Exploring Mechanisms to Overcome Economic Disincentives to Rights Holders

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Explaining why he had founded Life magazine in 1936, Henry Luce said, "To see life; to see the world; to eyewitness great events; to watch the faces of the poor and the gestures of the proud; to see strange things - machines, armies, multitudes, shadows in the jungle and on the moon; to see things thousands of miles away, things hidden behind walls, things dangerous to come to; to see and to take pleasure in seeing; to see and be amazed; to see and be instructed; is now the will and new expectancy of half mankind."

Luce's call for images to be the primary medium for the communication of history and culture was revolutionary in his contemporary American publishing environment, where text was primary and illustrations played a secondary role. Fourteen centuries earlier, Pope Gregory promoted the use of images in the church because, he said, "painting can do for the illiterate what writing does for those who can read." Seventeenth Century Dutch artists were so powerfully descriptive that, by studying paintings, prints and drawings as primary data, contemporary scholars have substantially altered our interpretation of Holland's Golden Age. Throughout history, images have been used to persuade and to inform.

For more than fifty years, editors in mass-market print media have used photographs to inform, entertain and market. Today, the ability to create image-based, interactive media is a revolution comparable to the introduction of photographic reproduction to print media. But even though the power of images as information and entertainment is universally accepted, the visual content of current multimedia software is often dismal.

I suspect three reasons for the disappointing content of most current multimedia. First, the level of visual sophistication of our better print media may not yet be expected from software producers. Second, these producers often avoid copyrighted pictures because of the hassle in locating and negotiating with the many individual rights holders. Finally, rights holders have economic and other disincentives to discourage them from licensing their intellectual property. All of these problems need to be solved before multimedia can achieve its potential to benefit rights holders, software publishers, and society.

This audience represents many of the world's great cultural and scientific museums and archives. I speak from another perspective, as an editorial photographer and individual rights holder. We are similar, and we are different. For your museum, photographs of the

collection serve to disseminate ideas and knowledge, second in importance only to the objects themselves. For the editorial photographer, the image has primary importance as the only tangible expression of our ideas and creativity. For museums, the distribution of photographs and the granting of reproduction rights are services to extend the reach of the collections, and may be a source of revenue. For photographers, royalties earned by granting reproductions rights enable photographers to continue to create. In order to survive as a profession, editorial photographers must overcome the economic disincentives of multimedia licensing, as our markets con tinue to devolve away from print media, and towards electronic dissemination of information and entertainment.

Rights holders, whether photographers or museums, earn royalties based on the economic value of the reproduction, display or perform ance of their intellectual property. The issue which arises in electronic media is that the use of images is far more volatile than print. Images on software are not only reproduced in a fixed context, but they may be used in other contexts. They can be transmitted, they can be downloaded onto other software and, when the resolution is high enough, they can be copied into print media. If these additional uses of the intellectual property are not authorized, they constitute copyright infringements. Of course the problem of infringement has always existed, but the proliferation of culpable technology makes infringements easier to accomplish and more difficult to detect.

Two options exist for the rights holder. The first option is to sell the electronic rights to another party for a fixed, one-time payment. The new owner of the rights assumes the economic risk of commercializing the images, in anticipation of earning a profit. If the one-time payment to the original rights holder is large enough, this may be an attractive option. However, the ultimate economic return on intellectual property is inherently uncertain.

The second option is for the rights holder to continue to earn royalties proportionate to the actual use of the images. To achieve this, we must clearly define the products for which our images are being licensed, and then define the secondary products and services that can be derived from our images. That's the easier part. The more difficult task is to measure each derivative use, assign appropriate economic values, and collect and distribute the royalties. To accomplish this task, our initiative integrates the paradigms for editorial stock photography distribution with music licensing.

Editorial Photography

The creation and distribution of editorial photography and ownership of copyright are dissimilar for newspapers, magazines and books. Reacting to television's ascendancy as the primary mass-market medium of visual information, the acquisition of photography for ma gazines and books has radically changed in the last generation, and the relationship between photographers, photo agencies and publishers is often a rude surprise to software developers who approach major publishing companies hoping to find one-stop sources of content for multimedia.

Books

Books with many photographs generally fall into two categories:

- 1) The works of a single photographer on a theme; and
- 2) Collections of pictures by many photographers on a theme.

Single photographer, single theme books are often the photographer's fulfillment of a personal commitment as an artist or documentarian to explore a subject. The tradition of the photographer working alone for many years to create a visual encyclopedia - today we might say image database - is almost as old as photography itself.

Eugene Atget, 1857-1927, is an unlikely figure to refer to in a discussion of databases. A Parisian, he was an actor and stevedore into middle age. But the last thirty years of his life, working from a cramped Montparnasse apartment, he created an image database of French culture. Aware that he was witnessing the industrial age obliterate Paris' pre-Revolutionary commerce and architecture, he photographed it with encyclopedic thoroughness. Every morning before dawn Atget would lug his awkward wooden view camera, tripod, and a few glass plates down still-empty streets to record the first misty light of day.

The few visitors who were interested in his photographs of Paris' bridges and fountains, shops, courtyards, gates and gardens climbed the creaky five flights of stairs to his quarters, and for a few centimes acquired a print, annotated on the back. For example, "Hotel des Archeveques de Lyon, rue Saint-Andre-des Arts, 58" would show 17th century doors, carved with profiles of Roman nobles, griffins and laurel wreaths, with two fleshy putti holding the noble family's insignia in the cornice above, one door open to reveal a bright, immaculately swept courtyard inside, and a sign "Apartment a Louer," Apartment for Rent, discreetly hung on a hinge.

Contemporary documentary photography in Atget's tradition is published in picture books of Civil War battlefields, Japanese gardens, Rumanian gypsy culture or Africa's endangered species. Most of these "image database" books capitalize on an independent photographer's personal interests. Few of the titles are shot on assignment. The photographer typically shops around for a publisher after all or some of the pictures are produced, and the union consummated when there is agreement on all issues including control of the final content and the photographer's compensation.

Rarely does either party consider an outright sale of the photographs to the publisher, but they share the risk and the rewards by negotiating a smaller guarantee at the time of publication against royalties pegged on the number of copies sold. These royalties usu ally range from 5% to 10% of the cover price, so that a $40 book may net the photographer from $2-4 for each copy sold.

Licenses for books that contain the work of many photographers are usually not negotiated for royalties. Instead, the publisher pays a reproduction fee for each picture. If the publisher goes back to press for another edition not included in the original contract,

the negotiations with the photographer must be reopened. The lowest prices, close to $100, are usually paid for textbooks, for small photographs. A trade book cover photo may cost several thousand dollars.

Magazines

The magazine industry, even in its anemic financial condition, is the economic engine that sustains high quality non-fiction photography. Before television took the lion's share of advertising dollars, Life, Look, National Geographic, and other mass-market picture magazines, each had many staff photographers. Until the 1960s, publishers could afford to assume all the economic risks associated with photojournalism, and they owned the copyright to the photographs produced by their staffs.

Photography of the highest quality requires talent, hard work and frequent exposure to hardship and danger. For the best photojournalists, photography is not a job, but a spiritual calling and even a mystical experience.

The great photographer W. Eugene Smith, 1919-1978, had a turbulent career at Life magazine, quitting and being rehired repeatedly. In the late 1940s and early 1950s he produced the photo essays that set the narrative and aesthetic standards for documentary photography. Shadows and Substance, the photographer's biography by Jim Hughes, reports that Smith, badly wounded by Japanese shrapnel while covering Marines in the South Pacific, spent a year in painful recovery before he could physically handle a camera again.

In May, 1946, he took the very first photograph since his injury. The well-known image, "A Walk To Paradise Garden," shows his two young children, from the rear, as they emerge from a shadowed forest into a clearing. Nine years later Smith wrote about the painful physical and emotional difficulty involved in forcing his partially mended body back into the service of photography.

> ...The children were scampering every which direction. They approached a clearing roughly arched by the trees, and I became acutely sensitive to the lines forming the scene and to the bright shower of light pouring into the opening and spilling down the path towards us. Pat saw something in the clearing, he grasped Juanita by the hand and they hurried forward. I dropped a little further behind the engrossed children, then stopped. Painfully I struggled - almost in panic - with the mechanical inequities of the camera...and as the children stepped in space to complete my foreseen composition, I pressed the camera release to retain the image of that instant - to hold secure on film the vision of this minute fraction of time floating within eternity. A printable reproduction of a mental realization.
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> The reaction was immediate. I knew the photograph, though not perfect, and however unimportant in the world, had been held. Shock waves of feeling

> released through me, breaking damply out of my flesh. Mist hazed my eyes, I began to tremble, nearly sick; I turned away that my children who had continued on might not turn and discover I was crying - crying out from the agony of my relief...

Photographers, artists and authors are attached to the intellectual property that is the fruit of their creativity by emotional and economic bonds. Smith was a brilliant photojournalist who channeled his spirituality into service for Life magazine, and Life symbiotically supported Smith by providing substantial economic and administrative support, as well as the outlet to publish his images.

While photographers are still highly motivated, staff positions for photojournalists have all but disappeared. Life, Time, Newsweek and USN&WR combined have only twelve staff photographers; even National Geographic has only six general field staff photographers, contributing less than 20% of the magazine's photos. Typically, magazines assign non-staff photographers, or use stock photographs, licensed through stock photo agencies or syndicates. General news magazines assign only 35% to 50% of the photographs they publish.Venerable giants like Time/Warner neither produce, nor own, much of the visual information on their pages.

When a magazine commissions non-staff photography, the copyright resides with the photographer unless there is a written agreement transferring it to the publisher. The majority of published editorial photos are not assigned, but are licensed for one-time use from the photographer, usually through a stock photography agent. Typically most magazine photography is shot by non-staff photographers, either on speculation or for day-rates and expenses from one or more magazines in non-competitive markets. By not requiring exclusivity, the publisher reduces economic risk and has cost-effective access to far more photography.

Stock Photography Distribution

The business of stock photography distribution is almost as old as photography itself. Matthew Brady pioneered the stock business, selling his cardboard-mounted views of the Civil War for the stereoscope viewers found in late 19th century parlors. With the invention of halftone printing, photography was published in books, newspapers and magazines; and photographers responded to new market opportunities by participating in stock photo agencies to more efficiently market and administer licensing of their images.

Compensation in Conventional Markets

Editorial stock photography markets include magazines, trade books, textbooks and encyclopedia. Again, many variables affect negotiations. While some pictures earn thousands of dollars from international syndication, a more typical fee is $200 for an image published in a textbook. Royalties for publishing stock pictures are divided between the photographer and the agency, most often a 50/50 split. Therefore, on a $200 sale, the photographer and

agency each net $100. For the photographer, the accumulated royalties must justify his efforts, expense and risk to create and distribute new photography. The agency earns most of its income from its share of the royalty, and some additional income from research fees and holding fees.

The cost of administration for stock agencies per transaction make lower-valued markets unattractive. One agency that does a large portion of its business with textbooks and encyclopedia is Stock_Boston Inc. Their expense per transaction invoiced, including invoices for research and holding fees, but not including royalties paid to the photographer, is $91.11. Stock_Boston's expense per image licensed, including *royalties paid to the photographer, is $174.94.*

Acquiring Stock Images for Multimedia

At a conference last year, the audience collectively moaned when a multimedia software producer described the problems he faced in acquisition. He stated that the lowest price he was able to negotiate for bulk use of images was $35 each from The Bettmann Archive, for photos with expired copyrights and, therefore, no royalties payments to photographers. Considering the volumes of content that multimedia can consume, it is not surprising that the first wave of educational software relies heavily on public domain images from the 19th and early 20th centuries, available cheaply from the Library of Congress or Smithsonian Institution.

As public domain sources are depleted of fresh images, incentives increase for producers to utilize copyrighted images. However, there has been no incentive for photographers or agencies to license images at rates appropriate for software. No conventional paradigm satisfies the multimedia producer's interest in economical access to large quantities of copyrighted images, nor the rights holder's interest in fair compensation, nor offers the incentive to create new images.

Economic Disincentives in Existing Software Contracts

Alarms have already gone off alerting photographers to be skeptical about offers from a number of vanguard companies seeking images for software. Photo District News reported on the first wave of photographers who were discouraged from participation with software publishers. "Publishers say the CDs help photographers tap soon-to-be lucrative electronic markets," wrote editor David Walker. "But photographers are wondering who's protecting their copyrights. At the same time, some are feeling bamboozled as sales projections and royalty payments have failed to pan out."

Walker described the Media Source CD-ROM series produced by Applied Optical Media. Each Media Source CD contains 1,500 images, and sells for about $400. "With Media Source, you don't have to worry about copyright," an executive is quoted by Walker. "You can abstract images, manipulate them and resell them electronically without paying an additional licensing fee."

d Optical is reported to be paying 20% royalties on each CD sold. According to
Ph trict News, Applied Optical's president promotes Media Source to prospective
ph hers as an image catalog that will spawn additional print sales, an enticement also
use EC's Image Folio CD. However, photographers later realized that these discs are
ma as electronic clip art, and that they do not spawn any requests for print media
rig I they generate few or no royalties. Some photographers reported that they never
got single request for an image, and no royalties at all. "Yet NEC has continued to
ad\ he CDs in computer magazines, numbers of units sold total in the thousands, and
the ny plans to produce more," reports PDN.

r well-known software company, seeking digital image rights eagerly, has con-
trit) further skepticism among photographers. The company commissioned a number
of] researchers to solicit photographers and stock agencies to supply photographs for
spe oducts, for example a CD-ROM encyclopedia. Distribution is projected as
lim erhaps 5,000 copies in three years. They offer the photographer around $100 for
eac e, which might seem generous for a product which is expected to sell only 5000
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Then the Licensing Agreement appears, in which the rights holder grants the company a worldwide, perpetual, and irrevocable license to reproduce and manufacture products containing the images for a fixed fee, regardless of the ultimate number of copies produced, including all updates, new versions and new compilations. This is a very broad interpretation of a product, especially in view of new formats being developed, such as CD-I and HDTV. The software company is granted license to market, distribute, sublicense, lease and rent the products containing the images, as well as to grant sublicenses to OEM's.

There are no restrictions in the Licensing Agreement to limit the digital resolution of the images, nor to define the company's promotion, distribution, and copyright protection of the product. Thus it may be argued that the company is licensed to distribute a version of the product with high-resolution images that can easily be downloaded for derivative use. Does the software producer have any interest or obligation to protect the photographer's copyright? Photographers are being offered $100 for extensive electronic rights, and could soon find themselves competing with the software giant for the distribution of their own intellectual property. The June, 1991 newsletter of the Picture Agency Council of America, stock photography's umbrella trade organization, called this contract a "digital-image bombshell."

Copyright is referred to as a "bundle of rights," including the right to copy, the right to distribute, the right to display or perform, and the right to create derivative works. Each of the rights may be licensed separately and assigned separate economic values. In considering "digital image rights," we must also unbundle the package and precisely define which of the various uses for digital images are being licensed.

For example, is the image being licensed as part of a single, self-contained multimedia disk, or is the image part of a picture collection that can be extracted to support many different products and services? Is the multimedia product being promoted and licensed for

personal use, or is the product being licensed for commercial applications, or being networked or broadcast to many consumers? Will the product be marketed as a source of clip art? At what resolution are the images being reproduced? What responsibility does the publisher have to protect the rights holder's copyright?

Contractually defining the separate digital image rights and issues is not intended to restrict the publisher or the consumer. Electronically disseminated intellectual property encourages volatile media, with new opportunities for information and entertainment delivery. However, rights holders are entitled to royalties based on the economic value of the actual use of their content.

From the rights holder's perspective, there are persuasive reasons to boycott electronic media. The business principle of image licensing is control of reproduction rights, and compensation when those rights are granted. In print media, infringements of copyright were kept at a tolerable level. In the digital environment, with its array of personal computers, scanners, optical and magnetic storage, high speed printers and networks, the familiar technological fences to copyright infringement have disappeared.

Hand-in-hand with the development of culpable technologies, public attitudes towards intellectual property threaten all rights holders, whether authors, photographers, songwriters or publishers. Warned Suzanne Dupre, corporate counsel for the National Geographic Society, "This is a multi-faceted problem. Everyone is a part of an increasing problem in modern society of rampant violation of copyright. We now have two generations of people who have grown up in this country assuming that they can tape off the air; that they can make copies of a tape they buy for their friends; that the Xerox machine is readily available to make as many copies as they want. It's going to be very, very tough to turn this generation around from the idea that because it is available, because physically it can be reproduced, that they have a right to just take it without compensating."

Towards a New Paradigm for Multimedia Markets

In 1987, the National Geographic Society sought to acquire rights to publish a pilot videodisc and a CD-ROM. Non-staff National Geographic contract photographers, like myself and colleague Cary Wolinsky, were asked to license our images at very low rates. We began 144 to investigate the industry standards for licensing images for software and quickly discovered that there were none; indeed, there was no industry. Then we met Dr. Stanley Besen, a Rand Corporation economist, who had studied the effects of new technology on the markets for intellectual property. Stan suggested that photographers look towards the music industry as a possible licensing model. He recognized that the inability to technically prevent unauthorized copying, dissemination and application of images in electronic media is comparable to the dilemma faced by songwriters. Music rights holders are compensated by royalty-based transaction fees forrecording fixed products, whether a record, tape or disc. The purchaser of the fixed product buys a "thing," a recording for his or her private, non-commercial enjoyment. With very narrow exceptions, the purchase of a record does

not transfer the right to electronically disseminate or download music, nor to create derivative works.

When music or images are used in commercial applications or electronically disseminated, this use takes on the attributes of a service. Continuing the music paradigm, images could be collectively licensed by subscription, offering the image user a blanket license based on the value of the image service to the application, and royalties based on a survey of use could be distributed to rights holders.

The rights holder voluntarily joins an organization that represents his interest in these markets. Dr. Besen explained, "These organizations -- known as performing rights societies or, more generally, copyright collectives -- are granted permission by their members to license their works. In joining a collective like ASCAP or BMI, (the rights holder) grants substantial discretion to the collective in determining how his work is to be licensed and for what fee. Indeed, the collective can be successful only if such discretion is granted. Although joining the collective is a voluntary act, the composer gives up a considerable degree of autonomy to the collective when he joins. Nonetheless, performing rights societies generate substantial incomes for their members."

The compelling factor in the rights holder's choice of whether to license his or her intellectual property through individual voluntary negotiation, or to forfeit control to a collective, is the bottom line. If an image is being licensed to Life Magazine, the value of the transaction justifies individual negotiation between the editor and the photographer or the photographer's agent. When thousands or millions of photographs are available for display on electronic networks, a uniform value must apply for each image. The compensation to each photographer is determined by the frequency with which his or her images are used, as determined by a use survey .

Reproduction Rights Organizations

The music industry is not alone in facing the problem of unauthorized and uncompensated commercial use of intellectual property. The Copyright Clearance Center (CCC) was founded in 1978, responding to a Congressional recommendation for an efficient mechanism to gr ant rights to photocopy and return appropriate revenues to the rights holders. American publishers were claiming that widespread copying of their works resulted in a significant loss of rights and income. In 1990 the CCC administered reproduction rights for 1.5 million publications, representing approximately 8,400 publishers.

Copyright collectives, like the CCC, to administer rights to printed material are referred to as Reproduction Rights Organizations (RRO). Twenty-one such RROs conveying reproduction authorizations are members of the International Federation of Reproduction Rights Organizations (IFRRO). RROs not only serve rights holders' interests but also serve publishers and distributors of intellectual property by offering a streamlined administration structure for efficient and legal access to content. RRO's ultimately serve the public interest by facilitating the creation and distribution of intellectual property.

Can Copyright Survive Electronic Media?

The CCC recognizes that the digital information environment requires new licensing paradigms that are appropriate to the technology of databases, networks and multimedia publishing. The CCC convened a colloquium to discuss the copyright and economic implications of electronic use of full-text materials. The participants agreed that rapidly advancing technologies constitute an unprecedented challenge to the copyright system. Their report concluded:

> "If computers are in fact becoming the printing presses of the future, will legislators recognize them for what they are? Can a copyright system, organized around the capabilities of paper publishing, successfully cope with the greatly expanded functionality of computers? Will legislators, and the society in general, conceive of computer use of information as somehow different from publishing, and attempt to regulate it in different ways? Users and rights holders alike need to avoid a government-imposed solution. Therefore, rights holders and users must define and generate workable solutions which maintain the copyright system, standardize developing technologies and streamline access, dissemination and royalty payments for the electronic use of copyrighted materials."

Clearinghouses for Content

The good news is that workable solutions are on the way, at least for still images, by combining digital image management and streamlined licensing to efficiently distribute pictures and collect royalties.

The Electric Book Company was founded in 1990 by this speaker and colleague Cary Wolinsky. EBC's business will incorporate all phases of still image distribution, including archiving, licensing and copyright enforcement. A gateway to images from a consortium of st ock photo agencies, EBC will help photographers to access new media markets and lower the administrative costs associated with stock photography acquisition.

As a clearinghouse for rights holders, EBC's implementation will promote the development of new, image-intensive products and services for education, information and entertainment. The company will provide transaction and subscription options to streamline licensing, and will apply digital image management technology to streamline fulfillment. Copyright protection for EBC-represented images will be enhanced by the efficiency of larger scale to implement technical, market and legal disincentives to infringement.

Electric Book Company is working with Eastman Kodak to implement a Photo CD-based high-resolution digital image management system, and Eastman Kodak is active in the development of technical and legal safeguards, and is sponsoring educational projects, to protect the interests of photographers and other image rights holders.

Museums and archives may also benefit from the services of an image clearinghouse. EBC's strategy is to implement the first phase of the business with the stock photography industry, where we benefit from many years of personal experi ver, the multimedia integration of contemporary photography with paintings, dra s and other images should be seamless to the publisher and consumer. We all fa challenges in image distribution and licensing, and in copyright protection ourselves as a utility that will be available to all still image rights holders, including museums and archives.

Towards a Mutually Beneficial Solution

Thomas Jefferson warned that the success of a democratic society depended upon an "informed and educated" populace. Today, databases, networks and multimedia can incorporate the information-rich content of the printed page with interactivity and the popularity of electronic media. Paradoxically, unless there is an appropriate licensing mechanism, the new information technologies can undermine the economic incentives for the creation and distribution of worthwhile new content.

Enforcement of copyright, clarity in defining the rights being granted, and distribution of appropriate royalties will serve the public interest by making independent rights holders eager and productive participants in the new media. Development of intellectual property clearinghouses can solve the bottleneck of image distribution and licensing.

