

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

The Authors Guild, Inc., Association of American
Publishers, Inc., et. al.,

Plaintiffs,

v.

Google, Inc.,

Defendant.

Case No. 05 CV 8136-DC

**FILED
ELECTRONICALLY**

**DECLARATION OF VICTOR S. PERLMAN, ESQ.
IN SUPPORT OF OBJECTIONS OF CLASS MEMBERS, AND MOTION TO
INTERVENE BY, THE AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, INC.,
GRAPHIC ARTISTS GUILD, THE PICTURE ARCHIVE COUNCIL OF AMERICA
AND THE NORTH AMERICAN NATURE PHOTOGRAPHY ASSOCIATION, AND
THE OBJECTIONS OF INDIVIDUAL PHOTOGRAPHERS JOEL MEYEROWITZ,
DAN BUDNIK, PETE TURNER AND LOU JACOBS, JR.**

I, Victor S. Perlman, being over 18 years of age, hereby declare as follows:

1. I am General Counsel and Managing Director of the American Society of Media Photographers, Inc. ("ASMP"). I have served as General Counsel for the last fifteen years and as Managing Director for the last fourteen years. Before joining ASMP, I was in private law practice in Philadelphia for twenty-three years, where among other clients, I represented photographers on a broad range of copyright, contractual and other matters. All in all, I have been involved in the negotiation, protection and enforcement of photographers' rights for over 30 years.

The Objectors/Proposed Intervenors

2. Objector ASMP is the nation's preeminent organization representing the interests of photographers working in the field of publication photography. Founded by a group of highly accomplished freelance photographers in 1944, ASMP has long

included in its membership the world's leading photographers whose works have been published in an extraordinarily broad range of publications, including magazines such as *Life*, *Sports Illustrated*, *Vogue*, *National Geographic* and *Time*, and also including books on every conceivable subject, including biographies, textbooks and historical studies, as well as books consisting entirely of their photographs. ASMP members' photography has also been published throughout the world in newspapers such as *The New York Times*, *The Washington Post*, *the International Herald Tribune* and many others.

3. ASMP has 39 chapters across the country and its 7,000 members include many of the world's foremost photographers. ASMP's members are almost entirely freelance photographers who operate small businesses, the principal assets of which are the copyrights to the body of works created by them over the course of their careers. Many of ASMP's members, including most of the individual photographers who join these objections (see §§ 7-10, *infra*), have published their photographs in books that fall within the class defined in the Proposed Settlement Agreement ("Proposed Settlement") (*i.e.*, books consisting of their photographs in which they own the copyrights to both the books and the individual photographs appearing in the books, and which books have been registered in the Copyright Office). As to these "books" of photographs, those ASMP members are part of the Settlement Class.

4. However, many of our members – often the same individuals who have one or more "books" covered by the Proposed Settlement - collectively own copyrights in millions of other photographs that the Proposed Settlement has expressly excluded from the definition of "Inserts." Thus, as for those ASMP members, they own some

works (i.e., “books”) that are included, and many that are excluded (i.e., images not included in “books”), from the Proposed Settlement.

5. Many other members of ASMP do not own copyrights in any “books” of photographs. Collectively, those ASMP members own copyrights in millions of photographs that are not found in “books” as defined in the Proposed Settlement. Since such photographs are expressly excluded from the definition of “inserts” under the Proposed Settlement, those photographers are not covered at all by it.

6. In sum, ASMP has some members who own the copyrights in works (i.e., “books” of photographs) covered by the Proposed Settlement, but for whom the rest of their body of work is not covered. And ASMP has members who do not own the copyrights in any “books” as defined in the Proposed Settlement. The inherent unfairness and arbitrariness of this disparate impact of the Proposed Settlement is readily apparent from these facts.

7. Objector Joel Meyerowitz is an award-winning photographer whose work has appeared in over 350 exhibitions in museums and galleries around the world. His first book, *Cape Light*, is considered a classic work of color photography and has sold more than 100,000 copies during its 25-year life. He is the author of 15 other books, including *Aftermath: The World Trade Center Archive*, *Bystander: The History of Street Photography*, and *Tuscany: Inside the Light*. Meyerowitz is a two-time Guggenheim fellow, a recipient of both the NEA and NEH awards, as well as a recipient of the Deutscher Fotobuchpreis. His work is in the collection of the Museum of Modern Art, the Boston Museum of Fine Art and many others.

8. Objector Dan Budnik is an American photographer noted for his portraits of famous people and photographs of the Civil Rights Movement. Budnik received ASMP's prestigious Honor Roll Award in 1988. Budnik's work is included in the collections of the King Center in Atlanta, Georgia, and the Museum of Modern Art. Budnik has also exhibited his work at the Agnes gallery. Budnik is the author of *The Book of Elders: The Life Stories of Great American Indians*, and his photographs appear in numerous other books, including a number of Time-Life books.

9. Objector Pete Turner's photographs are in the permanent collections of major museums, including the MEP in Paris, the Tokyo Metropolitan Museum of Photography and ICP in New York. The George Eastman House International Museum of Photography and Film in Rochester is the central depository of Turner's life's work. Turner has received innumerable awards from various design groups and photography associations, including The Outstanding Achievement in Photography award from ASMP. In 1986, Harry Abrams published *Pete Turner Photographs*, Turner's first monograph. Turner's second monograph, *Pete Turner African Journey*, is the visual diary of his adventures in Africa, which began with his first journey in 1959 from Cape Town to Cairo. Turner's latest book, *The Color of Jazz*, is a comprehensive collection of his memorable and provocative jazz album covers that have become legendary.

10. Objector Lou Jacobs Jr. is a freelance editorial photographer whose work spanning more than five decades has been published in dozens of magazines. In the mid-50s, Jacobs began writing for photographic magazines, illustrating stories with his journalistic and fine art photographs. In 1960, Jacobs wrote his first "how-to" photography book, followed by 36 more how-to books covering subjects such as

photojournalism, selling stock photographs, studio photography, a college textbook and more. His best selling books are *Petersen's Basic Guide to Photography* (1973 - 500,000 copies) and *How To Take Great Pictures with Your SLR* (1974 - 300,000 copies). Jacobs has also worked with numerous book publishers, authoring 15 books for young readers on topics such as air traffic control, transportation, space exploration, Polaroid photography and jumbo jets. Jacobs was President of ASMP in 1984-85 and served on the national ASMP Board of Directors for more than 15 years. His prints are in the collections of George Eastman House, Los Angeles County Museum of Art, International Center of Photography and California Museum of Photography.

ASMP's Mission

11. Since its founding in 1944, ASMP has been at the forefront of freelance photographers' struggle to protect and commercially benefit from the value of their copyrights in their photographs. Generally, ASMP members retain their copyrights and grant their clients one-time publication rights for the use of the licensed photographs in specified publications, or for certain periods of time, or for specified purposes. As ASMP has advocated for many years, photographers must attempt to preserve their ownership of the copyrights in their published photographs, for it is those photographs that generally have the greatest value in the marketplace as potentially licensable to other clients for other purposes (or to the same clients for different purposes). Those copyrights are the source of a valuable and continuing stream of income. Accordingly, ASMP's members have historically depended on their retention of copyright rights in their works, and the corresponding revenue stream that results from licensing them in the

marketplace, to sustain their businesses and build a foundation for their retirement income.

12. Throughout the years, ASMP has fought to protect the rights of photographers through negotiations with publishers, by participating in significant copyright cases in the federal courts, in policy discussions and testimony before the Copyright Office, in legislative consideration of copyright reform in the Congress and in educational campaigns to provide useful information to its members about copyright law, contractual issues and good business practices. Among the most notable of the copyright cases in which ASMP participated as an *amicus curiae* was the Supreme Court case of *Community For Creative Non-Violence v. Reid*, 490 U.S. 730 (1989), which unanimously rejected the argument that freelance photographers' works should be considered "works made for hire" under the 1976 Copyright Act. This important victory preserved freelance photographers' copyright rights in their works created for publication purposes (absent a written agreement to the contrary) and confirmed that they should not be considered "employees" of publishers or other corporations for copyright purposes, but not for any other purposes.

13. ASMP also filed an *amicus curiae* brief in one of the first Supreme Court cases to address the impact of digital technology on the rights of authors and other creators. In *The New York Times Co., Inc. v. Tasini*, 533 U.S. 483 (2001), ASMP argued, and the Court ultimately held, that publishers could not re-use an author's work first published in a periodical in an electronic compendium of such periodicals on the false premise that the compendium was a "revision" of the original issue under §201 (c) of the Copyright Act.

14. ASMP similarly supported photographer Jerry Greenberg in his ultimately unsuccessful battle with the National Geographic Society over its alleged right to republish Greenberg's photographs without his permission in an electronic collection of the issues of *National Geographic* magazine. *Greenberg v. Nat'l Geo. Soc.*, 244 F. 3d 1267 (5th Cir. 2001).

15. The success of freelance creators in *Tasini*, followed by the setback in *Greenberg*, are illustrative of the volatile legal landscape in which photographers, graphic artists, illustrators and other copyright owners or their licensees that derive income from licensing of visual images in books (collectively "Visual Arts Rights Holders") struggle to retain and economically benefit from their copyrights in their works.

The Challenges Faced by Photographers and Other Visual Arts Rights Holders

16. I have personally testified before Congress and the Copyright Office on numerous occasions on behalf of ASMP on a broad range of issues implicating the copyright rights of photographers. Recently, these issues have included Congress' consideration of the copyright status of so-called "orphan works," the Copyright Office's roundtables on "orphan works," its efforts to facilitate group copyright representation of photographs by freelance photographers and its consideration of amendments to §108 of the Copyright Act.

17. As Congress and the Copyright Office have long recognized, and as ASMP members have long experienced, photographers and other Visual Arts Rights Holders have historically been among the most vulnerable of copyright owners with respect to their ability to retain and profit from their copyrights. Like other individual or

small business copyright owners, photographers and other Visual Arts Rights Holders have traditionally found themselves in a weak bargaining position when negotiating with publishers, corporations and other clients.

18. With the decline of traditional media such as magazines and newspapers, combined with the rise of new forms of electronic media, the negotiating position and economic status of publication photographers and other Visual Arts Rights Holders have dramatically declined. Thousands of professional photographers and Visual Arts Rights Holders have been forced to abandon their profession because they simply could not make a living. Those who have survived have suffered a decline in income and increasingly few opportunities to license their works. The consolidation of potential clients has resulted in a worsening of the “David and Goliath” bargaining position for photographers and other Visual Arts Rights Holders. The recent economic downturn has exacerbated these problems, and Visual Arts Rights Holders have sought new and innovative ways to license their works, especially in the context of the expanding opportunities available via electronic media.

19. The digital age has also presented new challenges to photographers and other Visual Arts Rights Holders with respect to the growing and widespread infringement facilitated by the Internet. Even before the proliferation of infringement on the Internet, they generally found it impractical and beyond their means to file copyright infringement actions in the federal courts. They often lacked the resources to register their substantial bodies of works in the Copyright Office on a regular basis, which resulted in the unavailability of statutory damages under the Copyright Act.¹ Aside

¹ Under § 412 of the Act, registration of a work in the Copyright Office prior to the commencement of infringement has been and remains a prerequisite to entitlement for statutory

from the limited damages available to photographers and other Visual Arts Rights Holders, they did not have the staff or resources, financial or otherwise, to sustain lengthy and frequently complex copyright battles, particularly against corporate infringers. Other factors have made it almost impossible for them to find copyright attorneys who are willing to accept representations in infringement actions on a contingent fee basis. As a result, photographers and other Visual Arts Rights Holders lack any effective remedy to stop traditional forms of copyright infringement, much less to address the ubiquitous infringement of copyrights via electronic means (such as by digitizing photographs with a scanner) that have been greatly facilitated by the Internet.

20. At the same time, the new and innovative uses of images and other copyrighted works in Internet publications has opened up potentially lucrative new opportunities for electronic licensing. But photographers and other Visual Arts Rights Holders, like other individual and small business owners, have lacked the resources and infrastructure to take advantage of these opportunities—a plight worsened by the Fifth Circuit’s retrenchment in *Greenberg* from freelancers’ success in the Supreme Court in the *Tasini* case. Ironically, it is the Internet that presents both the greatest dangers to the value of Visual Arts Rights Holders’ copyrights and the greatest opportunities for creating and exploiting new markets for digital uses of copyrighted materials. Thus far, photographers and other Visual Arts Rights Holders have suffered the consequences associated with widespread infringement on the Internet and have been

damages of \$ 750 to \$ 30,000 per work infringed, which can be increased to a maximum of \$150,000 per work infringed. *See* 17 U.S.C. §§ 412, 504(c)(1),(2). Photographers filing an infringement action usually register their photographs shortly before commencing the action, thereby limiting damages to actual damages or the defendant’s profits attributable to unauthorized use of the work. *Id.* § 504(b).

