁴⁰

For those for whom "xeroxing" a page or two from a publication is a commonplace activity, two lay questions spring to mind: 1) Is there any money in photocopy licensing? and 2) Why would anyone pay for that license if no one requires payment?

1. Is there any money in reprographic licenses?

In the United States, the Copyright Clearance Center (CCC) collects domestic reprographic royalties. In fiscal year 2004-2005, domestic royalties (for *all* reprographic material) totaled \$ 125,100,000 (+/-EUR 105,783,866.06). By comparison, international collections for the same year vary according to population and the efficiency of the RRO. Here are some examples:⁴¹

39. Dr. Michael Shapiro, *Reprographic Rights and the Visual Artist*, ILLUSTRATORS' PARTNERSHIP, Aug. 2001, http://www.illustratorpartnership.org/01_topics/article.php?searchterm=00034.

40. International Federation of Reproduction Rights Organizations (IFRRO), Frequently Asked Questions, <http://www.ifrro.org/show.aspx?pageid=faq&Culture=en#faq3> (last visited Feb. 28, 2006).

41. IFRRO, CLA, <http://www.ifrro.org/show.aspx?pageid=search&q=distributions> (follow "CLA," "VG WORT," "KOPINOR," "CFC," "Access Copyright," and "VG Bild-Kunst" hyperlinks) (last visited Feb. 28, 2006).

Agency	Royalties
Copyright Licensing Agency/U.K.	£ 37,320,762 (EUR 52,753,922)
VG WORT/Germany	EUR 40 Million
Kopinor/Norway	EUR 23,619,975
CFC/France	EUR 21,560,000
AccessCopyright/Canada	CAD \$ 27,898,000 (EUR 17,133,417)
VG Bild Kunst/Germany	EUR 11,427,150.09

According to the 2004 annual report of IFRRO, total international collections for the year 2003-2004 reached EUR 381,651,165.⁴² In general, RROs deduct 11-15% to cover administrative costs. More than one quarter of the RROs spend 10% or less on administration and only 22% use more than 20%.⁴³

For various reasons, these annual figures are expected to rise. First, because of normal growth: CCC, for example, collected \$ 57 million in 2000 and over \$ 125 million five years later. Second, the ratio of efficiency to population can improve: in Norway, for example, with a population smaller than that of New York City, Kopinor collects over one quarter as much as CCC collects for the entire United States. Should CCC ever become as efficient as Kopinor, domestic collections in the United States would soar. Third, as traditional photocopying technology is replaced by digital republication, collections are expected to swell.

2. Why do users pay photocopying fees?

As Bruce Lehman explained to a conference of medical illustrators in 2000,

[I]f you are the Mayo Clinic, or Mobil Oil Corporation or AT&T, you are photocopying or reprinting all kinds of articles. You want to do it in a lawful manner. That is why companies pay licensing fees to CCC. When you pay CCC you want to be covered. You want an insurance policy That way [the rights] can be cleared by a user and the user can be assured that what they are doing is lawful What the Mayo Clinic [for example] gets from the CCC is a blanket license. In effect, they pay a certain amount of money to CCC, which then takes that money and distributes it to publisher rights holders on the basis of various methods of tracking use.⁴⁴

[For many years], publishers, by and large, let photocopying get away from them. They did not take action early, aggressively, to attempt to regularize that process and license it. But . . . many years after photocopying began, and after they had lost a very important case in the Appellate Courts, the Supreme Court, in *Williams & Wilkins*, established the idea of fair use in photocopying. They decided there were certain areas where it was not fair use to photocopy.⁴⁵

42. Report of IFRRO Board to the AGM 2004, <http://www.ifro.org/upload/documents/Report%20from%20the%20Board%20IFRRO%20AGM%202004.pdf>.

43. IFRRO Secretariat, IFRRO Study on Reproduction Rights Organizations (RROs) in European Countries 2 (June 22, 2005), <http://www.ifro.org/upload/documents/EuropeanRROstudyfinal22June.pdf>.

44. Lehman, *Six Licensing Scenarios*, supra note 38.

45. *Id.* (citing *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975)). See also *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d

C. TRACKING HOW ART IS USED

Reprographic rights are licensed and royalties are distributed in two basic ways:

Title-specific royalties: To establish a claim for *individual* royalties, artists identify specific works and receive income based on one of three different methods of reporting:

Full reporting: In some countries, users record details of every copyrighted work copied and report these uses to the collecting society.

Sampling: In other countries, a defined number of users (generally two to five percent of those covered by the reprographic contract) report *actual copying* at agreed-upon intervals.

Objective Availability: In still other countries, rightsholders have decided it would be too complicated to collect data on photocopying directly from users, so they've chosen to distribute royalties based on *the availability of material in the market*. In this case, rightsholders report to the collecting society whenever their works have been published; they are compensated for the *probable* copying of their work. The rationale behind this method is that, because all materials that exist *can* be photocopied, they probably *will be* at one time or another.

Non-title specific royalties: In cases where neither the user (who photocopies the work) nor the author (who created the work) can be identified, reprographic royalties are collected and administered collectively under blanket licenses. In these cases,

Surveys are designed to collect generic, non-title specific information regarding the volume of copying of the type of material and categories of publications, rather than identifying the specific publication, author and publisher that have been photocopied. This distribution method often results in the collective distribution of remuneration. Data is collected for a limited number of the uses covered by an agreement (approximately 5%) for a limited period of time which can vary from 8 hours to weeks. Surveys are conducted less frequently than in a system based on sampling, normally not more often than every 4 or 5 years within each sector covered by an agreement . . .

913 (2d Cir. 1995), where plaintiffs American Geophysical Union and eighty-two other publishers of scientific and technical journals brought a class action claiming that Texaco's unauthorized photocopying of articles from their journals constituted copyright infringement. Among other defenses, Texaco claimed that its copying was fair use under § 107 of the Copyright Act. The Second Circuit court of appeals affirmed the district court's holding that Texaco's photocopying did not constitute fair use. In *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F.Supp. 1522 (S.D.N.Y. 1991), plaintiffs, in this case all major publishing houses, alleged that Kinko's infringed their copyrights when they copied excerpts from books, whose rights were held by the plaintiffs, without permission and without payment of required fees and sold the copies for a profit. The court found that Kinko's did not convincingly show that appropriating excerpts in this way was a fair use of the works in question and concluded that such use violated the Copyright Act.

The RRO distributes remuneration to the rights holders associations, which in turn pay individual authors and publishers. The split of the revenue between publishers and authors is generally subject to negotiation, but in some countries it is fixed in the legislation.⁴⁶

D. HOW ROYALTIES ARE DISTRIBUTED

Perhaps the most arcane problem in collective licensing is (to put it simply) how to determine *how* to pay *how much* to *whom*. To use an analogy from music, how do you calculate how much of every jukebox quarter should rightfully go to which artist? Yet, the example of jukebox royalties is proof that individual payments *can* be carved out of blanket licenses. So, the problem for artists is how to apply this principle to reprographic royalties. Luckily, illustrators do not have to reinvent the jukebox. Existing RROs are already making such determinations, although blanket licensing fees are handled differently from country to country. Here are a few examples.

In Norway, Kopinor collects visual arts reprographic royalties and distributes the money to Grafill, a visual arts organization created in 1991 by combining the Norwegian Graphic Designers and the Norwegian Association of Illustrators. According to Grafill's General Director Morten Berner, whom I interviewed in 2003, Grafill receives about 8 million NOK, or approximately \$ 1.6 million (U.S.) each year. Grafill has about 1100 professional and 400 student members. It is the members' choice that Grafill retain the money and use it for such things as exhibitions, scholarships and emergency loans to distressed members.

In Sweden, illustrators and fine artists are "experimenting" with a modified version of a similar system. In 2004, Anders Suneson of the Association of Swedish illustrators explained to IPA members how their system works:

[Sweden] and Norway had a system that brought the money back to our associations But [i]n Sweden we wanted to find a system for distributing the money back to individuals.

The system is based on the same statistics that are the base for our RRO to charge the users of the license agreement . . . the rights holder should fill in a form where he presents his production in the three different fields during the last five years, the amount of illustrations, how big the edition and the year of the release. This system gave every rights holder a number of points according to his production.

The total amount of points was now divided with the total amount of money for the three different fields. Of course the point in schoolbooks was the most valuable.

There was also a roof and a bottom of the system, from 20.000 SKR [approximately \$ 2,900 U.S.] to 500 SKR [approximately \$ 75 U.S.]. And of course we had some more rules . . . in order to correct or make the system more soft, because of the fact that the system is based on statistics and assumptions.

46. IFFRO Secretariat, *supra* note 43.

The system called IR (Individual Reprographic Rights) distributed in 2004 the sum of 3.282.000 SKR [or] \$ 432,900 US.

509 rights holders get money out of the system.

The database and the administration is build up at BUS [the Swedish collecting society] For us the Illustrators, we receive the revenue from our RRO and . . . from the three field [sic] schoolbooks, non-fiction and fiction, we know that it is 65% of what we get every year. The [other] 35% is being handled as before, for scholarship/grants and other collective achievements for the benefit of the illustrators.

The system has been given a test-period of three years and we are now [evaluating it] We hope that the system should be accepted and permanent.

We are also working in a group from the artists, the photographers and us the illustrators around the future of copyright and also a similar idea as the [IPA] Copyright Bank. But still we are on a very basic starting up level.⁴⁷

According to representatives of various international RROs, the use of visual art accounts for roughly eight to thirteen percent of total reprographic collections. In the UK, for example, in 2004, the Designers and Artists Copyright Society (DACS) distributed “over £ 2.25 million” to British visual artists; the “50 highest paid claimants” received over £2,600 apiece and the top twenty over £3,700.⁴⁸ And in Germany, where visual art royalties are collected by a separate RRO, it is notable that in the figures shown above, Germany’s VG Bild Kunst, which collects “for works of art, photographs, and graphic design,” collects over a quarter as much as VG WORT, which represents “scientific and literary works.” Clearly, given the amount of visual art produced in the United States (and the amount of money collected by the American CCC), it seems certain that there are unaccounted-for domestic royalties that could be used wisely to bring some order to the chaotic state of artists’ secondary rights licensing in the United States. Yet, since the CCC’s inception in 1976, no visual creators or their organizations have succeeded in getting CCC to acknowledge the authorship of American illustrators or photographers.⁴⁹

E. THE SITUATION IN THE UNITED STATES

American fine artists collect foreign reprographic royalties through two organizations: the Artists’ Rights Society (ARS) and the Visual Artists’ and Gallery Association (VAGA). These groups have established reciprocal agreements with

47. Letter from Anders Suneson to author (Aug. 25, 2004) (on file with author), *available at* IPA Members-only Forum (Aug. 27, 2004, 14:07 PM CST), http://www.illustratorpartnership.org/01_topics/article.php?searchterm=00210.

48. Design and Artists Copyright Society, PAYBACK 2004 REPORT 3-4 (2004), http://www.dacs.org.uk/pdfs/payback_2004_report.pdf.

49. *Id.*

RROs in various countries, but, traditionally, they have not collected royalties on behalf of illustrators.

From the perspective of international collecting societies, the situation in the United States is “anomalous.” Here is how Simon Stern, a board member of the British visual arts collecting society DACS explained it to this author in an email dated Oct 15, 2004:

In the case of DACS the issuing of blanket licences and gathering of sample data is carried out by . . . the Copyright Licensing Agency (CLA) . . . Unlike CLA, which is jointly owned and run by creators and publishers, [the American] CCC is entirely a publisher owned operation, and the money goes to publishers. Whether they pass a share on to their authors, I don't know Nevertheless I am told that CCC currently collects about £80m per year CCC is a member of the collecting societies' international organisation IFRRO, and is in a somewhat anomalous position, I understand, because of its 'publisher only' status. There is also a trend within IFRRO to acknowledge the significance of the visual repertoire when licensing photocopying. The CCC therefore may be open to persuasion on this point.⁵⁰

The international emphasis on publisher-author cooperation is not a mere courtesy; it is one of the principles of IFRRO, as stated on their website: IFRRO is an “independent organisation established to foster the fundamental international copyright principles embodied in the Berne and Universal Copyright Conventions. . . . IFRRO works to . . . support *joint attempts by publishers, authors and other rightsholders* to create and develop rights management systems world-wide (emphasis added).”⁵¹

Yet, as Bruce Lehman reminded medical illustrators in 2000, “I would guess that every single one of you is aware of a situation in which an institution has photocopied a text using your work, or has electronically reprinted it. *Your rights have not been cleared.* I don't think it is because anybody wants to be mean. There is no mechanism [in the U.S.] to clear the rights.”⁵²

F. A REPROGRAPHICS ALLIANCE

In an effort to bring illustrators together and initiate an approach to the CCC, the Illustrators Partnership, in 2001, formed an alliance with the Association of Medical Illustrators (AMI) to lay the groundwork for a broad-based *reprographics coalition*. In Europe, IPA representatives began meeting with the heads of foreign collecting societies. On April 24, 2002 they met with Mr. Andre Beemsterboer, Chairman of IFRRO at the Cedar Institute in the Netherlands. At the meeting, IPA presented over 250 samples of work by American illustrators that were subject to reprographic or digital republication both in the United States and overseas. We

50. Letter from Simon Stern to author (Oct. 15, 2004) (on file with author). Posting of author to IPA Forums: Reprographics Coalition (Oct. 16, 2004, 1:33PM CST), available at http://www.illustratorpartnership.org/01_topics/article.php?searchterm=00212.

51. IFRRO, WHAT IS IFRRO, <http://www.ifrro.org/show.aspx?pageid=about/whatis&Culture=en> (last visited Feb. 28, 2006) (emphasis added).

52. Lehman, *Six Licensing Scenarios*, *supra* note 38.

accompanied these samples with copies of the artists' contracts for the work, demonstrating that the artists had retained their reprographic rights.

Mr. Beemsterboer expressed surprise that artists had retained such rights because, he said, two U.S. organizations—CCC and the Graphic Artists Guild—were each claiming the rights to collect artists' royalties. Such competing claims, he said, were causing “consternation” among international RROs, since they had no way of knowing which groups—if any—in the United States had actually been authorized by rightsholders to collect their royalties. He said this confusion was unlikely to be resolved internationally until there was one group in the United States properly mandated to act as a collecting society. As a result, he said, the fate of reprographic funds for American illustrators was in the hands of individual countries. As reported by Mr. Paul Rogers of Fintage House, agent for the IPA:

I asked [Mr. Beemsterboer] specifically if the CCC had been paid all American shares in all countries and he said it depended on the country. For example in some countries the amounts are so small they are not distributed at all but go to the cultural fund [in that country] to support authors and artists. In some countries like Netherlands the CCC received the authors share and the publishers shares (in fact all shares for American works), and in some countries the money is sitting at the society, since they do not know how to resolve whom to pay.⁵³

Mr. Beemsterboer noted that one European country “has a 60 million Euro fund which is going to be eventually much much higher due to digital distribution.” We believe this confirmed Bruce Lehman's suspicions about the fate of artists' overseas royalties. The question for U.S. artists was whether there was anything artists could do to collect these funds and pool them to create a collecting society.

G. A REPROGRAPHICS COALITION

Between 2002 and 2004, IPA applied for and became an Associate Member of IFRRO. During that time, the IPA also united four other illustrator's organizations into a graphic arts Reprographics Coalition. Our coalition brought together over 2,500 of the most prolific and widely published cartoonists and illustrators in the United States. Their pictures illustrate a wide spectrum of general and special interest publications. The majority of these artists are independent contractors and have reserved reproduction rights to a substantial number of their published works. In the spring of 2006, the Guild of Natural Science Illustrators and the San Francisco Society of Illustrators joined the coalition, so the member groups of this alliance are now seven:

- The Illustrators' Partnership of America, founded 2000 (300 members)
- The Association of Medical Illustrators, founded 1945 (800 members)
- The Society of Illustrators, founded 1901 (1,000 members worldwide)
- The National Cartoonists Society, founded 1946 (600 members)

53. Report by Paul Rogers of Fintage House to Cynthia Turner, Board Member of IPA, April 24, 2002, posted on IPA Forums: Sept. 1, 2004, 15:34 CST, available at http://www.illustratorpartnership.org/01_topics/article.php?searchterm=00211.

- The American Society of Architectural Illustrators, founded 1986 (400 members)
- The Guild of Natural Science Illustrators, founded 1968 (1000 members)
- The San Francisco Society of Illustrators

Because most RROs are non-profit organizations,⁵⁴ an American collecting society for graphic artists would have the best chance of establishing reciprocal agreements with other countries if it, too, were non-profit. And, since artists don't have to belong to any organization to do published work, they should not have to join an organization to receive earned income from that work. Therefore, their coalition believes a collecting society should be open to any artist who has reason to believe his or her work is subject to photocopying or digital distribution. Membership should be free, with administrative costs borne by commissions on the fees a collecting society would distribute to artists.

H. SETTING UP A COLLECTING SOCIETY

When this coalition was officially announced in October 2004, Mr. Simon Stern, a board member of DACS, contacted it.⁵⁵ After confirming that artists were starting very much as DACS had, he advised them how to proceed:

The first thing to do is to get as many visual creators from all disciplines to join as you can. The best way of doing this is probably through associations rather than individuals. You need mass membership across the full spectrum of visual creators to give you recognition and clout. DACS was in the fortunate position of being able to use funds from cable retransmission of TV programmes quite soon after it had got enough creators together to claim to be representative, and these funds were swallowed up initially in setting up the structure of the secondary rights operation (to put it bluntly, DACS charged a commission of 100%, which is the way almost all collecting societies have funded their start-ups). . . . You will also probably need to find some funding from somewhere to employ at least one person initially to get the whole thing together.⁵⁶

I. WHICH ARTISTS WOULD BENEFIT?

Based on the principle that “work which *can* be photocopied *will* be,” one might guess that the greatest beneficiaries of reprographic distributions would be the most prolific illustrators or those whose work appears in the most widely distributed publications. But surveys by overseas collecting societies suggest that certain genres predominate. In Sweden, as Anders Suneson noted (above), the largest percentage of illustrators' reprographic fees goes to schoolbook illustrators. This

54. IFRRO GENERAL PAPERS IV: EMERGENT RROS 1 (1997), <http://www.ifrro.org/upload/documents/Emergent-RROs-1997.pdf>.

55. See Letter from Simon Stern, *supra* note 50.

56. *Id.*

seems to be true in other Nordic countries as well: a 1997 survey by collecting societies in Norway, Sweden, Finland and Denmark showed that between one-fifth and one-third of their total reprographic fees come from educational licenses.⁵⁷

Nevertheless, the situation is different in the United States, as Simon Stern of DACS points out. “In the UK [and other European countries] copying for educational purposes is not a ‘permitted act’, but in the [United States] it is.” A *permitted act* in the United Kingdom is what Americans call *fair use*. “This means that whereas [the British] CLA collects a lot of money from schools & universities, [the American] CCC has only the business (& presumably government) sectors to target.”⁵⁸

Yet, in the United States, the business and government sectors are significant. As Bruce Lehman told medical illustrators in 2000, “[CCC’s] photocopying licenses probably deal disproportionately with scientific and technical journals. That means medical journals contain a lot of your stuff. Have any of you ever seen a check from CCC?”⁵⁹

Because the CCC does not track illustration use, there are no figures available for which artists CCC would be paying *if* CCC were paying them. Common sense suggests that *average* artists would be the greatest beneficiaries, although preliminary reports from overseas suggest that as digital republication replaces traditional photocopying, all artists stand to benefit.

J. A COPYRIGHT BANK

During the same period that the IPA organized a Reprographics Coalition, waited for IFRRO membership and attempted to locate foreign visual arts royalties, prominent medical illustrator Cynthia Turner took the lead in contacting the Copyright Clearance Center to inquire how illustrators could register to collect their domestic royalties. From our very first discussions in February 2002, CCC representatives took the position that they knew of no way to track visual material when it appears in a collective work. They told us that we ourselves would have to propose a means of tracking art—either when it is photocopied with a page of text or as a separate element.

At that time, the IPA was unaware that foreign collecting societies already track illustration using the methods described above. Yet, we *were* aware that U.S. publishers were embedding *Digital Object Identifiers* (DOIs) in the work they distribute (CCC reports over ten million already in place). Consequently, we began to research technology that would allow us to harmonize our efforts with what publishers were already doing.

In 2004, IPA located a firm that could supply technology for embedding a *persistent identity tag* in every work of art delivered to a client. This tag would

57. IFRRO General Papers II: Reprographic Reproduction, http://intranet.ifrro.org/papers/repro_rep.html (last visited May 9, 2006).

58. Letter from Simon Stern, *supra* note 50.

59. Lehman, *Six Licensing Scenarios*, *supra* note 38.

identify the author of each illustration, photograph, map or chart within a collective work (the issue of a publication, for example) and link it to an artists' registry—a *Copyright Bank*—along with contractual metadata that would allow potential users to know which rights the artist has made available for licensing and which he or she had reserved. The IPA hoped that tagging each item within a compilation would enable CCC to track usage not only of the *compilation* itself, but also allow the artist to license his or her own contribution as a *separate element*.

An artists' Copyright Bank would let artists license their available rights at their own discretion according to their own terms. The Copyright Bank would remit fees to the artists. As Ms. Turner points out, this would retain the existing rights-negotiated model and insure that artists retain control over price and usage. It would provide sufficient market flexibility to satisfy the demands of diverse users, while respecting the time-honored tradition of authors' rights. The questions are whether the Reprographics Coalition can locate enough undirected foreign royalties to use as seed money and whether CCC will work with us to negotiate a business arrangement that would benefit all parties. On October 8, 2004 the Coalition submitted our proposal for a Copyright Bank to the CCC See PDF: *Copyright Bank*.⁶⁰ This submission complied with CCC's demand that we recommend a tracking solution to them as a precondition of their discussing the issue of tracking artists' rights.⁶¹

It is now obvious to the IPA after extended contact with overseas collecting societies that CCC's previous position—that visual material cannot be tracked using existing methods—is at odds with the tracking that collecting societies in other countries such as Norway, Sweden, Finland, Denmark, Germany, France, Italy, Canada, UK and Australia have been doing for years, and doing without the benefit of cutting edge technology. At the 2004 Conference of IFRRO organizations in Singapore, attorney Bruce Lehman, speaking on behalf of the IPA Reprographics Coalition, said emphatically that it was incorrect for any organization to say there was “no way” to track visual arts material in the United States. Likewise, at the 2005 IFRRO Conference in Madrid, Hans-Petter Fuglerud, Director of Licensing for Kopinor (Norway), stated that it is “easy to track illustration.” Yet, in spite of repeated requests to the CCC that they meet with the IPA, as of February 2006, CCC still has not responded. The failure of the CCC to act on this issue has international ramifications as well. Without a mechanism to track art in the United States, the work of foreign visual artists published in this country cannot be collected and returned to the proper rightsholders overseas.

60. See *infra* Appendix.

61. Letter from IPA to Christopher Kenneally, Director, Author & Creator Relations, Copyright Clearance Center (Oct. 8, 2004), http://www.illustratorpartnership.org/01_topics/article.php?searchterm=00204. The letter responded to an email from Christopher Kenneally Director, Author & Creator Relations, Copyright Clearance Center To Cynthia Turner, Brad Holland and Seth Traxler [Attorney, Kirkland & Ellis] (Aug. 19, 2004, 15:54:37 CST).

III. CONCLUSION

In January 2005, the U.S. Copyright Office announced an Orphan Works Study to determine if certain works, whose authors were “difficult or even impossible to locate” should henceforth be declared “orphans” and made available to potential users under a system of default licensing.⁶² At roundtable discussions in Washington D.C., Jule Sigall, Associate Register for Policy and International Affairs at the Copyright Office, indicated that the purpose of their study was to “smoke out” which authors cared to manage their copyrights and which did not: using illustrators as an example, he suggested that unless artists adopted the kind of collective management system “envisioned” by the IPA Reprographics Coalition, many “might suffer the consequences of being lumped in with the batik printmakers,” or in other words, with folk artists who have lost control over how others use their work.⁶³

It is impossible to tell how such warnings will resonate with freelance artists or shape their decisions. While most artists would probably rather work as they have for decades, competing with one another to do the best possible work for trusted clients, living in such a time warp has become increasingly untenable. The internet has created a defining moment in the history of popular art, and artists who fail to take charge of the changes affecting them may find themselves in the same position as blacksmiths were at the dawn of the auto age.

Because illustration is still a cottage industry, there are no reliable statistics to document the effects of the changes discussed in this Article. Nevertheless, one indicator of the damage done to long-term careers is the collapse of several illustrators’ directories, the once-profitable promotional books in which artists advertised for clients: both *RSVP* and *American Showcase* (which until recently was published annually in two large volumes) ceased publishing in 2005. Furthermore, any professional with a brief history in the illustration business can name talented colleagues who have dropped out of the field or taken day jobs to augment what, until recently, had been successful careers.

The demands from publishers that artists sign all-rights contracts on take-it-or-leave-it terms is one of the reasons freelancers are either surrendering their rights against their will or seeking employment in other fields. And the CCC’s status,

62. Orphan Works, 70 Fed. Reg. 3739 (Jan. 26, 2005).

63.

We’re trying to sort of smoke people out . . . [T]o incentivize folks . . . [O]ne way is to create a orphan works system that says to the illustrator, if you don’t start getting part of a collective, . . . you might suffer the consequences of being lumped in with the batik printmakers . . . I think the reality is that there is that gray area of people who . . . for whatever reasons don’t really want to actively manage their copyright, and . . . would be perfectly happy with a default licenses [sic] . . . But they may also, after thinking about it, say, no, I want to actively manage copyright[s]. So the question is, maybe you can identify that group that your group wants to make most use of in the negative, in the sense they’re the ones who have not managed to join a collective organization like the one Ted [Theodore Feder, President of Artist Rights Society] operates or the one that Brad [Holland] is envisioning.

Transcript of Orphan Works Roundtables, Library of Congress, Wash. D.C. 146 (July 27, 2005), available at <http://www.copyright.gov/orphan/transcript/0727LOC.pdf>.

which is unique among international RROs as a publishers-only collecting society, indicates how publishers intend to share with artists the licensing fees they collect from artists' published work. Besides this loss of rights and income, artists also face the competitive pressure of bidding for assignments against discount image providers such as Getty and Corbis, who, because they acquire inventory for virtually nothing, can sell a work for even a small fee and still make a profit. Consequently, regardless of whether one sees the stockhouse phenomenon as the hostile takeover of a cottage industry by predatory means or simply an inexorable concentration of the means of distribution by "two of the richest families on earth," freelance artists now face a future in which each must find a way to thrive individually or band together with others to protect their rights more effectively.

One strategy for artists to succeed in spite of the stockhouses might be for artists to "adapt" to the erosion of their copyrights and clients and "unionize" in the faint hope that someday that theoretical union can change the National Labor Relations Act to permit artists to form a real union. Nevertheless, most experts agree that this hope is quixotic, and in any event, it raises a legitimate question of why artists should surrender their copyrights and independence now so that someday a union may be able to fight to restore them.

Without organization, some artists will yet survive the kind of "decimation" that thinned the ranks of assignment photographers a decade ago. Talent, name recognition, adaptability or resourcefulness will give a number of artists the means to persevere. Yet, no trade really can be considered healthy without a sufficient number of those basic, everyday assignments that most small business persons depend on for their livelihood; and no craft truly can be considered viable unless entry-level craftsmen can find enough journeyman work to acquire and hone the skills of their trade.

The idea of an artists' Copyright Bank is one possible solution for artists to band together as a market force, but even here, some caveats are in order. First, it is difficult enough to get five artists to agree on a restaurant to go to for dinner, let alone to get thousands of artists scattered across the country to agree on a new way to license their work. Second, artists face considerable opposition from all the forces that now benefit from their disunity. Third (and perhaps most critically), no existing visual arts collecting society anywhere in the world can yet be compared to a real "artists' ASCAP." Even the top twenty British artists who received checks this year from DACS cannot count their royalties as anything more than "a little extra money." In other words, while the establishment of an American artists' collecting society might someday be a valuable gift to future generations of illustrators, it will have to be created, funded and given to them by artists who still will have to survive the current conditions.

APPENDIX

COPYRIGHT BANK

How Persistent Identity Tags and Contractual Meta-Data can be embedded in artwork, allowing a Copyright Bank to administer artists' individually-held rights on a use-per-image basis.

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